

## Rawls vs Nozick: justice as fairness or justice as freedom?

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In the 1960s, Harvard University made two hires that would greatly impact the direction of political theory for the next several decades, namely John Rawls (1962) and Robert Nozick (1969). Prior to their philosophical works in the following decade, political theory in the English-speaking world was dominated by consequentialism or utilitarianism – theories that view justice in terms of the consequences of one's conduct on happiness, the good, or utility in the world. After their interventions, this was most certainly no longer true; discussions of individuals' rights, freedom and equality were now centerstage.

The most systematic political thinker of the two was Rawls, and in 1971, he published *A Theory of Justice*, which aimed to challenge the current state of affairs in political theory and, indeed, revolutionized political theory. Simplified, Rawls proposed that when we think about the most basic questions of justice, like the basic principles of our constitution, to do it well, a certain thought experiment is useful:

Like the blindfolded Lady Justice, imagine that you and your fellow citizens, cloaked in a veil of ignorance and seeking to protect and ensure a set of primary goods that you all need to live well, are discussing the question of which principles should govern your basic public legal and political institutions. The veil of ignorance makes it impossible for each of you to know facts about yourself that track bias and oppression (such as your class, your sex, your race, your talents and abilities, religion etc.) and also exactly what your conception of the good or happy life is. The set of primary goods, instead, is assumed to include both natural goods like intelligence, imagination, and health and social goods like rights, liberties, income and wealth, and social bases of self-respect that you all want and need to do well regardless of what kind of life you find meaningful. If we deliberate well, under these conditions, Rawls proposed, we will be able to identify principles that should negotiate our interactions in a way that is fair to each citizen viewed as free and equal; hence Rawls calls his position "justice as fairness."

Rawls proposes that when we deliberate in this space – which he calls "the original position" – we will end up concluding that two principles of justice – the principles of justice as fairness – should ground our public legal and political institutions. The first principle states, simplified, that each person has fundamental, indefeasible rights to an adequate set of basic liberties that is consistent with the same set for each and all. The second principle concerns social and economic inequalities, and it has two parts: (i) *the principle of opportunity*, according to which public offices and positions must be open to all; and (ii) *the difference principle*, according to which these inequalities can only be justified insofar as they are to the greatest benefit of the least advantaged members of society. He also proposed that our deep intuitions of justice neither permit us to let considerations of the second principle override the first nor considerations of the difference principle to override those of the principle of opportunity. Rawls, in short, proposed that only societies that are based on these principles, so understood, can justify any claim that the basic structure of their public legal and political institutions is consistent with treating its citizens as free and equal.

Nozick was deeply unconvinced and worried by Rawls's theory, and just three years later – lightning speed in academia – he published *Anarchy, State, and Utopia* (1974), which claimed that Rawls's theory does not secure each person's freedom and equality through principles of justice as fairness. Nozick argued that Rawls's justice as fairness is actually a theory that is profoundly unfair on those who work hard and do well; indeed, Nozick thinks, it is a theory that makes freedom impossible and enslavement a reality. Nozick is especially critical of the difference principle. He argued that if we let the difference principle structure our legal and political institutions, then we end up with a society in which individuals do not have equal rights to be free.

Nozick illustrates this logic by invoking the famous American basketball player Wilt Chamberlain. Imagine, he writes, that many people want to come to see Chamberlain play, and they are willing, and thus freely choose to pay money to do so. As a result, Chamberlain becomes quite rich quite fast. The problem, according to Nozick, is that the difference principle is inconsistent with this wealth accumulating to Chamberlain – a wealth that is the result of Chamberlain working hard to realize his talents and the free choices of paying individuals – because the difference principle seemingly requires a transfer of (some of) this wealth from Chamberlain to those who are the least advantaged in society (through taxation). Hence, Nozick argues, Rawls's theory of justice as fairness is inconsistent with any exercise of liberty because free choices will always upset patterns of economic distribution. Put another way, Rawls's theory of justice as fairness requires a certain end-result theory of economic justice to be maintained – that economic inequalities always benefit the worst off – but this is inconsistent with liberty because liberty is fundamentally open-ended in terms of end-results. You can't have it both ways in your theory; you have to choose either freedom or certain end-results. In this way, Nozick's critique was also that although Rawls wanted to present a theory that is not consequentialist, he in fact ended up with one that is.

