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Fairness and the Distribution of Primary Goods

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ABSTRACT

I consider whether any one of the schemes of distributive justice envisioned by John Rawls, Robert Nozick, or G.A. Cohen is truly fair. By means of a close and critical reading of their work on distributive justice, I conclude that their schemes of distributive justice in some instances fail to correct for elements of unfairness and at other times introduce unfairness in the furtherance of other largely unacknowledged ends. More specifically, I (1) describe the ways in which Rawls, Nozick, and Cohen fail to show us what a fair scheme of distributive justice would look like, (2) sketch what I take to be a truly fair (though unappealing) scheme of distributive justice, and, (3) (in conclusion) suggest that the unwillingness or inability of Rawls, Nozick, and Cohen to be constrained by fairness highlights the potential disutility of fairness as a major determinant in the proper distribution of primary goods.
I. Introduction:

In this article I consider whether any one of the schemes of distributive justice envisioned by John Rawls, Robert Nozick, or G.A. Cohen is truly fair. While each of these theorists uses the language of fairness I conclude that their schemes of distributive justice in some instances fail to correct for elements of unfairness and at other times introduce unfairness in the furtherance of other largely unacknowledged ends. My goal is to describe the ways in which Rawls, Nozick, and Cohen fail to show us what a fair scheme of distributive justice would look like. I would also like to suggest that their unwillingness or inability to be constrained by fairness highlights the potential disutility of fairness (and possibly justice as well) as a major determinant in the proper distribution of primary goods.

Some Preliminary Thoughts on Distributional Fairness

In my view we are only right to call a thing fair if and only if it results from the actions or inactions of impartial agents whose actions or inactions, by definition, neither reflect nor perpetuate the taint of either force or fraud. Likewise, I believe that we are only right to call a thing unfair if and only if it results from the actions or inactions of partial agents whose actions or inactions, by definition, reflect or perpetuate the taint of either force or fraud. Finally, I also believe that things can be neither fair nor unfair (though possibly undeserved) when, as in the case of Nature or happenstance, they do not result from the actions or inactions of agents, whether they be partial or impartial.¹ My foundational and operating belief² is that distributive

¹ Rawls does, to some degree, anticipate the distinctions that I want to make between that which results from impartial agency, partial agency, and non-agency when he acknowledges that “[t]he natural distribution is neither just nor unjust; nor is it unjust that persons are born into society at some particular position. These are simply natural facts. What is just or unjust is the way that institutions deal with these facts.” John Rawls, A Theory of Justice 87 (Harvard University Press 1999) (1971). What disturbs Nozick (and me) about this understanding of
fairness, the elimination of the impact of force or fraud on distributions, is a significantly less
appropriate tool for the distribution of primary goods than a moral sense of what ought to be the
case. The moral sense that I have in mind would require us to (1) to justify the rules and policies
governing distributions on the basis of their contribution to human flourishing (as abstract a
concept as that may be) and (2) to proceed with the implementation of rules and policies that
satisfy (1) even if doing so results in a net increase in distributional unfairness.

For myself (and for those who currently agree with my understanding of fairness) we call
a thing unfair (and really mean it) when it has been influenced by the force or fraud of some
agent and call another thing fair (and really mean it) where/when the force or fraud of some
agent is absent. It is with this considered sense of fairness that we distinguish between (1) the
good and bad things that simply happen(ed) to us by virtue of good and bad luck and (2) the
good and bad things that happen(ed) to us by virtue of the force or fraud of individuals or
groups—the former being fair (or, in actuality, not unfair) and the latter being unfair. Despite
these considered distinctions we often find ourselves labeling things “unfair” in the normal
course when what we really mean is that these things are both undeserved and possibly worthy of
some form of correction consistent with our moral sense.

When a rich man finds a winning lottery ticket in the subway or a poor man is struck by
lightning we often say “now, that was unfair”\(^3\) but if we examine our thoughts we may recognize
two things: First, we may understand that neither situation is in fact unfair because no (non-

\(^3\) The converse is also true, we might (loosely) remark that “it’s only fair” when a scoundrel gets struck by lightning
or a saint experiences a miraculous recovery.

Rawls’s is that he thinks that justice as fairness actually requires the elimination and exploitation of the impact of
avowedly not unjust natural facts (genetic and social) on distributions.

\(^2\) This is a belief on my part that extends beyond the scope of this Article.
cosmic) agent tipped the scales to the benefit of the rich man or to the detriment of the poor man, and, second, we may understand that it isn’t the considered sense of fairness that accounts for our uneasiness about this state of affairs but a more basic (and not merely fairness-oriented) sense of what ought and ought not to happen to our fellow human beings.\(^4\)

Another way to put all of this is to distinguish between a thing that is *unfair* and a thing that is *merely undeserved*. I want to draw attention to the difference between Situation A in which I am $20 richer because I stole $20 from you (*unfair*) and Situation B in which I am $20 richer because I found $20 lying on the sidewalk (*merely undeserved*).\(^5\) I think that many of us have a sense that there is a meaningful difference between Situations A and B based on the considered sense of fairness and I want to get significant mileage out of that sense. We think it unfair that I am $20 richer in Situation A because I employed force or fraud in order to obtain your $20 and fair (or not unfair) that I am $20 richer in Situation B because in that instance I was merely lucky.\(^6\) At the risk of oversimplifying my own project, almost all that I want to do is to illustrate how Rawls, Nozick, and Cohen fail to treat the society-sized non-metaphorical versions

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\(^4\) We also need to understand that the presence of human agency does not always imply force or fraud. If the rich man trades the poor man his umbrella for the poor man’s lottery ticket and the umbrella attracts the lightning while the lottery ticket yields a fortune no human agent has perpetuated a force or a fraud and the results remain fair even though unfortunate, unsettling, and possibly worthy of some correction.

\(^5\) I use $20 simply because it seems like a significant amount of money that one might encounter on the sidewalk but my point in this example and throughout this article is the same whether we’re dealing with $20, $20 billion, or all the money (or primary goods) in the world.

\(^6\) I also think that we have a sense that we *can* justify a demand that I return your stolen Situation A $20 on the basis of fairness and that we *cannot* justify a demand that I give to you or share with you my acquired Situation B $20 on the basis of fairness. The idea being that it is *fair* to remedy the unfair thing and that it is *unfair* (though not necessarily *wrong*) to augment the merely undeserved (and not unfair) thing.
of Situations A and B as the considered sense of fairness would dictate. I say “almost all” because I also want to suggest the ethical vacuity of a society that distributes or redistributes primary goods solely on the basis of the considered (and I think very real and correct) sense of fairness. My point is not that there is a problem with the considered sense of fairness but that there is a problem with blindly accepting that fairness (and maybe even justice itself) should solely or primarily determine the proper distribution of primary goods.

While guaranteeing fairness through the universalization of impartiality and the rectification of all that results from force or fraud is easy (as easy as ideal theory can be), guaranteeing the world as it ought to be is a far more daunting endeavor (even in terms of ideal theory). I agree that fairness is a very important concept but I do not believe that guaranteeing fairness or ridding the world of unfairness (the same thing) is (1) enough to ensure that everyone is treated as he or she ought to be treated, or, (2) the best way to consider issues of distributive justice if, as I think it ought to be, our ultimate end is universal or widespread human flourishing.

Roadmap

My goal is not to describe and discuss each and every difference between Rawls, Nozick, and Cohen on the issue of distributive justice. Instead I want to think about how they explicitly and implicitly regard and treat the notion of moral arbitrariness—a notion that bears an interesting and crucial relationship to fairness. Moral arbitrariness is interesting because it can mean different things to different theorists in part because things can be arbitrary in different ways. For instance, we might call something random-arbitrary (I draw a card from an unstacked deck and the designation of the card that I receive is arbitrary in the sense that it is random) or capricious-arbitrary (I draw a card from a stacked deck and the designation of the card that I receive is arbitrary in the sense that it is a capricious result—metaphorically speaking, what I
Moral arbitrariness is also crucial in that it is usually in the language of moral arbitrariness that theorists express their distributive justice fairness determinations and it is important to note whether they consider either or both forms of moral arbitrariness, random and capricious, to be unfair. As we proceed, I want to keep an eye out for what Rawls, Nozick, and Cohen seem to consider morally arbitrary, how they treat those things that they call morally arbitrary, and how well their definitions and proposed treatments comport with the considered sense of fairness. By way of preview I’ll say now that everything that is random-arbitrary fits within the considered sense of fairness (meaning nothing truly random should strike us as unfair⁸) and that everything that is capricious-arbitrary strike us as unfair.⁹ I’ll also say by way of preview that I think that Rawls and Cohen

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⁷ My understanding of the random-arbitrary (good or bad hand) and capricious-arbitrary (stacked deck) distinction is based largely on comments made by David Schmidtz in his book *Elements of Justice*. David Schmidtz, *Elements of Justice* 217-18 (Cambridge University Press). For my purposes (and for his as well) random-arbitrary and capricious-arbitrary stand in as short-hand for the situations where a thing is good or bad independent of any force or fraud by an agent on the one hand and the situation where a thing is good or bad as a result of some force or fraud by an agent on the other.

⁸ Please note that I am most definitely not saying that we do not or should not feel compelled to remedy certain random occurrences. My point is simply that our desire to remedy certain random occurrences doesn’t really have anything to do with fairness as properly and meaningfully distinguished from our much larger (and more important) sense of what ought to be case and what ought not to be case.

⁹ For example, Situation B is random-arbitrary because it is simply a matter of undeserved luck that I came to be $20 richer in that instance while Situation A is capricious-arbitrary because I came to be $20 richer in that instance only by forcing you to give me the $20 or tricking you into giving me the $20 by means of fraudulent misrepresentations. The bigger picture in all of this that I will get into below is that important things in life are like Situations A and B—the influence of discrimination on the distribution of primary goods is capricious-arbitrary like Situation A and the
violate the considered sense of fairness by seeking to exploit or eliminate random-arbitrary
features of society while Nozick violates the considered sense of fairness in that he does not
necessarily seek to eliminate all of the capricious-arbitrary features of society.

