

# TRADING ON IGNORANCE: AMENDING INSUFFICIENCIES IN NOZICK'S ENTITLEMENT THEORY

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## I. Introduction

Libertarian ideas are increasingly prevalent on both popular and intellectual fronts (Huemer, 2013; Silver, 2011; Fuller, 2014; de Rugy, 2013). One of the most contentious issues regarding libertarian philosophy is the moral fairness of its theory of distributive justice. By exploring a particular facet of Nozick's entitlement theory, I confront the claim that this theory, as well as other libertarian accounts, provides an adequate description of procedural justice. I agree with Nozick that "a distribution is just if it arises from another just distribution by legitimate means" (Nozick, 1974, 151). However, I believe that his entitlement theory as it currently stands is incomplete. By focusing on a particular inadequacy of the principle of justice in transfer, my hope is not to upset the Nozickian project, but instead to modify entitlement theory, thereby creating a more robust account of distributive justice. However, in doing so I mean to show that a procedurally just entitlement theory will be inconsistent with a central principle of libertarian philosophy.

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Nozick does not actually present the principles of entitlement theory in their full form, remarking that “to turn these general outlines into a specific theory we would have to specify the details... [but] I shall not attempt that task here” (Nozick, 1974, 153). Rather, he presents us with an intuitively convincing formal framework, which he then supports with *implied content* by the use of examples and explanation. In particular I shall be interested in the principle of justice in transfer and the implied content that Nozick gives it. My first aim is to show that Nozick’s entitlement theory as supported by his implied content can result in transactions which are intuitively unjust. I agree with Nozick that justice is procedural, but I disagree that the implied content he gives it is sufficient to meet the requirements of justice.

I will propose a counter example that I believe Nozick would agree is unjust although it is consistent with the implied content of his formal principles. I will show that Nozick is committed to believing that it is unjust, in part, because the agent’s actions are inconsistent with the particular Kantian-brand normative theory that Nozick espouses. By showing that the implied content is insufficient, it follows that many of his subsequent claims in regard to the permissibility of a certain set of market transactions ought to be judged as morally and/or legally wrong according to Nozick’s own political and moral foundations. Furthermore, I will show that the Non-Aggression Principle is inconsistent with what a procedurally just entitlement theory would require, and therefore diminishes the degree to which a full-fledged account of distributive justice can properly be called libertarian. Finally, I offer a principle intended as a starting point for a discussion of what constitutes just transfer, and briefly speculate as to the legal results of implementing such a principle.

## II. The Formal Principles of Nozick’s Entitlement Theory

The explicit principles of Nozick’s entitlement theory are as follows:

1. A person who acquires a holding in accordance with the principle of justice in acquisition is entitled to that holding.
2. A person who acquires a holding in accordance with the principle of justice in transfer, from someone else entitled to the holding, is entitled to the holding.

3. No one is entitled to a holding except by (repeated) applications of 1 and 2 (Nozick, 1974, 151).<sup>1</sup>

Since this account stipulates protecting individuals that freely trade justly-acquired resources, the account is quite compelling, even to those disagreeing with the results. Nozick himself points out that we do not really have a theory here, only the formal outlines of one. I believe that the problem arises when Nozick starts discussing what I call the implied content in his theory.<sup>2</sup>

### III. Implied Content

Nozick asks, “how may a person acquire a holding from another who holds it? Under this topic come general descriptions of voluntary exchange, [trades], gifts, and on the other hand fraud, as well as reference to particular conventional details fixed upon in a given society”<sup>3</sup> (Nozick, 1974, 150). He goes on to admit that what he presents may not be exhaustive: “the complicated truth about this subject (with placeholders for conventional details) we shall call the principle of justice in transfer” (Nozick, 1974, 150). Nozick is essentially saying that voluntary transfers are just when they proceed from just initial holdings, leaving some wiggle room to fully define what constitutes a voluntary transaction. Some libertarians, such as Rothbard, construe the notion of a voluntary transaction quite widely, while others, such as John Hospers, admit that voluntary choice is much narrower than commonly conceived due to external forces such as social pressure and extreme poverty (Hospers, 1982; see also Rothbard, 1982; Block, 2008). However, even if we grant the widest net possible and give the more radical libertarians the point by saying that these external forces cannot be counted as constraining individual choice, this will still not be enough to account for the gap in Nozick’s second principle of distributive justice.

We can draw the implied content of entitlement theory more fully from pages ix, 26, 149 151, 152, 172, and 179 of *Anarchy, State, and Utopia*. There are two aspects of this implied content: negative, designating what one may

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<sup>1</sup> Nozick also discusses a principle of rectification of injustice in holdings, but that falls outside the scope of this paper. (Nozick, 151).

<sup>2</sup> I will only discuss the implied content as it relates to the principle of justice in transfer, as that is what will be in question here.

<sup>3</sup> This remark is particularly interesting since it implies there are some context-dependent moral facts operating; however, this slight constructivist bent does not have significant importance for my discussion.

not do, and positive, designating what one may do. Nozick spells out what is impermissible in the negative sense: “some people steal from others, or defraud them, or enslave them, seizing their product and preventing them from living as they choose, or forcibly excluding others from competing in exchanges. None of these are permissible modes of transition from one situation to another” (Nozick, 1974, 152). He does not specify whether these are *all* of the measures by which one can come to improperly hold something via transfer. Yet it is extremely difficult to think of an example that does not fall under any of the criteria Nozick lists.

