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THE TABLES TURNED: WILT CHAMBERLAIN VERSUS ROBERT NOZICK ON RECTIFICATION[1]

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1. INTRODUCTION

Recently the demand for rectification of past injustices has become an increasingly important issue. Each of the last three decades has witnessed democratization processes in the Mediterranean basin, Latin America, in Central and Eastern Europe and in Africa where debates have arisen over rectification of past wrongs which naturally include the unjust expropriation of *property*. Most recently, moreover, the idea of land restitution to indigenous people, particularly in Australia, Canada and Zimbabwe, has become a prominent, if not always equanimous, part of those countries' domestic political agendas. The difficulties associated with satisfying such demands have been discussed with particular regard to the framing of new post-Communist constitutions in eastern and central Europe by, among others, Jon Elster and Claus Offe.[2] Yet, not only in the field of public policy has the issue of rectification become

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[1] Nozick's principle of justice in rectification is a methodologically contradictory aspect of *Anarchy, State and Utopia* and theoretically fatal to the Entitlement Theory. This becomes clear if one appeals to Nozick's own 'Wilt Chamberlain' argument against patterned principles of justice which can be conceived as taking two distinct although compatible forms, one Moral the other Instrumental. The latter clearly parallels Hayek's arguments about the diffuse and context-bound nature of knowledge yet the principle of rectification assumes its falsity. Moreover, the Instrumental Wilt Chamberlain Argument explains why Nozickian rectification is impossible to fulfil and fatal to the Entitlement Theory.

[2] On this see Elster, 1993 and Offe, 1991, pp. 865–92.

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important. Perhaps because of these developments, there has been a resurgence of interest in rectification in political philosophy as is shown by a forthcoming collection of essays on the subject edited by Elster.[3]

What I hope to do in this paper is narrow our focus still further by concentrating upon the work on rectification of one philosopher. Of course, what makes Robert Nozick's principle of justice in rectification different to the gargantuan task faced by Elster and Offe's new constitution framers is that it already presupposes a system of private property rights that is up and running.[4] Moreover, in the vast majority if not all of the cases mentioned earlier, the demand for rectification is brought against the state rather than private transgressors of property rights. Nonetheless, looking at Nozick's treatment of rectification will be of interest at least insofar as it forms part of the wider set of problems that politicians and constitutional experts in the wider world currently face.

In comparison to the other two principles of justice of the Entitlement Theory not very much has been written on the principle of justice in rectification.[5] Indeed, in the only paper to date devoted solely to the principle, Robert Litan's 'On Rectification in Nozick's Minimal State' (p. 233), rectification has been described as 'the single most important issue Nozick admits leaving untreated'. However, as Lawrence Davis has observed, the principle is 'an essential part [of the Entitlement Theory]; for, without it, owing to the inductive nature of the definition of entitlement, if there has been a single injustice in the history of the state, no matter how far back, the state will not be able to achieve a just distribution of goods in the present'.[6] This is because without rectification being completely satisfied any present-day holder of an unjustly acquired or transferred holding may well see his entitlement seriously compromised at best and maybe even nullified. In Davis's compelling words, without a principle of rectification we will see 'the nonentitlement of individuals to goods spreading plaguelike

[3] Elster's collection, yet untitled, is to be published by Cambridge University Press.

[4] The difference here is of philosophical significance. As Offe points out the driving motive of those engaged in building east European market economies

> is not the prepolitical datum of the owner's (Lockean) natural right to his property and its free enjoyment. Rather, the driving motive is what in the case of the Western countries was only discovered subsequently as a welcome functional side effect of an economic order based on the freedom to property, namely, the fact that an efficient economic mechanism serves at least in the long run the overall interest of society. (Offe, 1991, p. 877)

[5] The other two principles are the principle of justice in acquisition and the principle of justice in transfer. There are but three scholarly articles devoted entirely or substantially to the principle of rectification: Litan, 1977, pp. 233–46; Davis, 1982, pp. 344–54; and Kavka, 1982, pp. 371–80.

[6] 'Nozick's Entitlement Theory', p. 348.

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after an injustice'.[7] Successful application of the principle is therefore essential to the theoretical viability of the Entitlement Theory as a whole. Taking time to consider the principle in more detail is therefore a useful means of increasing one's familiarity with the Entitlement Theory, of providing a new and interesting perspective for the assessment of its strengths and weaknesses and, perhaps, of drawing broader conclusions concerning the theoretical viability of theories of rectification generally. However, due to Nozick's notably thin exposition any such consideration will necessarily include a degree of theoretical reconstruction. To begin with, I would like to take a look at the principle, its place in the Entitlement Theory and seek to fill in any gaps that Nozick may have left out.

2. JUSTICE IN RECTIFICATION: A RECONSTRUCTIVE OVERVIEW

It is clear that Nozick intends the principle to be applied by the State. As Jonathan Wolff (1991, p. 151) comments '[t]he only legitimate forms of taxation are, according to Nozick, to fund defence, the police, and the administration of justice', of which the principle of rectification is one aspect. Secondly, and unlike the principles of acquisition and transfer, the principle of rectification is given no formal expression. Rather, Nozick (1974, pp. 152–3) argues that it makes use of:

> historical information about previous situations and injustices done in them (as defined by the first two principles of justice and rights against interference), and information about the actual course of events that flowed from these injustices, until the present, and it yields a description (or descriptions) of holdings in the society.