Having said that fairness determinations are often couched in the language of moral
arbitrariness and introduced the notions of random-arbitraryness and capricious-arbitraryness, I
want to also point out how I see these notions interacting with the theorists’ treatment of the
concepts of natural endowments, social endowments, and social contingencies. Typically these
terms come with a “morally arbitrary” in front of them (as in “morally arbitrary natural
endowments”) and sometimes the terms social endowments and social contingencies are used
interchangeably even though I think that it is best to regard these as referring to two different
ideas. I find it most useful to understand these concepts as follows:

- **Natural Endowments**: (how one does in the “natural lottery”) Our natural endowments
  are those attributes we are born *with* rather than born *into*. For instance, some are born
  with more innate aptitude for mathematics or music and others less and some are born
  able-bodied while others are born disabled.

- **Social Endowments**: (how one does in the “social lottery”) Our social endowments are
  those attributes that we are born *into*. For instance, it takes social construction for
different chromosomes to indicate different sexes and even more social construction to
come up with gender. We are born into (rather than “born with”) sexes, genders,
families, ethnic groups, races, social classes etc.

- **Social Contingencies**: (how one does in the “everyday luck lottery”) Our social
  contingencies are the chance things that happen to us throughout life. For instance,
illinesses, accidents, or being in the right place at the right time or the wrong place at the
wrong time. In some cases our natural endowments and/or social endowments render us
predisposed to these contingencies and in other cases they are completely unrelated
(contrast a genetic predisposition for asthma, being born into a family of chain-smokers,
and suffering debilitating asthma attacks with suffering brain damage after getting hit in
the head by a foul ball at a baseball game).

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The influence of the fact that some people (like me) are born with an innate inaptitude for mathematics on the
distribution of primary goods is (in most instances) random-arbitrary like Situation B.
Considering the question of whether or not we should allow one or more of these concepts to influence the distribution of primary goods we get a different answer from all three theorists at issue in this article and yet another distinct answer through application of the considered sense of fairness. First, Rawls wants to eliminate the influence of social endowments and social contingencies on distributions and to exploit the influence of natural endowments on distributions in a particular way (the difference principle). Second, Cohen wants to eliminate the influence of any kind of lottery (any kind of luck in terms of endowments or contingencies) on distributions. Third, Nozick does not want to eliminate or exploit the influence of natural endowments on distributions but does want to eliminate the influence of certain social endowments (and possibly certain social contingencies highly related to social endowments) on distributions in circumscribed ways. Lastly, the considered sense of fairness tracks the aforementioned random-arbitrary/capricious-arbitrary distinction and holds that we should not eliminate or exploit the influence on distributions of any natural endowments on distributions (because they can only be random-arbitrary), that we should not eliminate or exploit the influence on distributions of any social endowments or social contingencies which happen to be

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10 What I am doing here with Rawls, Cohen, and Nozick is understanding the implications of their various comments on distributive justice and assigning them these positions even though they are not always as precise as I have been in delineating between natural endowments, social endowments, and social contingencies or between their elimination and exploitation.

11 Please note that I believe that the considered sense of fairness would treat those attributes that we are born with but that result from social factors as social endowments rather than natural endowments. Here I am thinking (mostly) about children who are born with AIDS or addicted to drugs and similar situations. Like all other social endowments these endowments would be random-arbitrary or capricious-arbitrary depending upon the circumstances.
random-arbitrary, and that we should eliminate (and not merely exploit) the influence on distributions of any social endowments or social contingencies which happen to be capricious-arbitrary. The considered sense of fairness focuses less on what the influence on distributions results from (Nature or society\footnote{Although it should be noted that since Nature (being a non-agent) cannot stack decks, natural endowments are, by definition, always random-arbitrary.}) and more upon whether or not the deck has been stacked in favor of a particular distribution or stacked against another.

The remainder of this article conforms to the following structure: In Section II (Rawls) I (A) describe the Rawlsian conception of distributive justice as it is depicted in his second principle of justice, (B) consider the critiques of the Rawlsian conception offered by Nozick and Cohen, and (C) offer my own critique of the Rawlsian conception and of the critiques in line with what I’ve called the considered sense of fairness; in Section III (Nozick) I (A) describe the Nozickian conception of distributive justice as it is depicted in his entitlement theory, (B) consider the critique of the Nozickian conception offered by Cohen, and (C) offer my own critique of the Nozickian conception and Cohen’s critique in line with the considered sense of fairness; in Section IV (Fairness and Systems of Distributive Justice) I (A) describe practical principles of fairness-in-distributive justice that are generated by the considered sense of fairness and (B) locate the system of distributive justice based upon considered fairness along a continuum of systems of distributive justice; and in Section V (Conclusion) I conclude first, that no one of the conceptions of distributive justice offered by Rawls, Nozick, or Cohen is truly fair, second, that the use of the considered sense of fairness as a major determinant in the proper distribution of primary goods in society is ethically unsatisfying, and, third, that rather than limit
the discussion over distributive justice to an egalitarian-liberal-libertarian debate over what is or is not fair we would be well served to acknowledge and embrace other ends (like human flourishing) based on other human sentiments (like empathy) as we proceed with this debate regarding the proper distribution of primary goods in society.

II. Rawls:

A. The Rawlsian Conception of Distributive Justice:

Rawls’s theory of distributive justice is revealed in the second principle of justice that he believes would be agreed to in the original position. In its first formulation the second principle reads: “social and economic inequalities are to be arranged so that they are both (a) reasonably expected to be to everyone’s advantage, and (b) attached to positions and offices open to all.”13 As with the first principle of justice the second only applies to the “basic structure of society and govern[s] the assignment of rights and duties and regulate[s] the distribution of social and economic advantages.”14 The second principle means that “[w]hile the distribution of wealth and income need not be equal, it must be to everyone’s advantage, and at the same time, positions of authority and responsibility must be accessible to all” and is applied by “holding positions open,

13 Rawls, A Theory of Justice, supra note 1, at 53; The final formulation is meaningfully different in that it stresses the lexical priority of the first condition of the second principle, stresses “fair equality of opportunity”, and stresses the greatest benefit to the least advantaged: “Social and economic inequalities are to satisfy two conditions: first, they are to be attached to offices and positions open to all under conditions of fair equality of opportunity; and second, they are to be to the greatest benefit of the least advantaged members of society (the difference principle).” John Rawls, Justice as Fairness: A Restatement 42 (Harvard University Press 2001).

14 Rawls, A Theory of Justice, supra note 1, at 53.
and then, subject to this constraint, arrang[ing] social and economic inequalities so that everyone benefits.”

Before embarking on a discussion of what the second principle calls for I want to proceed as Rawls does by sketching the development of the principle. Recognizing that the phrases “everyone’s advantage” and “equally open to all” are ambiguous, Rawls describes three possible interpretations of the second principle: the system of natural liberty, liberal equality, and democratic equality. He then explains why he adopts democratic equality as the proper interpretation of the second principle.

The system of natural liberty presupposes a background of equal liberty and requires “a formal equality of opportunity in that all have at least the same legal rights of access to all advantaged social positions.” Careers are open to talents but no effort is made to protect equality and “the initial distribution of assets for any period of time is strongly influenced by natural and social contingencies.” In other words, formal equality of opportunity prevails such that intentional discrimination of the “traditional kind” is prohibited and an efficient market economy defines what counts as a just distribution. Rawls is quick to label the system of natural liberty unjust because it perpetuates inequalities in social and natural endowments “so arbitrary from a moral point of view.”

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15 Id.
16 Id. at 62.
17 Id.
19 Rawls, A Theory of Justice, supra note 1, at 63.
The system of liberal equality adds to the notion of careers open to talents inherited from the system of natural liberty the further condition of the principle of fair equality of opportunity. Liberal equality counters the effects of intentional discrimination and social class by substantively ensuring that individuals with the same level of talent and ability, and the same willingness to exercise that talent and ability, will have the same prospects of success regardless of their initial social endowments.

Rawls clearly prefers the system of liberal equality to the system of natural liberty but objects to liberal equality on the basis of consistency. He argues that since the “natural lottery” is just as arbitrary as the “social lottery”, there is no more reason to allow the distribution of wealth and income to be determined by an individual’s natural endowments than to allow such to be determined by an individual’s social endowments. Rawls argues that “from a moral standpoint” the influence of social endowments and natural chance are “equally arbitrary.”

Rawls responds to the supposed inconsistency of liberal equality by proposing a system of democratic equality. This system combines fair equality of opportunity with the difference principle. The difference principle means that all of our talents, abilities, and the varied extent of our natural endowments should be treated in the same way, regardless of their initial social class of origin, the class into which they are born and develop until the age of reason. In all parts of society there are to be roughly the same prospects of culture and achievement for some similarly motivated and endowed.”

