

Liberty, Equality, and the Wilt Chamberlain Argument

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Abstract

The objective of this paper is to respond to some recent developments in an oft-overlooked aspect of the Rawls-Nozick debate, specifically, Nozick's Wilt Chamberlain Argument which implies that Rawls' Liberty and Difference Principles are formally inconsistent. Political philosophers have tended to side with Rawls on this issue of late, and they share, in my interpretation, a very interesting change of strategy. Whereas Nozick's critics used to raise primarily consequentialist objections to the argument—specifically, objections which purport to show the injustice of the Liberty Principle's outcomes—recent scholarship has trended towards non-consequentialist objections instead. In particular, they share either of two assumptions concerning the concept of economic liberty in particular, which I shall refer to as the Exclusion and Pluralism Assumptions respectively. They assume that either (a) economic liberties such as the liberty to freely transfer property is not protected to the same extent as other liberties under the Liberty Principle or (b) economic liberty is just one value among others, including other kinds of liberty. They then use either or both of these assumptions to license the conclusion that the two principles are not contradictory, i.e. to prove that the redistribution of property in accordance with the Difference Principle does not violate the Liberty Principle as formulated by Rawls.

In this paper, I shall argue that this line of criticism is mistaken, and that Nozick's argument does, in fact, expose deep tensions within Rawls' theory. To this end, I will introduce a modest conception of what I call the 'internal' and 'external' structure of

liberty. The former explains the relationship of the positive liberty-negative liberty distinction in relation to the Liberty Principle, while the latter explains the concept of what I call an 'enabling' liberty and its connection with other kinds of values and goods. I will use this conception to show that both the Exclusion and Pluralism Assumptions are mistaken, and that, as a result, the Wilt Chamberlain Argument is capable of withstanding this new line of objection.

Keywords: Liberty, Equality, Rawls' Two Principles of Justice, Wilt Chamberlain Argument, Liberalism, Libertarianism

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We argued in Part I that the minimal state is morally legitimate; in Part II we argued that no more extensive state could be morally justified, that any more extensive state would (will) violate the rights of individuals. This morally favored state, the only morally legitimate state, the only morally tolerable one, we now see is the one that best realizes the utopian aspirations of untold dreamers and visionaries. It preserves what we all can keep from the utopian tradition and opens the rest of that tradition to our individual aspirations. Recall now the question with which this chapter began. Is not the minimal state, the framework for utopia, an inspiring vision?

The minimal state treats us as inviolate individuals, who may not be used in certain ways by others as means or tools or instruments or resources; it treats us as persons having individual rights with the dignity this constitutes. Treating us with respect by respecting our rights, it allows us, individually or with whom we choose, to choose our life and to realize our ends and our conception of ourselves, insofar as we can, aided by the voluntary conception of other individuals

¹ I am deeply indebted to Prof. Doug Bamford, PhD from the University of Oxford for providing some valuable feedback on an earlier version of this manuscript. His incisive comments greatly improved my understanding of certain aspects of Rawls' views which had previously eluded me.

possessing the same dignity. How *dare* any state or group of individuals do more. Or less.

Robert Nozick, *Anarchy, State, and Utopia* (1974)

Introduction

The objective of this paper is to engage some recent developments in an oft-overlooked aspect of the Rawls-Nozick debate, specifically, Nozick's famous 'Wilt Chamberlain Argument' that Rawls' Liberty and Difference Principles are formally inconsistent. Political philosophers have tended to side with Rawls on this issue of late, and they share, in my interpretation, two assumptions concerning the concept of economic liberty in particular. They assume that either (a) economic liberties such as the liberty to freely transfer property is not protected to the same extent as other liberties under the Liberty Principle or (b) economic liberty is just one value among others, including other kinds of liberty. They then use either or both of these assumptions to license the conclusion that the two principles are not contradictory, i.e. to prove that the redistribution of property in accordance with the Difference Principle does not violate the Liberty Principle. I shall argue that this line of criticism is mistaken, and that Nozick's argument does, in fact, expose deep tensions within Rawls' theory.

This paper shall be divided into three parts. Firstly, I will summarize Rawls' theory of justice and explain what the Liberty and Difference Principles entail. Secondly, I will recapitulate the Wilt Chamberlain argument and its implication that the two principles are formally inconsistent and also review some recent criticisms thereof. In this section, I will also argue that these criticisms share one of the two assumptions mentioned above. Finally and most importantly, I will argue that both assumptions miss crucial aspects of what I call the 'structure' of liberty—including its 'internal structure' which relates economic liberty to other types of liberty as well as its 'external structure' which relates liberty to the realization of other values.

The Derivation of Rawls' Two Principles of Justice

Rawls' main project in *A Theory of Justice* (1971) was to present a theory of two fundamental principles of justice that an ideal

and well-ordered society would organize itself around. He intended for these principles to govern all justice-related matters, including issues of law, individual rights, the limits of state authority, and the distribution of economic resources. As such, any principle, rule, or social policy would have to be grounded in these two principles. His theory may be derived in two stages: first, the explanation of the original position thought experiment, and second, the formulation of the two principles and their justification.

