

## Chapter Eight

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### Justice

8-01

“Justice” refers to the family of moral concepts connected particularly with law and politics—“politics” here being understood broadly in the sense of public decision-making regarding the distribution of goods. Justice is a subset of morality. Thus, one can sensibly speak of something being “right” or “wrong” on occasions where it seems inapt to speak of “justice”.<sup>1</sup> Additionally, justice seems to refer to the relatively rigid application of rules and standards, where right action might sometimes require more nuanced treatment (“equity” or “mercy”).<sup>2</sup>

There are various ways of dividing up the domain of justice. The most famous distinction is probably Aristotle’s, between “corrective justice” and “distributive justice”.<sup>3</sup> Corrective justice involves rectification between two parties, where one has taken from the other or harmed the other. Modern discussions of corrective justice often occur within the context of arguing about appropriate standards within tort law and contract law. Distributive justice involves the appropriate distribution of goods among a group (“giving each person his or her due”). Most of the better known modern discussions of justice, which usually treat justice primarily as about the proper structuring of government and society, are basically discussions of distributive justice.

The relationship between corrective and distributive justice is a matter of controversy. One question is whether there is a conceptual connection between the two. Aristotle argued that both forms of justice were matters

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<sup>1</sup> For example, while one might sensibly say that it is wrong for someone to make no use of substantial natural talents, it would sound strange (to most people) to say that it is “unjust” of that person to waste those talents.

<sup>2</sup> Aristotle wrote: “when men are friends they have no need of justice”. Aristotle, *Nicomachean Ethics*, Book VIII, 1:1155a, in Jonathan Barnes ed., *The Complete Works of Aristotle* (Princeton University Press, Princeton, 1984), vol. 2, p. 1825. Some would also contrast justice—treatment according to what is due—with right (or at least expected and acceptable) action within a family, where we accept and prefer “our own”, regardless of their merit.

<sup>3</sup> Aristotle, *Nicomachean Ethics*, Book V, 3:1131a–4:1132h, in *The Complete Works of Aristotle*, vol. 2, pp. 1785–1787.

of “proportion”<sup>4</sup>: that both when one person has harmed another, and when there has been a mal-distribution of goods, matters are out of proper proportion. A quite different question is the connection between the two as a matter of moral evaluation. That is, how do the two interact? For example, if one lives in a society that is distributively unjust (some people have much more than others, without basis or warrant), does this in any way mitigate the demand for corrective justice (e.g. when the deserving take from the undeserving)?<sup>5</sup> Many people seem to feel this way, often at an unreflective level, as when someone will claim that there is nothing wrong in deceiving a large insurance company or some other large corporation, the implicit premise being that these companies have themselves benefited from significant wrongdoing, and therefore it would not be unjust to take from them.

Along with corrective justice and distributive justice, the term “justice” is also frequently used to refer to following the rules laid down.<sup>6</sup> This has obvious applications to law (“no retroactive punishments”), but is relevant also to other aspects of daily life (“not changing the rules in the middle of the game”, and the like).<sup>7</sup> “Justice” is also often used to describe the appropriateness of punishments for crimes (the topic of punishment will be considered in the next chapter) and the appropriateness of actions relating to warfare (“just war theory”).

The remainder of this chapter will focus on some of the more influential modern theories of (distributive) justice.

<sup>4</sup> Aristotle, *Nicomachean Ethics*, Book V, 3:1131a–b, in *The Complete Works of Aristotle*, vol. 2, pp. 1785–1786.

<sup>5</sup> See, e.g. Stephen R. Perry, “The Distributive Turn: Mischief, Misfortune and Tort Law”, in Brian H. Bix ed., *Analyzing Law: New Essays in Legal Theory* (Clarendon Press, Oxford, 1998), pp. 141–162 at pp. 142–143; Jules Coleman, “Second Thoughts and Other First Impressions”, in *Analyzing Law*, pp. 257–322, at pp. 308–310.

<sup>6</sup> See, e.g. Aristotle, *Nicomachean Ethics*, Book V, 7:1134b, in *The Complete Works of Aristotle*, vol. 2, pp. 1790–1791: “Of political justice part is natural, part legal—natural, that which everywhere has the same force and does not exist by people’s thinking this or that; legal, that which is originally indifferent, but when it has been laid down is not indifferent . . .”. This sort of “procedural” or “formal” justice was discussed in greater detail in the context of Lon Fuller’s work, in Ch. 6.

<sup>7</sup> Lloyd Weinreb gives the example of the chariot race in the *Iliad*, which was part of the funeral commemoration for Patroclus. Achilles announced prizes for the race, including a mare for second place. Antilochus finished second, but Achilles wanted to give the mare to Eumelos, the best charioteer of the group, who finished last only because of the meddling of the gods. Antilochus protests that Achilles may give Eumelos whatever Achilles wishes, but the mare, the prize for second place, is rightly his. See Homer, *The Iliad*, Book 23 (W. H. D. Rouse trans., Thomas Nelson and Sons, Edinburgh, 1938); Lloyd L. Weinreb, *Natural Law and Justice* (Harvard University Press, Cambridge, Mass., 1987), p. 186.

