

# Discovering Entitlements

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## **1 INTRODUCTION**

The purpose of this thesis is to critically examine the reach of the entitlement theory. This is a theory, proposed by Robert Nozick in his *Anarchy, State and Utopia*. It is drafted as an argument against distribution theories, most notably that of John Rawls.

For the purpose of explaining distribution theories, the totality of goods in the world is compared with a pie. Rawls theory of justice aims to divide this pie evenly, according to his principle of fairness. Nozick rejects this view of a sky-fallen pie. The pie distributes itself. Pies come into this world with entitlements already attached to them. Such an entitlement may for instance rest on the baker, the boss of whoever baked the pie, or on the client who ordered the baker to bake a pie. In *Anarchy, State and Utopia* Nozick argues that a self-distributed pie is not necessarily unjust. He comes up with the entitlement theory as an argument why the view of goods as an evolving pie should be preferred above the view of the pie distributors.

Most political philosophers reject the evolving pie perspective, on the grounds of its presumed libertarianism. Libertarianism is then thought of as a right-winged political doctrine that strongly endorses self-ownership and property rights, which can be protected by the use of force.<sup>1</sup> Yet, elements of Nozick's entitlement theory can be recognized in the law of property and the law of contracts of differing continental systems. Of all types, these systems are not the most libertarian. By comparing juridical entitlement systems with Nozick's entitlement system, an answer will be given to the question why Nozick came up with the entitlement theory, what it may and may not look like, and what practical use it may have.

### **1.1 APPROACH OF THE MAIN THEME**

In order to evaluate the use of an entitlement theory it is ineluctable to clarify what Nozick thought about his version of the entitlement theory. It is necessary to have a clear picture in mind about what the entitlement theory according to Nozick should look like. An outline of the entitlement theory *sec* shall therefore be given in the second paragraph of this chapter.

In the following paragraph it will appear that the entitlement theory consist of three elements or principles, of which the first two are the most important. The second chapter will devote its attention to the first element of the entitlement theory. This element is commonly conceived to be the most important in the entitlement theory. That reception of the entitlement theory will be contradicted in chapter two. As a consequence of this contradiction, the emphasis shifts to the second element in the entitlement theory.

The third chapter will focus on the second element of the entitlement theory in more detail. It will consider the voluntariness-requirement as an aspect to this second element. It furthermore considers what Israel Kirzner upheld concerning the second element. He tries to extend the entitlement theory with his discovery theory and the finders-keepers test. It will be concluded for several reasons that this cannot be done.

The fourth chapter of this thesis is devoted to Kirzner and to his views on Nozick's entitlement theory. Unlike most authors, Kirzner looks at the practical consequences of the entitlement theory. Although he criticizes the entitlement theory, he considers himself to be "riding piggyback"<sup>2</sup> upon it. Kirzner states that an additional ethic is needed in the entitlement theory, the "finders-keepers ethic". Like Kirzner, I will consider what the economical and/or juridical consequences of the entitlement theory may be. On top of that it will be examined how Kirzner's amendments to the entitlement theory should be evaluated. Kirzner:

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<sup>1</sup> Viz: Vallentyne, Peter, "Libertarianism", *The Stanford Encyclopedia of Philosophy (Fall 2004 Edition)*, Edward N. Zalta (ed.), url: <<http://plato.stanford.edu/archives/fall2004/entries/libertarianism/>>.

<sup>2</sup> Kirzner 1989, p. 131.

The sketch I have given of a finders-keepers approach to distributive justice, a discovery theory of justice, fully accepts and depends upon this framework of the entitlement theory.<sup>3</sup>

This thesis undertakes to do the same.

## 1.2 THE ENTITLEMENT THEORY

In this paragraph, I'll give an account of the entitlement theory as sketched by Nozick and furthermore, I will draw a comparison that is found throughout the thesis. The entitlement theory resembles some continental systems of property law. Conclusions that are drawn for those systems can enlighten our view of the Nozickean entitlement theory. For this purpose a brief introduction in the law of property is given in section 1.2.2.

### 1.2.1 NOZICK'S ENTITLEMENTS: ACQUISITION AND TRANSFER

Nozick describes a theory of entitlement that, unlike distribution theories, does not concentrate on distributions only but also on the origin of what is distributed. Nozick's theory on justice in -as he calls it- "holdings", (i.e. the having of goods) is caught in a definition found in *Anarchy, State and Utopia*.

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. None is entitled to a holding except by (repeated) applications of 1 and 2.<sup>4</sup>

Three elements can be deduced out of this definition, that are commonly referred to as principles. These are the PJOA: principle of just original acquisition that appears from the first part of the definition, the PJT: principle of just transfer that corresponds with the second point in the definition, and the third principle RP: the principle of rectifications of violations of the first two principles.<sup>5</sup>

Note that the third principle is not necessarily following from the definition Nozick gave. Out of the definition could have followed that no holding would be possible unless it is a just one. In that case the last principle would be meaningless. Violating the first two principles would not lead to a distribution at all. Nozick thereby gives us the definition of a just distribution, not of a distribution as such.

Nozick then elaborates on his set of principles. His entitlement theory of justice has two distinctive features. The first is that his theory is historical. For if we want to know whether a distribution is just, we must also look at how it came about. We would have to look at the transaction itself *and* at the distribution or acquisition that lead to this transaction. Both have to be just in order to establish a justified distribution. In this the theory is opposed to a Marxian just distribution. Latter only looks at the results of the distribution: Is redistribution possible for those who give and needed for those who receive.

The Nozickean entitlement theory is not only historical. It is also unpatterned. We can imagine a historical distribution that would look to moral merit, usefulness to society or even to the intelligence of the beholders. Nozick calls such distributions "patterned" because they have a distribution criterion varying in accordance with some natural dimension in some way or another. Nozick considers his entitlement theory not to be patterned in this manner. As Nozick says:

There is no one natural dimension [...] that yields the distributions generated in accordance with the principle of entitlement.<sup>6</sup>

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<sup>3</sup> Kirzner 1989, p. 164.

<sup>4</sup> Nozick 1974, p. 151.

<sup>5</sup> Nozick 1974, p. 153.

<sup>6</sup> Nozick 1974, p. 157. He also mentions in a footnote that it is possible to squeeze such a moral merit into it if, as is not the case, one considers the principles of justice obligatory. This however cannot be the case because of the existence of the third principle, as mentioned in paragraph 4.

Any theory of distributive justice that is filling in the blank: “to each according to his \_\_\_\_\_” is bound to be patterned, according to Nozick.<sup>7</sup> For whatever is filled in the blank is a given value. Nozick’s theory does not contain values other than those that derive from the distribution principle.

### 1.2.2 ENTITLEMENT SYSTEMS OF PROPERTY LAW

Although Nozick is the only political philosopher to have drafted an entitlement theory concerning holdings, the phenomenon of making transfers dependent on a formal prerequisite: “title”, is not new. Some legal systems “distribute” property along a similar system. Matthias Storme in his *Property Law in a Comparative Perspective*, makes a distinction between abstract and causal systems on transfer of property.<sup>8</sup> Nozick’s system of entitlement has striking parallels with the causal systems.

Unlike causal systems, abstract systems (amongst which the German, the Greek, the Czech, the South African and to a lesser extent also the Anglo-American and Scottish system) lack a title requirement.<sup>9</sup> In order to transfer property it is in those systems not required for a transfer to be justified by an underlying obligation.<sup>10</sup> Thus, if I buy a bicycle from someone who stole it, it in those systems becomes my property -at least initially- upon transfer. The ground for acquiring property in those systems can be for instance the contract or the actual transfer.

On the other hand, if I buy a stolen bicycle under a causal system of transfer of property, the bike does not become mine at all. Such systems can be found in most “continental” systems of law, e.g. the French, Belgian, Italian, Portuguese, Spanish, Austrian, Swiss, Dutch and Polish law.