From the 1970s, political theory in the English-speaking world was no longer the same: the theories of Rawls and Nozick have since been critically engaged or developed from all theoretical directions. Among the very many works that have utilized the theories of Rawls or Nozick, three especially have been significant in broadening the horizons of the philosophical tradition to encompass feminist philosophy, the philosophy of race, and the philosophy of disability: Susan Okin Moller's *Justice Gender and the Family* (1989), Charles Mills *The Racial Contract* (1997), and Eva Kittay *Love's Labor* (1999).

Importantly too, of course, in the United States – where these two thinkers lived – Rawls's liberalism fit well with the kind of left-leaning political thinking dominant in the Democratic Party in the late 1900s, while Nozick's libertarianism appeals to the sort of right-wing political thinking found in the Republican Party of the same time period. Hence too, for better or for worse, discussions around these two political thinkers often also channeled much party-political sentiment into these academic discussions in the US.

Finally, these discussions – crucial as they were to igniting post-consequentialist or post-utilitarian political theory in the English-speaking world – are actually rooted in older philosophical discussions. And since scholars around the world are celebrating Immanuel Kant's 300<sup>th</sup> birthday this year – with birthday parties, conferences, special publications, and all the other things academics do to celebrate such events – and both Rawls and Nozick viewed

themselves as presenting Kant-inspired theories, focusing on this Kant connection seems appropriate.

Most of us know about Kant indirectly in that his thinking about human dignity, freedom, natural science, and religion has revolutionized our world to that point that when we invoke our “common sense” on these topics, we often (unwittingly) draw on Kant’s ideas. In the 1970s, when Rawls and Nozick were writing and publishing their theories, it was Kant’s works on ethics – especially on freedom and dignity – that inspired most political thinkers, including Rawls and Nozick.

As was common at the time, therefore, Rawls and Nozick didn’t engage with what is now known as Kant’s main legal and political writing, a work called the “Doctrine of Right,” which we find in Kant’s *The Metaphysics of Morals*. One reason consequentialism was so influential before Rawls and Nozick was correspondingly the peculiar historical fact that this work of Kant had received so little scholarly attention. This, however, changed towards the end of the 1990s and into the 2000s. As Rawls revised and developed his theory of justice as fairness – in books like *Political Liberalism* (1993) and *The Law of Peoples* (1993) – Kant scholars now engaged with both Rawls and Nozick by using the critical tools given us by Kant himself in addition to presenting their own, new Kantian theories of justice based on Kant’s “Doctrine of Right.” These new theories were fundamentally grounded in Kant’s works and often claim to keep what is good in Rawls or Nozick and move beyond them – some also with the help of other neglected works (of Kant and others).

To make their case, some Kantians argue that although more philosophically sophisticated than Nozick’s account in many regards and being a more consistent freedom theory, Kant defends a position theoretically very close to the libertarian one Nozick defends. The most influential book of this kind is Sharon B. Byrd and Joachim Hruschka’s *Kant’s Doctrine of Right: A Commentary*.

Others disagree, arguing in ways that are philosophically much closer to Rawls. For instance, Paul Guyer in *Kant on Freedom, Law, and Happiness* (2000) argues that Kant’s own position is in fact philosophically very similar to Rawls. Others think this is going too far and argue that though the positions are complementary or philosophically similar in several important regards, Kant’s argument is much more complex than Rawls’s, since Kant gives us important theories we cannot find in Rawls. The most influential book of this kind is Arthur Ripstein’s *Force and Freedom: Kant’s Legal and Political Philosophy* (2009). For example, Kantians of this stripe (including me) maintain that Kant himself provides a theory of the kinds of liberties all human beings should have – what Rawls’s first principle more vaguely characterizes as an adequate set of liberties – such as freedom of thought and the right to bodily integrity, to private property, to contract, and to start a family. In addition, for these Kantians, Kant gives us philosophical resources that enable us to understand why poverty is a systemic problem that the state (and not private individuals) has the right and duty of justice to assume responsibility for. Kant can explain why the state must ensure that all citizens have legal access to means at all times, including why citizens’ exercise of freedom cannot be made dependent on charity or on someone wanting to hire them. More generally, Kant can explain why the state must assume a monopoly on coercion and responsibility for the economy, the financial system, and legal movement across land.