We may note that Nozick fails to mention which parties would properly figure in any rectificatory action. This is especially important given

[7] Davis, Lawrence (1982, p. 346). One can see the logic of the plague of post-injustice entitlements in the desire on the part of the ex-Communist framers of the post-revolutionary Romanian constitution to insert what must count as one of the most brazen 'get-out' clauses in constitutional history. As Elster notes

> [t]o some extent the constitution itself may have been influenced by the fear of the founders – many of whom have been former Communist officials – of being targeted for retribution. Thus [article] 41.7 of the Romanian constitution says that 'Property is presumed to have been acquired legally', which is an unusual sort of provision. To make sense of it, we might look to a decision made by the Czechoslovak government on 26 September 1991, that in the future successful bidders for state-owned business would have to prove where their money comes from. The measure was intended to block the use of 'dirty money' that had been illegally accumulated by members of the former *nomenklatura* or black marketers. There is a presumption of guilt, the government is under no obligation to show that the funds have an illegal pedigree. Instead, citizens will have to prove that their money is clean. The Romanian clause may have been intended to pre-empt similar measures. (1993, pp. 170–71)

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Nozick's rights-based approach: it would be no use in Utopia for rights to be violated in the course of rectifying previous rights-violations. Building, then, upon Litan's paper the following requirement seems necessary but not sufficient for successful application of the principle:

a) identify the victims and perpetrators of an unjust acquisition or transfer of holdings and/or their descendants

Moreover, it is clear that if justice amounts to compensation for holdings unjustly lost then *something* has to be the object of such compensation. Justice in rectification is not just about finding out who did what to whom but also about seeking the return of the holdings lost. Therefore, we could gloss a second requirement to add to our list:

b) identify the lost holdings and their possessors

In actual fact Nozick makes no mention of the necessity of tracing *particular* unjustly acquired or transferred holdings; perhaps because he realized that unjustly acquired holdings often go missing, get destroyed or taken to pieces. He therefore skips putting something like requirement b) forward and thus we are led directly to the issue of compensation. This immediately raises the question of how much compensation would be due. In order to ascertain this the rectifying authority – let us call it the Utopian Rectifying Authority (URA) – would need to know the distribution of holdings that *would have* obtained had the injustice not taken place. That is, in applying the principle of rectification the URA 'presumably will make use of its best estimate of subjunctive information about what would have occurred . . . if the injustice had not taken place'. With this information Nozick concludes that '[i]f 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 realised'. In 'An Internal Critique of Nozick's Entitlement Theory', Gregory Kavka has called this requirement the No Net Harm Criterion such that 'victims of injustice are sufficiently compensated if they are no worse off (having received the compensation) than they would have been had the injustice not taken place'.[8] Building upon Kavka's interpretation and calling the time at which compensation is made 't(R)' let us replace requirement b) with b') such that:

b') compensate victims of injustice so that they are no worse off after t(R) than they otherwise would have been had the injustice not taken place.

[8] Without slavery and baby snatching perhaps the incomes of the descendants of slaves or snatched babies would have been *lower*? This consideration does seem to subvert the idea that a lowered income is the only criterion of harm.

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Two observations are worth making about b'). Firstly, it makes no mention of *who* is to compensate the victim. This seems in keeping with the tenor of Nozick's treatment of rectification as he writes on this issue in a passive voice that leaves aside who ought to pay. Recall: '[i]f 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 realised*'.[9] Given, however, our presumption that the State is to be the administrator of justice we may safely assume that the source of compensation will be taxation of the members of society. The second point to be made about b') is that underlying this 'fundamental principle of Nozick's theory of rectification'[10] is the assumption that it is possible to gather the subjunctive information necessary to calculate the compensation due to a victim. Let us call this Nozick's Subjunctive Information Assumption and note further that it is absolutely vital to his purposes: were the Subjunctive Information Assumption to prove unfounded then the principle of justice in rectification would not get off the ground because the URA would have no way of fixing a level of compensation that satisfied the No Net Harm Criterion. Consequently, and given Davis's point about the inductive nature of the derivation of entitlement, serious if not fatal damage would be done to the normative edifice of the Entitlement Theory.

3. THE SUBJUNCTIVE INFORMATION ASSUMPTION: WILT CHAMBERLAIN

Let us now examine the legitimacy of the Subjunctive Information Assumption. Doing this will involve finding out just what kind of assumption it is. I propose to do this by turning attention first to perhaps the most famous part of *Anarchy, State and Utopia*: the notable (or notorious) Wilt Chamberlain argument against 'present-day'[11] patterned principles of justice.[12] Starting from the idea of an aggregate distribution of holdings ordered so as to conform to a principle of just distribution D1, Nozick draws our attention to the following curious transformation: when individuals independently proceed from D1 to pay, for instance, to watch the gifted basketball player Wilt Chamberlain exhibit his remarkable talents, they unintentionally produce an aggregate pattern of distribution D2 that is sharply at variance with D1 (in this case one in which at least Wilt Chamberlain ends up being far better off than anyone else). Thus by 'people choosing to act in various ways; for example, by people exchanging goods and services with other people, or giving

[9] Nozick (1974, p. 153), own emphasis.
[10] Kavka (1982, p. 372).
[11] To distinguish these from retroactive principles of justice such as justice in rectification.
[12] Nozick (1974, pp. 160–64).