The implied content in the positive sense is that the trade was a voluntary transaction conducted by persons, i.e., free beings with rational capacities (Critchley, 2007, 4; for more on persons and choices see Shapiro, 1995, 104; Romar, 2009). Nozick claims, “What each *person* gets, he gets from others who give it to him in exchange for something, or as a gift. In a free society, diverse persons control different resources, and new holdings arise out of the voluntary exchanges and actions of *persons*” (Nozick, 1974, 149; see also Rothbard, 1982; Barnett, 1992; Kinsella, 2003).

I will contend that it is possible to have an unjust transfer even where there are rational, autonomous, consenting adults of clear mind in a situation where there is no force, no fraud, and no external pressure except through rational incentives.<sup>4</sup> I believe Nozick is committed, albeit unwittingly, to this contention as well. Now I will turn to a thought experiment to test the principle of justice in transfer against our intuitions.

#### IV. The Scenario

Imagine you live in a small village with 100 other individuals. Each member of the village has the same preferences and utility functions, the same rational and physical capabilities, and reacts to the environment in an identical manner. All villagers have a similar aversion to darkness and thus sleep and awaken at the same time. There is only one commodity in this community that is valuable, the berries that can be harvested from trees that surround the village. There are no social rules regarding how many each individual can harvest, and the trees, being natural resources, are unowned.<sup>5</sup>

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<sup>4</sup> For more information on the necessary condition for contracts, see “Contracts” (2008).

<sup>5</sup> Under Locke’s account of property acquisition, the trees and berries are owned in common by all the villagers insofar as all have an equal right to harvest (Locke, 1690, 15-20). However, Locke also argues “that labor put a distinction between them and

There are of course a finite number of these trees: 1,000 to be exact. Every night, each tree grows 10 berries, and once they are harvested the following morning, they will not regenerate again until a full night has passed. Since all workers have the same rational and physical capacities, they operate with identical efficiency in the harvesting of berries.

Thus, each member of the village goes out each day to harvest the fruit that had grown the previous night, precisely 10 pieces per tree. Since everyone desires berries equally, has the same ability in berry harvesting, equal access to berries, and harvests at the same rate, they each gather 100 berries per day. Everyone gathers berries in such a manner that they acquire them strictly from nature by their own labor. According then to the Lockean principle of homesteading in conjunction with the notion of self-ownership—which Nozick adopts—they have each obtained these berries justly (Nozick, 1974, 178; Locke, 1690, 16-20; see also Mack, 2009).

	<b>Berries Harvested</b>
Community Total	10,000
Per Person	100

Imagine you are one of these villagers. One evening, after the harvesting but before dark, a village member named John approaches you with the following proposal: he will give you a single berry tonight in exchange for your eternal commitment to never again harvest from a specific set of 100 trees in the area north of the village. At first his proposition sounds disadvantageous to you, but you consider it rationally. Under his offer you would have no particular commitment not to harvest from any of the

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common: that added something to them more than nature, the common mother of all, had done; and so they became his private right” (Locke, 1690, 9). In Locke’s account each villager owns the berry he harvests so long as it does not spoil under his ownership and that he leaves as much and as good for others (Locke, 1690, 16-20). Thus each villager in the thought experiment is entitled to the berries he picks from the trees under the competitive model, assuming that far fewer berries are required for self-preservation. Furthermore, villagers in the thought experiment could not come to appropriate a set of trees by attempting to fence them in for two reasons: the first is one of access rights, which is implied by the continual and competitive harvesting of the forest (Locke, 1690, 14-21). The second reason is that, unlike the berries, the trees themselves are not improved by the labor in this example, and appropriation of resources only occurs in Locke’s account if there is “labor mixing” (Locke, 1690, 15-27). For a more complete account of Locke’s proviso see (Mack, 2009).

other 900 trees. You take some time and conduct an in depth analysis. You reason on the basis of current harvesting patterns and on the basis of the new contract with John. This involves considering the harvesting patterns of the other community members from the total 1,000 trees and your harvesting patterns utilizing only the 900 other trees. With these assumptions you accurately calculate that, using only those 900 trees, you are capable of harvesting the 100 berries that you were always able to competitively harvest.

In terms of results, John's offer looks like this: you give up the right to harvest from 100 trees that you need not ever harvest from again anyway, and you gain 1 berry.

Total Revenue – Total Cost = Profit

$$1 - 0 = 1$$

Since your net gain from the deal is 1 berry, the choice is easy: you make the deal with John.

What you do not know, however, is that John made the same offer to everyone else in the village. Everyone else reasoned in a similar way and came to the same conclusion as you. The result is that through the agreements, John is now the only member of the tribe with the right to harvest from all 1,000 trees. Every member in the tribe except for John is incapable of harvesting from those 100 trees via legal agreement and thus can only harvest from the other 900 trees.