The party without valid *titulus* never becomes owner, even if the invalidity manifests itself only after conveyance; if meanwhile he has sold the thing to a third party, that party has thus “acquired” *a non domino*. In an abstract system, the third party will normally have acquired *a domino* (from the owner).<sup>11</sup>

It thus may become clear that the causal systems resemble the Nozickean entitlement theory, as in both systems; the possibility of transfer depends upon the title. Unlike in causal systems, there is no physical object or a concrete “fact of law” that is the source of a just transfer. Its source is a formal, abstract requirement, as a sort of invisible name tag. Whereas in an abstract situation the transaction of goods leads to a shift in property,<sup>12</sup> in causal systems and the entitlement theory this is made dependent upon the existence of a title, that can arise out of property law or in Nozick’s case from any of the three principles that set out the entitlement theory.<sup>13</sup>

It is precisely therein that some consequences in law should also be held applicable for the entitlement theory. Some are discussed in chapter 2, in so far as they deal with the principle of just original acquisitions. Whenever the subject relates to transfers, it will be dealt with in chapter 3. In chapter 4 it may also be needed to refer to juridical parallels, in relation to the finders-keepers ethic. As for now, it is sufficient to suppose that there are parallels. Chapter two will continue by considering the details of the entitlement theory, as worked out by Nozick in *Anarchy, State and Utopia*.

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<sup>7</sup> Nozick 1974, p. 159, 160.

<sup>8</sup> Storme 2002, p. 77.

<sup>9</sup> Storme notes that the word “title” is unfortunate, as it may be confused with the unrelated notion of “good root of title”, thus he uses the Latin expression: *titulus*, also known as *iusta causa adquirendi*. Nevertheless in this thesis the word title will be used, as it is more (though still not much) appealing to ones imagination.

<sup>10</sup> Storme 2002, p. 77.

<sup>11</sup> Storme 2002, p. 77.

<sup>12</sup> See: *Bowmakers Ltd. v. barnet Instruments Ltd.* [1945] KB 65.

<sup>13</sup> On top of that it is made dependent on the combined application of the principle of just original acquisition and the principle of just transfer. See *infra* 2.3.4.

## **2. ACQUISITIONS: LOCKE AND ORIGINALITY**

As the contents of the PJOA will be subject of discussion in this chapter, they cannot be defined beforehand. They obviously concern the acquisition of property from an original, i.e. unowned, state. Yet whatever this unowned state is, is unclear beforehand. It is neither clear from a first instance what role the acquiring of objects plays in the principle. Does the principle maintain a limitative list with conditions under which property can be distracted from the realm of non-owning, or is it less substantiated. If so: to what extent?

Nozick says concerning the topic of original acquisitions:

This includes the issues of how unheld things may come to be held, the process, or processes, by which unheld things may come to be held, the things that may come to be held by these processes, the extent of what comes to be held by a particular process, and so on. We shall refer to the complicated truth about this topic, which we shall not formulate here, as the principle of justice in acquisition.<sup>14</sup>

It cannot be established beforehand to what extent Nozick specifies the complicated truths concerning the topic, as this will be subject of examination. Critics have mentioned two of those complicated truths in particular. These are the Lockean element in the principle of acquisitions and the extent of originality/the definition of the unheld state. As the aspect of originality is less complicated, it precedes the discussion on the Lockean element.

### **2.1 THE PRINCIPLE**

The principle of just original acquisitions is not clearly defined. Therefore, the first sub paragraph describes the principle of just original acquisition within its context in the following sub paragraph. It has been argued that Locke's theory of acquiring objects and Locke's proviso<sup>15</sup> is adopted by Nozick in the entitlement theory, as will be pointed out in the second subparagraph.

By means of circumventing definitions, I'll describe where Nozick says what concerning acquisitions in the first sub paragraph. Secondly I'll briefly address what is commonly thought on the paragraphs that are thought to deal with the principle of acquisitions.

#### **2.1.1 THE STRATEGY OF NOZICK'S CHAPTER 7**

Nozick discusses the PJOA as an element of the entitlement theory in the first section of chapter 7. There he explains why he comes up with this theory and what it looks like. Nozick's textual strategy in chapter 7 is weird. There seems to be only a vague relation between the passages on Locke (part g and h, v. table) and the preceding passages that deal with the defects of conventional distribution theories (parts c-f, v. table). This vagueness is related to the structure of the chapter.

The structure of the first section of chapter 7 can be sketched as follows. Nozick firstly states that the entitlement theory is based on two principles. He gives a definition that consists of three elements that relate to the two principles.<sup>16</sup> He then announces that he is not going to talk about the first principle.<sup>17</sup> Yet at some points he does make statements concerning the first principle.

In order to give an overview of what is happening in chapter 7, I made the following table that enlists the titles that construct section 1 of chapter 7.

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<sup>14</sup> Nozick 1974, p. 150.

<sup>15</sup> I.e. the theory that property is acquired by putting ones labour into it, lest that acquiring makes others worse of than they would be otherwise. The role of this theory and its exception will be extensively discussed in the following paragraphs, which prohibits me from specifying these Lockean elements.

<sup>16</sup> Nozick 1974, p. 151.

<sup>17</sup> Nozick 1974, p. 150.

**Table 2:1 The Contents of chapter 7:**

Part	Title	Concerns...	Page
a	The entitlement theory	ET; consisting of PJOA, PJT and RP	150
b	historical principles and end-result principles	ET being historical, which is better than end-state because property can be deserved. Past circumstances can influence the set of holdings	153
c	Patterning	That patterned principles make a set of holdings vary along with a natural dimension. Formulation of the maxim: <i>From each as they choose to each as they are chosen</i>	155
d	How liberty upsets patterns	The Chamberlain example, the voluntariness-component	160
e	Sen's argument	That patterning requires continuous interference with the actions and choices of an individual.	164
f	Redistribution and property rights	That ET redistribution violates people's rights as it does not involve the right to choose what people do with what they have.	167
g	Locke's theory of acquisition	A complexity, mixing labour, the Lockean proviso, social considerations <sup>18</sup>	174
h	The Proviso	That adequate PJOAs contain a proviso similar to the weaker of the ones we attributed to Locke. The well-example. <sup>19</sup>	178

After the entitlement definition, given in part a, Nozick makes a distinction between historical/unhistorical principles and between patterned/unpatterned principles. At the end of a long discussion on the merits of the entitlement theory, and the defects of its opposite: patterned principles, Nozick suddenly talks about Locke from page 174 onwards. Nozick expresses his doubts about what Locke said on property. He recognises several problems in Locke's theory on property. Most concern the idea that mixing ones labour into an object leads to the property of that object. Nozick wonders why this property-through-mixing is so logical to Locke. Does it mean:

- A/ whether I own follows from the fact that I *own* my labour, or
- B/ whether I own follows from the idea that I am *entitled* to what I create?<sup>20</sup>

Then Nozick changes subject again and it appears that these problems concerning the acquirement through labour aren't his main concern. Nozick is more interested in the way in which Locke limits original acquiring.<sup>21</sup> Locke puts this limit at the point where there is not "enough and as good left in common for others."<sup>22</sup> Appropriation cannot occur if it is in violation with this proviso. In the remainder of the chapter, the entitlement theory is compared with Rawls' Theory of Justice.<sup>23</sup>

It remains blurry why Nozick addresses Locke and Locke's proviso. Nozick does not explain why he suddenly prefers to pay attention to Locke, above any other philosopher's theory of property. Locke appears out of the blue. Why doesn't he address Grotius or Bentham? It is held that Nozick is a professed Lockean and that he therefore more or less adopts Lockean principles. In the following I will address what is thought in general on the entitlement theory that Nozick proposes.