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things to other people, things the transferors are entitled to under the favored distributional pattern' the 'favored pattern [is] transformed into one unfavored by the principle'.[13] Why should this transformation take place? A way of finding out is to appeal to a distinction central to economic analysis and already touched upon in the brief exposition above. This is the distinction between the macro or aggregate level and the micro or disaggregated level. The importance of this distinction is that typically the discrete actions of agents at the disaggregated level combine to dovetail into outcomes at the aggregate level which, for better or for worse, none of those agents was capable of foreseeing or intending. Thus, Nozick arrives at the conclusion of the Wilt Chamberlain argument: that in order to correct any of these necessarily occurring deviations from the pattern D1 'no end-state principle or distributional patterned principle of justice can be continuously realized without continuous interference with people's lives'. Given his rights-based methodology this conclusion is central to Nozick's purposes. However what I would like to focus on is not this quasi-subliminal, unargued-for appeal to the moral dubiousness of interference by others but, rather, upon a second argument that Nozick yields from the Wilt Chamberlain example.[14] This argument, let us call it the Instrumental Wilt Chamberlain Argument to distinguish it from its more (in)famous cousin above, the Moral Wilt Chamberlain Argument, appears a little later on in Nozick's deliberations and within the context of a response to an objection he anticipates will be launched against the Moral Wilt Chamberlain Argument. The objection, Nozick anticipates, goes like this: in putting forward the Wilt Chamberlain argument Nozick is wrong to assume that people would not be *motivated* to maintain D1. If so, then what we have called the Moral Wilt Chamberlain Argument against present-day patterned principles is a non-starter, for 'all persons voluntarily will choose to refrain from actions that would upset the pattern'.[15] Thus the need to interfere in people's lives does not even arise, let alone provide a basis upon which to object to the 'imposition' of D1. Anticipating this, Nozick is moved to respond:

> that this presupposes unrealistically (1) that all will most want to maintain the pattern . . . (2) that each can gather enough information about his own actions and the ongoing activities of others to discover which of his actions will upset the pattern, and (3) that diverse and far-flung persons can co-ordinate their actions to dovetail into the pattern.

[13] *ibid.*, p. 163.

[14] For other useful arguments against this Moral aspect of the Wilt Chamberlain argument, see O'Neill, 1982, pp. 305–22; Ryan, 1982, pp. 323–43; and Nagel, 1982, pp. 191–205.

[15] Nozick (1974, p. 163).

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We have three responses to consider. The first, like the anticipated objection, relates to the moral attractiveness of a given pattern. This response, Wolff (1991, pp. 82–3) has conceded, is probably fair for it is only very rarely, if at all, that a society is unanimously agreed upon ends no matter what they are, let alone upon those necessarily involving the threat of coercion as the achievement or maintenance of an aggregate pattern such as D1 would. For the existence of the possibility of coercion in itself probably would be sufficient for at least some members of society – say hippies, surfers, career down-and-outs and (Classical) Liberals – to object to D1 in principle. If this is so, then the Moral Wilt Chamberlain Argument against patterns holds. In clear contrast, responses (2) and (3) amount to a shifting of the focus of disagreement from the moral attractiveness of D1 to the *possibility* of its achievement and maintenance over time, given a) that Wilt Chamberlainesque distributive transformations *necessarily* occur and b) regardless of whether the maintenance of D1 is an ethically valuable enterprise.[16] [17] In offering these responses – which are in actual fact the same response made from the contrasting perspectives of pattern maintenance and pattern achievement – Nozick contends that, even if the moral desirability of D1 over any other distribution, D*x*, is unanimously conceded, that is, that the Moral Wilt Chamberlain Argument is false and continuous interference in people's lives to maintain D1 would not be considered a morally dubious enterprise, that still leaves unanswered the question of whether it is possible for individual members of a society or an agent acting at the aggregate level, call it the Ministry of Pattern Determination (MPD), to ensure that deviations from the pattern did not arise (response (2)) or whether it is *possible* to achieve D1 (or, for that matter D*x*) (response (3)). Both responses are based upon the occurrence of the distributive transformations caused by disaggregated decision making exemplified by the Wilt Chamberlain example. However, Nozick fails to give an account of *how* such transformations occur. To supply such an account we first must be in a position to know what would be necessary for D1 to be possible. That is, a) what would be necessary for the MPD to avoid deviations from D1, and b) what would be necessary for several individuals acting at the disaggregated level to achieve D1?

[16] Although equally this shift may be no more than a *recasting* of the debate from the moral attractiveness of D1 to the moral attractiveness of arguing in favour of the unattainable. For, despite the Instrumental Wilt Chamberlain Argument being prima facie non-moral, it soon does become a matter of moral reflection as to whether one should knowingly advocate the use of inferior means of attainment of a widely-desired end.

[17] Indeed, at least in some sense responses (2) and (3) can be said to be logically prior to the Moral Wilt Chamberlain Argument. After all, if it can be shown that an end cannot in principle be achieved, there is little point in starting a debate as to whether it ought morally to be achieved.

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4. THE SUBJUNCTIVE INFORMATION ASSUMPTION: HAYEK'S KNOWLEDGE PROBLEM

An answer to both these questions can be found if we briefly turn to the thought of Friederich Hayek. In a seminal paper, *The Use of Knowledge in Society*,[18] Hayek considers what problem would need to be solved were members of a society to attempt to create and maintain what he called a rational economic order or, in Nozick's terms, a patterned economic order. 'On certain familiar assumption', he writes, 'the answer is simple enough'.