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20 Id.
21 Rawls explains fair equality of opportunity/liberal equality more fully in Justice as Fairness when he says: “supposing that there is a distribution of native endowments, those who have the same level of talent and ability and the same willingness to use these gifts should have the same prospects of success regardless of their social class of origin, the class into which they are born and develop until the age of reason. In all parts of society there are to be roughly the same prospects of culture and achievement for some similarly motivated and endowed.” Rawls, Justice as Fairness, supra note 13, at 44.
22 Rawls, A Theory of Justice, supra note 1, at 64.
23 Id. at 64-65.
24 Id. at 65.
to which we are willing to work hard constitute an asset owned collectively by society.\textsuperscript{25}

Assuming that an unequal scheme is the most beneficial for everyone, the most talented, most able, and most diligent still make out the best in terms of wealth and income.\textsuperscript{26} Nevertheless, the economic scheme is set up such that it will maximally help those in the lowest social position. Compliance with the difference principle means that, “Those who have been favored by nature, whoever they are, may gain from their good fortune only on terms that improve the situation of those who have lost out.”\textsuperscript{27}

I mentioned earlier that I want to be on the lookout for this “moral arbitrariness” language and here it is. Rawls rejects the natural liberty interpretation because it enables the distribution of assets to be strongly influenced by natural and social endowments that he finds morally arbitrary. He rejects liberal equality because, even though it eliminates much of the impact of social endowments on distributions, it does nothing to curtail the influence of natural endowments. What does all of this have to do with fairness? Well, Rawls doesn’t think it unfair that people are born more or less talented (recall Footnote 1) but he does think that it is unfair for those people who are better endowed naturally and/or socially to benefit more than others do from their undeserved good fortune.\textsuperscript{28} This is why he rejects the lingering moral arbitrariness in the systems of natural liberty and liberal equality in favor of democratic equality.

\begin{itemize}
\item [25] Id. at 87.
\item [27] Id. at 87.
\item [28] Please note that in Rawls’s way of thinking it is possible to ensure that the better endowed do not benefit more from their undeserved good fortune than the least well off even if the holdings of the better endowed are always greater than those of the least well off. More on this idea as we proceed.
\end{itemize}
If we pause for a minute, digest all of this, reflect on this emerging Rawlsian sense of fairness, and forget all that we already know about the difference principle, what might we expect democratic equality to look like? We might guess that Rawls is going to want to get rid of all of this moral arbitrariness by demanding an equal distribution of social primary goods even though some people are more talented than others and could command higher wages in the systems of natural liberty and liberal equality. We might suppose that Rawls would find such an arrangement necessarily fair in that it wholly eliminates the influence of both social and natural endowments on the distribution of primary goods.

Rawls’s vision of the operation of the difference principle does in fact start out much like the arrangement I just described (meaning complete equality) but then quickly changes. He asks us to imagine an initial arrangement of complete equality that we are to use as a prima facie just benchmark for judging “improvements.” A situation of complete equality is fair and just as far as Rawls is concerned because morally arbitrary factors have no influence on distributions but he allows for the possibility that other (“better”) states of affairs may exist that are equally just even though no longer equal in terms of distribution.

What justifies an unequalizing change to this completely equal and perfectly just state of affairs? Any unequalizing change is valid according to the difference principle so long as it benefits most the least advantaged. Recall that our initial sense of Rawls’s intuition was that he wanted to eliminate the influence of all morally arbitrary factors. Now, it seems that the “intuitive idea is that the social order is not to establish and secure the more attractive prospects of those better off unless doing so is to the advantage of those less fortunate.”

29 Rawls, A Theory of Justice, supra note 1, at 53.

30 Id. at 65.
that he’ll let the undeserving talented earn more if doing so benefits most the untalented—he hasn’t, in fact, eliminated the influence of morally arbitrary factors, he’s merely harnessing or exploiting them in a manner that he believes would be agreed to by the people in the original position behind the veil of ignorance.

Rawls claims that the difference principle is a “strongly egalitarian conception” and yet also seems fairly positive that it calls for unequal distributions.\(^{31}\) It is “strongly egalitarian” in the sense already mentioned that no move away from the benchmark of equality is warranted unless it benefits most the least well off. Rawls seems to think, however, that a society guided by the difference principle is likely to maintain an unequal distribution of primary goods because greater pay for the more talented is likely to lead to a more efficient economy, greater innovation etc. He doesn’t linger too long on the justifications for inequality but simply says that “[t]he point is that something of this kind [efficiency, innovation, etc.] must be argued if these inequalities are to satisfy the difference principle.”\(^{32}\) By definition, the unequalized economy must do better in some way that benefits the least advantaged or such a state of affairs will not be chosen under the difference principle. Rawls suspects that the “better prospects” of the talented serve as “incentives” for them to work harder and more efficiently in a manner that benefits most the untalented.\(^{33}\) A point to note here then (and this will come up again) is that Rawls must also suspect that the talented will not work as hard or as efficiently without the incentive of “better prospects” as they will with the incentive of “better prospects.”

\(^{31}\) Id. at 65-66.

\(^{32}\) Id. at 68.

\(^{33}\) Id.
What we need to see here is that Rawls is saying two very curious things and implying a third. First, he’s saying that the talented shouldn’t necessarily earn more than the untalented by virtue of their assumed greater/better productivity because the social and natural endowments that enable that productivity are morally arbitrary (meaning undeserveable) (let’s call this Eliminating the Influence of Arbitrary Factors). Second, Rawls is also saying that the talented should enjoy “better prospects” (earn more) by virtue of their assumed greater/better productivity so long as when such inequality exists the least advantaged benefit the most and benefit more than they would in the benchmark state of complete equality (let’s call this Exploiting the Influence of Arbitrary Factors). Third, Rawls is implying that if the talented did not enjoy “better prospects” by virtue of their greater natural endowments they would lack the incentive to work hard enough to render the unequalized state of affairs an “improvement” over the benchmark state of complete equality (let’s call this the Incentive Argument for Inequality). The remainder of Section II is devoted to the ways in which these two claims and one implication are troubling from the standpoint of fairness and theoretical coherence.

B. Nozick’s Critique of Rawls:

I want to delay discussion of Nozick’s entitlement theory until Section III and only focus here on what he has to say specifically about eliminating or exploiting the influence of arbitrary factors and about the incentive argument for inequality. Nozick is useful for understanding (at least) two things about Rawls’s theory: first, he helps us to recognize that Rawls really isn’t in the business of eliminating the influence of inequalities in natural endowments and he identifies the tension that exists between Rawls’s desire to nullify morally arbitrary factors by means of the original position and his decision to give larger shares to the talented; and, second, he (Nozick) questions the fairness of a conception of social cooperation in which the terms of cooperation are
dictated to those who contribute the most to the cooperative effort by those who contribute the least to the cooperative effort.

Nozick notes that “Rawls makes many scattered references to [the] theme of nullifying the accidents of natural endowment and the contingencies of social circumstance” and rejects the systems of natural liberty and liberal equality because they allow distributions to be influenced by natural endowments and social endowments “so arbitrary from a moral point of view.”34 He attempts to rebuild Rawls’s positive argument by asking the question: “How might the point that differences in natural endowments are arbitrary from a moral point of view function in an argument meant to establish that differences in holdings stemming from differences in natural assets ought to be nullified?”35 As Nozick continues to build and discount arguments it becomes clearer and clearer that the influence of morally arbitrary factors on distributions is not eliminated by the conception of distributive justice that Rawls offers. Nozick then attributes to Rawls the idea that “differences between persons…are arbitrary from a moral point of view if there is no moral argument for the conclusion that there ought to be differences” and summarizes the operation of the difference principle as follows:

1. Holdings ought to be equal, unless there is a (weighty) moral reason why they ought to be unequal.
2. People do not deserve the ways in which they differ from other persons in natural assets; there is no moral reason why people ought to differ in natural assets.
3. If there is no moral reason why people differ in certain traits, then their actually differing in these traits does not provide, and cannot give rise to, a moral reason why they should differ in other traits (for example, in holdings).

Therefore,

35 Id. at 216.
4. People’s differing in natural assets is not a reason why holdings ought to be unequal.
5. People’s holdings ought to be equal unless there is some other moral reason (such as, for example, raising the position of the worst off) why their holdings ought to be unequal.\footnote{Id. at 222.}

Unlike inequalities in \textit{social} endowments and \textit{social} contingencies which are nullified or eliminated by the condition of fair equality of opportunity in the second principle of justice, inequalities in \textit{natural} endowments are not nullified but rather exploited by the difference principle because, apparently, there is a good enough moral reason to do so.

According to Rawls, the positive influence of the greater natural endowments of the talented on their holdings is justified because the inequalities that result work to the benefit of everyone. Even though the talented need the incentive of “better prospects” in order to ensure the greater economic benefit of everyone the benefit ultimately redounds most to the least advantaged.\footnote{Meaning that when you compare the Rawlsian state of inequality with the Rawlsian state of complete equality that the extent to which untalented do better in the former state as compared to the latter state is greater than the extent to which the talented do better in the former state as compared to the latter state even though the talented do better in ultimate terms (earn more and possess greater holdings) than the untalented in the Rawlsian state of inequality.}

This stimulation of the talented toward greater production is the manner in which inequalities in endowments are exploited rather than simply nullified or eliminated. Nozick is certainly aware of this choice on the part of Rawls to exploit rather than to eliminate and to dangle incentives in front of the talented. This is, in many ways, what gets him the foot in the door that he needs in order to criticize the cooperative dynamic of the difference principle.

Nozick questions the fairness of the scheme of social cooperation required by the difference principle. He asks us to imagine three states of affairs: non-cooperation, partitioned-
cooperation, and full-cooperation. In the non-cooperative state the talented and untalented do not cooperate with each other or amongst themselves and the talented earn T1 and the untalented earn U1 (where T1 > U1). Under the scheme of partitioned cooperation the talented and untalented do not cooperate with each other but do cooperate amongst themselves and the talented earn T2 and the untalented earn U2 (where T2 > T1, U2 > U1, and T2 > U2). Finally, under the scheme of full-cooperation the talented and untalented cooperate amongst themselves and with each other and the talented earn T3 and the untalented earn U3 (where T3 > T2 > T1, U3 > U2 > U1, and T3 > U3). Nozick suggests that in determining which group, the talented or the untalented, benefits more from the scheme of general cooperation it makes sense to compare the groups’ mean incremental gains in going from the state of partitioned-cooperation to full-cooperation. In other words, asking whether the difference between T3 and T2 is larger or smaller than the difference between U3 and U2. Nozick speculates that since the

the better-endowed group includes those who manage to accomplish something of great economic advantage to others, such as new inventions, new ideas about production or ways of doing things, skill at economic tasks, and so on, it is difficult to avoid concluding that the less well endowed gain more than the better endowed do from the scheme of general cooperation.