<sup>18</sup> As in the following paragraphs I will reinterpret the meaning of the latter two subsections g) and h), I am forced to sum up elements only, rather than giving a brief description.

<sup>19</sup> Nozick 1974, p. 179-180.

<sup>20</sup> Nozick 1974, p. 174.

<sup>21</sup> Nozick 1974, p. 178.

<sup>22</sup> Locke, *Second treatise on government*, par. 27.

<sup>23</sup> Nozick 1974, p. 183-231.

### 2.1.2 ON WHAT IS THOUGHT OF NOZICK

Often it is argued that Nozick's entitlement theory partly consists of the Lockean principle of acquiring property. Nozick mentions a sentence that I partially quote elsewhere:<sup>24</sup>

Whether or not Locke's particular theory of appropriation can be spelled out as to handle various difficulties, I assume that any adequate theory of justice in acquisition will contain a proviso similar to the weaker of the ones we have attributed to Locke.<sup>25</sup>

This is the only sentence upon which can be concluded, and upon which *is* often concluded that Nozick embraces the Lockean proviso. One might take this sentence to mean that Nozick is indeed convinced of the need for a Lockean proviso. Many people appear to do so.<sup>26</sup> The vast majority of literature on Nozick is convinced that Nozick adheres to the Lockean proviso. Gijs Van Donselaar calls Nozick:

[A] professed "Lockean" and it seems that he is ready to acknowledge the prohibition of parasitic (trans) actions through original acquisitions of "previously unowned things". He takes what he calls "the Lockean proviso" to prohibit a person to worsen another person's position by appropriating something.<sup>27</sup>

Onora O' Neill says, unfortunately without any reference to an exact location in Nozick's work:

But according to Locke and Nozick control over things need not violate others' liberty if there remains 'enough and as good left for others.'<sup>28</sup>

Jonathan Wolff considers Nozick to be a professed Lockean as well. He also assumes that Nozick stated that Nozick intended the proviso as a necessary condition:

In Nozick's defence, it might be insisted that he nowhere says that the proviso is intended as a sufficient condition on appropriation but only as a necessary condition.<sup>29</sup>

Thomas Scanlon interprets the passage on the Lockean proviso alike.

While his [Nozick's] principles are not described in detail, it appears that his theory differs from other pure entitlement conceptions chiefly in admitting fewer restrictions on the acquisition and exchange of property. He mentions only one such restriction, called "the Lockean Proviso", which provides that any acquisition, transfer, or combination of transfers is void if it leaves third parties worse off when they were in the state of nature.<sup>30</sup>

I think that the above-cited authors all put Nozick's point with the proviso too strongly. There are no clear indications in the text that Nozick thinks that the proviso is correct in a metaphysical sense, or that it is a necessary condition for the entitlement theory.

Israel Kirzner agrees with the authors mentioned above. He upholds<sup>31</sup> that Nozick pursues the implications of the Lockean proviso only insofar as it introduces complications.<sup>32</sup> But he does not specify what complications these may be nor does he draw the consequence that the paragraphs on Locke serve only that particular purpose of explaining a complication. Whereas Kirzner stated that:

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<sup>24</sup> Viz. sup. paragraph 2.3.2.

<sup>25</sup> Nozick 1974, p. 178.

<sup>26</sup> That this sentence is ambiguous is dealt with *infra* 2.4.1.

<sup>27</sup> Van Donselaar 1997, p. 86.

<sup>28</sup> O'Neill in Paul eds. 1981, p. 312.

<sup>29</sup> Wolff 1991, p.114

<sup>30</sup> Scanlon in Paul eds. 1981, p. 109.

<sup>31</sup> I uphold the same *supra* 2.3.4.

<sup>32</sup> Kirzner 1981, p. 402.

And, while Locke himself enumerated the “proviso” in relation to original acquisition from nature, Nozick has pursued its implications insofar as it introduces complications into the justice of acquisition by transfer.<sup>33</sup>

A few sentences further he notes that:

While Nozick sharply limits the scope of the Lockean proviso as it enters into his own entitlement theory of justice, he does, without hesitation, strongly accept the principle that justice in original acquisition requires that such acquisition shall leave no one else in a worse situation than he would have been without it.<sup>34</sup>

Nozick might have thought so. It will be argued at the end of this chapter, that this is unlikely. I’ll uphold that the acquisition principle is formal instead of a specified Lockean content. This will be argued for, because Nozick did not argue in favour of Locke for its own sake, and he did not say anything explicitly in favour of the proviso in *Anarchy, State and Utopia*. He doesn’t do this because his aim in this book was not to take position in favour of Locke but to use the entitlement theory as an argument against Rawlsian distribution theories. Before that argument is made, the following paragraph examines what PJOA stands for, by examining what is meant with originality.

## 2.2 ACQUISITIONS AND ORIGINALITY

How can acquisitions be original? On the one hand it can mean that the acquired object was not owned at the moment preceding the acquisition. On the other, it can also mean that the acquired object never had been owned. Latter may seem to be the most obvious interpretation. But in that case, the PJOA is already almost completely redundant as the majority of objects is already owned. Apart from that it may appear from the following quote that things can re-enter the unheld state:

(And we shall suppose it also includes principles governing how a person may divest himself of a holding, passing it into an unheld state)<sup>35</sup>

Nevertheless, originality is taken literally to a more or less infinite extent and Nozick is thus seen by some as an advocate for the rights of indigenous people.<sup>36</sup> The following will consider the consequences of a literal interpretation of Nozick’s entitlement theory. It will proceed from the thought that whatever Nozick says about acquisitions, he abstains from taking a position in what property really is, and rightly so. It will consider the consequences of that part of the entitlement theory of holdings that deals with original acquisition.

### 2.2.1 THE TRAP IN ENTITLING ORIGINAL ACQUISITIONS

Nozick did not aim to attach much importance to the question of original acquisition. It is neither Nozick’s intention to explore the boundaries of the subject, nor is it necessary that he does this. Yet it is often thought that the principle of original acquisitions is crucial in the entitlement theory of holdings. If we consider the question for original acquisitions as relevant, the following problem will arise: *how* original is this original acquisition? Nozick asks this himself, but does not answer the question.<sup>37</sup>

Though he provides us with no answer, the question remains relevant. Nozick would not have asked this question himself, if it were only natural to him that every part of the history of an entitlement is equally important. Nozick wonders whether this would mean that the heirs of someone else’s unentitled holding of their property have a justified claim to the object. He especially asks in how far we have to wipe out past injustices. Again, Nozick does not answer the question, but the fact that he asks for it, means that he is himself in doubt about whether the historical quest should not end somewhere or at least would diminish in importance. We can however find out what Nozick certainly did not mean, if we follow the entitlement procedure literally.

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<sup>33</sup> Kirzner 1981, p. 402.

<sup>34</sup> Kirzner 1981, p. 402.

<sup>35</sup> Nozick 1974, p. 150-151.

<sup>36</sup> MacIntyre 1984, p. 247-248.

<sup>37</sup> Nozick 1974, p. 152.

In the phrase “original acquisition” original is often read to mean original up to a large if not infinite extent. Nozick is then thought to be a strong advocate (unlike Locke) for the rights of indigenous people, such as the Indians and the Maori. If there is no good reason to *not* undo the history all the way back to the Indians, there is also no reason to *not* undo any earlier unjust event. If there is no additional reason to stop the process of erasing history at a given point in time -and Nozick does not provide us with a reason to stop applying the third principle-, then there is no reason to stop at all.