> *If* we possess all the relevant information, *if* we can start out from a given system of preferences and *if* we command complete knowledge of available means, the problem which remains is purely one of logic. That is the answer to the question of what is the best use of available means [to achieve the pattern] is implicit in our assumptions.[19]

Hayek's characterization, in effect, amounts to a fulfilment of the neo-classical conception of general equilibrium in which 'all the members of the community, even if they are not supposed to be strictly omniscient, are at least supposed to know automatically all that is relevant for their decisions'[20] to dovetail into the aggregate pattern of distribution D1. However, Hayek points out that these 'certain familiar assumptions', assumptions which are fundamental to the realization of any pattern, are precisely the kinds of assumptions which cannot ever be made. Indeed, he claims further that assuming them *misconceives* the problem of achieving and maintaining patterns because 'the ''data'' from which the economic calculus [for the achievement and maintenance of D1] starts are never given to a single mind which could work out the implications and can never be so given.'[21] Consequently, neither citizens acting at the disaggregated level, nor the MPD acting at the aggregate level, would ever be privy to the information necessary for successful co-ordination and deviation correction because

> the knowledge of the circumstances of which we must make use never exists in concentrated or integrated form but solely as the dispersed bits of

[18] For a useful summary of Hayek's 'epistemological' argument against patterns from a social philosophy perspective and, more controversially, its place within the tradition of arguments of a similar kind, see Gray, 1993 (1992), pp. 66–123. Here it is offered as part of a wider critique of libertarianism and egalitarianism from the perspective of autonomy-based social market liberalism. See also Gamble, 1996, Chapter 3. For a more detailed economic analysis of Hayek's epistemological insights that is sensitive to the contours of the Economic Calculation Debate of the 1930's and beyond see Lavoie, 1985.

[19] Hayek, Friederich A., 1948 (1945), p. 77.

[20] Hayek, Friederich A., 1948 (1937), p. 46.

[21] Hayek (1948 (1945)), p. 77.

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> incomplete and frequently contradictory knowledge that all the separate individuals possess. . . . Or, to put it briefly, it is a problem of the utilization of knowledge which is not given to anyone in its totality.[22]

Therefore, '[a]ny approach . . . which in effect starts from the assumption that people's *knowledge* corresponds with the objective *facts* of the situation, systematically leaves out what is our main task to explain'[23] because such correspondence would presuppose the possibility of stepping outside the process of 'data' formation which enables one to co-ordinate for D1. Hayek continues by claiming that:

> [o]nly to a mind to which all these facts were simultaneously known would the answer necessarily follow from the facts given to it. . . . The problem is thus in no way solved if we can show that all the facts, *if* they are known to a single mind, would uniquely determine the solution; instead we must show how a solution is produced by interactions of people each of whom possess only partial knowledge. To assume all the knowledge to be given to a single mind . . . is to assume the problem away and to disregard everything that is important and significant in the real world.[24]

Thus, the claim Hayek made is more than the empirical one concerning the practicality of achieving D1. It is not just that there is *too much* information to be handled. Rather, he made the claim that such achievement would be *necessarily* impossible because 'of the *necessary* and *irremediable* ignorance on everyone's part of most of the particular facts which determine the actions of all the several members of human society'.[25] It is then, because agents necessarily would be located *within* the process of data formation necessary for D1 and hence never would be privy to all of it, that achievement of D1 would always be elusive. Hayek's reason contrasts strongly with the somewhat pessimistic and empirical reasons of 'greed or lack of care' put forward by Wolff (1991, p. 82) to explain why, on the issue of people's desire to achieve and maintain D1, 'one might think that the evidence of history is on Nozick's side'. Rather, the reason that 'only in the most exceptional circumstances will this [pattern maintenance] happen, and if society is at all divided on the question of whether D1 is the correct pattern it will not be long before D1 is left behind'[26] is because D1 cannot in principle be achieved and maintained *even if it was unanimously desired*. This point can perhaps be made more vivid if one were to concede for the sake of argument that

[22] *ibid.*, pp. 77–8.
[23] *ibid.*, p. 91.
[24] *ibid.*, pp. 90–91.
[25] Hayek, Friederich A., 1982 (1973), p. 12, own emphasis.
[26] *ibid.*, pp. 82–3.

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everybody wanted to achieve socially just distribution D1 and that their preferences really were unanimously altruistic as opposed to self-interested.[27] The whole point and force of Hayek's Knowledge Problem is that, even in this case, given that all preferences are never given to a single mind and that the actors – be they discrete individuals or a government department – are only ever within the process of altruistic preference formation, society would still be incapable of ensuring that altruistic decisions made discretely at the disaggregated level would dovetail into D1 and then be maintained in perpetuity.[28] This is because the required information for D1, being perpetually disaggregated, is only ever available from the process itself and, as such, cannot be second-guessed. So, *contra* Wolff, D1 would be transformed not because of the moral failings of market participants but rather because of their lack of even the most rudimentary mind-reading skills, the assumption of which would presuppose their occupation of a fictitious, epistemically privileged, position.[29]

Surely, however, an argument against Nozick and Hayek here would be that, as has been pointed out in the literature, what we have called Nozick's Instrumental Wilt Chamberlain Argument is a 'red-herring'[30] and is at most 'a precondition for realising patterned justice *perfectly*' for:

> even if lack of information and imperfect co-ordination lead to deviations from the pattern, these would tend to be temporary – though possibly numerous and serious – aberrations rather than cumulative long-term difficulties. For if people are motivated to keep the pattern they would do their best to correct any discrepancies which occur. (Wolff, 1991, p. 82)

Clearly, this is an important counter-objection. After all, given advances in economic understanding, there are not many people today who would seriously entertain the idea that a pattern could be perfectly

[27] Of course one would be conceding (or claiming) too much if one were to conjecture that unanimous altruism went hand in hand with a *particular* pattern of distribution. For the veracity of such a claim would be dependent upon current levels of economic understanding. It is important to bear in mind here that one may find that, after Hayekian insights are taken on board, aggregate distribution D2 – a pattern which admitted marked income inequalities – is the morally preferable choice, given that any other pattern was in principle unachievable.

[28] In any case, would it not be presumptuous to believe that the moral worthiness of D1 would hold at all times, regardless of future social and cultural developments?