## JOHN RAWLS AND SOCIAL CONTRACT THEORY

8-02

John Rawls' book, *A Theory of Justice*,<sup>8</sup> is probably the most influential book of political theory written in the twentieth century.<sup>9</sup> For Rawls (1921–2002), and for many competing approaches, theories of justice are about the appropriate way to structure government and society—that is, political theory, writ large.<sup>10</sup>

To the question of why a theory of justice is needed, Rawls would probably respond: because publicly agreed terms of social cooperation are both necessary and possible.<sup>11</sup> For Rawls, justice is the structural rules of society, within which people who (inevitably) have different sets of values and goals in life can coexist, cooperate, and, to some extent, compete. Rules are necessary for people to cooperate to create social and individual goods within society. The question then becomes: *On what terms* are people to cooperate, and how are the social goods to be distributed? Theories of justice are answers to that question, or at least constraints on the answer.

How do we determine which principles to follow? If I write out some principles, and declare that they are fair, many will disagree with me. If I claim to prove that these principles derive from basic foundational axioms, some will contest my derivation, while others will argue that the foundational axioms I have chosen are the wrong ones. However, if we were all to agree on principles, however they might be derived, then we would seemingly have no basis for arguing against the fairness of their application to us. Consider an analogy: there might be substantial room for disagreement if the question is whether \$400 is a fair price for painting the fence around your house; the issue would be substantially changed if it were noted that I had *agreed* ahead of time, after negotia-

<sup>8</sup> John Rawls, *A Theory of Justice* (Harvard University Press, Cambridge, Mass., 1971). For detailed discussions of Rawls's work, see, e.g. Norman Daniels ed., *Reading Rawls: Critical Studies of A Theory of Justice* (Basic Books, New York, 1990); Robert Paul Wolff, *Understanding Rawls: A Reconstruction and Critique of A Theory of Justice* (Princeton University Press, Princeton, 1977).

<sup>9</sup> One commentator stated: "two decades after the publication of John Rawls's *A Theory of Justice* (1971)[.] [o]ne cannot, at least in the English-speaking world, think about justice without taking one's position relative to that work." Ruth Anna Putnam, "Why Not a Feminist Theory of Justice?", in Martha C. Nussbaum and Jonathan Glover eds., *Women, Culture, and Development: A Study of Human Capabilities* (Clarendon Press, Oxford, 1995), pp. 298–331 at p. 303.

<sup>10</sup> In this sense, there is a distant family relation between Rawls' theory of justice and Plato's. Plato viewed justice both for individuals and for societies as involving the elements of the whole being arranged appropriately to create overall harmony. Plato, *Republic*, Book II, pp. 357–367; Book IV, pp. 441–445; Book IX, pp. 588–592, in E. Hamilton and H. Cairns eds., *Plato: The Collected Dialogues* (Princeton University Press, Princeton, 1961), pp. 605–614, 683–688, 816–819.

<sup>11</sup> See Rawls, *A Theory of Justice*, pp. 3–6.

tion, to paint the fence for that amount. In that case, most people would likely presume that my being paid that (agreed) price was fair, even if they might have thought prior to the agreement that a different price was more appropriate.<sup>12</sup>

The notion of agreement as the foundation of “just” or “legitimate” principles for governing society is the basis of the “social contract” tradition in political theory, which goes back at least to Thomas Hobbes’ work in the seventeenth century, and continues in the influential contemporary work of John Rawls and David Gauthier.<sup>13</sup> These political theorists were working from the starting point that a government can *legitimately* govern its citizens if those citizens expressly granted the government those powers.

Some of the early social contract theorists wrote of a historical express agreement among citizens to create a government and empower it to maintain order and protect citizens’ rights. Of course, even if there had been such a historical agreement (which seems unlikely), the question remains why later generations, who had not been party to this social contract, should be bound by its terms. In response to that problem, John Locke offered the notion of “tacit consent”: that while many of us have not offered any express agreement to be subject to the government and to be bound by its rules, we have done actions which (the argument goes) have tacitly given our consent, or, at least, have put us in a position where consent could fairly be ascribed to us. Examples of actions which might be said to give tacit consent to the government would include voting in an election, accepting government benefits, or simply remaining in the country (and thereby benefiting from it) after one was of age, and had the legal right to leave.<sup>14</sup> However, most commentators do not find the idea of “tacit consent” persuasive.<sup>15</sup>

As will be discussed in greater detail later (in Ch. 11), modern social contract theorists, Rawls included, have transformed the inquiry from an investigation of what historical figures *actually* agreed, and how those

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<sup>12</sup> The presumption that an agreed price can be fairly/justly imposed on the person who agreed to it is subject to inquiries regarding that person’s mental capacity, whether that person had been subject to duress, whether there had been any fraudulent representations by the other party, and so on. There are also arguments that some agreements are so one-sided in their terms that the consent of the parties is insufficient to justify the agreement’s enforcement.

<sup>13</sup> For a selection of social contract theory texts, including works by Thomas Hobbes, Samuel Pufendorf, John Locke, Jean-Jacques Rousseau, Immanuel Kant, John Rawls, and David Gauthier, see Michael Lessnoff ed., *Social Contract Theory* (New York University Press, New York, 1990).

<sup>14</sup> Many variations on the consent theory appear in the related context of whether there is an obligation to obey the law (see Ch. 16), and can be traced to Plato’s *The Crito*, where Socrates argues for his own obligation to comply with the unjust death penalty verdict imposed upon him.

<sup>15</sup> Some of the reasons for rejecting “tacit consent” will be discussed in Ch. 16.

agreements might still bind people today, to a discussion of what *reasonable people would have agreed* to had they tried to reach agreement.<sup>16</sup> As I note in that chapter, this is a more substantial change than it might at first appear, just as the inquiry about how much I should be paid for painting the fence changes if it turns out that I expressly agreed ahead of time to a particular price.<sup>17</sup> The question is whether actual choice is carrying the heavy moral weight, or whether the weight is being carried by some notion of “reasonableness”.