In the first stage, Rawls imagines what it would be like for everyone in modern society to collectively work out a hypothetical contract that contains their governing principles. He immediately realizes that the contracting parties would fail to arrive at an agreement due to conflicting and divergent interests. For example, the rich and the middle class would oppose the principle of welfare, much on the same grounds on which they have decried subsidized healthcare plans like Obamacare, while the poor would welcome it as a social safety net. The root of such economic disagreement, Rawls believes, is that the contracting parties would be inherently biased due to their self-awareness of their natural or social advantages and disadvantages. That is, they would fail to negotiate in good faith with one another because they would be blinded by self-interest. To set up a fairer procedure, Rawls proposes situating them behind a veil of ignorance in the 'original position'.² It is 'original' in that it depicts what they would be like *before* they entered society. They would not know anything about their particular circumstances, including facts about their personal intelligence, economic status, physical strength, race, gender, religion, skills, and other natural or social assets. But Rawls thinks this is a good thing; precisely because they no longer know which assets they could leverage or which arrangements would benefit them, they would be more likely to negotiate with each other rationally and impartially, prioritizing principles that benefitted all rather than a few.³

² John Rawls, *A Theory of Justice* (Cambridge: The Belknap Press of Harvard University Press, 1971), p. 136.

³ Rawls views his theory as contractarian in the tradition of Kant, who, in his interpretation, conceives of the ideal agent as "reasonable, rational, and lucid as well as truthful and sincere." See *Lectures on the History of Moral Philosophy*, ed. Barbara Herman (Cambridge: Harvard University Press, 2000), p.166. The parties behind the veil of ignorance may be conceived of as such agents.

This leads to the second stage of Rawls' derivation. Behind the veil of ignorance, not knowing anything about their eventual lot in life, Rawls contends that the parties would first settle on a universally desirable principle. He refers to this as the Liberty Principle that 'each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others.'⁴ Rawls construes the concept of liberty broadly, which he takes to include what we now call basic human rights such as the freedom of conscience, belief, or religion, as well as political rights such as the freedom of speech, expression, or association. Presumably this extends to negative liberties such as freedom from harm. In short, Rawls defines the scope of liberty in a manner reminiscent of Mill.⁵ Similarities aside, however, there are obvious differences between them as well, most prominently the fact that Rawls rejects utilitarianism in favor of egalitarian considerations as we shall shortly see in his second principle.

Rawls argues that purely rational persons behind the veil of ignorance would accept the Liberty Principle for two reasons. First, it is compatible with different conceptions of the good and enables them to pursue the specific lifestyle they desire, be it one of pleasure, virtue, or something else. Accepting this principle is considered by Rawls to be a way of 'playing safe' because it empowers individuals to practice any sexual, religious, social, or professional lifestyle they see fit. The principle is formal rather than substantive; it does not impose any particular conception of excellence, flourishing, or the good life so much as it outlines the conditions for state neutrality. According to it, individuals are free to express themselves however they see fit provided doing so does not result in any third party harm. They are just as free to live the poet's life of peace, solitude, and security as they are to live the extreme athlete's life of adventure, risk, and unpredictability. Naturally, a principle that enables individuals to live the kind of life they want to lead would appeal to anyone who did not know anything about herself. The second reason is that the Liberty

⁴ Rawls, *supra* note 2, 60.

⁵ I base this interpretation on Robert Amdur, "Rawls' Critique of *On Liberty*," in *Mill's On Liberty: A Critical Guide*, ed. C.L. Ten (Cambridge: Cambridge University Press, 2009), p. 105; Ruth Abbey and Jeff Spinner Haley, "Rawls, Mill, and the Puzzle of Political Liberalism," in *The Journal of Politics* 75:1 (Dec. 2012), p. 126; and Henry R. West, "Mill and Rawls," in *Mill on Justice*, ed. Leonard Kahn (New York: Palgrave MacMillan, 2012), p. 120.

Principle accounts for the fact that the contracting parties would share a thin conception of the good—the set of primary goods that any individual would rationally desire regardless of their lot in life.⁶ These goods may be thought of as basic needs such as the right to nourishment, shelter, education, or livelihood—the minimum requirements for anyone to pursue what they desire. The Liberty Principle does not only give individuals a positive claim or entitlement to these goods, but a negative claim against unjustifiable interference from other parties like the state, church, or private institutions. Thus, the thin conception of the good therefore does not only refer to a set of material resources, but a set of political *conditions* under which the pursuit of the good is conducive. Thus, even if someone were disadvantaged beyond the veil of ignorance, the Liberty Principle guarantees that basic goods and liberties will be respected by others.