[29] Further, and just in case the more narrowly ideological would be naive enough to think that Hayek's point gives succour to those seeking to plan for so-called 'free market' outcomes, this problem does not arise because of any descriptive features one may care to ascribe to D1. . .D*x per se*. The Knowledge Problem, being a *meta-normative* claim about our rational capabilities rather than a normative claim concerning the distributive features of any given society, can be generalized to apply to *any* patterned theory of distribution justice 'whether it be an order of equality or inequality' (Hayek, 1960, p. 87).

[30] Cohen, 1977; Wolff 1991, p. 82.

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achieved or maintained. Indeed, that is why many liberal theorists have at least embraced the 'middle ground' of Welfare Liberalism. But would Wolff's solution to the problem, being 'motivated to do one's best', be enough to carry the day for D1? Or is it in fact the case that this objection merely passes on the problem posed by the Instrumental Wilt Chamberlain Argument from the criterion of achieving perfection to the revised criterion of doing one's best to achieve perfection? How would members of society acting at the disaggregated level ever *know* when their best had been done in the absence of trying? For achieving the newly revised optimum denoted by 'doing one's best' *also* presupposes sufficient information to co-ordinate with those others who are doing their best so that their actions may dovetail into that revised aggregate pattern of distribution D-*next-best-thing-to-D1* in terms of which 'doing one's best' is to be judged. Clearly the threat of infinite regress looms large, for the problem of knowing whether or not the revised pattern has been achieved would still remain. Wolff's response, then, is inadequate, for, in the absence of the disaggregated process of individual decision-making – the very process that yields the idea of an optimum in the first place – there simply is no knowable optimum in virtue of which the efficiency of actions intended to dovetail into a pattern can be judged. Criteria of optimality do not manifest themselves *ex nihilo*. As Israel Kirzner, a leading contemporary exponent of Hayek's 'Austrian' brand of economics, has pointed out:

> [a] social efficiency objective implies a single mind to which all resource supply conditions and all consumer attitudes are simultaneously given. Otherwise, there can be no coherent notion of a relevant optimum. The entire notion of 'social choice' presumes, in principle, the relevance of imagined omniscience. (1998, p. 50)

Of course, some pages later in his discussion of the Wilt Chamberlain argument, Wolff (1991, pp. 88–92) does discuss at length the idea that deviations from patterns could be remedied via taxation. Once again, however, this only begs the question of knowing how much to tax to rectify the deviation that in itself presupposes knowledge of the pattern that has been deviated from. As such, Wolff's point fails to provide a satisfactory answer to the *Instrumental* Wilt Chamberlain Argument. Nozick's responses (2) and (3) have gone unanswered.[31]

[31] The answer to the usefulness of Wolff's idea of taxation as a remedy to deviations from D1 does, in any case, appear to be 'no'. For whilst not being a pattern of distribution itself – it involves second-guessing of both i) which specific assortment of good causes deserve funding and ii) how much funding they deserve. Presumably, however, the kind of pattern that one would desire to achieve and the amounts of money that pattern would take to be achieved would have to be deduced by those implementing the tax regime. This second-guessing, however, simply begs the question of by what means it is known

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5. HAYEK'S KNOWLEDGE PROBLEM IS NOZICK'S PROBLEM

What, then, does Hayek's Knowledge Problem have to do with Nozick's principle of justice in rectification? Curiously Nozick himself falls prey to the muddled thinking he observes in the proponents of present-day patterned principles of justice when setting out his principle of rectification for it too is a patterned principle of justice and, like all patterned principles, carries with it an assumption regarding the availability of information necessary for it to function. The only difference between present day and retroactive principles is the kind of assumption: on the one hand a present information assumption, on the other a subjunctive information assumption. Nozick himself observes that:

> a principle of distribution 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 let us say a distribution is patterned if it accords with some patterned principle. . . . And we extend the use of 'pattern' to include the overall designs put forth by combinations of end-state principles. . . . Almost every suggested principle of distributive justice is patterned: to each according to his moral merit, or needs, or marginal product, or how hard he tries, or the weighted sum of the foregoing, and so on. (1974, p. 156)

Further, '[t]o think that the task of a theory of distributive justice is to fill in the blank in "to each according to his _____" is to be predisposed to search for a pattern'.[32] As we have already seen, justice in rectification is satisfied in terms of the No Net Harm Criterion and, given that justice in rectification is parasitic upon Nozick's two other principles of justice, we can identify the following *patterned* principle of justice in rectification which is in actual fact a variation of requirement b'):

> To each according to their being no worse off at t(R) than they would have been had any injustice against them not taken place.

If the principle of justice in rectification is patterned, how successful would the Instrumental Wilt Chamberlain Argument be in derailing Nozickian rectification and with it the Entitlement Theory? To answer this we must look at each requirement for successful application of the

that this is the right assortment of good causes and the right level of funding. In the absence of an answer to this, there is good reason to believe that any funds raised will have been misallocated and, as such, may well *undermine* any chance of success. The only way to confirm this either way would, once again, be not to second guess the good cause preferences of individuals but, rather, to let them fund only the good causes of their liking and to a degree of their liking so that those preferences may be more accurately revealed.

[32] Nozick (1974, pp. 159–60).