But then it would mean not only that America has to be given back to the Indians, there is no reason left why the Anglons and Saxons should not have to give back London to the Welsh and why half of Europe should not be returned to the Huns, or the Romans. The collective migration of peoples during the early Middle Ages would have to be corrected. To answer the question on whether I rightfully own the glass of milk in front of me, I have to investigate not only whether the supermarket voluntarily sold it but also whether the first-owned cow that was the mother of the mother of the mother (etc.) of the cow that made my milk, was not stolen from another tribe. Following Nozick’s three principles of justice in holdings, and only those, we would have to go back to the beginning of times, when people first started to appropriate cows and plots of land. Are these the earliest farmers, who for the first time started to appropriate land after the Neolithic Revolution or the hunters and gatherers that might already have a notion of owning a mammoth?

This nonsensical historical exploration has to be stopped, not only because the infinite applicability of Nozick’s entitlement theory would be of no practical use, but also because Nozick refutes such a zipping back to the original acquisition of Locke, later on, precisely because it would be senseless.<sup>38</sup> Nozick holds that if we would adopt a stringent position of Locke’s theory on acquisitions, having a system of property would in fact be impossible, for owning any finite thing would make another worse off.

Owning anything would, under the entitlement of Nozick be even more impossible than when entitlement is subject to the stringent version of the Lockean proviso. If we were to apply Nozick’s definition on just holdings infinitely, we would have to look back to the origin of a thing in the broadest sense of the word, for *every* thing we own. We would have to consider the primitive origin of the product and to how that came about all the way back to the beginning of time. If Nozick wants to stop the zipping back to the position where appropriation worsens no one by introducing a weaker interpretation of the Lockean proviso, he clearly would not want us to zip back from his interpretation of the entitlement theory.

If the zipping back reasoning is not stopped, the entitlement theory leads us straight into the *sorites paradox*. “Having an entitlement” is a vague predicate. There is a beginning to it when the predicate is ascribed and there must be an end to it. The result would be untenable otherwise. Nozick must have been weary of this unsatisfying result since he ponders on it in the context of the Lockean proviso. He certainly does not want us to conclude that every wrongful entitlement has to be corrected. It cannot follow from the entitlement theory that Indian land should in principle be returned, without any other reason than rectifying injustice. If we would accept that, there would be simply no end to rectifying injustices.

### 2.2.2 NOZICK AND SORITES

The sorites paradox – sorites being Greek for sand – supposes that heaps of sand cannot exist. The conclusion is reached by supposing two premises: one grain is not a heap of sand and adding another grain does not make it a heap either. If two grains of sand is no heap, then three grains is not a heap either. And so, by applying the so-called *Modus Ponens* deduction, even 9,999 grains are no heap and then 10,000 grains do not form a heap. So heaps of sand cannot exist. Whereas the argument is logically sound, the result is increasingly unsatisfactory from a practical perspective. For we do want to think that heaps of sand exist. Logicians tried to solve the paradox for instance via supervaluations<sup>39</sup> or not at all, as Dummett did.<sup>40</sup>

The conclusion Dummett reached, of merely accepting the paradox, might be fine for semantic purposes, but is untenable in a situation where the limits of acquisitional entitlement of objects has to be established. Lawyers in property law and contract law have dealt with the finitude of entitlements.<sup>41</sup> They have solved the

<sup>38</sup> Nozick 1974, p. 176.

<sup>39</sup> This method is introduced by Kit Fine, 1975 and entails that an arbitrary limit can be established if you want to accept the fact that it is arbitrary.

<sup>40</sup> Dummett maintains the opposite from Fine: that we are unable to be precise, without clashing with a semantical principle inherent to the use of vague predicates. We therefore have to accept the paradox, according to Dummett.

<sup>41</sup> Note that “entitlement” is not a notion that arises in every system of law. It especially arises in systems where property law and contract law are strictly separated, as is the case in German and Dutch law. In these two countries,

problem via the concept of superannuation. Superannuation resembles the semantical solution of supervvaluations. Both entail that a limit can be decided on. The infinite historical quest that the entitlement theory would otherwise pull us in can easily be stopped via the concept of superannuation/supervaluation. Having a thing in possession without having a title to it, does not lead to ownership, unless the unjust acquisition/transfer can superannuate after a period of time or after a number of transactions.

Another juridical way of stopping the quest for the divine origin is to have a gradual superannuation-lapse. The problem with superannuation is that it is in some cases too rigid. If theft superannuates in a country after three years, it would be too large a time lapse for a lost pencil, but it would be too short for a lost Rembrandt. A “fluid” type of superannuation that is directly linked with the suffered damage of the loss can solve this rigidity.<sup>42</sup>

If a stolen object were traced back after it is bought from someone who did not know he bought it illegally, it would be very unfair to demand the object back without paying damages for the costs he made in purchasing it. This would be increasingly unfair over time. So, with a gradual superannuation-lapse, the first heirs of a stolen painting would have to be compensated a little for their loss and the accidental buyer of an heir in the sixth degree would have to be fully compensated. The fluid approach also has its defects. For an object, the fluid superannuation-lapse works, because of the *additional* value for the one who is entitled to it, apart from its value in terms of money. It does not work for stolen money, since the reparation for the damage and the missing ‘object’ are the same.

That Nozick should have introduced such a concept if he specified the consequences of his entitlement theory seems all the more plausible since Nozick asks for the consequences himself. Nozick rhetorically wonders whether the rectification of past injustices would lead to a just result.

What obligations do the performers of injustices have towards 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 the 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?<sup>43</sup>

Apart from wondering about the possible endlessness of the rectification principle Nozick also points at a book about reparations for the injuries suffered by black slaves: Bittker’s *The case for black reparations*.<sup>44</sup> The problem is that, if there are no additional reasons to grant compensation to a sixth generation of heirs, other than because they are simply entitled to it, there is also no reason to reject the claim of the seventh or the eighth generation, and so on. This is where the sorites-paradox enters the realm of the entitlement. If every past injustice has to be rectified, including that from the slaves, there would neither be a reason to reject a claim from the heirs of the decapitated Louis XVI.

It follows from the mere impossibility of the quest to the origin of any acquired thing that Nozick did not attribute the importance to original acquisition that is sometimes argued for. For Nozick original acquisition is only important for a short historical time lapse. If someone wants to know whether my car is really mine, he has to figure out whether I bought or stole it. Then he should search out (but this is slightly less important for the question on whether I rightfully own it) whether the store where I bought/stole it, rightfully received or acquired it. Then to an even lesser extent he has the task to investigate how the place that sold to my store received or acquired the car justly.

If we accept a fluid concept of superannuation, the expiration depends on the lapse of time set against the value of the dislocated property. At the point in time where the reasonable amount of reparation equals the worth of the dislocated object, it is *de facto* relocated to the new owner. The former possessor has an even reasonable claim as the new possessor, so why would it be reasonable to shift the object to the other heir?

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unlike in French and Commonwealth systems of law, the property does not shift via the contract, but via entitlement and the realm of property law. The Germanic systems thus have much more in common with Nozick's entitlement theory than most other systems.

<sup>42</sup> This can for instance be done by making the duration of the possibility to ask for restitution dependent of the object that is to be restituted.

<sup>43</sup> Nozick 1974, p. 152.

<sup>44</sup> Viz. note 2 at page 152 of Nozick 1974.

### 2.2.3 CONCLUSION ON NECESSARY FINITUDE

In conclusion, it can be said that the PJOA is rather limited in its originality. The origin of an object either rigidly stops being relevant at a fixed point in time (e.g. after twenty years or after the second heir) or it fluidly leaks away until its relevance equals that of the object being justly transferred only. The two other possibilities:

- 1: originality stops being relevant immediately and
- 2: originality never stops being relevant

are logical, not practical possibilities. The first possibility excludes any PJOA. Concerning the second, if all originality is relevant, any object can be recuperated by anyone.

It is obvious that Nozick did not formulate the principle of just original acquisition in an Adam/Eve sense of the word “original”. *That* original acquisition does not matter to the vast majority of objects, is unknown to the vast majority of objects and is in the end impossible for the vast majority of objects to be established.