Rawls' second and more controversial principle of justice is known as the Difference Principle,⁷ which states that 'social and economic inequalities are to be arranged so that they are both (a) to the greatest benefit of the least advantaged and (b) attached to offices and positions open to all under conditions of fair equality of opportunity.'⁸ It is notoriously difficult to spell out what this principle concretely requires, for it was intentionally formulated at a high level of generality.⁹ Broadly speaking, however, it requires resources to be redistributed from the best-off to the worst-off members of society. Redistribution may be accomplished through various methods, most

⁶ Paul Weithman, "Thin and Full Theories of Good," in *The Cambridge Rawls Lexicon*, ed. Jon Mandle and David Reidy (Cambridge: Cambridge University Press, 2015), p. 828. It should be noted, however, that not all philosophers interpret the 'thin' conception so narrowly. For example, Weithman argues that the 'thin' conception can account for other goods as well, especially to pursue their other interests outside the veil of ignorance (see pp. 831-833).

⁷ To illustrate its controversiality, several philosophers are unconvinced that even purely rational parties behind the veil of ignorance would choose the Difference Principle. See, e.g. Johan Gustaffson, "The Difference Principle Would Not Be Chosen Behind The Veil of Ignorance" in *The Journal of Philosophy* 115: 11 (2018), pp. 590-600.

⁸ Rawls, *supra* note 2, p. 83.

⁹ Samuel Freeman, "Rawls on Distributive Justice and the Difference Principle," in *The Oxford Handbook on Distributive Justice*, ed. Serena Olsaretti (New York: Oxford University Press, 2018), p. 17; Hun Chung, "On Choosing the Difference Principle Behind The Veil of Ignorance: A Reply to Gustaffson," in *The Journal of Philosophy* 118:8 (Aug. 2021), p. 458.

obviously through the welfare state. But it may also be attained through taxation,¹⁰ land reform, fiscal policy, affirmative action quotas, and other economic programs.¹¹ The scope of this principle is therefore expansive, and the only exceptions to it are cases wherein an inequality would actually benefit disadvantaged or marginalized sectors. For example, under this principle, it is arguably acceptable for some doctors to be allowed to earn above the average, income inequality notwithstanding. Provided this incentivizes more residents from poor rural communities to pursue medicine as a career and thereby improve their local healthcare system, it is justifiable. There is still, however, a presumption in favor of egalitarianism before any other consideration. That is to say, an equal distribution of resources and opportunities should be pursued before other projects.

There are two main arguments in defense of the Difference Principle. The first is known as the ‘maximin principle.’ From behind the veil of ignorance, Rawls explains, the contracting parties would be risk-averse.¹² Not knowing anything about themselves, they would want to ascertain that the worst possible outcome will be humane and tolerable. Just in case they have the misfortune to be among the least advantaged members in society, they will be reassured that inequalities will be arranged in a way that marginally benefits them. The second is the argument that natural advantages and social advantages are morally arbitrary. On this view, nobody is automatically entitled to the benefits they gain from genetic traits, just as nobody deserves to suffer for being born into poverty. For example, nobody has an inherent moral right to be born intelligent and to profit from it, let alone the right to multiply personal wealth inherited from affluent parents. The Difference Principle aims to level the playing field in this regard. Furthermore, it accounts for the fact that even people who work to earn their wealth, are not entirely entitled to the fruits of their labor. As Sandel points out in his famous interpretation of Rawls, it is still a matter of luck that they were born into a society

¹⁰ I would like to acknowledge Prof. Bamford’s illuminating note that while Rawls supports taxation, he surprisingly does not support progressive taxation.

¹¹ Philippe Mongin and Marcus Pivato, “Rawls’ Difference Principle and Maximin Rule of Allocation: A New Analysis” in *Economic Theory* 71 (2021), p. 1500.

¹² John Rawls, *Collected Papers*, ed. Samuel Freeman (Cambridge: Harvard University Press, 1996), p. 228.

which happened to place economic value on their skillsets.¹³ We may update his example with a more contemporary personality. It is common knowledge that legendary basketball player Kobe Bryant spent several hours per day training in the gym ever since childhood. Many people would say that he has earned every last cent of his fortune after playing for twenty years in the NBA. But this argument ignores the fact, Rawls would plausibly reply, that Bryant was fortunate enough to have been born in a society that rewards basketball skills for entertainment. Had he been born to an uncontacted tribe that has never even heard of basketball, his athletic ability would have been economically worthless. The members of his economic system would not reward him for his ability to the extent the Americans do. Even more powerful than this, Sandel adds in his most recent work, *The Tyranny of Merit*, that the widely accepted belief that it is an individual's choice to work hard and reap their own rewards may be a myth. There are genetic, environmental, and political factors that influence the disposition to persevere which individuals cannot take credit for.¹⁴ To be born in a society which is structured around the famous Protestant work ethic is an example of how environmental factors can influence the tendency to work hard. Similarly, to be born with a strong, healthy body capable of enduring twelve hours of work per day for years is an example of how genetic luck discriminates between those who want to work hard and can, and those who want to work hard but cannot. In short, even the fruits of one's labor are morally arbitrary, undeserved, and unfair to an extent, so it is necessary to correct the inequalities that arise from them. Rawls thinks that the Difference Principle is an expression of this necessity, and this is how he concludes that the two principles put together produce a conception of justice as fairness.