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principle in turn. With regard to requirement a) the Entitlement Theory is perhaps not derailed very much at all. This can be illustrated with recourse to an objection to the deployment of the Instrumental Wilt Chamberlain Argument against the principle of rectification that many readers may have in their minds at this stage of our deliberations. It is all well and good beating Nozick with the stick of his own Wilt Chamberlain argument but the blows simply miss their target. The Instrumental Wilt Chamberlain Argument simply does not have the force against past injustices as it does against present-day injustices for the former are static, and so all that remains is for perpetrators and victims to be identified so that adequate compensation can be made. Past injustices merely present the pursuer of Nozickian justice in rectification with a practical problem, albeit a complex one, of historical research which, unlike the attempt to keep up with the relevant parties to dynamically unfolding injustices in the present, is a far easier windmill at which to tilt. This seems fair enough. Indeed, it may not even be necessary to identify perpetrators so long as victims can prove title to lost holdings. What of requirement b')[33] and the general requirement that compensation be paid to victims which would leave them no worse off had the injustice not taken place? It is important to remember here that the third principle of rectification, like Nozick's other two principles, is a historical principle; that is, it does not demand that the rectifying authority gauge

[33] What would the Instrumental Wilt Chamberlain Argument imply for requirement b) had Nozick chosen to include it? Transfers of holdings have repercussions that reverberate down to the present. Further, not only do they reverberate in the sense that any holdings gained can be handed down from generation to generation, but equally, they reverberate in the sense that they can also be passed on, lost or given up to those completely unrelated to the original injustice through selling, altruism, the occurrence of further injustice, a reckless life or bad judgements concerning the intentions and capabilities of others. Indeed it is as a result of what Nozick describes as 'people choosing to act in various ways; for example, by people exchanging goods and services with other people, or giving things to other people, things the transferors are entitled to under the favored distributional pattern' (1974, p. 163) that this occurs. Consequently it could always be the case that the holding's present owner did not even *know* that he had gained an originally unjustly acquired or transferred holding when he inherited it or transacted with the original perpetrator or the perpetrator's descendants. So, given that Nozick's entire approach is predicated upon the non-violation of rights – 'rights as side constraints' (1974, p. 29) – were the rectifying authority to ignore the issue of the identity of the current possessor of an unjustly-held holding there would be opened up the morally hazardous issue of 'compensation' being extracted from people regardless of their knowledge, causal contribution or genealogical relationship to the original injustice. Would justice in rectification demand that these people pay up and, if so, would this demand accord with the rest of Nozick's project? From this follows the moral imperative for a rights-based theory such as Nozick's to ensure that compensation is paid by the right people. That is, by the *perpetrators* of injustice, lest future injustices similar to those currently being rectified are visited upon the innocent as a consequence of the ill-informed actions of the rectifying authority.

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the moral rectitude of a distribution D1. . .D*x* across the whole of society or any other defined domain but, rather, is only applicable when violations of the other two principles occur. 'The three principles of justice', Nozick (1974, p. 208) writes, 'are themselves process principles rather than end-state principles of distributive justice. They specify an ongoing process, *without* fixing how it is to turn out, *without* providing some external patterned criterion it must meet'. In brief, the principle of justice in rectification is only applicable to individual victims and not to the whole of society itself and whether compensation would be received is wholly determined by that *individual* being a victim of injustice. So, despite appearances, justice in rectification is not a patterned principle of justice at the aggregate level in a way that, say, Rawls's Difference Principle may be said to be. The principle, however, is patterned at the aggregate level in two other ways. Firstly, recall that the principle makes use of:

> historical information about previous situations and injustices done in them (as defined by the first two principles of justice and rights against interference), and information about the actual course of events that flowed from these injustices, until the present, and it yields a description (or descriptions) of holdings in the society. (Nozick, 1974, pp. 152–3)

Does 'holdings in the society' refer to some kind of aggregate? Perhaps using the phrase 'holdings across the society' would have made this more clear. Or, perhaps 'individual holdings in the society' is what Nozick meant. If he meant the former, then whilst the principle itself may not be patterned, its successful application would demand acquaintance with aggregate patterns of distribution in much the same way as an individual who wanted to execute a plan for society would. If Nozick meant the latter, then let us take as an example the case of one Wilt Chamberlain who, one week after retiring from an illustrious basketball career at the age of 33, is robbed of nearly all his assets by a crack team of international cat burglars and cyber-pirates. Call this time *t*(INJ). Further, in the thirty-two years since the robbery the gang has never been traced and this has left poor Mr Chamberlain, now 65 and on the verge of retirement, not only penniless but with grown-up children and grandchildren much worse off than they otherwise would have been in a Utopian society without state pensions (that method of provision, but not the provision itself, being outlawed as a violation of the principles of justice). The Utopian Rectification Authority (URA) has been called in to try and calculate how well off Wilt Chamberlain would have been were it not for the commission of the injustice so that it may ascertain how much compensation to pay him at *t*(R). What kinds of problem would the URA face? Firstly, the URA could not simply exclude the robbery from the genealogy of choices both effected by and affecting Wilt

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Chamberlain and then deduce his subjunctive well being accordingly. It is highly probable that, had Wilt Chamberlain's holdings not been unjustly transferred from him, he would have chosen to exchange for money, or bank, or invest at least some of them with any one of possibly thousands of different individuals or institutions. In addition, it is highly likely that Wilt Chamberlain would *not* have engaged in at least some of the transactions he did engage in after the injustice. There are, then, potentially *thousands* of courses of action and ensuing subjunctive levels of well-being for Wilt Chamberlain, one of which the URA must choose as a benchmark for compensation. But which one and why? Nozick provides no account of this.