For Rawls, the focus is a “thought experiment”: a hypothetical discussion among hypothetical citizens within a community. Even though the discussion is entirely fictional, it does not mean that we would necessarily become any more optimistic about how quickly the participants would come to consensus. (A thought experiment will not lead to useful conclusions, it will not give a basis for persuading other people about some point of ethics, if one does not use realistic assumptions.) The starting point for Rawls, and for other social contract theorists, is that there is no point in making arguments from foundational moral beliefs (or religious beliefs or political dogmas), for many people would not accept whatever starting point one chose.

If one cannot derive the principles of government from foundational axioms on which all agree (because there *are* no foundational axioms on which all agree, or at least none of sufficient substance or specificity to be of use), perhaps we can at least reach agreement after open and free discussion. If we do come to governing principles in this way, there would seem to be no basis then for objecting to the principles thus agreed upon. However, we would likely never come to consensus after free discussion because, Rawls argues, our different circumstances in life create differing self-interest (and bias). And nothing short of consensus would do, for the dissenters from a majority vote would have a sound ground for objecting to having principles imposed upon them without their consent. Self-interest will often bias people’s thinking, to favour principles that make them better off, or at least create resistance to principles of justice, however fair, which would result in a decrease of their well-being. Therefore, Rawls suggests, we should imagine instead a discussion among people similarly situated—or similarly unsituated, similarly ignorant of their position in society.

Thus, as part of Rawls’ thought experiment, we are to imagine negotiators who are magically shorn of all knowledge that might be the basis for self-interested bias: knowledge of their gender, wealth, race, ethnicity,

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<sup>16</sup> The use of “hypothetical” social contracts goes back at least to Immanuel Kant (in *The Metaphysics of Morals* (Mary J. Gregor ed., Cambridge University Press, Cambridge, 1996)).

<sup>17</sup> See also Ronald Dworkin, *Taking Rights Seriously* (Duckworth, London, 1977), pp. 150–153.

abilities, and general social circumstances. They would also be ignorant of their own views on the good life (e.g. born-again Christian, hedonist, art-centred, or materialist), which would likely also bias their views on how to organise society.<sup>18</sup> Rawls calls this starting point, of imagined negotiators behind a “veil of ignorance”,<sup>19</sup> “the original position”.<sup>20</sup>

This is the first part of Rawls’ argument: that the result of this thought experiment, this hypothetical negotiation, would be legitimate principles of justice (this is why Rawls refers to this theory as “justice as fairness”—justice as the result of agreement by persons under fair conditions<sup>21</sup>). The second part of Rawls’ work is an argument about what principles would in fact result. One can accept the first part and not the second (arguing that Rawls has improperly calculated what principles would result from the original position); one can also accept the second part and not the first (arguing that the original position is not the right way to derive principles of justice, but that the principles Rawls comes up with nonetheless are the right ones).<sup>22</sup>

### RAWLS’ TWO PRINCIPLES

- 8–03 Rawls first considers whether negotiators in the original position would adopt utilitarianism.<sup>23</sup> He argues that this is not likely: for utilitarianism allows some to suffer if the suffering is outweighed by the benefits to others; and as negotiators would not know if they would be in the advantaged or the disadvantaged group, they would not want to take the risk that they might be in the suffering group. This exemplifies the cautious (“risk-averse”) attitude that Rawls attributes to the negotiators,<sup>24</sup> which seems to produce many of the argument’s conclusions.

<sup>18</sup> This also reflects Rawls’ notion that “the right is prior to the good”. See Rawls, *A Theory of Justice*, p. 31: principles of justice should be the structure in place *within which* citizens can follow their diverging views of the good.

<sup>19</sup> Rawls, *A Theory of Justice*, pp. 12, 136–142.

<sup>20</sup> See Samuel Freeman, “Original Position,” in Edward N. Zalta ed., *Stanford Encyclopedia of Philosophy*, <http://plato.stanford.edu/entries/original-position/> (2014).

<sup>21</sup> See John Rawls, “Justice as Fairness”, 54 *Journal of Philosophy* 653 (1957), in expanded form, 67 *Philosophical Review* 164 (1958).

<sup>22</sup> Rawls, *A Theory of Justice*, p. 15.

<sup>23</sup> Rawls, *A Theory of Justice*, p. 14. Rawls defines as follows the utilitarianism with which he contrasts his own approach: “society is rightly ordered, and therefore just, when its major institutions are arranged so as to achieve the greatest net balance of satisfaction summed over all individuals belonging to it.” Rawls, *A Theory of Justice*, p. 22 (footnote omitted). Rawls sees utilitarianism as the predominant moral philosophy (at least as applied to political issues) in the English-speaking world, and therefore the primary alternative and competitor to consider when putting forward a theory of justice. See John Rawls, *Political Liberalism* (Columbia University Press, New York, 1993), pp. xvi–xvii.