Not only does Kant have the resources to answer Nozick's criticisms, but, in my view, he does not appeal to the kinds of arguments Nozick finds objectionable in Rawls. Indeed, some of the ingenuity of Kant's theory in the "Doctrine of Right" is that he can show that if you argue consistently from the foundation of each person's right to freedom – understood as a right not to be enslaved – you cannot end up with Nozick's libertarianism. Kant's "Doctrine of Right" can also show us why Nozick's famous Wilt Chamberlain argument doesn't get off the ground. In Nozick's example, Chamberlain's contract gives him 25 cents per \$1 of the entrance fees of those paying to see him play. The problem is that once we introduce money – dollars and cents – and professional basketball teams, it is no longer philosophically plausible only to appeal to what Chamberlain and his fans do. We must now explain how freedom is possible within an economic system on which we are all dependent, one that also requires a financial system enabled by the state through legislation, the issuing and controlling of legal tender (including money), and the positing, applying, and enforcing laws governing businesses (including professional basketball teams). We need an explanation, in other words, of how freedom is possible once our exercise of it is systemically dependent. What we need and what Nozick doesn't and cannot (given his theoretical parameters) provide (while Kant can) is an account of systemic (in)justice.

Finally, as might be expected from the above, many Kantians have been and are working with philosophical resources found in other neglected Kant texts to help us overcome Kant's own sexism, racism, heterosexism, ableism, etc., including as we find them in his "Doctrine of Right," views contrary to his principled theory of justice as freedom. In fact, in my view, some of the most exciting contemporary philosophy – what we might call the "philosophy of the isms" -- is happening exactly here.

To illustrate the spirit of some of this work, consider again Rawls's veil of ignorance or Nozick's Chamberlain example. We may reasonably point out that in understanding the complex questions of justice surrounding Chamberlain, we cannot avoid the glaringly obvious fact that Chamberlain was a Black man who lived in the US, where playing professional basketball within the parameters of the NBA was one of the very few opportunities available to young Black men of his generation. Hence, there is something troublesome about choosing an actual Black player (without even noting this fact) and then arguing as if (or that) the most fundamental questions of justice facing this person at this historical time in the US is whether or not he is taxed for his income to benefit the worst off in society. After all, it seems fair to say, one of the most basic problems of justice facing Chamberlain (and any other actual basketball player, however racialized) at this time was the fact of racism (in the US generally and in professional NBA basketball). And this is a question that Nozick never mentions or takes on, since in an ideal, just world – hence as a matter of ideal theory – this problem would not exist and in this world, the biggest danger to freedom would be redistributive taxation measures. The problem is not that Nozick doesn't have an in principle argument against Rawls; the problem is that these ideal theories of justice seem unable to capture important aspects of actual and particular cases of serious injustice. In a spirit similar to Moller Okin, Mills and Kittay, many so-called non-ideal philosophers of the isms today focus some of their criticism exactly on this type of issue. They emphasize that we don't live in the ideal world and our theories are not minimally satisfying if they cannot also help us think better about, and act better in our ever so real, messy non-ideal realities.

In addition, notice too that reasoning behind Rawls's veil of ignorance is insufficient to address the way in which our reasoning is easily skewed and distorted when we live in worlds characterized by systemic forces of racism, sexism, heterosexism, ableism, etc. For example, here we might point to other facts Nozick fails to mention: Chamberlain is also known for his inability to handle important complexities concerning his racialized or gendered identity. Such failures and blind spots are common among those who are able to break glass ceilings, and they are important to understand if we are to adequately characterize the problems of systemic injustice of our times. And neither Rawls's nor Nozick's theories can help us there.

Understanding basic questions of justice, including in relation to Chamberlain, then, is much more complicated than reasoning behind the veil of ignorance – which blinds us to phenomena tracking the history of race and gender – or the question of whether or not the income from his professional basketball games should be taxed so as to assist those who find themselves in the most disadvantaged societal positions. And, some of us argue, that although Kant-the-man wasn't able to do this, his philosophical system – especially in dialogue with the world of neglected freedom thinkers of the past – gives us resources with which we can theorize these aspects of justice better. Rawls and Nozick were, in other words, crucial to helping us yet again take up and develop further philosophical resources left behind by those who went before us, thereby also honoring their efforts to strive to leave the world a little better, a little freer than we found it.