Nozick is saying that T3-T2 (the benefit of full-cooperation for the talented) is less than U3-U2 (the benefit of full-cooperation for the untalented) and all of this in the context of the scheme of general cooperation and before the application of the difference principle. Given his speculation about the untalented getting the better end of the full-cooperation deal to begin with he is left with “a deep suspicion of imposing, in the name of fairness, constraints upon voluntary social

38 Id. at 193-95.
39 Id. at 194 (emphasis in original).
cooperation (and the set of holdings that arises from it) [the difference principle] so that those already benefiting most from this general cooperation benefit more!”

Nozick then pounces on Rawls at this point wanting to know why it is that the talented do not have grounds to complain about this situation. He wonders how Rawls would respond if it was the talented who said the following: “‘Look, worse endowed: you gain by cooperating with us. If you want our cooperation you’ll have to accept reasonable terms. We propose these terms: We’ll cooperate with you so long as we get as much as possible. That is, the terms of our cooperation should give us the maximal share such that, if it was tried to give us more, we’d end up with less.’” In Nozick’s reading of *A Theory of Justice* all that Rawls seems to do with this possibility is to suggest that the talented, wanting the untalented to cooperate, would decide to be reasonable and not make such one-sided demands.

Rawls does have a better answer for Nozick. He claims that the talented find the difference principle reasonable because “they regard themselves as already compensated, as it were, by the advantages to which no one (including themselves) had a prior claim.” Nozick criticizes Rawls for suggesting that the talented should be content with the difference principle when they already contribute the most and benefit the least from cooperation. Rawls says that the talented don’t complain about this state of affairs because they feel fully compensated to begin with and that the difference principle is fortified by a sense of fraternity between the talented and untalented.

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40 Id. at 194-95.
41 Id. at 195.
43 Id. at 88-91.
What then are we to make of the incentive argument for inequality? We begin to see that it becomes hard for Rawls to argue that the benchmark of equality is fair but that the inequality that benefits most the untalented is also fair. Even if we stick with Rawls’s own sense of fairness it begins to look like he must be either treating the talented unfairly by admitting that they need “better prospects” as an incentive to cooperate with the untalented but also claiming that they should not benefit most from cooperation or treating the untalented unfairly by allowing the talented to have more than the untalented even though they (the talented) supposedly think of themselves as already having been compensated through fortune alone. On the one hand, we might conclude that it is the talented who are being cheated in the sense that they make less than they would if they could ever benefit as much or more than do the untalented from the scheme of social cooperation let alone the difference principle (a greater amount they could easily secure by virtue of their dominant position within the social cooperation relationship). On the other hand, we might agree that the talented are fully compensated by fortune and conclude that, therefore, it is the untalented who are being cheated out of what more they could have in terms of holdings were “better prospects” abolished and the talented actually treated like they’ve already been fully compensated.

It is here that we begin to see Rawls struggling to compensate for the extent to which his own sense of fairness fails to comport with other senses of fairness (like the one that I and others ascribe to) in the midst of pursuing unacknowledged ends other than fairness. He doesn’t actually want to eliminate the influence of moral arbitrary natural endowments on holdings but rather exploit those endowments in a manner that he deems fair on the basis of its selection by the people in the original position. My speculation is that Rawls is uncomfortable with the idea of dispensing with “better prospects” for the talented because it strikes him as unfair and
unrealistic not to offer them greater pay for highly productive work that benefits most the untalented even if the reason they are capable of doing such great work is the result of their morally arbitrary natural endowments. Either the talented are fully compensated by virtue of fortune or they are not and “better prospects” are only necessary if Rawls does not fully reject the view that the talented are entitled to at least some of the fruits of their lucky natural endowments.\textsuperscript{44}

Walking this tightrope between subtle concessions to entitlement and practicality on the one hand and his desire to dispense with moral arbitrariness on the other leaves Rawls vulnerable to attack in terms of both the coherence of his theory and in terms of his commitment to fairness. Such vulnerability in Rawls’s conception will become increasingly apparent as we turn to Cohen’s critique. Keep in mind however that while Nozick and Cohen are right to point out Rawls’s failings in terms of theoretical coherence and in terms of his sense of fairness, they too fall short of recognizing the potential disutility of fairness as a major determinant in the distribution of primary goods.

C. Cohen’s Critique of Rawls:

Cohen’s “root belief is that there is injustice in distribution when inequality of goods reflects not such things as differences in the arduousness of different people’s labors, or people’s different preferences and choices with respect to income and leisure, but myriad forms of lucky and unlucky circumstance.”\textsuperscript{45} This “root belief” leads him to the very interesting position of accepting what he calls a “strict” interpretation of the difference principle and rejecting the “lax”

\textsuperscript{44} Id. at 88-89.

Rawlsian interpretation of the difference principle. Cohen believes that the difference principle, properly construed, requires almost complete equality and that it unfairly favors the talented in the context of Rawls’s misapplication of his own theory.

Cohen refers to the Rawlsian construction of the difference principle that he would disprove as the Pareto Argument for Inequality. It is a two-stage argument the first stage of which he accepts and the second stage of which he rejects:

(1) **First Stage:**
   (a) First Thought: “true equality of opportunity is achieved only when all morally arbitrary causes of inequality are eliminated”
   (b) Second Thought: “there exist no causes of inequality that are not arbitrary in the specified sense”

(2) **Second Stage:** we come to the argument “which pleads that inequality is indeed just when and because it has the particular consequence that it causes everyone to be better off.”

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46 Cohen says “I take it, a cause of inequality is ‘morally arbitrary’ if it does not justify that inequality because of the kind of cause that it is” and suggests that such unjustifiable causes for Rawls and Rawlsians would be things like desert and entitlement. Cohen, *The Pareto Argument for Inequality*, supra note 26, at 161-62.

47 Here we have reached the *prima facie* just benchmark of complete equality.
(a) First Thought: “it is irrational to insist on equality when it is a Pareto-inferior\(^48\) state of affairs (why would anyone, and, in particular, the worst off, prefer equality to an inequality in which everyone is better off?)”

(b) Second Thought: “sometimes, and indeed typically, equality is Pareto-inferior.”\(^49\)

As you will see, the large claim that Cohen wants to make here is that there is a Pareto-improving and equality-preserving move that Rawls could and should make that he does not make because he cannot bring himself to definitively reject desert and entitlement.

Cohen invites us to consider three alternative schemes, D1, D2, and D3.\(^50\) D1 stands for the Rawlsian initial situation of equality of primary goods which serves as the benchmark against which all other feasible schemes are to be judged. Cohen concludes that the benchmark is under-described in that it tells us nothing of the labor inputs into the system by the talented and the untalented alike and nothing about the relative burdensomeness of the work done by each group. He assumes for the purposes of his thought experiment that both the talented and the untalented apply the same effort over the same period of time meaning that it is the talented that are more

\(^{48}\) Cohen understands the Pareto definitions as follows: “State A is strongly Pareto-superior to state B if everyone is better off in A than in B, and weakly Pareto-superior if at least one person is better off and no one is worse off. If state A is Pareto-superior to state B, then state B is Pareto-inferior to state A. State A is Pareto-inferior (tout court) if some state is Pareto-superior to A. State A is Pareto-optimal if no state is Pareto-superior to state A: it is strongly Pareto-optimal if no state is weakly Pareto-superior to it, and weakly Pareto-optimal if no state is strongly Pareto-superior to it. States A and B are Pareto-incomparable if neither is (even weakly) Pareto-superior to the other. A change is a weak Pareto-improvement if it benefits some and harms none, and a strong Pareto-improvement if it benefits everyone. The Pareto principle mandates a Pareto-improvement whenever one is feasible: the strong principle mandates (even) weak Pareto-improvements, and the weak only strong Pareto-improvements.” Id. at 160 n4.

\(^{49}\) Id. at 161-62 (emphasis in original).

\(^{50}\) Id. at 169-72.
productive by virtue of their greater social and natural endowments. Despite the greater productivity of the talented, under the D1 scheme both groups receive the same wage, \( W \).\(^{51}\)

D2 then stands for a Pareto-superior scheme that Rawls would choose over the situation of initial equality because it leaves everyone better off than in the initial situation. Here Cohen imagines that the talented now work more intensely leading to greater productivity and benefit to spread around and that the talented are accordingly rewarded with \( W_t \) while the untalented work no more intensely and yet receive \( W_u \) where \( W_t > W_u > W \).\(^{52}\) D2, the Pareto-superior scheme (relative to D1) that would be chosen by operation of the difference principle, rewards the talented with the highest wage \( W_t \) as an incentive for them to work hard and benefit most the untalented.\(^{53}\)

With what Rawls has said about fraternity and the talented already feeling compensated by fortune in the back of his mind, Cohen then wonders why it is that the talented should receive a higher wage than the untalented. In this vein, he imagines a third scheme, D3, in which the talented work with their D2 heightened intensity and both the talented and the untalented make \( W_e \) where \( W_t > W_e > W_u > W \). Assuming the feasibility of D3 and the willingness of the talented to produce as well as they can given their greater natural endowments the equal scheme of D3 is a

\(^{51}\) Cohen acknowledges that many would regard paying both the more productive talented and less productive untalented as unfair. He notes, however, that in Rawls’s view (as well as his own) “the greater output of the more able is here to be regarded as due to the morally arbitrary circumstance of their lucky talent endowment, which is among the factors whose effects are to be discounted in the argument for initial equality.” Id. at 171.