So we start from the idea that original acquisition at a point in time stops being relevant for the question whether some property was justly owned. For the entitlement theory this means that whatever reasons there were to bar a person from owning an object, they are undone after a certain time lapse. Either the entitlement theory contradicts itself or the right that the entitlement theory distributes to the initial owner is not absolute.

We can conclude for the diminishing importance of the original origin, that the question of original acquisition is of minor importance to the entitlement theory. The acquisition principle is not superfluous. It has to be incorporated in an entitlement theory so that unowned things can be acquired. If I want to know whether I own a thing that is in my possession, I can look at the principle of acquisitions only. I can also look at whether I rightfully received the object in combination with the acquisition principle. On top of that I can also look at the (repeated) principle of just transfers alone. And for the vast majority of object this has to be done, as the original acquisition is unknown and even if it were known it would lead straight into the sorites paradox.

## 2.3 LOCKE AND THE ACQUISITION-PRINCIPLE

In this and the following paragraph it will be argued that the paragraphs on Locke are only inserted in *Anarchy, State and Utopia* for illustrative purposes, rather than as a statement concerning how to acquire. That is a new interpretation, as it is commonly thought that Nozick upholds the Lockean concept of original acquisitions. Why Nozick should be interpreted this way is subject to the next paragraph. This paragraph seeks to answer a range of questions that precede or should precede the statement that Nozick adopted Locke’s principles of acquiring property.

A first such question is: Why Locke, rather than any other philosopher. A second concerns why the PJOA should contain a notion of property, as is argued by for instance Wolff. Thirdly it can be questioned why there should be “something similar to a proviso”, as Nozick claims in the last paragraph that deals with Locke.<sup>45</sup> Induced by this question, a last question pops up. Why should complexities be introduced, as Nozick assumes?<sup>46</sup>

### 2.3.1 WHY LOCKE?

Why Locke? Why not any other philosopher? In order to answer this question, it is necessary to briefly consider what the purposes of Nozick’s entitlement theory are.

In answer to this question it is often thought that Nozick is a Locke adept.<sup>47</sup> It seems as if property is an issue of major concern to Nozick, and that Nozick embraces the Lockean concept of property acquisition. This point of view is especially likely if *Anarchy, State and Utopia* is considered as a defence against the collective system of property and the principle of equal distribution.

A closer look at the purposes of the entitlement theory reveals that it is not a new theory of property, but rather as an argument against Rawls. Nozick says:

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<sup>45</sup> Nozick 1974, p. 178.

<sup>46</sup> Nozick 1974, p. 174.

<sup>47</sup> Viz. inf. 2.1.2.

We have used our entitlement conception of justice in holdings to probe Rawls' theory, sharpening our understanding of what the entitlement conception involves by bringing it to bear upon an alternative conception of distributive justice, one that is deep and elegant.<sup>48</sup>

The entitlement theory is instrumental as an argument to Nozick's claim that no extensive state is needed.<sup>49</sup> In order to "use" a theory in this way, Nozick argues that it is not necessary to formulate a complete alternative theory in order to reject the one from Rawls.<sup>50</sup> It does not need to hold a solid notion of property, or to uphold a consistent idea on how one can appropriate. Property is a mere radar within an entitlement system. Lots of definitions of property are thinkable. Most of them will fit in an entitlement theory of holdings, though not necessarily without defects. Nozick is:

as well aware as anyone of how sketchy my discussion of the entitlement conception of justice in holdings has been.<sup>51</sup>

The success of a fully specified version of the entitlement theory is critically dependent on the accompanying definition of property. Yet, in order to appreciate an entitlement theory above any other distribution theory/theory of holdings, it makes no sense to look into every possible definition that might constitute an entitlement theory. Especially not if certain notions of property might conflict with the merits that Nozick attributes to the entitlement theory in general.

Nozick therefore restricts himself to considering the merits and defects of the entitlement theory only, regardless variable contents, such as a definition of property.<sup>52</sup> Nozick then, does not really depend on Locke's notion of property. His entitlement theory does not depend on a particular notion of property. The entitlement theory can be filled in with any particular acquisitional theory. The reason why Nozick brought up his entitlement theory was not so much to reinvent Locke's PJOA, but to defend a theory that does not depend on preceding notions of justice.

Knowing this, it is possible to answer the question brought up at the beginning of this paragraph. The only reason why Nozick refers to Locke is to give an example of a *historical* and *unpatterned* theory on property. It are these two features that Nozick is looking for in an entitlement theory, and for which he rejects Rawls' distribution theory

That Locke's notion of property is historical, is due to the justification of property via its origin, through labour or otherwise. The Lockean concept of property is not patterned, because it does not lead to a fixed division of holdings. Distributing according to I.Q. or according to needs would lead to property in a fixed sense. Everybody would always be entitled to the same amount of property. Neither Locke's idea of property, nor the proviso enforces a certain way in which holdings should be distributed. Locke's proviso, that is as historical and unpatterned as the property acquiring principle, focuses on a particular way to appropriate instead of proceeding from an "end-state principle"<sup>53</sup>

To summarize the above: Nozick wants to show how property can be justified by asking where it comes from, rather than to justify property by any sort of principle of equality. Locke has a notion of property, without which principles of fairness or other –as Nozick would say– "patterned" principles would leak into the entitlement theory. Locke provides Nozick with an example of a concept of property that is historical and unpatterned. Nozick uses it to show how the Lockean notion of property combines with the entitlement theory.

Some authors think that Nozick should also have evaluated Locke's notion of property, despite the fact that Locke is mentioned as an example only. The next paragraph considers this negative aspect in the reception of Nozick's paragraphs on Lockean property. As such it may have its defects but it is –according to Nozick– still to be preferred above a Rawlsian theory.<sup>54</sup>

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<sup>48</sup> Nozick 1974, p. 230.

<sup>49</sup> Nozick 1974, p. 230.

<sup>50</sup> Nozick 1974, p. 202, 230.

<sup>51</sup> Nozick 1974, p. 230.

<sup>52</sup> Nozick 1974, p. 202.

<sup>53</sup> Nozick 1974, p. 180.

<sup>54</sup> Nozick 1974, p. 230.

### 2.3.2 WHY A PJOA?

It is not very difficult to explain what Nozick considers to be a valid or sensible or good Principle on how to Justly Acquire Property (i.e. PJOA). Apart from a short explanation of its formal requirements, Nozick neither says what property should look like, nor how it should be obtained. The only thing said about the PJOA is that it concerns

[t]he appropriation of unheld things. This includes the issues of how unheld things may come to be held, the process, or processes, by which unheld things may come to be held, the things that may come to be held by these processes, the extent of what comes to be held by a particular process, and so on.<sup>55</sup>

Some criticise Nozick for the lack of explanation for what property exactly is and for his meagre explanation of how we can originally acquire.<sup>56</sup> Jonathan Wolff is one of them.