Below is the distribution on the day that every villager made a deal with John:

	<b>Berry Holdings</b>
Community	10,000
Per Person (except John)	101
John	0

Below is the new distribution for every day after the day of the trade:

	<b>Berry Holdings</b>
Community	10,000
Per Person (except John)	90
John	1090

On the day the trade was made, John went hungry and all of the other villagers ate slightly more. Every day after the trade, John will feast, while

everyone else in the village will eat 10% less than they had each day before the trade.<sup>6</sup> This new distribution is not at all what each individual tribe member expected, except John. Each individual traded on the very premise that they would still be able to harvest 100 berries per day. Furthermore, assuming that nobody else's behavior would differ, they all accurately calculated the results. Of course, this was a false assumption and so their calculations were flawed. John traded with all members of the tribe on the premise that they would not know the results and with the purpose of attaining the exclusive right to harvest from those 100 trees. Each villager made the right decision given the information at hand, but without knowing John's intention, or the trades the other villagers had made, they all committed themselves to reducing their own harvesting capacity.

## V. Analysis of the Scenario

On the basis of our intuitive judgments it seems clear that John's action is morally wrong. I will expound in much greater detail section VII why John's action is wrong and should be prohibited. However, before moving forward I want to make three brief points in order to ground this intuition. First, each villager except John not only failed to anticipate the result, but given what they knew at the time, had no strong reason to suspect what would happen. Second, the result itself was that one individual benefitted at the *deliberate* expense of ninety-nine others. Finally, and most relevant to Nozick, each individual would not have engaged in the trade if they had known John's goal.<sup>7</sup> Let us now see if this transaction is legitimate according to entitlement theory.

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<sup>6</sup> After harvesting his share of berries from the other 900 trees, bringing him to 90 berries, John will then begin harvesting, free from competition, from his newly acquired lot of trees. I have not gone into detail on the production capacities of each person, or their utility functions analyzed in accordance with labor, berries, and free time. We might speculate that at a certain number of berries the marginal utility gained from each additional berry is not worth the labor cost necessary to harvest it. One can then conceive a case where John either lets those berries go to waste, or makes trades with the other villagers such that they are allowed to harvest from those other 100 trees so long as part of their harvest is given to John. While these are interesting microeconomic details, they are not of immense import here because they are not relevant to our moral judgments of the case.

<sup>7</sup> An anonymous reviewer poses an interesting question: why should the person who accepts the extra berry assume he is the only one to whom an offer has been made? Why would he not ask himself, 'why am I being offered the berry?' Perhaps the people who

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To determine whether or not the final holdings are just according to Nozick's theory we need to establish whether or not they are in accordance with the principle of justice in acquisition and justice in transfer. According to principles of Lockean homesteading, each individual is entitled to the berry he harvests because he mixed his labor with it (Locke, 1690, 16; see also Nozick, 1974, 175; Rothbard, 1982, 63). Furthermore, according to the principle of self-ownership, each villager owns his individual labor capacity, meaning he can make binding contracts with respect to the ways he utilizes it (Locke, 1690, 13-15, Nozick, 1974, 34; see also Mack, 2009, 55-65). Furthermore, Nozick contends that the purpose of the state is "limited to the functions of protecting all its citizens against violence, theft, and fraud, *and to the enforcement of contracts*" (Nozick, 1974, 26). Since what John traded was a berry which rightly belonged to him and what each villager traded was their own natural right of access and use, in accordance with Locke's principle of homesteading, we can say that both parties to the trade had just initial holdings. Thus, *absent any violation of the implied content*, the contract between John and the villagers is now enforceable (Locke, 1690, 16-27; see also Nozick, 1974, 150; Rothbard, 1982). In order to establish whether or not the final state of holdings is just, we need only determine whether or not the transaction itself, by which the initial holdings were traded, was just.

Let us first consider whether the trades between John and each of the respective villagers violate the negative implied content of entitlement theory.

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end up worse off are simply the victims of their own poor judgment, not the unjust actions of the person who winds up better off. This is a salient point and raises the question of how responsible one is for failing to make good judgments. Yet, as in this case, it is very easy to point out after the fact that people aren't assiduous enough in asking questions. This may be a case of hindsight bias where respondents see someone as more or less responsible only after knowing the outcome (Labine, 1996, 501-516). Also, while the villager may not have had good reason to believe that John wouldn't transact with anyone else, he also did not have any good reason to believe that he did.

However, suppose we grant the point and say the villagers are responsible in this case for their own poor judgment, how far does this go? In the case of the secret bidder (discussed below), for example, there is no practical way that all of the individual sellers of the product would be able to learn the intentions of the bidder. If the barriers to gaining this information are sufficiently high, it seems quite plausible to argue that one's *ability to consent to a trade* is being undermined, and thus our moral judgments against such transactions hold. We can make this a bit more formal by articulating it as follows: the responsibility of the ignorant party in such trades decreases as the cost to gaining the relevant information increases.



Nozick specifically mentions three types of violations: theft, force, and fraud (Nozick, 1974, 26). Regarding force, John never issued any threat of intimidation, physical or otherwise. He did not use physical measures to keep others from harvesting the 100 trees, nor did he ever affect the bodies, or minds, of other agents, except through speech. John's only interaction with other agents in this matter was a verbal offer containing no threat of violence, or harm.<sup>8</sup> The offer was one that could be declined and one that John would have honored if it were. Furthermore, since the consideration of exchange on the part of the villagers was the forfeiture of access rights in accordance with Lockean self-ownership and homesteading, it is impossible for John to have stolen it (Locke, 1690, 16-27; see also Mack, 2009, 58-60). The villagers honor the agreement after the trade was made by no longer harvesting from those trees of their own volition. It seems then that we can safely eliminate theft and force without much controversy.