<sup>24</sup> Rawls refers to the “maximin” principle: that people would want to maximise the worst-case scenario they could possibly face. Rawls, *A Theory of Justice*, pp. 152–155. Rawls

The two principles of justice to which the negotiators would agree, according to Rawls, are the following:

- First Principle: "Each person is to have an equal right to the most extensive system of equal basic liberties compatible with a similar system of liberty for all."
- Second Principle ("The Difference Principle"): "Social and economic inequalities are to be arranged so that they are both: (a) to the greatest benefit of the least advantaged, . . . and (b) attached to offices and positions open to all under conditions of fair equality and opportunity."<sup>25</sup>

For the first principle, "basic liberties" include, among other things, political liberty, freedom of speech and assembly, freedom of conscience, the right to hold personal property, and the right to fair treatment under the law.<sup>26</sup>

The first principle is to have "lexical priority" over the second: that is, the equality of liberty is not to be sacrificed (traded off) for compensating benefits in wealth or equality of resources.<sup>27</sup> Rawls argues that it would be irrational for the negotiators to take chances with their liberty.<sup>28</sup>

As for the distribution of resources, the topic of Rawls' second principle, the beginning position the negotiators might consider is the equal sharing of social wealth. Again, the cautious negotiators would not want to create substantial inequalities, on the chance that they might be at the

argued that negotiators would be particularly inclined to be risk-averse because: (a) the likelihood of various options are far from clear and would be hard to ascertain; (b) there is a great deal to lose in the worst-case scenario; and (c) there is not that much to gain (advantages above the average case are of modest value, relatively speaking; having a lot of money is better than having a modest amount; but the difference is not as great as that between having a modest amount and being completely destitute). Rawls, *A Theory of Justice*, pp. 155–156.

<sup>25</sup> Rawls, *A Theory of Justice*, p. 302. In later works, the first principle was slightly altered: instead of speaking of each person having the "most extensive system of equal basic liberties compatible with a similar system of liberty for all", the principle refers to each person having an equal claim to "a fully adequate scheme of equal basic rights and liberties, which scheme is compatible with the same scheme for all." Rawls, *Political Liberalism*, p. 5. Rawls included a "just savings principle" as a means of ensuring justice between generations: "Each generation must not only preserve the gains of culture and civilization, and maintain intact those just institutions that have been established, but it must also put aside in each period of time a suitable amount of real capital accumulation." Rawls, *A Theory of Justice*, p. 285.

<sup>26</sup> Rawls, *A Theory of Justice*, p. 61.

<sup>27</sup> Rawls, *A Theory of Justice*, pp. 42–44, 61, 151–152.

<sup>28</sup> Contrast the argument that has been used at various times to defend government actions in Singapore, South Korea and Hong Kong, among other countries, that the citizens in those countries had willingly, and reasonably, given up rights to liberty, in exchange for greater material well-being.

bad end of the scale. The only reason someone might accept anything other than an equal share is if the inequalities that would be allowed would result in each and every person doing even better than they would have done in an equal-sharing system. This may occur because inequalities create competitive incentives that increase productivity, that in turn increase both individual and social wealth.<sup>29</sup> Also, if the inequalities are combined with redistributive tax and benefits policies, everyone might ultimately benefit.

Why not just let the free market system work as it will? Because, Rawls states, even putting aside concerns about social class perpetuating itself, natural liberty

“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.”<sup>30</sup>

The reference to “natural lottery” indicates the extent to which significant inequalities derive from chance, not merit (we do not “deserve” the good traits and bad traits with which we were born). From the perspective of the Rawlsian negotiators, because of the chance that they might be unlucky in the natural lottery—with few natural talents, born to a poor family, in a benighted area, and so on—they want to make sure that they are not unjustly punished for that bad fortune.

#### RAWLS’ LATER MODIFICATIONS

- 8-04 Rawls later wrote a number of important articles which expanded or modified ideas in *A Theory of Justice*,<sup>31</sup> many of which later appeared, in modified form, as the book *Political Liberalism*.<sup>32</sup> The extent to which the later work diverged from either the content or the intentions of the earlier work has been a matter of controversy. Rawls himself allows that there are differences, though he tends to hold them to be less comprehensive and less radical than other commentators have claimed. The (apparent

<sup>29</sup> Rawls, *A Theory of Justice*, p. 151. Rawls states that it is an assumption that no one will make their negotiation decisions based on envy.

<sup>30</sup> Rawls, *A Theory of Justice*, pp. 73-74.

<sup>31</sup> See John Rawls, “Kantian Constructivism in Moral Theory”, 77 *Journal of Philosophy* 515 (1980); John Rawls, “The Basic Liberties and Their Priority”, in *The Tanner Lectures on Human Values*, vol. 3 (University of Utah Press, Salt Lake City, 1982), pp. 1-87; John Rawls, “Justice as Fairness: Political not Metaphysical”, 14 *Philosophy & Public Affairs* 223 (1985); John Rawls, “The Idea of an Overlapping Consensus”, 7 *Oxford Journal of Legal Studies* 1 (1987); and John Rawls, “The Priority of Right and Ideas of the Good”, 17 *Philosophy & Public Affairs* 251 (1988).