It is clear from the outset that Nozick needs to provide a justification of private property rights, and the examination of his principle of justice in transfer has shown that the weight of the position falls upon the principle of justice in acquisition.<sup>57</sup>

According to those critics, Nozick needs to have a foundation for his entitlement theory. He should have at least made an attempt to define property, especially if we suppose that Nozick did not want to rest such weight on the Lockean proviso. According to Wolff: “Given the weight of these rights in his theory, this omission is nearly incredible.”<sup>58</sup> The importance of property rights to the entitlement theory is, according to Wolff, a given. Nevertheless, Wolff fails to explain why it is so strictly necessary to adhere to a particular theory of entitlement in order to prefer an entitlement theory to any patterned, unhistorical theory.<sup>59</sup>

My previous conclusion that Locke is mentioned as an example only, puts the omission in another perspective. The necessity of a property definition for Nozick’s argument against a more than minimal state is not a given. Nozick nowhere claims to depend on such foundations; neither does he need to depend on them. He did not aim to defend the entitlement theory as a solid ethical-political doctrine.<sup>60</sup> His sole aim was to argue that the *structure* that entitlement theory has, offers a sufficient alternative theory of justice in holdings. In Nozick’s view:

But we do not need any *particular* developed historical-entitlement theory as a basis from which to criticize Rawls’ construction. If *any* such fundamental historical-entitlement view is correct, then Rawls’ theory is not.<sup>61</sup>

What idea of property is best is not Nozick’s main concern. He aimed in this chapter to defend a more general outline of a theory of holdings that could compete with Rawlsian distribution theories.<sup>62</sup> Nozick tried to point out that there is no argument for a more extensive state, as the entitlement theory fulfils the need for justice in holdings satisfactory. As Nozick says:

If the set of holdings is properly generated, there is no argument for a more extensive state based upon distributive justice.<sup>63</sup>

The fact that Nozick does not elaborate on property should not be seen as a shortcoming of the entitlement theory for the mere sake of its not being mentioned. Those who believe that this is a shortcoming should explain why Nozick’s motive to abstain from defining property is not adequate. The entitlement theory is a structure that is freestanding, regardless whether we adopt a Lockean idea of property combined

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<sup>55</sup> Nozick 1974, p. 150.

<sup>56</sup> Wolff 1991, p. 106.

<sup>57</sup> Wolff 1991, p. 106.

<sup>58</sup> Wolff 1991, p. 117.

<sup>59</sup> Nozick 1974, p. 202.

<sup>60</sup> Viz. inf. par. 2.3.1.

<sup>61</sup> Nozick 1974, p. 202.

<sup>62</sup> Nozick 1974, p. 230.

<sup>63</sup> Nozick 1974, p. 230.

with his proviso or not. We can adopt several –and probably many– ideas of property, even a collective idea of property,<sup>64</sup> and the entitlement theory at the same time.<sup>65</sup> Nozick is only interested in the structure of the entitlement theory in as far as it offers an alternative to Rawls’ theory of justice. The structure of the entitlement theory enforces Rawlsian distribution theorists to argue why the entitlement theory of justice (in combination with a notion of property) is not sufficient.

If Nozick has to be opposed, it should be for his statement that his sketch of the entitlement theory is preferable above Rawls’ distribution theory, or for his statement that the entitlement theory precedes distribution theories such as that of Rawls.<sup>66</sup> Nozick knows he does not enter in full detail. He does so on purpose as he thinks that he does not need a full theory in order to reject Rawls. If someone states that Nozick should have given a full notion of property, he thereby should explain why Rawls’ theory cannot be rejected on the grounds that Nozick gives.

This perception of the relevance of the passages on Locke and property, has also got consequences for how the passages on the Lockean proviso should be interpreted. If Nozick’s aim was not to plead for a specific, detailed entitlement theory, why did he come up with this Lockean proviso? In order to answer this question, the following sub paragraph will consider what Nozick says about the Lockean proviso.

### 2.3.3 WHY THE LOCKEAN PROVISO?

In discussing the entitlement theory and the theory of acquisition that is part of it, Nozick mentions the Lockean proviso.<sup>67</sup> The purposes of Nozick’s proviso examination are not immediately clear. It is often assumed that Nozick’s entitlement theory is more or less founded on Locke’s theory of acquisitions.<sup>68</sup> As Nozick’s interpretation of Locke is rather different from that of Locke’s, Nozick’s version of the Lockean proviso is by some authors referred to as the “Nozickean proviso” This Nozickean proviso is the outer constraint of possible appropriation and Nozick is said to have more or less adopted this proviso on top of the accompanying notion of property.

Locke argues that we come to own things, by mixing our labour with the unowned. The proviso puts limits to this acquisition of property. Locke poses an exception to appropriation in that one can only appropriate if there is “enough and as good left for others.”<sup>69</sup> To Nozick, this means that the position of others cannot be worsened, which can be understood in two ways.

It can be understood stringently, meaning that another is worse off if he loses the opportunity to improve his situation. In this case it would boil down to a prohibition to appropriate any finite thing. The one who finds that there is nothing left to appropriate will be made worse off, as a consequence of which the last one appropriated unjustly in retrospect. As a consequence of which the one but last cannot appropriate, as a consequence of which the two but last is made worse off, and so on.<sup>70</sup> Since most things are finite, it doesn’t seem likely that this would be what Locke meant. Nozick adds however, that it is not completely impossible that Locke intended this stringent proviso.<sup>71</sup>

But Locke might also have meant something weaker: it would not be forbidden to appropriate the last when others are still able to use it, as they previously could before anyone appropriated the object.<sup>72</sup> To Nozick, this weaker position is the most obvious, as it does not lead to the zipping back to the first appropriator. The last appropriator can appropriate as long as there is left enough for others to *use*. Nozick supposes that one can argue that under these conditions, no prohibition of appropriation on the grounds of being worse off can be made.<sup>73</sup>

At first sight, the most crucial Lockean element to Nozick’s entitlement theory seems to be the “Lockean proviso”, as a special paragraph is devoted to it. The Lockean paragraphs take the form of an intermission, as

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<sup>64</sup> Nozick 1974, p. 178.

<sup>65</sup> Yet it is not possible to adopt an idea of property that would lead to incorporation of principles of fairness into the entitlement, which is why Nozick tries to re-explain the Lockean proviso.

<sup>66</sup> Nozick 1974, p. 203, 160 and at page 160 in footnote 5.

<sup>67</sup> Nozick 1974, p. 174.

<sup>68</sup> Viz. e.g. Van Donselaar 1997, p. 86, Wolff 1991, p. 114, Kirzner 1981, p. 402, Scanlon 1981, p. 109.

<sup>69</sup> Locke, *Second treatise on government*, par 27. Viz. inf. 2.1.1.

<sup>70</sup> Nozick 1974, p. 176.

<sup>71</sup> Nozick 1974, p. 176.

<sup>72</sup> Nozick 1974, p. 176.

<sup>73</sup> Nozick 1974, p. 176.

Nozick immediately plunges into a discussion of Locke's ideas on property and acquiring property. The only sentence that announces Locke's theory is as follows:

Before we turn to consider other theories of justice in detail, we must introduce an additional bit of complexity into the structure of the entitlement theory.<sup>74</sup>

Apparently the proviso enters the discussion on the entitlement theory because of these complexities. The Lockean proviso is only mentioned in order to explain this complexity. Kirzner noticed the complexity as well. He upholds<sup>75</sup> that Nozick pursues the implications of the Lockean proviso only insofar as it introduces complications.<sup>76</sup> He does not specify, unfortunately, what complications these may be. He neither concludes from this that the paragraphs on Locke serve only that particular purpose of explaining a complication. Kirzner remarks that:

And, while Locke himself enumerated the "proviso" in relation to original acquisition from nature, Nozick has pursued its implications insofar as it introduces complications into the justice of acquisition by transfer.<sup>77</sup>

Why this sudden need to introduce complexities? This need in fact never becomes truly apparent, since Nozick does not explicitly refer back to this need for complexities. He does however mention that a principle of justice in acquisition that includes the Lockean proviso:

must also contain a more complex principle of justice in transfer.<sup>78</sup>

#### 2.3.4 WHY THE COMPLEXITIES?

If one reads the paragraph on the Lockean proviso only briefly, he might be tempted to say that there is a satisfying explanation in there that explains the relevance of the Lockean proviso. Nozick simply holds the proviso to be true. This is thought by many.<sup>79</sup> I, however, hold the opposite to be true.

This paragraph aims to give two explanations as to why Nozick mentions the proviso. They both relate to the complication that Nozick addresses. The first is an overall explanation of the purpose of the proviso within the structure of chapter 7. The second aims to explain under what conditions a proviso can enter the entitlement theory.