This leaves us with only fraud to consider, and while at first face John's act seems fraudulent, it does not conform to any definition of fraud. Fraud is typically defined as "in law, the deliberate misrepresentation of fact for the purpose of depriving someone of a valuable possession" ("Fraud," 2014) see also Barnett, 1992). This may seem to fit John's act, but for a notable problem: this definition implies, if not entails, an act of deception. Acts of deception are deliberate and involve purposely giving someone misinformation, or leading them to believe something is true when in fact you know it is not. Yet John never lied to or misinformed the villagers, or gave them any information that was not true. All of John's statements were completely factually accurate and all obligations he committed too, he upheld. Not even in the interpretation of the trade that we can find fault with John, as the explicit terms of the deal were fully agreed upon and met by both parties whereby they each gave *consideration* ("Contracts," 2008; "Consideration," 2014) Randy Barnett puts it this way: "a duty to disclose is not warranted by this analysis of fraud when the seller remains silent about a fact that does not concern the substance of the rights being transferred... he commits no fraud provided that he delivers [product] of a quality and quantity conforming to the rights that were communicated and transferred" (Barnett 1992, 803). Each villager received from John what was promised, a single berry, in exchange for giving up certain harvesting rights. Since there was neither (a) an action on the part of John to misinform the other party or (b) a failure of John to uphold his end of the bargain, or (c) misinformation

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<sup>8</sup> By "threat of harm," I do not mean there is no possibility of harm resulting from the contract, I mean that there is no *coercion* impelling one party to accept the contract.

about the consideration being traded, it therefore seems impossible to legitimately label his behavior as being fraudulent.

Turning now to the positive implied content, Nozick states, “Whoever makes something having bought or contracted for all other held resources used in the process (transferring some of his holdings for these cooperating factors), is entitled to it” and also, “from each as they choose, to each as they are chosen” (Nozick, 1974, 160). The positive implied content of Nozick’s principle of just transfer judges contracts as legitimate and therefore enforceable, if consenting persons agree to them, notwithstanding the aforementioned cases of force, fraud, or theft.

John was indeed, *relying* upon each villager to come to a false conclusion, but he did not lead them to that conclusion, or give them information that would even suggest that conclusion.<sup>9</sup> John merely approached each villager with an offer, and left the reasoning up to them. The trade was made voluntarily, whereby each person traded in consideration something belonging to them. On the one hand, every individual in the village agreed *not to partake in labor* with regard to a particular set of natural resources. On the other hand, John traded a berry that he justly acquired. Since the consideration was delivered from both sides in the way agreed upon by consenting parties of rational agents, the contract and its fulfillment is morally legitimate according to Nozick’s implied content (Nozick, 1974, 160; see also “Contracts,” 2008; Kinsella, 2003; Rothbard, 1982; Barnett, 1992).

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<sup>9</sup> An anonymous reviewer remarks argues that John does not really encourage others to make errors. This in turn means it is not clear whether John is doing harm when he allows people to make the contract. The idea is that if we care about actual, demonstrable harm, then John is not culpable, because there is no clear harm being done in making the agreement—even though it turns out after the fact that harm has been done.

The reviewer makes a subtle argument by pointing out that John is not *doing harm* in an identical sense that someone who lies, assaults, or steals does harm. The harm in the latter cases is different from the harm John inflicts, because in the latter cases the harm is necessitated and directly caused by the aggressor. The harm in the case of John’s contract is done with the assistance and consent of the harmed. However, while John would have respected the villager’s wishes had they declined the terms proposed, I do not think this is sufficient to argue that John has not intentionally caused harm. John is still doing harm, because the goal of his action requires that the people he interacts with are worse off. Furthermore, I argue that the meaningfulness of consent has been undermined because the villagers do not have sufficient information. If one signed a convoluted contract that had the effect of making one a slave, would we say they were not harmed by the contract?

## VI. Nozick's Similar Case: The Secret Bidder and the Lockean Proviso

After exhausting both the positive and negative implied content of Nozick's entitlement theory, we can see that John's trade is completely within the bounds of entitlement theory *as it is currently understood*. Nozick, however, worked out a strikingly similar case in his discussion of the Lockean proviso. There are unmistakable parallels between John's contract and Nozick's case, which presents a secret bidder who acquires a monopoly from a multitude of ignorant sellers. His explanation of the injustice of this case ultimately rests on his interpretation of the proviso, but I will show that this explanation cannot cover the case of John's contract. Therefore, we will subsequently consider a different explanation of the injustice that arises in both cases.

The case of the secret bidder is as follows:

Imagine someone makes simultaneous secret bids to separate owners of a substance, each of whom sells assuming he can easily purchase more from the other owners; or some natural catastrophe destroys all of the supply of something except that in one person's possession. The total supply could not be permissibly appropriated by one person at the beginning. (Nozick, 1974, 180)

This passage leaves us with the following question: why are the actions of John and the secret bidder wrong? An astute reader of Nozick might believe that the injustice in from a violation of the Lockean proviso via impermissible transfers. Nozick argues that the "historical shadow of the Lockean proviso" follows each transaction, meaning that an individual is excluded from "transferring it into an agglomeration that does violate the Lockean proviso" (Nozick, 1974, 180; see also Vallentyne, 2012).