Nozick's Wilt Chamberlain Argument

Nozick raises his famous Wilt Chamberlain argument to illustrate that Rawls' Liberty and Difference Principles are formally

¹³ Michael Sandel, *Justice: What's The Right Thing To Do?* (New York: Farrar, Strauss, and Giroux, 2009), pp. 153-155.

¹⁴ Michael Sandel, *The Tyranny of Merit: Can We Find The Common Good?* (New York: Farrar, Strauss, and Giroux, 2021), pp. 129-130. Sandel bases this argument on his own reading of Rawls.

inconsistent. He invites us to imagine a society characterized by a patterned distribution of wealth D_1 in which everyone has roughly equal shares,¹⁵ arising perhaps from the application of the Difference Principle. Throughout the season, one million basketball fans purchase \$1.00 tickets to watch Chamberlain play home games. Chamberlain's team contract stipulates, however, that he receives \$0.25 for each ticket sold. By the end of the season, he ends up with \$250,000—a sum much larger than the average income. Also, *ceteris paribus*, some basketball fans will by then have less savings compared to those who did not purchase tickets. This new unequal distribution is called D_2 . Nozick, contra Rawls, denies that D_2 is unjust. It is not sufficient to consider end-state distributions, he explains. One must also consider the history behind the transition to D_2 , which was simply realized by fans' free choices to spend their money as they please.¹⁶ Provided they justly acquired their wealth, and assuming nobody coerced them into transferring their income, D_2 is legitimate. This principle can be generalized at a higher level of abstraction as follows: whatever arises from a just situation (D_1) from fully voluntary transactions by participating agents in a market is itself just, even if it breaks the original pattern and results in something less egalitarian. The main point of this argument is that liberty inevitably upsets patterns, and redistributing resources to restore these patterns every time there are deviations necessarily entails continuous interference into people's lives and free choices. If this is true, then the Liberty Principle and Difference Principle are *prima facie* untenable. Fabian Wendt offers an abbreviated version of the argument,¹⁷ which I truncate further, as follows:

P1. A society is just if and only if the distribution of property D_1 has an egalitarian distribution (Equality arising from the Difference Principle).

¹⁵ A patterned distribution may be thought of as an allocation of resources (wealth) in a particular society in accordance with a socialist principle of justice. See G.A. Cohen, "Robert Nozick and Wilt Chamberlain: How Patterns Preserve Liberty," in *Self Ownership, Freedom, and Equality* (Cambridge: Cambridge University Press 1995), p. 20.

¹⁶ Robert Nozick, *Anarchy, State, and Utopia* (Great Britain: T.J. Press Ltd., 1974), pp. 161-163.

¹⁷ Fabian Wendt, "Nozick's Wilt Chamberlain Argument" in *Just The Arguments* (West Sussex: Blackwell Publishing Ltd., 2011), pp. 256-257.

P2. When people freely transfer their property to other persons, they bring about a new distributional structure D_2 .

P3. It is not unjust for people to freely transfer their property to other persons. (Liberty Principle)

P4. Therefore, the new unequal distributional structure D_2 is itself not unjust.

P5. But if P1 is true, then D_2 is not just.

C1. D_2 is not just (*modus ponens*, P1, P5).

C2. D_2 is just and D_2 is not just (*conjunction*, P4, C1).

C3. P1 (The Equality Principle) is false (*reductio*).

In short, the argument purports to show that liberty and equality as conceived by Rawls are logically incompatible, and that, by extension, the Liberty and Difference Principles which support them are formally inconsistent. To break the momentum of the argument, many of Nozick's critics used to primarily target P4 in one way or another. This is a consequentialist strategy. As I see it, however, this is an indirect assault that does not target the Liberty Principle at P3 *per se* so much as it targets the justness (or unjustness) of the outcome of its application which is expressed in D_2 . Older critics have argued, for example, that that the voluntary transfers that brought about D_2 may have been coaxed through fraud,¹⁸ that the concentration of wealth in the hands of select individuals such as Chamberlain represents an unconscionable concentration of power,¹⁹ or that D_2 worsens the (market) inequalities and the social divide between advantaged and handicapped individuals.²⁰

Recent literature on the Wilt Chamberlain argument, however, suggests that Nozick's critics have shifted towards *non-consequentialist* objections of late. There is now a trend of challenging

¹⁸ Robert Wolff, *Robert Nozick: Property, Justice, and the Minimal State* (Oxford: Blackwell Publishing Ltd., 1991), p. 69.

¹⁹ Cohen, *supra* note 15, pp. 26-28.