\(^{52}\) I think that we can also assume that Nozick would claim that the difference between \( W_u \) and \( W \) is most likely greater than the difference between \( W_t \) and \( W_u \).

\(^{53}\) Id. at 171.
Pareto-improving move\textsuperscript{54} that preserves equality and results in a situation in which no one is as badly off as some are in D2 (\(W_e\) being greater than \(W_u\)).\textsuperscript{55}

Cohen reasons that if D1 is fair to the talented as far as Rawls is concerned then there is no reason why D3 should not also be fair. It is true that the talented are working harder than the untalented under D3. It is also true that they should earn more for working harder under D3 than they do under D1 and they do because \(W_e\) is a higher wage than \(W\). Rather than go with \(W_e\) for both, Rawls is, in effect, suggesting a rate of pay for the talented, \(W_t\) (which is higher than the wage for the untalented \(W_u\)), that could only be secured by the talented by virtue of the bargaining power associated with their superior talent.\textsuperscript{56} But none of that makes any sense when you consider the way that Rawls understands morally arbitrary advantages. If the talented cannot be heard to complain that they deserve a higher wage than the untalented on account of their greater productivity at D1 then they cannot be heard to complain that they deserve a higher wage than the untalented on account of their even greater productivity at D3. Rawls’s decision to exploit rather than to eliminate the influence of natural endowments on distributions indicates that he is less willing than is Cohen to completely dismiss desert or entitlement.

After such a deep critique of Rawls it may be hard to believe that Cohen actually accepts the difference principle. His acceptance comes as a result of his conclusion that

the difference principle in a society of just people would not induce the inequality it is usually thought (e.g. by Rawls) to produce, and it would not, in particular, justify incentive payments in the ‘standard’ sense of the phrase…that is, payments not to compensate for

\textsuperscript{54} D3 is Pareto-superior to D1 and Pareto-incomparable to D2.

\textsuperscript{55} Cohen, The Pareto Argument for Inequality, supra note 26, at 172.

\textsuperscript{56} Id. at 174.
unusually arduous work, but to draw talent to jobs that are not generally especially
grueling.\textsuperscript{57}

Cohen’s belief is that it is only when Rawls gives up on the sense of justice that inspires the
difference principle and is supposed to pervade his just community that incentive payments come
into play. His “strict” interpretation of the difference principle would not merely select “a tax
function that maximizes the income return to the worst off people” but would mean (as Rawls
himself implied) that the “talented would not expect (what they usually have the power to obtain)
the high salaries whose level reflects high demand for their talent.”\textsuperscript{58} In Cohen’s version there
would be no exploitation of natural endowments or “better prospects” for the talented. The
talented and untalented alike would be paid at the same wage rate (the influence of natural
endowments eliminated) and people would only earn more or less depending upon the
arduousness of their work and/or their decisions regarding the appropriate balance of work and
leisure.

D. Rawls and His Critics Measured Against the Considered Sense of Fairness:

Some of the analytical flaws evident in Rawls’s theory arise in part from his inability to
completely disregard the considered sense of fairness which leads him to want to only partially
eliminate the influence of natural endowments on holdings even though he completely eliminates
the influence of even random-arbitrary social endowments and contingencies. These flaws and
the superficiality of the critiques of Nozick and Cohen result from the failure of all three to
clearly distinguish between that which is unfair and that which is merely undeserved (between

\begin{footnotes}
\footnote{G.A. Cohen, \textit{Incentives, Inequality, and Community} (1991), 316
http://www.tannerlectures.utah.edu/lectures/documents/cohen92.pdf.}
\footnote{Cohen, \textit{Where the Action Is}, supra note 45, at 9; Cohen, \textit{Incentives, Inequality, and Community}, supra not 57, at
316.}
\end{footnotes}
that which is capricious-arbitrary and that which is random-arbitrary) as well as their failure to explicitly recognize and privilege ends other than fairness. Coming from different ends of the spectrum, Nozick and Cohen both show some of the ways in which Rawls’s conception is unfair. That they are both right about the unfairness evident in Rawls’s theory illustrates the manner in which my the considered sense of fairness actually straddles the viewpoints of all three theorists. That Nozick and Cohen are likewise incapable of tracking the considered sense of fairness further illustrates their unacknowledged pursuit of ends other than fairness and the danger of constraining the debate over proper distributions to the language of fairness.

I want to be careful about how much I bring Nozick into the discussion at this point because we have yet to go through his entitlement theory of justice. Nozick will serve for now simply as one who disagrees with the idea that fairness requires the elimination or exploitation of the influence of natural endowments on distributions but agrees with the elimination or rectification of the influence of certain social endowments on distributions. This will place Cohen then at the other end of the spectrum as one who believes that fairness requires the elimination of the influence of all natural endowments, social endowments, and social contingencies on distributions. Finally, Rawls will occupy a point between Nozick and Cohen (significantly closer to Cohen) as one who believes that fairness requires the elimination of the influence of social endowments and social contingencies on distributions and the exploitation of the influence of natural endowments on distributions.

In order to understand the distinctions between Rawls, Cohen, and Nozick let’s consider Alice, a talented and able-bodied worker who was raised in a wealthy family whose wealth was neither positively nor negatively impacted by discrimination or any other kind of force or fraud. When Rawls sees the Alices of the world and their morally arbitrary natural and social
endowments he wants to do two things: first, he wants to ensure that no other similarly talented laborer is prevented from achieving what it is that Alice can achieve because he was born into a less fortunate social endowment, and, second, he wants to offer the Alices of the world “better prospects” such that they are willing to work harder for the greatest benefit of the least advantaged. When Cohen sees the Alices of the world and their morally arbitrary natural and social endowments he wants them to recognize that their innate talents and acquired ability to innovate and produce great things for society are merely the products of luck, are wholly undeserved, and that by no means should any of that luck render their distributions any larger than those of anyone else. When Nozick sees the Alices of the world he wants to do nothing at all but sit back and let them do their thing for society even if that means that the Alices are able to bargain for higher salaries on account of their larger contribution to the joint product of social cooperation and even though their ability to contribute more is, at least in part, attributable to luck.

With regard to Alice, at least, I believe that the considered sense of fairness is in complete agreement with Nozick. The description of her background reveals only random-arbitrary unstacked-deck kinds of endowments (natural and social) and, therefore, eliminating or exploiting any of these endowments would be capricious and unfair (see Footnote 6). If we eliminated or exploited any of Alice’s endowments we would be treating a random-arbitrary situation in a capricious-arbitrary manner by stacking the deck against Alice (as when Rawls corrects for avowedly not unjust natural facts—see Footnote 1). To be clear this is true not only when Alice is required to settle for a wage that is less than she could negotiate for in good faith (whether or not it is higher than (Rawls) or equal to (Cohen) that of the rest of society) but also to the extent that she is required to subsidize society’s efforts to ensure that other similarly
talented but less socially endowed members of society receive roughly the same prospects of culture and achievement (what Rawls calls fair equality of opportunity).

Now let’s consider Bob, a talented and able-bodied worker who was raised in a wealthy family whose wealth was positively impacted by discrimination. Rawls and Cohen want to treat Bob just like they treat Alice because they make no distinction between the impact of merely undeserved luck and unfair discrimination upon an individual’s social endowments and social contingencies. Nozick is unwilling to eliminate or exploit Bob’s natural endowments but may be willing to somehow rectify the influence of discrimination on Bob’s holdings. The considered sense of fairness holds that Bob’s natural endowments are random-arbitrary and their influence should be neither eliminated nor exploited but would call for the elimination of the influence of his social endowments (or at least that part of his social endowments that could be connected to discrimination) on his distribution. The Bobs of the world serve as an example of Situation A, in that (some part of) Bob’s holdings are like stolen property⁵⁹ and unfairly held, and the considered sense of fairness justifies remedying the situation by taking away Bob’s metaphorical $20 (or whatever part of his $20 was “stolen”).

Finally, let’s consider Carol, an untalented woman disabled from birth who cannot work on account of her disability. She was raised in a family of modest wealth whose wealth was neither positively nor negatively impacted by discrimination or any other kind of force of fraud. Rawls wants Carol to have the same prospects of culture and achievement as those similarly

⁵⁹ Discrimination, even when it does not take the form of enslavement or the outright theft of goods, amounts to the theft of property in the sense that it is an anti-competitive way of discounting the value of a person’s labor. When you discriminate against me you steal from me the value of the time and energy that I could trade for primary goods. I believe that this is what Nozick means when he says that it is unjust to “forcibly exclud[e] others from competing in exchanges…” Nozick, Anarchy, State, and Utopia, supra note 34, at 152.
motivated and endowed. Cohen treats Carol just like Bob and Alice—luck should have no impact on her life prospects. Nozick sees no force or fraud in this situation, does not recognize an issue for fairness or justice, and so (probably) would not do anything to augment Carol’s distribution leaving her to the mercy of private charity. The considered sense of fairness (fairness again, not what I think that we ought to do) sees nothing but random-arbitrary natural and social endowments in Carol’s case and, like Nozick, would not do anything to augment Carol’s distribution. Carol’s situation is clearly unfortunate but as far as the considered sense of fairness is concerned there is no unfair to fix, there is no deck to unstack, and no agents to hold accountable. Her predicament simply isn’t a matter of fairness—it’s merely a matter of bad luck just as Alice’s circumstance is merely a matter of good luck. The Alices and Carols of the world represent different ends of the Situation B spectrum—Alice is lucky and stumbles across $20 on the sidewalk while Carol is unlucky and drops $20 onto the sidewalk. Both situations are undeserved but neither is unfair because there is no bad agent that we can point to. If we demand that Alice give Carol $20 or $10 we cannot justify our demand with the considered sense of fairness which treats as unfair the augmenting of a merely underserved not-unfair thing like Alice’s possession of the $20. The considered sense of fairness also does not justify giving all or some part of Bob’s metaphorical $20 to Carol because Carol’s social endowments were not negatively impacted by the discrimination that positively impacted Bob’s social endowments. (All or some part of Bob’s $20 goes to another individual Dave whose family’s wealth was negatively impacted by the discrimination which positively impacted Bob’s social endowments even if Dave happens to be more talented and his family more wealthy than Carol, Bob, or even Alice.)