<sup>32</sup> John Rawls, *Political Liberalism* (Columbia University Press, New York, 1993).

or perceived) differences may be summed up in the title of one of the intermediate articles: "Justice as Fairness: Political not Metaphysical". Many readers read *A Theory of Justice* as making broad claims about the nature of justice, which were in turn based on claims about the basic nature of human beings. The later work makes its claims clearly on a less ambitious scale: "justice" is presented as a set of institutions and practices which allow people with distinctly different ideas about the good life to co-exist and prosper. The claims of the theory are to be seen as "political, not metaphysical", as a *modus vivendi* for coexistence by people who have quite different "theories of the good" (e.g. based on different religious or ethical belief systems).<sup>33</sup> The principles of justice attempt to reflect an "overlapping consensus"—values which people with a variety of theories of the good can nonetheless support, because these values appear in the various theories of the good.<sup>34</sup> This re-interpretation of the theory as a political conception of justice was continued in the published (but unfinished) *Justice as Fairness: A Restatement*.<sup>35</sup>

Looking back over Rawls's collective works on themes relating to justice, Jeremy Waldron commented that Rawls's theory can be seen as an investigation of when societies and governments can be seen as legitimate despite the existence of significant social inequalities. The rich and powerful can justify their actions and position against the claims of those less well off, if and only if all have equal civil liberties, inequalities are for the benefit of all (including, and perhaps especially, the least well off), and there is equality of opportunity (Rawls's two principles of justice).<sup>36</sup>

## ROBERT NOZICK AND LIBERTARIANISM

There have been a number of responses to Rawls' theory of justice. One of the most important and thought-provoking was from the libertarian theorist, Robert Nozick (1938–2002), in his book, *Anarchy, State and Utopia*.<sup>37</sup> The main project of the book was to defend a minimalist state (a "night watchman state"), on one side against anarchists who believe that state power over individuals can never be justified, and on the other side against theorists (like Rawls) who advocate an interventionist state that would redistribute wealth, help the poor, and the like.<sup>38</sup>

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<sup>33</sup> See Rawls, *Political Liberalism*, pp. 4–22.

<sup>34</sup> Rawls, *Political Liberalism*, pp. 9–11, 58–66.

<sup>35</sup> John Rawls, *Justice as Fairness: A Restatement* (E. Kelly ed., Harvard University Press, Cambridge, Mass., 2001).

<sup>36</sup> Jeremy Waldron, "The Plight of the Poor in the Midst of Plenty", *London Review of Books*, July 15, 1999.

<sup>37</sup> Robert Nozick, *Anarchy, State, and Utopia* (Basic Books, New York, 1974).

<sup>38</sup> Nozick appeared to have a change of heart later, writing that "[t]he libertarian position I once propounded now seems to me seriously inadequate, in part because it did not

In response to Rawls, Nozick's first question is: why are we talking about a just *distribution*? Rawls had written: "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."<sup>39</sup> Nozick points out that most of the goods which we own or want to own are *not* "distributed" in the sense of being divided among people at one given time by the government or "the basic structure of society" or any other centralised power. "What each person gets, he gets from others who give to him in exchange for something, or as a gift".<sup>40</sup> The issue for government will not be one of "distribution", but of "*redistribution*".

Secondly, Nozick points out that any sort of "*patterned*" *distribution* (e.g. justice requires that everyone to have an equal amount, or that the distribution of goods be according to need, merit, intelligence, ability, effort, etc.) will be vulnerable: it will likely be regularly and continually disrupted by the voluntary independent choices of individuals. Nozick uses the example of the star athlete, working after hours, whom many people will pay to see from whatever wealth they have.<sup>41</sup> This type of transaction, along with gifts, bequests and private contractual agreements, will all serve to undermine whatever "just" pattern has been set. (And how can anyone complain about the resulting distribution, which was caused by the voluntary actions of people dealing with their own resources as they saw fit?) Someone who believes that justice requires a patterned distribution will then be left with two equally unpleasant options: forbid all voluntary independent actions that affect people's holdings, or impose regular, intrusive, redistributive taxes.<sup>42</sup>

Nozick's alternative approach is to replace "just (re)distribution" with "justice in holdings". According to Nozick, there are two ways in which one can justly own something: (1) one could have acquired a previously unowned object consistently with the principles of just acquisition (the appropriation of unheld things: e.g. claiming and working unclaimed land); or (2) one could have obtained the thing in accordance with the principles of just transfer, from someone else who was herself entitled to own the thing (i.e. a voluntary transaction, whether by exchange or gift, with no fraud, duress, or the like). No one is entitled to own a thing where the ownership cannot be traced by the (perhaps repeated) application of one or both principles.<sup>43</sup> This Nozick refers to as "historical" principles

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fully knit the humane considerations and joint cooperative activities it left room for more closely into its fabric . . . There are some things we choose to do together through government in solemn marking of our human solidarity. . . ." Robert Nozick, *The Examined Life: Philosophical Meditations* (Simon and Schuster, New York, 1989), pp. 286–287.

<sup>39</sup> Rawls, *A Theory of Justice*, p. 62.

<sup>40</sup> Nozick, *Anarchy, State, and Utopia*, p. 149.

<sup>41</sup> Nozick, *Anarchy, State, and Utopia*, pp. 160–164.

<sup>42</sup> Nozick, *Anarchy, State, and Utopia*, pp. 163–164.