²⁰ Will Kymlicka, *Contemporary Political Philosophy*, 2nd ed. (New York: Oxford University Press, 2002), pp. 106-107. For a more recent version of this argument, see Paul Warren, "Karl Marx and Wilt Chamberlain, or: Luck Egalitarianism, Exploitation, and the Clean Path to Capitalism Argument," in *Res Publica* 23 (Nov. 2017), p. 459.

not P4, but P3, by arguing that the Liberty Principle, one way or another, does *not* cover economic liberties such as the free transfer of property. This strategy is not only more direct, it is also potentially more devastating because it restricts the principle's scope of application. In short, it is a conceptual argument that attempts to redefine what liberty is. If it is correct, then the Liberty Principle does not countenance as much individual freedom as Nozick thought, which implies that he has misinterpreted Rawls from the onset. I shall now argue that recent objections share either or both of the following assumptions. Either:

- (a) economic liberties such as the liberty to freely transfer property are not protected to the same extent as other liberties under the Liberty Principle;
- (b) economic liberty is just one value among others, including other kinds of liberty.

I shall refer to (a) as the Exclusion Assumption and (b) as the Pluralism Assumption. These assumptions are logically compatible but are mutually exclusive; that is to say, each can stand on its own without depending on the validity of the other. Arguably economic liberty is not the primary form of liberty covered by the Liberty Principle (the Exclusion Assumption), but this arrangement is independent of their values relative to one another. Or it might be the case that economic liberty is indeed of less worth than other liberties or values (the Pluralism Assumption), but it could be afforded the same amount of protection under the Liberty Principle. The distinction between the two assumptions is subtle but substantial. I suspect, however, that both are somewhat misguided, and I shall attempt to flesh out the difference between them by conducting a survey of the recent literature. Jonathan Wolff has recently raised a new objection based on the Exclusion Assumption:

The...Liberty Principle does not distribute liberty as such. Rather it is concerned with giving individuals an extensive scheme of what Rawls calls 'basic liberties', such as freedom of speech, or the right to run for public office. It does not say that people should be absolutely

free from interference. So there is no formal inconsistency between Rawls' two principles of justice.²¹

Wolff is directly attacking P3; he distinguishes between 'basic liberties' on one hand, which, his examples suggest, are political liberties, and economic liberties on the other. That is to say, he deliberately excludes economic liberties from the set of political liberties that Rawls enumerates. Problematically, Wolff does not clarify how he manages to draw the somewhat arbitrary line, and he would be hard-pressed to do so. I do not think he goes as far, however, as claiming that the liberty to transfer property is not protected, only that it is negotiable under the Liberty Principle. A similar argument is raised by Fried in the following paragraph:

[The Wilt Chamberlain argument] has been subject to numerous criticisms, including the unsupported assumption that each fan's initial right to her 25 cents must necessarily carry with it the absolute right of transfer. One could, for example, defang Nozick's argument simply by defining the property right *ab initio* as not including the right to transfer the property in a fashion that will upset unduly some end-state egalitarian distributive pattern.²²

Fried is also attacking P3; she does not deny that the Liberty Principle protects economic liberties, only that the unfettered right to transfer property is not covered by the principle *ab initio*. This initially seems fair enough. Like Wolff, Fried argues that there are moral limits to economic liberty, and these constraints are set by the possibility of upsetting some 'end-state egalitarian distributive pattern'. This kind of pattern, of course, is exactly what the Difference Principle hopes to preserve and recreate whenever upset, and so the liberties afforded by the Liberty Principle are not granted unqualified protection. This pattern is also what constitutes the grounds of the moral justification for state interference into individual liberty. This is how Wolff and

²¹ Jonathan Wolff, *An Introduction to Political Philosophy*, 3rd ed. (New York: Oxford University Press, 2016), p. 176.

²² Barbara Fried, *Facing Up To Scarcity: The Logic and Limits of Nonconsequentialist Thought* (New York: Oxford University Press, 2020), p. 203.

Fried respond to the Wilt Chamberlain argument's charge that the Liberty and Difference Principle are formally inconsistent: the Liberty Principle is simply not absolute. The moment its exercise breaches some threshold of justice and generates a certain level of inequality, then it is the business of the liberal state to curtail it. Let us move on to other recent objections, this time, one based on the Pluralism Assumption:

[The liberty to freely choose a distribution] represents an absolutism of liberty that denies or disregards the relative importance of other values, like human well-being. Surely that is a mistake. Liberty matters, but it is not the only thing that matters. The value of liberty does not trump all other values in all possible situations.²³

Barnes is also directly attacking P3; albeit in a different way from Wolff and Fried. He is undoubtedly correct that liberty is not the only value that matters. In fact, I suspect that no serious libertarian would quarrel with him there.²⁴ No one denies that there are important values other than liberty, but this argument is hinged on the assumption that there is some clear bifurcation between liberty and 'human well-being'. Unfortunately, this does not seem to be a very secure principle. He asserts the existence of such a bifurcation without proof, and this is because, I suspect, there is none—at least, none that is clear and uncontroversial. Other writers have similarly criticized Nozick for discounting the importance of other factors which they feel are of primary importance. For example, Hicks points out that Chamberlain would not have been as successful as he was without his coaches, teammates, families, friends, school, media, and other institutions that shaped him into the athlete he was.²⁵ This argument implies that the moral justification for equality is based on some

²³ Gordon Barnes, "Wilt Chamberlain Redux?" *Philosophia* 44 (2016), p. 82.