60 What Rawls or Cohen would do in practical terms is very unclear.
My point, again, isn’t about right and wrong so far it is about how well the distributive justice visions of Rawls, Nozick, and Cohen comport with the considered sense of fairness. Through Alice, Bob, and Carol we can see that not only do these theorists disagree with each other but they also largely disagree with the considered sense of fairness (even though Nozick gets disturbingly close at times in somewhat unclear ways). The point to understand then is that they can’t (meaning shouldn’t) disagree with the considered sense of fairness on fairness grounds because the considered sense of fairness is fairness—it ensures unstacked decks but does nothing at all about “bad hands” and, most importantly, recognizes the necessity of agency in fairness determinations. The unacknowledged concerns of Rawls, Cohen, and Nozick here are with something more or something different than fairness. Rawls doesn’t really want to be fair to the talented or to the untalented but instead he strikes a balance between the two that is unfair to both groups but appears to him as the right solution based on his original position thought-experiment. He eliminates the influence of some properly held and completely just social endowments and exploits natural endowments which are, by definition, not unfairly acquired. Cohen treats unfairly those whose wealth was generated without force or fraud by eliminating the influence of both natural and social endowments without any concern for the random-arbitrary nature of all natural endowments and many social endowments. Nozick, for his part, is somewhat harder to pin down as we will see in the next section but stands fairly close to the considered sense of fairness even if it is far from clear that he’d be willing to eliminate the influence of all capricious-arbitrary social endowments on distributions as the considered sense of fairness would require.

III. Nozick:

A. The Nozickian Conception of Justice in Holdings:
Nozick would rather not think of his entitlement theory as a theory of distributive justice. He contends that “distributive justice” is a non-neutral term in the sense that it implies the existence of “some thing or mechanism that uses some principle or criterion to give out a supply of things.”\(^6^1\) It also follows from the implication of “distribution” that redistribution might be warranted in cases where some error has crept into the distribution of shares. Nozick disputes the notion that there exists some form of central distribution—some person or group that is entitled to control all resources and to decide how they should be doled out. To him, a free society is one in which “[w]hat each person gets, he gets from others who give to him in exchange for something, or as a gift.”\(^6^2\)

The entitlement theory is, then, a theory about the correct view of justice in holdings, not justice in distribution. Nozick’s theory consists of three principles: the principle of justice in acquisition, the principle of justice in transfer, and the principle of rectification of injustice in holdings.\(^6^3\) The principle of justice in acquisition concerns the manner in which unheld things may come to be held\(^6^4\), the principle of justice in transfer concerns the processes by which a person may transfer holdings to another and how a person may acquire a holding from another

\(^{61}\) Nozick, Anarchy, State, and Utopia, supra note 34, at 149.

\(^{62}\) Id.

\(^{63}\) Id. at 150-53.

\(^{64}\) As with the other two principles Nozick has very little to say about what the principle of justice in acquisition would actually look like. That said, he does discuss Locke’s theory of acquisition and assumes that any adequate theory of justice in acquisition would include a Lockean proviso such that no one could, for instance, appropriate (or purchase) all of the drinkable water in the world. Id. at 178-79. Nozick also believes that it is very unlikely that the free operation of a market system will run afoul of the Lockean proviso. Id. at 182.
who holds it, and the principle of rectification of injustice in holdings concerns the rectification of violations of the first two principles.\textsuperscript{65}

According to Nozick, in a wholly just world this inductive definition would “exhaustively cover the subject of justice in holdings”:

\begin{enumerate}
\item A person who acquires a holding in accordance with the principle of justice in acquisition is entitled to that holding.
\item A person who acquires a holding in accordance with the principle of justice in transfer, from someone else entitled to the holding, is entitled to the holding.
\item No one is entitled to a holding except by (repeated) applications of 1 and 2.\textsuperscript{66}
\end{enumerate}

The important insight offered here is that a distribution of holdings is necessarily just “if it arises from another just distribution by legitimate means” or, said in another way, “whatever arises from a just situation by just steps is itself just.”\textsuperscript{67} As we will see this is an insight with which Cohen disagrees.

The fact of the matter is though that the world is most definitely not “wholly just.” In the real world “some people steal from others, or defraud them, or enslave them, seizing their product and preventing them from living as they choose, or forcibly excluding others from competing in exchanges” and “none of these are permissible modes of transition from one situation to another.”\textsuperscript{68} Situations such as these (like Situation A) are violations of Nozick’s first two principles and require rectification. As with the other two principles, the principle of rectification is merely sketched by Nozick and is severely underdescribed. He does say, however, that the principle is meant to do three things: First, it “uses historical information about previous situations and injustices done in them…and information about the actual course

\textsuperscript{65} Id. at 150-52.
\textsuperscript{66} Id. at 151.
\textsuperscript{67} Id. at 151.
\textsuperscript{68} Id. at 152.
of events that flowed from these injustices, until the present, and it yields a description (or
descriptions) of holdings in society”; second, it makes “use of its best estimate of subjunctive
information about what would have occurred…if the injustice had not taken place”; and, third,
“if the actual description of holdings turns out not to be one of the descriptions yielded by the
principle, then one of the descriptions yielded must be realized.”69 Conspicuously (though
avowedly) absent from Nozick’s discussion of rectification are considerations about how, if at
all, things change if the beneficiaries and those made worse off by the injustice are descendants
of the parties to the injustice and how far we must go back into history etc.70

Nozick clearly has very little to say about the substance of his proposed principles. His
major contribution does not come in the form of a detailed rival theory to that of Rawls but in
illustrating the framework for such a theory based on “historical” as opposed to “end-result”
principles. Nozick’s entitlement theory is historical in that it determines whether or not a
distribution is just based upon how that distribution came about (just steps yield a just
distribution and one unjust step yields an unjust distribution). By contrast, end-result principles
of justice determine whether or not a distribution is just based on how things are actually
distributed according to some structural principle(s) of just distribution (think the difference
principle as both Rawls and Cohen conceive of it).71 The historical principles of the entitlement

69 Id. at 152-53.

70 It should be noted that Nozick (in 1974) remarks that he does “not know of a thorough or theoretically
sophisticated treatment of such issues” but includes a footnote that says “See, however, the useful book by Boris
Bittker, The Case for Black Reparations (New York: Random House, 1973).” Id. at 152 and 152 n2.

71 Id. at 153.
theory hold that past circumstances or actions, rather than the structural landscape of current holdings, “create differential entitlements or differential deserts to things.”  

Nozick also distinguishes between a subclass of historical principles which are patterned and a subclass of historical principles which are non-patterned. A principle is patterned “if it specifies that a distribution is to vary along with some natural dimension, weighted sum of natural dimensions, or lexicographic ordering of natural dimensions” and a distribution is patterned if it accords with a patterned principle. For example, one could specify that a distribution is to vary along with I.Q., or with I.Q. and moral merit either lexicographically or as a weighted sum, and a distribution that accorded with that principle would be patterned. Nozick believes that almost every suggested principle of distributive justice is patterned and stresses that his entitlement theory is not. He believes that his theory is non-patterned because the entitlement principle does not specify a distribution that varies along any natural dimension or combination of natural dimensions.  

Holdings are acquired and distributed merely on the basis of Nozick’s first two principles and redistributed when they are not.

Nozick’s next move is to illustrate the manner in which liberty upsets patterned distributions and, on the basis of his illustration, question whether those holding alternative conceptions of distributive justice can reject his entitlement theory. He seeks to illustrate this point with his famous Wilt Chamberlain example which is meant to show that it is only by suppressing liberty and taking from people what they not unfairly possess that patterns can be maintained. To accomplish this Nozick introduces his own D1 in which distributive shares can be equal as Cohen might like or they can vary in accordance with some dimension like the

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72 Id. at 155.

73 Id. at 156-57.
difference principle as Rawls might like—the point is that the pattern satisfies whoever it is that is imposing the patterned principle. I quote the Wilt Chamberlain illustration at length because it is important for this discussion of Nozick’s entitlement theory as well as for Cohen’s critique:

Now suppose that Wilt Chamberlain is greatly in demand by basketball teams, being a great gate attraction...He signs the following sort of contract with a team: In each home game, twenty-five cents from the price of each ticket of admission goes to him...The season starts, and people cheerfully attend his team’s games; they buy their tickets, each time dropping a separate twenty-five cents of their admission price into a special box with Chamberlain’s name on it...Let us suppose that in one season one million persons attend his home games, and Wilt Chamberlain winds up with $250,000, a much larger sum than the average income...Is he entitled to his income? Is this new distribution D2, unjust? If so, why? There is no question about whether each of the people was entitled to the control over the resources they held in D1; because that was the distribution...that (for the purposes of argument) we assumed was acceptable. Each of these persons chose to give twenty-five cents of their money to Chamberlain....If D1 was a just distribution, and people voluntarily move from it to D2, transferring parts of their shares they were given under D1 (what was it for if not to do something with?), isn’t D2 also just? If the people were entitled to dispose of the resources to which they were entitled (under D1), didn’t this include their being entitled to give it to, or exchange it with, Wilt Chamberlain?