<sup>43</sup> Nozick, *Anarchy, State, and Utopia*, pp. 150–153.

of justice, to be contrasted with “end result” or “end state” principles.<sup>44</sup> What follows from Nozick’s analysis is that society/government has no right to redistribute goods, violating people’s just claim to the objects they own, for some general benefit. However, society does have the right—and probably the duty—to redistribute goods to correct some prior injustice in holdings.<sup>45</sup>

Two significant objections can be raised to Nozick’s approach. First, even accepting the basic approach, how can or should society respond if it is not some small percentage of property holdings which are unjust, but the injustice rather reaches the vast majority of such holdings? For example, one might argue that almost all American holdings can be traced back to an unjust displacement of Native Americans; and, additionally, a significant portion of the holdings can be traced to unjust enslavement of African-Americans. It is far from clear whether Nozick’s approach can be of significant use with a starting point like that.<sup>46</sup>

A second line of criticism inquires why property rights should have such a high, indeed almost absolute, standing in our moral or political thinking. Many would argue that other people within our community, and the community itself, have claims upon us and our resources which justify infringements on our holdings, however otherwise beyond reproach those holdings may be.<sup>47</sup>

#### MICHAEL SANDEL, COMMUNITARIANISM AND CIVIC REPUBLICANISM

A distinctively different critique of Rawls came from Michael Sandel, whose arguments have been associated with an approach to political and moral theory called “communitarianism”.<sup>48</sup> Some communitarians

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<sup>44</sup> Nozick, *Anarchy, State, and Utopia*, pp. 153–155.

<sup>45</sup> Nozick, *Anarchy, State, and Utopia*, pp. 152–155.

<sup>46</sup> Nozick at a couple of points, *Anarchy, State, and Utopia*, pp. 152–153, 230–231, seems to realise some of the problems with rectifying significant historical injustice, and even suggests, *ibid.* at p. 231, that it may be best “to view some patterned principles of distributive justice as rough rules of thumb meant to approximate the general results of applying the principle of rectification of injustice.”

<sup>47</sup> See, e.g. James W. Harris, “Rights and Resources—Libertarians and the Right to Life”, 15 *Ratio Juris* 109 (2002). The recognition of the claims of need against the claims of property can be found in theorists ranging from Thomas Aquinas (his *Summa Theologica*) to John Locke (in his *First Treatise*).

For a collection of critical views of Nozick’s position, see Jeffrey Paul ed., *Reading Nozick: Essays on Anarchy, State, and Utopia* (Rowman and Littlefield, Totowa, N.J., 1981).

<sup>48</sup> Sandel’s critique appears in Michael J. Sandel, *Liberalism and the Limits of Justice* (2nd ed., Cambridge University Press, Cambridge, 1998). In a Preface, Sandel notes that the label “communitarian” does fit to some extent the critique of Rawls and contemporary liberal political theory given in the book. However, he adds: “[t]he ‘liberal-communitarian’ debate that has raged among political philosophers in recent years describes a

have argued that the liberal view of justice<sup>49</sup> is valid only to the extent that the liberal view of individuals is correct: cut-off people who have no connections with one another, and who cooperate only to the extent that it is useful in achieving each individual's short-term or long-term goals. Communitarians contest this view of persons.

Liberals and libertarians ground their theories of justice on an analysis which treats people as essentially atomistic: in this view, an individual is, essentially, just a metaphysical will, an ability to choose any form of good, any set of values, etc., and an ability to step back from prior choices, evaluate them, and perhaps decide to modify them.

Sandel argues that this does not reflect real life at any level. We come into the world as part of a family, a community, an ethnic and religious group, etc., and this is an essential part of our identity at all stages of our lives. What follows from this? Sandel suggests that justice/ethics should centre on, or at least take into account, our connections: our responsibilities as members of our communities, citizens of a country, and so on.

More specific to the current topic: Sandel is suspicious of the view of individuals that seems to underlie Rawls' analysis, and especially the "original position". For Rawls, we can speak of the choosing individual separate from his or her view of the good, and indeed separate from all of his or her attributes, beliefs, attachments and affiliations. This is a minimal self or simple will that makes choices, a view of human essentials that can be traced from Rawls at least back to Immanuel Kant.<sup>50</sup> For Sandel and other communitarians, it is unwise, and likely distorting, to view individuals separate from the families, communities and other attachments which shape individuals long before those individuals can make mature, informed and autonomous choices. (Individuals can, and many do, reject the communities from which they came, but coming from those communities still remains part of their identity.<sup>51</sup>)

Communitarians do not all believe in the same things, and to the extent that their positions do converge, they tend to be on criticisms of the basic points of liberal individualism. The conventional view of society is that government is there to protect individual rights (for some, the

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range of issues, and I do not always find myself on the communitarian side." Sandel, *Liberalism and the Limits of Justice*, p. ix. On communitarianism generally, see Daniel Bell, "Communitarianism", in Edward N. Zalta ed., *Stanford Encyclopedia of Philosophy*, <http://plato.stanford.edu/entries/communitarianism/> (2016).

<sup>49</sup> In the context of the communitarianism-liberalism debate, and in a number of other settings in political theory, "liberalism" is to be understood broadly, as any approach which emphasises individualism and individual rights against the state. In this sense, most ideological conservatives can be called "liberal", as can the vast majority of major politicians in the UK (whether Conservative, Liberal-Democrat, or Labour) and in the US (whether Republican or Democrat).

<sup>50</sup> See Sandel, *Liberalism and the Limits of Justice* (2nd ed.), pp. 6-9.