²⁴ Not all defenders of the Wilt Chamberlain argument are libertarian like Nozick. Some writers have pointed out that a similar argument was actually raised by John Locke who does not use it to defend the minimal state so much as to advance a modest form of liberalism. See e.g. Kenneth Henley, "Hume's 'Wilt Chamberlain Argument' and Taxation," *Canadian Journal of Philosophy* 42:S1 (Feb., 2012), pp. 153-159.

²⁵ Douglas Hicks, "Inequality, Justice, and the Myth of Unsituated Market Exchange," *Journal of Religious Ethics* 47:2 (Jun., 2019), pp. 341-342.

conception of social gratitude. In a similar vein, Crowe points out the importance of commutative or ‘small justice’, which he describes as the non-formal or non-institutional relationships at the heart of market transactions between individuals.²⁶ This, in turn, is somewhat communitarian arguments that emphasize the importance of interpersonal values such as gratitude, reciprocity, and solidarity within a community over highly individualistic or ‘atomistic’ ones such as liberty.²⁷ The Difference Principle ensures that resources are redistributed in a manner that protects these other values, by enabling the community, for example, to prosper as a reward for their collective contributions towards the success of individuals such as Chamberlain. Thus, they conclude, there is no formal inconsistency between Rawls’ two principles of justice.

In summary, although both Rawls and Nozick begin their theories with powerful assaults on utilitarianism, they end with opposite conclusions about what the state may justifiably demand of its citizens. Rawls concludes that rejecting utilitarianism entails reducing inequalities by redistributing wealth and property, while Nozick concludes that it entails respecting the separateness of persons and respecting individual rights. I have argued that whether critics assume the Exclusion or Pluralism Assumption (or possibly both), the recent literature exhibits a trend of non-consequentialist reasoning against the Wilt Chamberlain argument that seeks to reconceptualize the liberal notion of liberty. There are less objections pertaining to inequalitarian outcomes of the *use* of liberty, and more which purport to show that the Liberty Principle is narrower than previously thought.

The Structure of Liberty

I shall now argue that both assumptions fail to account for what I call the ‘structure’ of liberty in relation to the Liberty Principle. This structure may be explained in two parts: the ‘internal’ structure of liberty *simpliciter*, and the ‘external’ structure of liberty in relation to other values such as human well-being. In the discussion to follow, I

²⁶ Jonathan Crowe, “The Idea of Small Justice,” *Ratio Juris* 34:3 (Sep. 2021), pp. 224-243.

²⁷ The term ‘atomistic’ was coined by Charles Taylor who, not coincidentally, was Michael Sandel’s adviser at Oxford. Sandel is arguably the most influential communitarian in contemporary political philosophy.

will focus on the economic liberty to freely transfer property as my primary example. I will then explain how this conception of liberty's structure can potentially deal with the Exclusion and Pluralism assumptions.

Allow me to first explain the 'internal structure' of liberty *simpliciter*. There is a wealth of literature on the distinction between positive and negative liberty, but not much has been said about its relation to Rawls' Liberty Principle. Positive liberty is the *freedom to* perform an action Φ , or to act autonomously in accordance with one's reasons, desires, or motivations. On the other hand, negative liberty is *freedom from* interference, coercion, or influences that restrict the exercise of liberty to Φ .²⁸ Ordinarily, when it is said that someone has the liberty to Φ , it means that they have *both* positive and negative liberty. To possess only positive liberty is not to be *at* liberty in the true, full, or proper sense of the word. For example, a child who is given a hundred dollars for his birthday and is told he can 'buy whatever he wants' may feel he has the liberty to do as he pleases with his money. But if his mother says that he cannot buy the video game he wants because he would be too distracted to study, he would realize he is not *really* at liberty after all. He may feel that he only has liberty-with-an-asterisk-or-qualification. His mother's restriction limits his negative liberty, but it also reduces his positive liberty by cutting away his substantive options. He is not only not free *from* his mother's intrusion, but he is not free *to* buy whatever he wants after all. Thus it may be said that the structure of liberty often consists of two interconnected components.

The Liberty Principle is a statement about both kinds of liberty. It clearly maximizes positive liberty by granting each individual 'an equal right to the most extensive basic liberty', and while critics like Wolff and Fried correctly point out that it is not absolute, they underestimate the extent to which the principle reduces interference on negative liberty as well. The only infringement it authorizes is the level at which one's liberty is, to quote Rawls, what is 'compatible with a similar liberty for others'. Literally construed, it says nothing about equalizing liberty or permitting redistribution; it

²⁸ Isaiah Berlin, "Two Concepts of Liberty" in *Liberty*, ed. Henry Hardy (New York: Oxford University Press, 2002), pp. 116-217.