The main point to glean from the Wilt Chamberlain illustration is that distributions like Rawls’s D1 and Cohen’s D3 discussed above cannot be continuously realized without suppressing liberty (you may not transfer as you wish) or without taking from people that which they not unfairly possess (you must return resources others freely chose to transfer to you). Clearly Nozick believes that Chamberlain is entitled to his $250,000 salary and is completely unconcerned with whether or not it is a morally arbitrary fact about the world that Chamberlain possesses once-in-a-lifetime natural gifts. Chamberlain is a stand-in for the talented or the lucky and the fact that members of an egalitarian society might freely choose to introduce inequality in connection with the exercise of their liberty makes one wonder whether or not it is truly unfair that someone as talented as Chamberlain has greater holdings than many others or truly unfair that he is able to earn more than many others even if him earning more does not redound to the greatest benefit of

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74 Id. at 161-62.
the least advantaged. Nozick isn’t particularly explicit on the fairness issue here (relying more on the shock value of the restraint of liberty) but I think we can understand him as questioning the unfairness of (almost) any unequalized state of affairs that has arisen by just steps or by just steps and rectified unjust steps.

B. Cohen’s Critique of Nozick and Nozick and Cohen Measured Against the Considered Sense of Fairness:
Cohen attacks the claim that whatever arises from just steps is itself just. His claim is that just steps are not necessarily justice-preserving and that “common or garden ‘innocent’ market transactions are not justice-preserving.”

Cohen believes that he can give us examples of just steps that yield unfair and unjust results and lead us to reject Nozick’s entitlement theory of justice in holdings.

Cohen’s argument is unconvincing due in large part to the fact that he and Nozick are speaking a completely different language. They are speaking different languages about justice and what is or is not justice-preserving because they don’t agree about what is or is not unfair. Nozick sticks very close to the ethically unsatisfying considered sense of fairness while Cohen imports concerns for unacknowledged ends other than fairness into the discussion in a way that he thinks trumps Nozick’s arguments. By the end of Cohen’s discussion though it becomes clear that neither he nor Nozick stays within the lines of the considered sense of fairness in all instances and at all costs (Cohen almost always goes beyond it and Nozick even finds one reason to demand more from his own theory).

Cohen places way too much faith in the notion that “justice-subverting misadventure” can show us how it is that just steps are not necessarily justice-preserving. He contends that injustice

in situation “does not presuppose wrongdoing” and “that it could result from misadventure.”

Consider two “ petty” illustrations of this idea offered by Cohen:

The Rolling Pin: “imagine that one of my justly held rolling pins rolls out of my front
door and down the hill and through your open door, without your knowledge. You
innocently mistake it to be the one you mislaid, and you keep it and use it.”

The Diamond: “I sell a diamond to you for a pittance, a diamond that we both think is
glass”…and it turns out to be an actual diamond.

Cohen believes that both of these examples illustrate “situational-injustice” arising from nothing
but just steps. His larger argument is that when “we widen our focus, away from discrete pairs
of transacting agents to the mass of uncoordinated transactions that occurs in a market economy,
then the scope of justice-subverting misadventure due to ignorance becomes large.”

Cohen’s point is that “accidents, lack of relevant foreknowledge, and foreknown combinatorial processes
may reasonably be regarded as producers of situational injustice.”

Cohen is also quick to point out that Nozick himself is not completely unmoved by
misadventure. When Nozick acknowledges that he would apply the Lockean proviso to the
case where someone comes to be the monopoly holder of all of the world’s drinking water he is
compensating for a misadventure that arose through nothing but just steps. Cohen is right here
to suggest that Nozick is willing to fix a misadventure but wrong to think that Nozick’s sense of
fairness leaves him vulnerable to the rolling pin and diamond examples. Nozick is presumably

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76 Id. at 43.
77 Id.
78 Id. at 45.
79 Id. at 45-46; Rawls, for one, is inclined to agree. See Rawls, Justice as Fairness, supra note 13, at 52-53.
80 Id. at 46.
81 Id.
82 Nozick, Anarchy, State, and Utopia, supra note 34, at 180.
disturbed by the monopoly holder of the world’s drinking water not because it is mere misadventure but because it is a very serious kind of misadventure that could render life itself overwhelmingly difficult. It should also be acknowledged as mentioned above that Nozick doubts that the Lockean proviso would ever be necessary in a free and open market economy.\(^{83}\)

Nozick would be unmoved by Cohen’s examples because nothing in his principle of acquisition or of transfer (aside from the Lockean proviso) would prohibit misadventure. The notion of “situational injustice” has no meaning in the context of a theory, like Nozick’s entitlement theory, which is based upon how-things-come-to-held and not about ensuring that every person continue to hold everything she doesn’t intend to lose or mistakenly transfer. From the standpoint of fairness and justice Nozick would be untroubled by the lost rolling pin and by the mistaken sale of a diamond for a pittance.

The question remains then are we troubled by misadventure? Of course we are but is it the considered sense of fairness that makes us feel troubled? I don’t believe that it is. If we apply the considered sense of fairness to Cohen’s examples I think that we are likewise unmoved. Think back to Situation B. Imagine that the $20 that I find lying on the sidewalk is the same $20 that you mistakenly dropped earlier in the day. Does that in any way alter Situation B such that we now find my being $20 richer and you being $20 poorer unfair rather than merely undeserved? The considered sense of fairness would treat this additional information as wholly immaterial because (as Nozick understands) there was no bad act, there was no unjust step. Fairness, rightly understood, is not impacted by misadventure or by so-called “situational injustice.”

\(^{83}\) Id. at 182.
It is evident then that Nozick, by embracing the Lockean proviso, shows that not even he lacks the compassion necessary to conceive of distributive justice solely in terms of the considered sense of fairness. Cohen on the other hand can’t ever resist demanding far more than the considered sense of fairness would allow and require (and Rawls demands more as well, if not as much as Cohen). As I’ve mentioned before, I believe this unwillingness on the part of all three theorists to be restrained by the considered sense of fairness results from their overwhelming desire to pursue ends other than fairness and reinforces my concern about the disutility of continuing to frame this debate about how holdings ought to be distributed in terms of fairness.

IV. Fairness and Systems of Distributive Justice:

A. The Principles of Fairness:

We know from the above discussion that a system of distributive justice comports with the considered sense of fairness if and only if the following criteria are met: first, the influence of natural endowments and random-arbitrary social endowments and social contingencies on holdings is neither eliminated nor exploited; and, second, the influence of capricious-arbitrary social endowments and social contingencies on holdings is completely eliminated. I now want to say a little bit more about the practical principles of fairness in distributive justice that are generated by this fairly abstract insight.

A commitment to the elimination of the influence of capricious-arbitrary social endowments and social contingencies on holdings implies two principles of distributive justice. The first principle (the meritocratic principle) provides for the opening of careers to talents and comprehensive non-discrimination while the second principle (the rectificatory principle)

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84 Remember that natural endowments are, by definition, always random-arbitrary.
provides for comprehensive and historically precise affirmative action and reparations. Together these two principles eliminate the influence of capricious-arbitrary endowments or contingencies on holdings without introducing any unfairness through the elimination or exploitation of the influence of any random-arbitrary endowments or contingencies on holdings.

We open careers to talents by removing the legal and formal barriers to advancement by qualified individuals and achieve comprehensive non-discrimination by removing the extra-legal and informal barriers to advancement by qualified individuals. Everyone is free from every kind of discrimination—every element of force or fraud that discounts the value of a person’s labor is comprehensively prohibited. Nevertheless, the term “qualified” remains meaningful and the meritocratic principle is in no way concerned with how or why it is that a particular person happens to possess the degree of innate talent and/or acquired skill necessary to pursue a particular career.

Comprehensive and historically precise affirmative action and reparations target those individuals whose social endowments have been negatively impacted by discrimination that positively impacted the social endowments of others.\(^{85}\) Fair affirmative action means that we require special preferences for only those candidates who may be less than optimally qualified whose social endowments have been negatively impacted by discrimination over only those candidates whose social endowments have been positively impacted by discrimination. Likewise, a fair system of reparations means that we require only those whose social endowments have been positively impacted by discrimination to compensate only those whose

\(^{85}\) I can think of no form of discrimination that negatively impacts the social endowments of some that does not also positively impact the social endowments of others.
social endowments have been negatively impacted by discrimination to no greater or lesser degree than the full value of the discrimination.

Let’s consider our archetypal examples in order to get a sense of what all of this means in practice. We know that the meritocratic principle means that Alice, Bob, Carol, and Dave must not suffer from any form of discrimination, that it is likely that no one of them is qualified for every career, and that it is possible that Carol is not qualified for any career. We also know that the rectificatory principle means that Dave must be preferred as a candidate over Bob even if Dave is not optimally qualified, that Dave must not be preferred as a candidate over Alice or Carol, that Bob may be required to compensate Dave for the full value of his family’s discrimination, and that neither Alice nor Carol need to compensate Dave in any way. Schematically, the considered sense of fairness requires the following (note that I’ve added two new individuals, Erica and Fred, in order to express additional dimensions of what fairness requires):

<table>
<thead>
<tr>
<th>Individual</th>
<th>Endowments</th>
<th>Effect of the Two Principles</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alice</td>
<td>Born with talent and born into a wealthy family whose wealth was not positively impacted by discrimination</td>
<td>Enjoys comprehensive non-discrimination, is not automatically qualified for any career, no other individual must be preferred as a candidate over her, and she owes no compensation to any individual.</td>
</tr>
<tr>
<td>Bob</td>
<td>Born with talent and born into a wealthy family whose wealth was positively impacted by discrimination</td>
<td>Enjoys comprehensive non-discrimination, is not automatically qualified for any career, Dave must be preferred as a candidate over him, and he may owe compensation to Dave.</td>
</tr>
<tr>
<td>Carol</td>
<td>Born with a severe disability and into a family of modest wealth whose wealth was not positively impacted by discrimination</td>
<td>Enjoys comprehensive non-discrimination, is not automatically qualified for any career (and may not be qualified for any career), no other individual must be preferred as a candidate over her, and she owes no compensation to any individual.</td>
</tr>
<tr>
<td>Dave</td>
<td>Born with talent and born into a wealthy family whose wealth was negatively impacted by discrimination</td>
<td>Enjoys comprehensive non-discrimination, is not automatically qualified for any career, no other individual must be preferred as a candidate over him, must be preferred as a candidate over Bob, Erica, and Fred, and may be owed compensation by Bob, Erica, and/or Fred.</td>
</tr>
<tr>
<td>Erica</td>
<td>Born without talent and born into a poor family whose wealth was positively impacted by discrimination</td>
<td>Enjoys comprehensive non-discrimination, is not automatically qualified for any career, Dave must be preferred as a candidate over her, and she may owe compensation to Dave.</td>
</tr>
</tbody>
</table>


Fred was born with a severe disability and into a poor family whose wealth was positively impacted by discrimination. He enjoys comprehensive non-discrimination, is not automatically qualified for any career (and may not be qualified for any career), Dave must be preferred as a candidate over him, and he may owe compensation to Dave.