Nozick seems to believe that what makes the secret bidder's action wrong is that he violates the proviso. However, John's contract, although being similar, does not violate the proviso, because the proviso merely stipulates that "enough and as good [be] left in common for others" (Locke, 1690, 16; see also Nozick, 1974, 175; Mack, 2009, 63). Provided that 90 berries or fewer satisfy the condition, John is not then violating the Lockean proviso. This conclusion is supported by both Mack's and Nozick's interpretations<sup>10</sup> (Nozick, 1974, 175, Mack, 2009, 63). Whatever amount we stipulate as "enough and as good," whether it is 98 berries or 10 berries, the wrongness of John's act, though possibly changing in severity, does not change in kind—his act is still wrong. If the categorical wrongness of John's

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<sup>10</sup> For an excellent discussion on this aspect of the Lockean Proviso see (Mack, 2009, 63).

act is not connected with where we set the limit of the proviso, we must look elsewhere to find the immorality of the act. The same seems true in the case of the secret bidder, such that the actions of the bidder are morally wrong whether or not he appropriates the entirety of a resource or half of it.

Of these similar situations, consider which of the following options is in keeping with the principle of parsimony:

1. That there are two completely different reasons for each case being unjust.
2. That what is wrong with the case of the secret bidder is the violation of the proviso, and that our intuitions are mistaken regarding the case of John's contract.
3. That the same thing is wrong with the case of the secret bidder and the case of John's contract, namely that the individuals involved in the trade are being taken advantage of because they are ignorant of a fact that is morally relevant to whether they accept or decline the transaction.

Given the similarities between the two sorts of action, it seems far more likely that our intuitions are motivated by the same sort of wrongness. There may be a degree to which the proviso is morally relevant in the case of the secret bidder, but it has to do with harm to third parties, and not the direct harm to the traders in question.<sup>11</sup>

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<sup>11</sup> Further, consider that if in the case of the secret bidder the other parties were actually informed of the depletion of the special material before the trade, but went through with the trade anyway because of some other important reason, would the trade be permitted despite violating the proviso? Barring third party considerations, Nozick would presumably think such a trade to be legitimate as it is in keeping with treating individuals as ends in themselves (Critchley, 2007, 4; Kant, 2009, 96; Nozick, 1974, 30; Shapiro, 1995; Romar, 2005). Imagine a similar thing were to happen in the case of John's contract. Suppose, for example, that for each villager the value of one berry today were greater than the value of ten berries tomorrow and on all subsequent days (for time sensitive preferences, see Hansson and Till, 2012). Imagine also that John told each villager of his intent, but they all consented to the trade anyway because of their time-sensitive preferences. It would seem that this too would be morally permissible even if it were a violation of the Lockean proviso. Thus, we would conclude that even in cases where individuals give up their right to acquire natural resources, if they do so freely and on the basis of complete and relevant information, then a violation of the proviso is no longer of moral relevance.

We first established that John's contract, although consistent with Nozick's implied content, is morally illegitimate. We then considered Nozick's case of the secret bidder and agreed with Nozick that it was illegitimate, but disagreed that this illegitimacy stems from a violation of the proviso. Instead, it seems more plausible that the wrongness of both cases stem from taking advantage of the ignorance of others in a way that is detrimental to them. Nozick is committed to the moral judgment that the actions of the secret bidder should be legally prohibited from the perspective of entitlement theory. If the same sort of wrongness is present in John's case that is present in the case of the secret bidder, and no other morally relevant difference is present, it follows that Nozick should also be committed to the view that John's contract is illegitimate according to a *fully developed* entitlement theory. To find the fundamental source of these moral propositions I will investigate the roots of Nozick's ethical theory in hopes of finding a way to repair this serious gap in the implied content of his entitlement theory.

## VII. Nozick and Kantianism

Both the case of the secret bidder and John's contract share a common feature: an agent is relying on the ignorance of the person he is trading with in order to make a deal that is better for himself, knowing that if the other party knew his intent, they would not agree to the deal. I contend that the wrongness of these cases is similar to the wrongness in cases of fraud. Cases of fraud and certain cases of non-disclosure undermine or bypass the ability of a party to rationally agree to a set of terms. This sort of wrongness can be traced to violations of Kantian first principles that Nozick himself continuously references and identifies as one of the moral pillars of his political theory. In particular, Nozick draws from Kant's principle of humanity, which holds that one should, "treat humanity whether in yourself or in the person of any other, always as an end-in-itself and never merely as a means" (Kant, 2009, 96). In relation to the state, Nozick puts it quite elegantly:

[T]he 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 cooperation of other individuals possessing the same dignity. (Nozick, 1974, 334; emphasis added)

Yet, does the minimal state truly respect us as individuals if it allows us, by virtue of its enforced laws, to be unjustly co-opted in the ways previously outlined?

Korsgaard contends that “to treat someone as a *mere* means, is to use her to promote your own ends in a way to which she herself could not possibly consent” (Korsgaard, 2004, 3). When trading on the ignorance of others we undermine the ability of other people to possibly consent to the trade because they do not understand the morally relevant ways in which the trade will affect them. This then is the source of wrongness in the case of John’s contract.