only says that one's liberty should be compatible with that of others. While Chamberlain might have more liberty than others in virtue of possessing more wealth, there is nothing 'incompatible' between his and other people's liberty. Granted, it might be unpleasant or distasteful to see such inequality, but this is a long way off from saying that his liberty cancels out that of others. The latter are still free to Φ and free from restrictions to Φ , it is just that they do not have as much wealth to do so and may occasionally have to refrain from doing so. But in theory, they are at liberty *to* do anything that Chamberlain can (they may theoretically apply for a loan to afford a nice car like Chamberlain's for instance), it is just that they cannot afford it as easily. That is to say, Chamberlain's positive liberty to Φ *per se* does not constitute a restriction on others' negative liberty from barriers to Φ ; it is the lack of wealth does. There is therefore a presumption of maximizing his liberty as the Liberty Principle requires. But Chamberlain's negative liberty is violated by redistributing his wealth, and as we have seen in the previous example, this also amounts to an assault on his positive liberty to realize his own ends. The Difference Principle uses Chamberlain as a *means* to an end and fails to respect him.

How, then, is a liberty connected to other liberties or values? Let us call a liberty an 'enabling' liberty if its realization is a necessary condition for the full realization of another liberty or good. This is analogous to how the exercise of a right may be contingent on some qualification or satisfaction of some condition.²⁹ For example, the right to run for public office is enabled by the right to education because, in many jurisdictions, literacy is a requirement for any candidate for public office. On this view, someone can run for public office if, and only if, the state creates the conditions for her to be literate, such as by building public schools that are accessible. Some liberties have a similar enabling function. The fundamental liberty to express oneself, for instance, enables a host of other liberties, such as the liberty to dress as one pleases, to form associations, or to support political parties. The latter kinds of liberty all logically depend on the prior existence of a more foundational liberty to express one's individuality or beliefs. Without it, the other kinds of liberty simply cannot be

²⁹ William Edmundson, *An Introduction To Rights*, 2nd ed. (Cambridge: Cambridge University Press, 2012), p. 154.

realized. Let us now focus economic liberty. It has been said that the liberty to own or transfer private property is also an enabling liberty in the sense described.³⁰ For example, the liberty of a farmer to earn depends on his liberty to possess and cultivate his own land, while the liberty of a successful businessman to uplift the poor community he grew up in by donating his wealth to local charities depends on his liberty to transfer his wealth to parties of his own choosing. Without the liberty to do exactly as they please with their money, they cannot enjoy or fulfill their liberty to the extent they plan to. Hence, economic liberties are logically prior to other liberties, so limiting them effects a limitation upon those which depend on them.

Liberties can enable the realization of values and goods, not just other liberties, in part because goods are dependent on some liberties. Take for example Barnes' argument that human well-being is a good. Well-being is a rich and multi-faceted concept, but almost any conception thereof will logically depend on the realization of certain liberties. Whether well-being is conceived of a set of public goods accessible to all,³¹ human development,³² welfare,³³ or virtue,³⁴ political philosophers have extolled the centrality of liberty its realization. The reason, I believe, is that liberty is so all-encompassing that any pursuit of any conception of the good must begin with the basic capacity to formulate a vision of that good and how to achieve it.

We are now in a position to better understand why the Exclusion and Pluralism Assumptions are misguided, beginning with the former. According to the Exclusion Assumption, economic liberties such as the liberty to freely transfer property are not protected to the same extent as other liberties under the Liberty Principle. Wolff and

³⁰ Eric Freyfogle, "Property and Liberty", *Harvard Environmental Law Review* 34:1 (2010), p. 77.

³¹ Joseph Raz, *The Morality of Freedom* (Oxford: Clarendon Press, 1986), p. 161.

³² Amartya Sen, *Development as Freedom* (New York: Alfred A Knopf Inc., 2000), p. 16.

³³ Ronald Dworkin, *Sovereign Virtue: The Theory and Practice of Equality* (Cambridge: Harvard University Press, 2000), p. 89.

³⁴ MacIntyre's conception of virtue is teleological and Aristotelean in character. MacIntyre writes, "Freedom is the supposition of the exercise of the virtues and the achievement of the good. See *After Virtue*, 3rd ed. (Indiana: Notre Dame University Press, 2007), p. 159.

Fried use this as a premise to conclude that economic liberties such as the liberty to freely transfer property are either excluded from the set of basic liberties or are not protected to the extent that other liberties are. This is flawed for a number of reasons. First, Rawls explicitly states that basic liberties *do* include freedom from economic interference as described. Specifically, he says ‘the right to hold personal property’ is among the liberties ‘to be [held] equal by the first principle.’³⁵ Rawls makes a similar point in *The Law of Peoples* where he counts the right to personal property as a ‘basic human right’³⁶ as well as in *Justice As Fairness: A Restatement* where he says that ‘among the basic rights is the right to hold and to have the exclusive use of personal property.’³⁷ Furthermore, in a separate lecture, Rawls admits to emulating Mill’s procedure of listing down liberties which are ‘defined by certain legal and moral rights of justice’, counting among them ‘liberty of tastes and pursuits’.³⁸ This presumably covers tastes such as buying tickets to enjoy Chamberlain’s basketball games, or buying tickets to the opera, art galleries, and other events frequented by those of high sensibilities. The Difference Principle violates liberty by permitting schemes of redistribution that seize a larger percentage of wealthy people’s hard-earned money compared to those of average income. It fails to afford them the most ‘extensive basic liberty similar to that of others’ as the Liberty Principle demands. Our analysis of the ‘internal structure’ of liberty—especially on the relationship between positive and negative liberty—supports this objection by showing that economic liberty *is* and *should be* protected to the same extent as other liberties.