Yet there is a more acute problem – we may call it the Circularity Problem – that centres upon the impossibility of assigning a value to Wilt Chamberlain's subjunctively-held holdings even if the URA could determine what choices he would have made. Despite being concerned with the events of the past, this problem, like the problem of achieving present-day patterns, arises from the inherently context-bound nature of the knowledge necessary for the achievement and maintenance of patterns that Hayek's Knowledge Problem brings out so clearly. Thus, despite the fact that unlike the MPD, the URA is not located *within* the process of data formation necessary for achievement and maintenance of D1, it is nonetheless subject to the same epistemological limitations in its efforts to reconstruct it. For even if the URA could ascertain how Wilt Chamberlain would have chosen, the *value* in money, goods or services that Wilt Chamberlain would have received in exchange for his holdings would in part be determined by the acquisition and transfer choices of all the other members of society at the time. So, to calculate the value of Wilt Chamberlain's holdings the URA would *simultaneously* need to know what choices everybody else made at t(INJ) and thereafter until t(R). This, in effect, represents in a manner similar to the requirement of equilibrium discussed earlier, a requirement to have acquaintance with the entire, aggregate, pattern of subjunctive choice of all members of society from t(INJ) to t(R). It is expressed clearly by Litan (1977, p. 238) who writes that this would amount to knowledge of 'the preferences of all persons throughout time (preferences between goods, between present consumption and saving, and between heirs) . . . in order to fix levels of compensation payments at each point of time'. Furthermore, and still staying within the limits imposed by Nozick's stipulation that the principle, being an historical process principle rather than an end-state principle, be applied to individual violations only, a significant minority of these other people in society, by virtue of whose choices Wilt Chamberlain's subjunctive level of material well-being must be at least in part ascertained, *would themselves have been victims of injustice*. In order to know what Wilt Chamberlain would have chosen to do and how

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much choosing to do it would have been worth, we must first of all know the same for these other victims at each and every point of time leading up to *t*(R). Yet, to know that for any one of them we simultaneously would have to know the same for all the others. Unfortunately, one of those others would be Wilt Chamberlain. We are led, therefore, into an insoluble vicious circle in which even if it can be ascertained what Wilt Chamberlain would have done, it remains unclear that it can be ascertained what he, or anyone else, would have received for doing it.[34]

Yet, to what degree do these criticisms stick on Nozick? Is it not too strict an interpretation to argue that, for the principle to work, it must work *perfectly*; that is, that the subjunctive information available be exhaustive for all cases? To be fair, Nozick himself seems to anticipate these epistemological problems when he says that '[t]he principle of rectification presumably will make use of its *best* estimate of subjunctive information about what would have occurred (or a probability distribution over what might have occurred, using the expected value) if the injustice had not taken place'.[35] One response would be to charge that this is merely the same argument that Wolff makes when he argued that deviations from present-day patterns are only significant if it is supposed that the pattern ought to be realized perfectly. As we have seen with regard to 'doing ones best', 'making a best estimate' will not overcome the problem of there not being an apprehensible level of subjunctive well-being. By virtue of what knowable criterion would one ever *know* when a 'best' subjunctive estimate had been arrived at?[36] Of course, one option open to some thinkers would be a tax regime to mitigate the effects of past injustices. However, notwithstanding the doubts one may

[34] Indeed, one could venture the claim that, just as with the determination of value, the URA could not even determine what *choices* Wilt Chamberlain would have made in the absence of knowing what choices the other members of society would have made and vice versa. Thus, the problem posed for the URA by an understanding of value as intersubjectively determined shifts to its reconstruction of subjunctive choice. Those choices are, like value, determined intersubjectively, that is, *within* a social matrix of other choices.

[35] Nozick (1974, pp. 152–53, own emphasis).

[36] Another problem that touches on the case of slavery mentioned earlier can be called the 'blessings in disguise' problem. It is quite often the case that an individual will lose a vast amount of money and then, years later, through a reformed life or improved business acumen, makes lots of money. Indeed, it is probably not too rare to find that people have become better off as a consequence of the change in their lifestyle following a dramatic downturn in fortunes. What of the cases, not innumerable but certainly not insignificant, where someone has ended up *better* off than they otherwise would have been were it not for the commission of some injustice against them (take the case of slaves)? According to Nozick's principle of rectification, it would seem that ex-slaves or their descendants deserve no compensation at all. However, how well does this sit with everyday moral intuitions?

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have regarding the success this option would have in overcoming the Instrumental Wilt Chamberlain Argument (given that the argument poses an epistemological problem, it seems that the *method* of revenue collection is irrelevant to that problem's solution),[37] it would not in any case be available to Nozick without serious compromise of the principles of justice in acquisition and justice in transfer. The Cohen/Wolff problem with regard to the present, then, becomes Nozick's problem with regard to the past.

In Nozick's system, then, one could never ascertain how much compensation should be given even if actually working out what a victim would otherwise have chosen to do, and how much he would otherwise have got for those choices presented no problems. The reason for this is that the attempted reconstruction of the past will fall foul of the same problem as the attempted construction of the present. Just as we are located within a present-day web of choice dynamically unfolding in the present we would also be located within a web of subjunctive choice in which individual choices we attempt to reconstruct were at least in part determined by the subjunctive choices of others. Like the present-day web of choice, this subjunctive web in turn determines the value of those subjunctive choices. Further, just as deviations from present-day patterns are cumulative, the longer rectification is left, the more havoc the subjunctive web 'grows' and plays irremediable havoc with the URA's attempt to effectively calculate subjunctive levels of well-being. As Litan (1977, p. 238) writes, 'the errors would be multiplicative, growing to enormous levels over time'. It is requirement b') and, in particular, the No Net Harm Criterion that nests in it, which makes Nozickian justice in rectification so vulnerable to the Instrumental Wilt Chamberlain Argument. As such, it is defeated by the force of Nozick's own critique of patterned theories of justice. Despite his expectation that present-day liberties will upset present-day patterns, Nozick failed to realize that subjunctive liberties equally would upset the reconstruction of subjunctive patterns for comparative purposes. For people choosing also means, people subjunctively choosing and, as we have seen, it is impossible to know how they would have subjunctively chosen unless we can simultaneously know how *they all would have chosen*. Each individual subjunctive choice has the power to effect