<sup>51</sup> Descriptions like "lapsed Catholic" and "British expatriate" reflect the understanding that affiliations we once had can affect us even after we have rejected them.

focus would be on rights of liberty and conscience, for others, on rights of property and free contract) and to resolve disputes between individual claims. The public good is defined as either the protection of the basic rights and the framework within which they can be fully realised (e.g. the free market), or simply the summation of (conflicting) individual preferences. Communitarians tend to emphasise the importance of community and the importance of (responsible) membership in a political community.<sup>52</sup> The argument is that “membership of a political community is a good that liberalism neglects, ignores, or whose sense it cannot successfully capture by its own terms.”<sup>53</sup> It is important to recognise, respect and protect the intermediate institutions that play such a large role in our identities and our lives. In considering principles and legal rules, the argument is that the focus should be on communities, and on society: how adopting one principle or rule rather than another might help or hurt society, not just how it might affect the autonomy of atomistic individuals. For example, the advantage of free public education should be seen not primarily in how it equips individuals to succeed in the marketplace, but in how educated people will make better citizens.<sup>54</sup>

It is not just a different justification for the same rules. A focus on communities might lead to different policies: communitarians are less likely than liberals to defend pornography and less likely than conservatives to defend corporate rights, e.g. regarding the rights of corporations to move or shut down when this means the massive loss of employment and loss of vitality to the local community.

Michael Walzer offers another communitarian critique of justice: that notions of justice arise *within* a community, a tradition, and a particular set of circumstances.<sup>55</sup> This is a challenge to a basic notion underlying conventional theories of justice (and, indeed, conventional theories of morality): that what is right is *universally* right—for all people, and for all times.<sup>56</sup> One should not overstate the disagreement here: Walzer

<sup>52</sup> “We know a good in common that we cannot know alone.” Sandel, *Liberalism and the Limits of Justice*, p. 183.

<sup>53</sup> David Archard, “Political and Social Philosophy”, in Nicholas Bunnin and Eric P. Tsui-James eds., *The Blackwell Companion to Philosophy* (2nd ed., Blackwell, Oxford, 2003), p. 271 (discussing communitarianism).

<sup>54</sup> See Michael J. Sandel, “Morality and the Liberal Ideal”, *The New Republic*, May 7, 1984, at pp. 15–17.

<sup>55</sup> See Michael Walzer, *Thick and Thin: Moral Argument at Home and Abroad* (University of Notre Dame Press, Notre Dame, 1994), pp. 2–11; Michael Walzer, *Spheres of Justice* (Basic Books, New York, 1983), pp. 4–6; Michael Walzer, *Interpretation and Social Criticism* (Harvard University Press, Cambridge, Mass., 1987), pp. 3–32.

<sup>56</sup> See, e.g. Aristotle, *Nicomachean Ethics*, Book V, 7:1134b, in J. Barnes ed., *The Complete Works of Aristotle* (Princeton University Press, Princeton, 1984), vol. 2, pp. 1790–1791, where Aristotle distinguishes between that part of justice “which everywhere has the same force and does not exist by people’s thinking this or that”, and that part of justice which derives from compliance with conventional laws.

is willing to speak of “a core morality differently elaborated in different cultures”<sup>57</sup>; however, for Walzer, critical debate occurs within the “thicker” culturally-based moralities. “The hope that minimalism, grounded and expanded, might serve the cause of a universal critique is a false hope.”<sup>58</sup> For Walzer, questions of justice, and responses to those questions, will, and should, be debated within the context of a particular community and a particular tradition.

Communitarianism is a near relation to an approach to political theory known as “republicanism” or “civic republicanism” (not to be confused with the “Republican” political parties in the US and elsewhere).<sup>59</sup> The connection may be only indirect, in the sense that one approach does not logically follow from the other, but both are responses to and reactions against the same views and attitudes; that is, both oppose or question the emphasis on individuals and individual interests at the heart of conventional theories of law and justice. Civic republicanism is the idea that *civic virtue*, the participation in public political life, is an important value that should be emphasised. According to this approach, one of the tasks of government is to make the citizenry more virtuous and encourage participation in promoting the public good.<sup>60</sup>

Civic republicanism has a robust theory of the public good, and our duties, as citizens or officials, to serve that public good, which places it as the diametrical opposite of public choice theory (which will be discussed in Ch. 18). Public choice theory argues, claims, or assumes that there is no such thing as the public good (or at least that the “public good” is rarely sought and even more rarely realised); rather, there is only, or primarily, the conflicting claims of different individuals and interest groups.

<sup>57</sup> See Walzer, *Thick and Thin*, p. 4 (footnote omitted).

<sup>58</sup> Walzer, *Thick and Thin*, p. 11. Walzer adds: “The morality in which the moral minimum is embedded, and from which it can only temporarily be abstracted, is the only full-blooded morality we can ever have.”

<sup>59</sup> On civic republicanism, see J. G. A. Pocock, *The Machiavellian Moment* (Princeton University Press, Princeton, 1975); Frank Lovett, “Republicanism”, in Edward N. Zalta ed., *Stanford Encyclopedia of Philosophy*, <http://plato.stanford.edu/entries/republicanism/> (2018). For the application of civic republicanism to law, see, e.g. Frank I. Michelman. “The Supreme Court 1985 Term—Foreword: Traces of Self-Government”, 100 *Harvard Law Review* (1986); Cass R. Sunstein, “Beyond the Republican Revival”, 97 *Yale Law Journal* 1539 (1988).

<sup>60</sup> Philip Pettit offers a somewhat different perspective on civic republicanism, when he argues that the core of the view is a particular theory of freedom—that citizens should never be exposed to political domination—and that republican views about the proper structure of government and society follow from that. See Philip Pettit, *Republicanism: A Theory of Freedom and Government* (Clarendon Press, Oxford, 1997).