We may now move on to scrutinizing the Pluralism Assumption in finer detail, which claims that economic liberty is just one value among others, including other kinds of liberty. We have seen that respect for human goods such as Barnes’ notion of well-being can be co-opted under a scheme that respects liberty to the greatest extent possible. A similar line of reasoning may be applied to Hicks’ notion of

³⁵ Rawls, *supra* note 2, p. 53.

³⁶ John Rawls, *The Law of Peoples* (Cambridge: Harvard University Press, 1999a), p. 65.

³⁷ John Rawls, *Justice as Fairness: A Restatement* (Cambridge: Harvard University Press, 2001), p. 114.

³⁸ John Rawls, *Lectures on the History of Political Philosophy*, ed. Samuel Freeman (Cambridge: The Belknap Press of Harvard University Press, 2007), p. 288.

reciprocity or Crowes' notion of interpersonal relationships. Both may be explained in terms of our previous example about the successful businessman. After his basketball playing career, the real Wilt Chamberlain moved on to become a very wealthy and successful entrepreneur. He eventually also became a philanthropist who donated to several social causes to which he held personal attachments, including many in his hometown Philadelphia. Several other basketball greats of his era such as Kareem Abdul-Jabbar and Bill Russell, who were also prominent civil rights activists, were known to donate to poor African-American communities, largely due the fact that they grew up in similar neighborhoods and recognized their debt of gratitude to the figures who helped them become successful. Wealthy and successful people are often motivated to pay it forward; they are generous to strangers and non-strangers alike, and most importantly, they freely choose to do so. The point I am making is not only that other goods can be realized in a society that respects economic liberty, but that, ironically, these individuals are the prime targets of the Difference Principle whose liberties are limited and curtailed. The state—through various redistribution regimes—takes large portions of their wealth and allocates it to other causes or projects that wealthy people have no attachments to. It abrogates their *choice* to transfer their property to those whom they feel are most deserving of their generosity and transfers it on their behalf to parties they otherwise have no allegiance, attachment, or obligation to. They are unable to realize their vision of the good for the communities they have sentiments for.

Furthermore, even the other goods that Wolff enumerates (the right to run for public office and freedom of speech) depend on the availability of economic resources that the Difference Principle targets. For example, running for public office obviously requires candidates to spend from their campaign war chest. But some candidates are wealthier than others. To promote equality in the election, the Difference Principle requires taking away a larger portion of their income than that of less wealthy candidates to level the playing field. Does this not equate to a violation of their political liberty? Does this not limit their ability to spread their political message to far-flung areas or the marginalized sectors that need to hear them the most? The same applies to freedom of speech. For some forms of political expression to reach its intended audience, an

individual may need to utilize expensive media platforms. Obviously, not everyone can raise awareness for their cause by filming a commercial and airing it on mainstream television. Even if the Internet is accessible to all and has significantly lowered the cost of mass communication, the flood of information uploaded daily drowns out the social message they want to get across.³⁹ In response to oversaturation, some content providers are more willing than others to devote more finance to spreading awareness. They decide that spending on various platforms to communicate their message is a worthy, desirable, and effective investment. The Difference Principle, however, authorizes taking away a larger portion of their assets compared in the name of equality once again. Does this not thereby limit their capacity and resources to exercise their free speech? Does this not deny audiences the right to access and filter the information that directly affects their lives and upon which they may base several of their opinions and decisions?

Conclusion

In this paper, I have surveyed recent literature criticizing Nozick's Wilt Chamberlain Argument. I argued that recent criticisms have turned away from consequentialist objections that decry the injustice of the Liberty Principle's outcomes, and have instead moved towards non-consequentialist objections that attempt to modify the scope of liberty (the Exclusion Assumption) or belittle its importance relative to other values (the Pluralism Assumption). In response, I have developed a modest conception of both the 'internal' and 'external' structure of liberty to better explain the relation of economic liberty to other forms of liberty and other values as well. I have barely scratched the surface of the concept of liberty and much, much more can be said in its defense. But based on the little that I have said, I conclude that the Difference Principle's purpose of eliminating inequalities comes at the steep cost of violating legitimate exercises of individual liberty and fails to respect persons. Nozick's argument that the Liberty and Difference Principles are formally inconsistent, under Rawls' formulation anyway, is therefore capable of withstanding some recent objections.

³⁹ Gregory Magarian, "The Internet and Social Media" in *The Oxford Handbook of Freedom of Speech* (New York: Oxford University Press, 2021), pp. 353-354.

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