A definition of the PJOA that includes the proviso, thereby inherently entails consequences for the PJT. Though acquiring an object can in itself be in accordance with the Lockean PJOA, and subsequent transfers of all other objects might very well cohere with the PJT, the combination of the two types of transfers might still violate the PJOA. In order to show what the consequences of this deadly combination are, Nozick treats his readers to a watery example.

Nozick considers the purchasing of water holes as an example of such a possibly unjust combination of the principles.<sup>80</sup> In order to understand the mixture between these principles, he fills PJOA in with the Lockean proviso. The LP-PJOA then looks as follows: if I were to find one or more water well, I can acquire them if I leave "enough and as good" for others.<sup>81</sup> Such an acquirement would then be in accordance with the PJOA that for the sake of the argument, is considered to be the same as the weaker interpretation of the Lockean proviso. If I then start to purchase all the other water wells, (at the same time, as otherwise the price would rise) I do not violate the PJT.

Yet I do violate the PJOA in the end, as there is no water well left for anyone else. Taken apart, the acquirement and the buying of water wells, is in accordance with the entitlement theory –filled in with the Lockean proviso– are just. It is their combination that violates the PJOA.<sup>82</sup> If I own many water wells, and I

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<sup>74</sup> Nozick 1974, p. 174.

<sup>75</sup> I uphold the same *supra* 2.3.4.

<sup>76</sup> Kirzner 1981, p. 402.

<sup>77</sup> Kirzner 1981, p. 402.

<sup>78</sup> Nozick 1974, p. 179.

<sup>79</sup> Viz. *sup.* par. 2.1.2.

<sup>80</sup> Nozick 1974, p. 182.

<sup>81</sup> Nozick 1974, p. 179.

<sup>82</sup> Nozick 1974, p. 180.

want to buy the rest, I'm forced under the entitlement theory to either sell my own water wells, or to give up purchasing the others. Otherwise I violate the proviso-part of the PJOA in the "rebound".

This violation would be a direct consequence of the proviso that is included –regardless its precise content– in the PJOA. As said earlier, the Lockean proviso is not a necessary element in the PJOA; any proviso might fulfil its task. Nozick does not say that the proviso has to have exactly the same contents as the Lockean proviso. His aim with the Lockean paragraphs was to explain this complexity via the Lockean proviso. The complexity is, that it cannot be said whether a transaction is and always will be just. It can always become unjust due to subsequent events. The justness of a transaction can only be established for a fixed period of time, under the condition of *ceteris paribus*.

Nozick's argument is difficult to explain in two sentences. That is why he addresses the Lockean proviso as an example. The water wells provide him with a case study. Assuming the Lockean proviso is applicable, given that there is an adequate number of other water wells, I can do no harm by originally acquiring one of the wells. The acquisition is not in violation with the assumed (in this case the Lockean) proviso. Suppose that I then buy all the other water wells, in accordance with the principle of justice in transfer. Each transaction is then in accordance with that principle. And if I did not already have some water wells, there would be no violation with the proviso. But since I already have originally acquired a water well, there is – according to Nozick – such a violation. The total amount of water wells is in my possession and there is not enough and as good left for any others.

It thereby violates the earlier assumption that a transaction is sound as long as it is in accordance with the proviso. In the water well incident, a specific PJOA is violated; not by a single act, but rather by the combination of several acts. The buying out of all water wells could be seen as one single act in violation with the proviso-assumption. Nozick wants to exclude the possibility that the clever entrepreneur can evade the consequences of this assumption by combining two types of transactions that are in themselves in accordance with the assumed adequate proviso and the entitlement theory.<sup>83</sup> He thereby fixes a possible loophole in the entitlement theory.

What purpose serves the suggestion of this hypothetical hiatus<sup>84</sup> to Nozick's main argument that the entitlement theory is a sufficient and adequate theory of holdings? Nozick has to exclude the possibility of this hiatus. His argument that the entitlement theory (in combination with a notion of property, and a principle of just original acquisitions) is sufficiently just, depends on it.

Without this water well-argument, the Rawlsian theorist might object that the entitlement theory is inherently insufficient as a distributive theory. The hiatus provides the possibility to circumvent an assumed principle of just original acquisition. Without a prohibition to, the entitlement theory paves the way for entrepreneurial monopolists of primary resources. Nozick does not reject this in itself. He only wants to pay attention to that it should not be possible to evade an earlier assumption, i.c. the Lockean proviso through the entitlement theory. Nozick has no problem with water monopolists as such.<sup>85</sup> Nozick only wanted to show that the PJT has to be connected with the PJOA. The two principles should not be applied separately. Separation of the principles might diminish the effect of their counterpart. The PJT should not be so interpreted that it would be possible to violate an earlier assumed PJOA "in the rebound".

This explanation of the purpose of the Lockean proviso can be summarized in three sentences. Nozick tried to insert in the definition of the entitlement theory the insurance that the PJOA or the PJT cannot be violated "in the rebound", by applying the principles separately. Nozick needs this definition to provide his entitlement theory with the strength to compete with distribution theories. The Lockean proviso is only addressed as an example to explain the intertwined character of the principles.

This concludes the first explanation I have on the purposes of the Lockean proviso. As said at the beginning of this paragraph, there is a second aspect to the *raison d'être* of the Lockean proviso. A system that allows property via the weaker Lockean proviso is justifiable for its social use. Property encourages experimentation and increases social product, it enables people to decide on the risks they want to bear, it protects future persons for it allows to hold back from consumption, it provides alternate sources of employment and the like.<sup>86</sup> All these reasons, says Nozick, do not so much explain the utility of a property law. They explain the intent behind the "enough and as good left over" proviso.<sup>87</sup>

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<sup>83</sup> Viz. sup. chapter 4 that deals with the relation between Nozick and the monopolist entrepreneur.

<sup>84</sup> As suggested by Wolff. Viz. sup. par. 2.3.2.

<sup>85</sup> This is a crucial statement of this thesis and shall be addressed again in chapter, in the context of Kirzner.

<sup>86</sup> Nozick 1974, p. 177.

<sup>87</sup> Nozick 1974, p. 177.

The proviso is not assumed because Nozick thinks such a proviso should be the foundation of anything. It is already argued for at the beginning of this paragraph that Nozick does not hold the assumption of the Lockean proviso to be true. The only thing he tries to explain here is that if someone adopts a Lockean idea of property, it is natural that he also adopts something similar to the Lockean proviso. It is, as it were, a political choice on the basis of such Pareto-ish grounds whatever proviso is chosen.

These considerations enter a Lockean theory to support the claim that appropriation of private property satisfies the intent behind the “enough and as good left over” proviso, *not* as a utilitarian justification of property. They enter to rebut the claim that because the proviso is violated no natural right to private property can arise by a Lockean process.<sup>88</sup>

Nozick tries to sketch what a Lockean version of the entitlement theory in practice would look like. He does not explain that this is the ultimate, best version that we can think of. He tries to explain the ratio of adopting a Lockean PJOA, merely in order to strengthen this example of the complexities connected with a Lockean version of the entitlement theory. He could have tried to explain this water well- complication with a Marxian conception of property, but that would have seriously affected the plausibility of the merits of the entitlement theory above Rawls’ theory of just distributions.

Nozick’s strategy is to take the Lockean idea of property and the Lockean proviso as an example of a *possible* PJOA. But since Locke combined his property theory with a complicated confessional metaphysics, taking over the complete Lockean example would be just as difficult as taking over the Marxian notion of property. Hence Nozick adjusts the confessional arguments to the Lockean proviso and replaces it with a hypothetical alternative.