So, how can it be that Nozick’s own entitlement theory fails to capture the full spirit of Kant’s principle of humanity? The problem derives from Nozick’s view of rights in the negative sense, i.e. seeing rights as being preserved by ‘not being violated.’ As he puts it, “side constraints upon action reflect the underlying Kantian principle that individuals are ends and not merely means; they may not be sacrificed or used for the achieving of other ends without their consent. Individuals are inviolable” (Nozick, 1974, 31). Many thinkers have pointed out that Nozick falsely believes this is sufficient to fulfill the Kantian proclamation<sup>12</sup> (Goldman, 1976, 823-833; Exdell, 1977, 142-149).

What is worse is that Nozick believes that in order to violate someone’s rights, it cannot be merely that they are being used, but further, that they are being used only in certain ways.

Another party, however, who would not choose to interact with you if he knew of the uses to which you *intend* to put his actions or good, is being used as a means, even if he receives enough to choose in his ignorance to interact with you. ‘All along, you were just *using* me’ can be said by someone who chose to interact only because he was

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<sup>12</sup> Alan Goldman argues that, “[if] a redistributive system will maximize satisfaction of Kant’s principles, given that under it fewer will be in need and more will be able to formulate meaningful life plans, do we as members of a moral community or state have the right to interfere with the free activity (spending or saving) of some in order to realize this situation? Do we have a right to force it upon the wealthy? A negative answer would first of all assume that taxation is equivalent to treating others as means, which I questioned above. On a deeper level, I admitted above the intelligibility of the distinction between the two types of moral system, but not the rationality of accepting the “side constraint” type. To refuse to violate the absolute freedom of those who fail to recognize the rights of others arising from basic needs, is to press the distinction between positive and negative duties to an irrational point.”

ignorant of another's goals and of the uses to which he himself would be put. Is it morally incumbent upon someone to reveal his intended uses of an interaction if he has good reason to believe the other would refuse to interact if he knew?... These and related questions raise very interesting issues for moral philosophy; but not, I think, for political philosophy. (Nozick, 1974, 32)

Here I believe Nozick is in error. His distinction between acts that are and are not politically relevant follows a loose demarcation between acts that are aggressive and acts that are not aggressive. Nozick asserts the following: "political philosophy is concerned only with *certain* ways that persons may not use others; primarily, physically aggressing against them"<sup>13</sup> (Nozick, 1974, 32). There are several examples of topics that Nozick's distinction would rule out, despite their apparent relevance to political philosophy: privacy rights, positive duties, discrimination, and in this case, the question of what constitutes a procedurally just transfer.

In fact, given Nozick's commitment to the importance of consent, it is difficult to see how he could maintain that something as crucial as the *conditions of that consent* could be seen as irrelevant to political matters. I therefore offer the internal critique that Nozick's position is inconsistent with his Kantian foundations in that it does not sufficiently protect the autonomy of the individual by ensuring proper conditions of consent. To clarify, consider that Nozick draws his political philosophy from an interpretation of Kantian autonomy, one that he references but leaves ambiguously undefined (Nozick, 1974, 31, 32, 33, 228, 337n1, 338n8.) In order to know whether or not something is in accordance with Kantian autonomy, we need to specify conditions of legitimate consent. My claim is that a failure to disclose relevant information, as in the case of John's contract, can fail to satisfy conditions of legitimate consent, thus undermining the legitimacy of the transaction. This means that a more complete entitlement theory must reckon with my challenge that the positive duty of disclosing certain information is crucial to a just transfer.

### VIII. John's Contract and Problems for the Non-Aggression Principle

I imagine that not all libertarians, Nozickean or otherwise, would want to bite the bullet and conclude that John's action is either morally or legally permissible. We might put the question better this way, 'should a libertarian

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<sup>13</sup> Note that the example of sexual fantasies he considers on p.32 is a markedly apolitical example.

judge, hired either by the minimal state or a private adjudication agency, rule the contract between John and the rest of the villagers as void or legitimate?’

If Libertarianism has a central axiom, it is that of the Non-Aggression Principle, which holds that, “the use of force is permissible only in response to initiated force [aggression]” (Kinsella, 2001, 15; see also Rothbard, 1982; Rand, 1963, 108; Block, 2008). Of course a great variety of actions can be conceived as acts of aggression including: intimidation, force, fraud, and theft. Thus, the question becomes, “can John’s contract or enforcement of it, in some way, constitute an act of initial aggression?”

We have already concluded that John’s contract cannot be conceived of as an act of force, theft, or fraud. However, is there some more nuanced way in which John’s contract violated the rights of another party? Libertarianism generally holds that “each agent has a right to maximum equal empirical negative liberty, where empirical negative liberty is the absence of forcible interference from other agents when one attempts to do things” (Vallentyne, 2012, 2<sup>nd</sup> par; see also Nozick, 1974, 31). According to this negative rights view, individuals do not have positive duties to one another, unless those duties were already formed via acts of consent, in which case violations of those duties would be negative rights violations of your property (Rothbard, 1982, 63; Kinsella, 2001, 20). Since the wrongness of John’s contract constitutes a failure to uphold a positive duty and not a negative duty, it seems impossible for libertarianism to count it as a violation of rights. It would further seem that John’s enforcement of the contract is not an act of initial aggression and therefore is not subject to the non-aggression principle. This brings us to the following argument:

1. The non-aggression principle states that only acts of initial aggression are subject to coercion
2. John’s action of enforcing the agreement is not an act of initial aggression
3. Therefore John’s action of enforcing the agreement is not subject to coercion according to the non-aggression principle
4. Under any legitimate account of entitlement theory, John’s action of enforcing the agreement is impermissible and subject to coercion
5. The non-aggression principle is inconsistent with a legitimate account of entitlement theory

A libertarian may want to deny premise #2, but doing so would be to admit that John has a *positive duty* to disclose information as an essential part



of libertarian contract theory. However, the leading libertarian theory of contracts, the title-transfer theory, lends support to the legitimacy of John's contract. Rothbard describes title-transfer theory by saying "far better for libertarian contract theory is to hold that when two parties act to transfer titles, and neither is under threat of physical violence, then the contract is thereby revealed as voluntary, consensual, and valid" (Rothbard, 1982, 63). Rothbardian conditions of exchange have indeed been met as highlighted earlier (see section V). Further, libertarian legal theorists hold that mental states are *not* grounds for illegitimacy. As Rothbard states, "there can be no property in someone's promises or expectations; these are only subjective states of mind, which do not involve transfer of title, and therefore do not involve implicit theft" (Rothbard, 1982, 63). Kinsella reinforces this by asking, "why can a person be forced to perform or be liable for failure to perform a promise, just because it is "relied" upon by another?" (Kinsella, 2001, 20). These theorists hold that mere reliance or expectation of something to happen is *not* sufficient to invalidate a contract. Since the exchange between John and the villagers meets the criteria of title-transfer theory, it seems apparent that the libertarian judge is committed to upholding the contract.<sup>14</sup> The argument can then be formulated as follows:

1. Libertarian contract theory says that contracts are only invalidated by violations of the non-aggression principle
2. John's contract is not a violation of the non-aggression principle
3. Libertarian contract theory would not invalidate John's contract
4. Under any legitimate account of entitlement theory, John's contract should be invalidated
5. Libertarian contract theory is not a legitimate account of entitlement theory

In conclusion, the denial of the legitimacy of John's contract depends on a positive duty to disclose information, a duty that libertarian contract theory denies. Therefore, the libertarian judge must either bite the bullet, accepting the legitimacy of John's contract, or he must deny libertarian contract theory, resign, and give up his gavel.

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<sup>14</sup> There are other Libertarian theories of contract to consider but they would require positive duties of disclosure in order to avoid this contention and that is a requirement that Libertarian theories seem unlikely to require. See also (Barnett, 1992; Kinsella, 2001).

## IX. Other Critiques and Replies

In his critique of Entitlement Theory, G.A. Cohen directs an attack toward Nozick similar to the one given here:

[Y]et we should surely also be disturbed if we can indeed see what the agent *thinks* he is gaining, but we know what he *will* gain is not that, but something he thinks less valuable; or that what results is not only the gain he expects but also unforeseen consequences which render negative net value, according to his preferences and standards, of the transaction. We should not be content if what he *thinks* he is getting is good, but what he actually gets is bad, by his own lights. I shall assume that Nozick would accept this plausible extension of his concession. It is hard to see how he could resist it. (Cohen 1995, 23)

Cohen then formulates his own principle of entitlement as follows:

Whatever arises from a just situation as a result of fully voluntary transactions which all transacting agents would still have agreed to if they had known what the results of so transacting were to be is itself just. (Cohen, 1995, 23)

Yet, where Nozick's principle was too narrow, Cohen's is far too broad, as it would rule as impermissible actions that are clearly morally legitimate, including insurance, financial investments, medical surgeries, drug purchases, and countless other transactions. This principle would also rule out a fundamental economic activity: the starting of new businesses. Investing one's own money and efforts into a business of choice is a voluntary undertaking that may indeed result in a worse outcome for one's self and family, as the business may not be successful. Is Cohen committed to arguing that starting a business is unjust? If Cohen is not claiming this, but instead believes that starting one's own business is only unjust if it fails, he is then committing himself to an even stranger position. This would be the view that the justice of the transaction and its corresponding permissibility depend on an unknown future result. Such a doctrine of the '*moral indeterminacy*' of action makes Cohen's principle untenable.

Another critic of Nozick, Edward Quest, rightly points out that Nozick's entitlement theory does not account for cases in which the individual, upon learning new relevant information, would rationally wish to change his prior action:

[G]eneralizing from the case [of Oedipus accidentally sleeping with his own mother], [we can see that] revaluations of voluntary actions can occur without any logical oddity as soon as one learns that what was chosen under one description can be redescribed correctly as an

action which one would not have chosen voluntarily. (Quest, 1977, 204-208)

Lederkramer responds by pointing out “the requirement that people voluntarily choose the distribution is not a necessary step in Nozick’s argument; that they voluntarily choose the transactions which account for the distribution is a necessary step, and it is satisfied by the Chamberlain Example” (Lederkramer, 1979, 219-222). Yet this is the point of contention. In accordance with Quest’s argument, we might ask whether or not the individual transacting has a ‘right of reasonable expectation’ in the terms of the trade. For example, if I buy a slice of apple pie from a baker, it is not reasonable for me to expect that I will enjoy the taste, much to Lederkramer’s point. However, it is reasonable to expect that it is made from apples and is not just artificially apple-flavored, which is Quest’s contention.