[37] But could this not be said about the voluntary fund idea brokered earlier? Probably so, however one significant factor that renders this objection irrelevant to at least one kind of voluntary fund would be that the fund does not pretend to know how much compensation should be given. After all, and in contrast to Nozick's preferred Involuntary Fund (taxation), part of the fund being voluntary is that not only does it not insist that one gives money, it does not insist upon how much one should give. Rather it leaves the decision to the conscience of the giver, given that debates concerning amounts are just as genuine as those concerning whether giving ought to take place at all.

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subjunctive distributional transformations, thus making the attempt to calculate morally adequate levels of compensation, in Wolff's words, 'mind-boggling' (1991, p. 115).

Thus, the Instrumental Wilt Chamberlain argument not only shows why present-day patterns are impossible to achieve, it also shows why retroactive principles of justice such as Nozick's are impossible to achieve. Whilst not demanding aggregate knowledge of patterns in the dynamically-unfolding present, they would demand knowledge of subjunctive patterns – of which there are an infinitely large number – as a necessary part of the subjunctive reconstruction of the past by the rectifying authority. Both demands are impossible to satisfy. Further, given the 'inductive nature of the definition of entitlement',[38] the edifice of the theory collapses if justice in rectification can be shown to be *in principle* unworkable. The principle of rectification deals the Entitlement Theory a fatal blow.

6. HAYEK'S KNOWLEDGE PROBLEM IS NOT ONLY NOZICK'S PROBLEM

Perhaps one of the most interesting aspects of these considerations is the interesting implication they have for the debate between Nozick and his critics. For instance, the Cohen/Wolff argument against Nozick with regard to perfection and present-day patterned principles of justice, becomes an argument in Nozick's *favour* as far as *rectification* is concerned: all Nozick has to say in response to Wolff's claim that the principle of rectification is mind-boggling would be that such a claim only exhibits force when taken as a claim against the realization of rectificatory justice *perfectly*. In other words, it is incumbent upon Wolff to explain why the mind-boggling claim makes Nozick vulnerable to criticism vis-à-vis rectification, but somehow does not tell in favour of the Instrumental Wilt Chamberlain Argument vis-à-vis present-day patterned theories of justice. And conversely, Nozickian justice in rectification is presumably immune to the Cohen/Wolff 'perfection' point to the same extent to which his Wilt Chamberlain argument against patterned theories of justice is blunted by it.

We are led, then, into the curious position where, on the one hand, Nozick wishes to deploy the Instrumental Wilt Chamberlain Argument against present-day patterned principles of justice, yet implicitly denies its truth when it comes to his own principle of justice in rectification. On the other hand, Nozick's critics implicitly and correctly rely upon instrumental considerations to rebut Nozickian justice in rectification as mind-boggling, but deny their force when it comes to present-day

[38] Davis (1982, p. 348).

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patterned principles of justice. Either way the results are not welcome for either side. If the critics accept it in order to reject Nozickian rectification then Nozick's argument against present-day patterned principles of justice holds. If they reject the Instrumental Wilt Chamberlain Argument against present-day patterned principles of justice then they must withdraw their critique of Nozickian justice in rectification as mind-boggling. Moreover, if Nozick accepts the Instrumental Wilt Chamberlain Argument then he must withdraw the patterned principle of justice in rectification from his Entitlement Theory. If he rejects the Instrumental Wilt Chamberlain Argument to save the principle of rectification and with it the Entitlement Theory, then the most telling aspect of the Wilt Chamberlain argument is a non-starter. The reason for this state of affairs is that both sides are mistaken: present-day patterned theories of justice *and* Nozickian rectification are bound to be failures for the reasons that Hayek's work makes clear: the impossibility of the construction or reconstruction of a fully rational aggregate economic order and the corollary that, *ex nihilo*, it is in principle unknowable who should give what to whom. To be fair, Nozick was aware of the potential difficulties that would beset pursuit of justice in rectification at the time of writing *Anarchy, State and Utopia*. He presents a plethora of questions before outlining the principle:

> What obligations do the performers of injustice have toward those whose position is worse than it would have been had the injustice not been done? Or, than it would have been had compensation been paid promptly? How, if at all, do things change if beneficiaries and those made worse off are not the direct parties in the act of injustice, but, for example, their descendants? Is an injustice done to someone whose holding was itself based upon an unrectified injustice? How far back must one go in wiping clean the historical slate of injustices? What may victims of injustice permissibly do in order to rectify the injustices being done to them, including the many injustices done by persons acting through their government? (p. 152)

However, one missing question is whether such a principle is workable on any systematic basis. For Nozick to advance a principle of rectification in such a scanty form and, no less, in a manner that appears blind to many of his most piercing critical insights, renders the Entitlement Theory fatally flawed and his wider project methodologically self-contradictory. If Nozick had considered the ramifications of the Instrumental Wilt Chamberlain Argument in more detail and within the context of his own at times rather 'Hayekian' project, he would have been better served leaving rectification out of *Anarchy, State and Utopia*, altogether. To be sure, Hayek's Knowledge Problem poses a question, like those Nozick does pose, which needs to be answered by *any* theory of rectification, with the perhaps unwelcome consequence that the

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arguments here presented may be deployed against such theories in general. Whether *this* would cheer the hard-done by is, clearly, another matter.

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