## FEMINIST CRITIQUES

8-07

A number of interesting criticisms of conventional discussions of justice have been put forward by feminist theorists.<sup>61</sup> For example, Susan Moller Okin (1946–2004) and Ruth Anna Putnam (among others) have argued that works about justice written by men tend to focus too narrowly on justice in political life and the distribution of goods, not giving enough emphasis to the implications of how the workplace is structured for family life, or family life for the workplace.<sup>62</sup> Additionally, the argument is that most theories of justice have tended to assume a traditional household, with its gendered division of labour, and assume that division to be just, an assumption feminists contest.<sup>63</sup> The claim is not that it is unjust for women to work in the home rather than seek wage work (if that is their choice), but that it is unjust to have legal or social norms that state or assume that women can or should *only* work in the home.<sup>64</sup>

Martha Fineman has argued that liberal individualism is built around a presumption of self-sufficiency, when the reality is that all of us are inevitably dependent for significant parts of our life (when we are very young) and many of us are dependent at other times due to age, sickness or disability. Additionally there are also “derivative dependencies”, as those who care for the inevitably dependent (in many societies, the child-care and elder-care tends to fall predominantly on women) are often unable or less able to support themselves. Legal, political, or moral theories built around assumptions of self-sufficiency, which have no place for inevitable and derivative dependencies, will present a false picture of society, and will usually fail to deal with the challenges that come from these dependencies.<sup>65</sup>

A related line of feminist criticism comes from those who believe that certain values often associated with women, involving caring and nurturing, are often excluded from (male) theories of justice, morality and moral development.<sup>66</sup> This line of argument will be discussed at greater length in Ch. 19, in connection with feminist legal theory.

<sup>61</sup> Feminist approaches to law and legal theory will be discussed in greater detail in Ch. 19.

<sup>62</sup> See Susan Moller Okin, *Justice, Gender, and the Family* (Basic Books, New York 1989), pp. 89–97; Susan Moller Okin, “Justice and Gender: An Unfinished Debate”, 72 *Fordham Law Review* 1537 (2004); Ruth Anna Putnam, “Why Not a Feminist Theory of Justice?” in Martha C. Nussbaum and Jonathan Glover eds., *Women, Culture, and Development: A Study of Human Capabilities* (Clarendon Press, Oxford, 1995), pp. 298–331.

<sup>63</sup> See Okin, *Justice, Gender, and the Family*, pp. 8–10, 90–97.

<sup>64</sup> See, e.g. Okin, *Justice, Gender, and the Family*, pp. 103–104.

<sup>65</sup> See Martha A. Fineman, *The Neutered Mother, the Sexual Family, and Other Twentieth Century Tragedies* (Routledge, New York, 1995); Martha A. Fineman, “Contract, Marriage and Background Rules”, in Brian H. Bix ed., *Analyzing Law: New Essays in Legal Theory* (Clarendon Press, Oxford, 1998), pp. 183–195.

<sup>66</sup> See, e.g. Carol Gilligan, *In a Different Voice* (Harvard University Press, Cambridge, Mass., 1982, rev. ed., 1993); Robin West, *Caring for Justice* (New York University Press, New York, 1997).

## Suggested Further Reading

- 08 Aristotle, *Nicomachean Ethics*, Book V.
- Schlomo Avineri and Avner de-Shalit eds., *Communitarianism and Individualism* (Oxford University Press, Oxford, 1992) (includes discussions by well-known figures associated with communitarianism, including Charles Taylor, Alasdair MacIntyre, Michael Walzer, Will Kymlicka and Michael Sandel).
- Daniel Bell, "Communitarianism," in Edward N. Zalta ed., *Stanford Encyclopedia of Philosophy*, <http://plato.stanford.edu/entries/communitarianism/> (2016).
- Samuel Freeman ed., *The Cambridge Companion to Rawls* (Cambridge University Press, Cambridge, 2003).
- Julian Lamont and Christi Favor, "Distributive Justice", in Edward N. Zalta ed., *Stanford Encyclopedia of Philosophy*, <http://plato.stanford.edu/entries/justice-distributive/> (2017).
- Robert Nozick, *Anarchy, State, and Utopia* (Basic Books, New York, 1974).
- Susan Moller Okin, *Justice, Gender, and the Family* (Basic Books, New York, 1989).
- Plato, *The Republic*.
- Thomas Pogge, *John Rawls: His Life and Theory of Justice* (Oxford University Press, Oxford, 2007).
- John Rawls, *Collected Papers* (Samuel Freeman ed., Harvard University Press, Cambridge, Mass., 2001).
- , *Justice as Fairness: A Restatement* (E. Kelly ed., Harvard University Press, Cambridge, Mass., 2001).
- , *Political Liberalism* (Columbia University Press, New York, 1993).
- , *A Theory of Justice* (Harvard University Press, Cambridge, Mass., 1971, rev. ed., 1999).
- Alan Ryan ed., *Justice* (Oxford University Press, Oxford, 1993) (a collection of readings, including Plato, Aristotle, Cicero, David Hume, John Stuart Mill, Karl Marx, John Rawls and Robert Nozick).
- Michael Sandel, *Liberalism and the Limits of Justice* (2nd ed., Cambridge University Press, Cambridge, 1998).
- Amartya Sen, *The Idea of Justice* (Harvard University Press, Cambridge, Mass., 2009).
- Robert C. Solomon and Mark C. Murphy eds., *What Is Justice? Classic and Contemporary Readings* (Oxford University Press, New York, 1990).
- Symposium: "Rawls and the Law", 72 *Fordham Law Review* 1381–2285 (2004).