Perhaps simplifying the case may help us. If we imagine that the baker spiked his apple pie with green olive juice, would the customer have any cause for legitimate complaint? Although the apple pie still contains apples and is not an instance of fraud, the reasonable expectation when purchasing apple pie is that it is not spiked with green olive juice, or anything which is directly contrary to the flavor of apple pie. Does this mean there is a certain degree of reasonable expectation with respect to the end-result? Perhaps. Or maybe it is simply that if the individual purchasing the pie *knew* beforehand that it was spiked with olive juice, he would not have partaken in the trade.

Yet such a principle is still too strong, as it would be impractical to legislate according to each individual’s knowledge and preferences. Doing so would lead to situations where the level of “reasonableness” demanded by certain customers or parties to the trade would be far-reaching and excessive. A particularly picky customer does not have recourse if he, after purchasing an apple pie from the baker, demands his money back on grounds that it was not made “from Grandma’s recipe.” We should be loath to claim that trades must demand perfect information in order for them to be legitimate; while ideal, such demands are impossible. Instead, we should be concerned about whether or not the relevant information deliberately excluded would *reasonably* undermine the agent’s reasons for accepting the trade.

The case of John’s contract, however, is a bit more complex than the case of the commodities I have been considering. In the case of commodities, reasonable expectation applies to the product, i.e. the *consideration* itself. However, the case of John’s contract and the secret bidder involve reasonable expectation too, but not with respect to the *consideration*, but rather the *expectations* or *conditions* of the consideration being traded. In the contract there is an intentional forfeiture of access rights dependent on a ‘reasonable assumption of similar conditions of harvesting.’ This was the implicit clause

that was violated. John's act is pernicious because he expects and relies upon the villagers to reason on the basis of the expectation being fulfilled, knowing and intending full well that it will not be.

## X. A Potential Principle and Concluding Thoughts

I imagine a fully developed entitlement theory would prohibit certain trades predicated upon the ignorance of participants who fail to realize that they are trading to their own disadvantage. It certainly would not prohibit all or even a majority of interactions involving risk, uncertainty, or self-detriment, for there are many such trades that we legitimately engage in that may be to our own detriment (investments, insurance policies, medical procedures, drug purchases, and so on). However, in these situations we can more or less understand the risks involved and are aware they exist. It is when these relevancies are withheld by the one side that the trade becomes questionable. With a change of this sort to entitlement theory, we would deny a central libertarian claim that all consenting transaction free from aggression is permissible. Many voluntary transactions would now be seen as legally impermissible and subject to prevention and rectification by law. It will be difficult to formulate a precise principle that can neatly fold into the account of justice in transfer. I make a suggestion here, not because I believe it to be sufficient, but to give an idea of the form such a principle might take:

Transactions where party X requires that party Y is ignorant of the fact that the trade has an expected negative payoff for party Y are illegitimate.<sup>15 16 17</sup>

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<sup>15</sup> Note that this principle does not contend "that any transaction in which someone ends up substantially worse off than he reasonably anticipated should be legally prohibited." Such a principle would rely solely on an *end-state* analysis and not on a *procedural analysis*. Instead, the proposed principle may rule out transactions in which someone ends up substantially worse off than he reasonably anticipated because the other party withheld information that was substantively relevant to the acceptance of the trade in the first place.

<sup>16</sup> The phrasing "negative payoff" is important because there are trades that rely on the ignorance of others that are not morally illegitimate, such as the purchasing of a Van Gogh from someone who does not know it is a Van Gogh. The gains from trade to the selling party are not negative because *payoff* in this case is subjective, despite the fact that the seller is ignorant of certain relevant information (see Shavell, 1994).

<sup>17</sup> It is worth pointing out that this principle would not rule out drug purchases, medical surgeries, investing, insurance, or previously-mentioned transactions that could

Certain transactions that violate this principle are already illegal, most notably insider trading, though there are many other transactions in our current system that are not, as noted by Mishkin (1991). They include but are not limited to: practices of predatory lending, boiler rooms, certain brokerage and subprime lending practices, specific forms of employment contracting, concealed credit card increases, and other such interactions which require the ignorance of one party to the full terms or expected results of the trade (Mishkin, 1991; Akerlof, 1970). Whether it is the deliberate sale of “lemons” in the used car market or the undisclosed value of a subprime mortgage, contracts that are contingent on the ignorance of one party in regard to a specific detriment are illegitimate: people are being used merely as a means and their right to pursue the good is being directly undermined. As it applies to legislation, one can speculate about the creation of laws that would force the disclosure of relevant information in trade and designate rules surrounding how that information be presented. It may also require regulatory trade agencies to provide oversight ensuring that trades are done in accordance with these measures, punishing any violators, and rectifying discrepancies in falsely earned income.

In order for entitlement theory to live up to its expectations as a procedural account of distributive justice, it must account for problems of the type raised in this discussion. If Nozick’s account is to be a true exhortation of Kantian individualism, then the state must not simply act in accordance with side-constraints, but must substantiate laws that protect individuals as autonomous agents pursuing meaningful lives. A true defense of individual liberty will require more than mere non-interference.

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and often do have expected negative payoffs. This is because these transactions are not predicated on the purchasing party’s ignorance of the risks and/or expected negative payoff.

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