This table expresses three things about the two principles of distributive justice implied by the considered sense of fairness: first (and as promised), they neither eliminate nor exploit the influence of natural endowments or random-arbitrary social endowments on holdings; second, they demand the elimination of the influence of capricious-arbitrary social endowments even when doing so benefits an individual (Dave) that is already naturally and socially well-endowed; and, third, they demand the elimination of the influence of capricious-arbitrary social endowments even when doing so works to the detriment of those who are not well-endowed socially and/or naturally (consider Erica and Fred).

B. A Continuum of Systems of Distributive Justice:

If we think of the system of distributive justice implied by the considered sense of fairness as a point along a continuum of possible systems we can see that every other system above or below is unfair in some fashion(s). Those systems to one side of considered fairness are unfair to the extent that they do not eliminate the influence of capricious-arbitrary factors on holdings and those to the other side are unfair to the extent that they do eliminate or exploit the influence of random-arbitrary factors on holdings. We end up with a continuum starting with natural liberty and ending with Cohen’s conception of democratic equality that looks like this:

<table>
<thead>
<tr>
<th>System of Distributive Justice</th>
<th>Attributes</th>
<th>Treatment of Arbitrariness</th>
</tr>
</thead>
</table>
| Natural Liberty              | --Careers are open to talents  
--Discrimination prohibited | The influence of natural endowments and social contingencies on holdings is neither eliminated nor exploited; the influence of capricious-arbitrary social endowments on holdings is partially eliminated |
| Nozick’s Justice in Holdings | --Careers are open to talents 
--Discrimination (comprehensively?) | The influence of natural endowments and random-arbitrary factors on holdings is neither eliminated nor exploited; the influence of capricious-arbitrary social endowments on holdings is partially eliminated |
<table>
<thead>
<tr>
<th>Considered Fairness</th>
<th>Liberal Equality</th>
<th>Rawls’s Democratic Equality</th>
<th>Cohen’s Democratic Equality</th>
</tr>
</thead>
<tbody>
<tr>
<td>--Careers are open to talents</td>
<td>--Careers are open to talents</td>
<td>--Careers are open to talents</td>
<td>--Careers are open to talents</td>
</tr>
<tr>
<td>--Discrimination comprehensively prohibited</td>
<td>--Discrimination prohibited</td>
<td>--Discrimination prohibited</td>
<td>--Discrimination prohibited</td>
</tr>
<tr>
<td>--The influence of force or fraud on holdings is (somehow and to some degree) rectified</td>
<td>--Fair equality of opportunity ensured</td>
<td>--Fair equality of opportunity ensured</td>
<td>--Fair equality of opportunity ensured</td>
</tr>
<tr>
<td>The influence of natural endowments and random-arbitrary social endowments and social contingencies on holdings is neither eliminated nor exploited; the influence of capricious-arbitrary social endowments and social contingencies on holdings is (largely?) eliminated</td>
<td>The influence of all social endowments and social contingencies on holdings is completely eliminated</td>
<td>The influence of all social endowments and social contingencies on holdings is completely eliminated</td>
<td>The influence of all social endowments, social contingencies, and natural endowments on holdings is completely eliminated</td>
</tr>
</tbody>
</table>

86 Please note that the requirements of fair equality of opportunity (in many respects) exceed the comprehensive and historically precise affirmative action and reparations called for by the considered sense of fairness. Here, again, is Rawls’s conception of fair equality of opportunity: “supposing that there is a distribution of native endowments, those who have the same level of talent and ability and the same willingness to use these gifts should have the same prospects of success regardless of their social class of origin, the class into which they are born and develop until the age of reason. In all parts of society there are to be roughly the same prospects of culture and achievement for some similarly motivated and endowed.” Rawls, *Justice as Fairness*, supra note 13, at 44.
I can’t be sure that Nozick’s theory is properly placed along this continuum and I think that that fact is important for a number of reasons. I say that I’m not sure about Nozick’s placement because his theory is profoundly underdetermined and because he includes a Lockean proviso (something eminently reasonable that the considered sense of fairness would disallow). I doubt that Nozick would (fully) follow the comprehensive non-discrimination element of the meritocratic principle or the affirmative action and reparations elements of the rectificatory principle implied by considered fairness but I can’t be sure. What I do know is that in at least one instance (the Lockean proviso) and possibly more even the libertarian Nozick cannot stomach the results of considered fairness.

Even if we assume that Nozick would not agree that Dave should be preferred as a candidate over Fred, Erica, or even Bob and that he should not be compensated by Fred, Erica, or even Bob we still have to wonder how he would treat the severely disabled Carol and Fred. Both were born with and not into their severe disabilities and so the value of their labor has not been discounted by the force or fraud of any agent. Would Nozick agree to redistribute some holdings in order to at the very least contribute to the likelihood that Carol and Fred lead minimally decent lives or would he leave such matters to the charitable impulses of better endowed individuals? It isn’t important that we come to a conclusion about what Nozick would do but it is important to see the ethical difficulties that might arise from the actual pursuit of fairness as the greatest end even for a proponent of an ultra-minimalist state.

C. The Discourse of Fairness:

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87 Please recall that those attributes that we are born with but that result from social factors are treated as social endowments rather than natural endowments (e.g. children born with AIDS or addicted to drugs).
I’ve made the analytical point that Rawls, Nozick, and Cohen use the language of fairness but fail to understand or provide for the actual implications of the considered sense of fairness. I also want to say that we’re not only dealing with conceptual flaws here but with an ethically flawed discourse. I want to make it clear just how disappointing actual fairness is and to suggest that violating fairness in the name of fairness also shields us from recognizing, analyzing, and debating an analytically coherent and ethically satisfying theory of the proper (though definitely unfair and possibly unjust) distribution of primary goods in society.

I don’t simply favor Rawls or Cohen over Nozick because their conceptions of distributive justice definitely seem to have the effect of yielding greater benefit to Carol, Erica, and Fred (our least well-endowed). I worry that because Alice, Bob, and Dave are right to call each of their conceptions unfair that we find ourselves in an egalitarian-liberal-libertarian stalemate that leaves everyone feeling cheated and only some truly flourishing. As long as this argument turns along the axis of fairness we may never recognize that Carol and Fred definitely need our help and that Dave and Erica probably do as well—not (necessarily) because we are responsible for their unenviable conditions but because we empathize with their situations and feel that we ought to set things right. If we fixate on fairness we lose our grasp on the compassion that we

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88 According to Schmidtz, when dealing with natural endowments we fix problems not injustices: “Being born with a cleft palate is a problem. The problem is not that a cleft palate is unjust but that it is bad. Its badness gives us some reason to intervene to fix the problem. But note the real issue: We are not trying to fix an improper distribution of cleft palates. We are trying to fix cleft palates.” Schmidtz, Elements of Justice, supra note 7, at 219 (emphasis in original). Here, Schmidtz too is motivated by another unarticulated end or ends. Even if he doesn’t say whether it is empathy or something else which he thinks should motivate us to help those who not unfairly face problems in life at least he recognizes that the discourse of fairness is theoretically and practically ill-equipped to get us where we want to go.
feel toward our fellow human beings and think instead about why in the world I should pay to
ease a pain that I did not cause with my unstolen $20 (Nozick) or why I should ever pay just $20
when I have $40 to spare (Cohen).

I am not content with Rawls or Cohen over Nozick because they too get it wrong and give us
an even less clear sense of what fairness is and how dangerous it can be. At least Nozick is fairly
honest about what fairness looks like and what its effects would be even if he is wrong not to be
appalled by the result. Until we recognize (within this debate over distributive justice) the
unacknowledged and highly warranted pursuit of ends other than fairness (like actual human
flourishing) we’ll just continue barking up the wrong tree.

V. Conclusion:

I started this article with a claim about the considered sense of fairness and I used that claim
in order to test the fairness or lack thereof evident in the fairness-based conceptions of
distributive justice offered by Rawls, Nozick and Cohen. I then used the response of Nozick to
Rawls and the responses of Cohen to Rawls and Nozick in order to show that each of their
conceptions lack theoretical coherence and that no one of them tracks the considered sense of
fairness (although Nozick comes disturbingly close). I also used archetypal examples in order to
draw out the practical implications of the considered sense of fairness in order to express the
manner in which fairness would impact actual people. Finally, and using those same examples, I
also sought to make it clear that fairness is ethically unsatisfying as a major determinant in the
proper distribution of primary goods and to introduce the claim that we would be well served to
acknowledge and embrace other ends (like human flourishing) based on other human sentiments
(like empathy) as we proceed with this debate regarding the proper distribution of primary goods
in society.