Nozick thus considers the purpose of the Lockean proviso rather than the exact words. Locke’s intention with the proviso does directly spring from the idea that there is a social aspect to the unowned,<sup>89</sup> which is something that is denied altogether by Nozick.<sup>90</sup> Locke does not want us to unlimitedly appropriate, because God gave us the world in common. Nozick refutes the idea of the unowned being in common hands. This already appears from the fact that Nozick refutes the word “distribution theory”, since that word in itself is not neutral. The word reminds us of a social pie that is to be distributed according to some sort of principle of equality. To Nozick, the notion of distribution implies initial centrality that is denied in his entitlement theory.<sup>91</sup> It is precisely this centrality that is deeply embedded in Locke’s ideas on property. Locke considers the earth as something God gave to all “Men in common”.<sup>92</sup> Nozick re-explains Locke’s intentions with the proviso, via utilitarian justifications. But he does not do so in order to encourage his readers to believe in the proviso.

Nozick is not inclined to take over the Lockean confessionalism behind the proviso and thus replaces Locke’s ratio with a more plausible ratio of “various familiar social considerations”.<sup>93</sup> This ratio serves in order to “rebut the claim that no system of property can arise out of a Lockean theory”.<sup>94</sup> Nozick does not insert this more plausible ratio because he believes that there should be constraints to infinite appropriation. The use of it has to be explained along various social considerations.

Now that the idea of the proviso sounds intuitively more attractive, Nozick can explain why one has to be weary of complexities in adopting a certain principle of just original acquisitions. With this proviso in mind, Nozick can explain a possible consequence of the simple version of the entitlement theory that he wants to avoid by adopting a more complex version.

In sum, Nozick does not conclude that the Lockean proviso is a necessity. Nozick did not mention the proviso as a goal in itself. It is instrumental to his argument that the entitlement theory is preferable above Rawlsian theories. The proviso and the Lockean theory to appropriate are only substituted in order to explain a possible loophole in the entitlement theory, that Nozick does not allow in it. Any paragraph that seems to be an argument in favour of the Lockean proviso can also be read as a mere argument in favour of using Locke as an example.

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<sup>88</sup> Nozick 1974, p. 177.

<sup>89</sup> Locke, *Second treatise on Government*, § 26.

<sup>90</sup> Nozick 1974, p. 148.

<sup>91</sup> Nozick 1974, p. 149.

<sup>92</sup> Locke, *Second treatise on Government*, § 26.

<sup>93</sup> Nozick 1974, p.177.

<sup>94</sup> Nozick 1974, p. 177.

### 2.3.5 SUMMARY

Whilst answering the questions that arose in 2.3.1, I interpreted Nozick's Entitlement theory differently than usual. Before I start arguing why this interpretation should be preferred above the conventional, it may be needed to summarize the main conclusions of my interpretation of the Entitlement Theory, as presented by Nozick in the first section of chapter 7 of *Anarchy, State and Utopia*. These were:

1. That Nozick prefers Locke's concept of acquiring property above any other philosopher, mainly because Locke's theory is historical and unpatterned.<sup>95</sup>
2. That the paragraphs on Locke in Nozick's text are merely instrumental to the purpose of explaining the Principle of Just Transfer and the functioning of the entitlement theory as a whole.<sup>96</sup>
3. That the lack of a property definition is not a shortcoming in the text.<sup>97</sup>
4. That the paragraphs dedicated to Locke and the proviso serve to illustrate a complexity only,<sup>98</sup> by means of a theory on acquisitions that is historical and unpatterned.
5. That this complexity aims to undercut what would otherwise be a defect in the entitlement theory; namely that the PJT when applied separately from a PJOA, can conflict with that PJOA.<sup>99</sup>

## 2.4 WHY READING ANEW

In the above, I've given a different interpretation than is usually held<sup>100</sup> concerning Nozick's idea of the Lockean concept of acquiring property and the Lockean proviso in particular. There are several reasons upon which the interpretation of Nozick's entitlement theory I gave, may be vested. I'll sum them up hereafter, in separate sub paragraphs. It should preliminary be noted that the objective of this paragraph: to attribute the view of 2.3 to Nozick, is not foundational to the relevance of paragraph 2.3. Even if Nozick did not mean what I argued for, he should have meant it, in order to uphold his entitlement theory above Rawls' principle of fairness and the accompanying distribution theory.

### 2.4.1 RELATIVIZED

The view I sketched of the Lockean proviso as part of an example only, might seem to conflict with the sentence that I read differently than the rest of the world does. Nozick says:

[...] I assume that any adequate theory of justice in acquisition will contain a proviso similar to the weaker of the ones we have attributed to Locke.<sup>101</sup>

Why is there an apparent need for anything similar to Locke's proviso? That Locke needs such a proviso is completely comprehensible and coherent with his views on the origin of the world as a given of God. But what is Nozick's excuse to take the interest of the Other into account? How can limits to appropriation be necessary before a definition of property is adopted?

The regular point of view is that Nozick adopted the proviso for some reason or another. As the reason whereto Nozick became such a proviso fan, remains in the dark, it has been concluded that Nozick didn't find the support in Locke that he had been looking for.<sup>102</sup>

But Nozick did not state in the above quotation that a Lockean proviso is a necessary element. We can only conclude from the above that Nozick *assumes* that any *adequate* theory of justice in acquisition will contain *a* proviso *similar* to the weaker Lockean proviso. The four words in italic stress the relativity of the statement. It should be noted that even if Nozick here pleaded in favour of something similar to the proviso

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<sup>95</sup> Viz. inf. 2.3.1.

<sup>96</sup> Viz. inf. 2.3.1 and 2.3.4.

<sup>97</sup> Viz. inf. 2.3.2.

<sup>98</sup> Viz. inf. 2.3.3.

<sup>99</sup> Viz. inf. 2.3.4.

<sup>100</sup> Viz. inf. 2.1.2.

<sup>101</sup> Nozick 1974, p. 178.

<sup>102</sup> Viz. inf. 2.1.2.

by postulating its need, there is no explanation as to why the proviso should be incorporated. To say that Nozick adheres to the proviso by means of a logical necessity, is an induction that cannot be argued, at least not on the basis of this sentence alone.

In arguing for his entitlement theory, Nozick empirically<sup>103</sup> claims, that even if one upholds a Lockean proviso –regardless why– the entitlement theory does not actually run afoul of that proviso. Nozick offers two arguments in favour of this in the paragraph on the proviso. One is that compensation can make up for injustices that occur through the assumed proviso.<sup>104</sup> The other is that there is a built-in-security mechanism in the entitlement theory that prevents an assumed proviso –regardless which– from being violated in the second instance.<sup>105</sup>

The entitlement-scepticist might object to Nozick’s entitlement theory that the situation of those who are under a certain proviso not able to appropriate, are worse off. That would be a violation with that proviso. They might argue in favour of the proviso regardless whether an entitlement theorist agrees with the proviso being valid. They might say to the entitlement theorist that his theory embraces a grotesque violation of the standard they think any theory of justice in holdings should be living up to.

Rashdall’s case is one example that the scepticist might use as an objection to the entitlement theory. Nozick mentions Rashdall’s case in a footnote. The case maintains that someone might appropriate all the water in the desert before anyone else is able to do so and thereby violates the proviso, or even the right of the others to live. Nozick’s argument against this objection is straightforward. Special considerations such as the right to life or the Lockean proviso enter with regard to material property. Hence a theory of property has to precede the Lockean proviso. One first has to have a theory of appropriation before provisos to this appropriation can enter.<sup>106</sup>

Since special considerations (such as the Lockean proviso) may enter with regard to material property, one *first* needs a theory of property rights before one can apply any supposed right to life (as amended above) Therefore the right to life cannot provide the foundation for a theory of property rights.<sup>107</sup>

Fourier provides Nozick with another example of someone who would not immediately accept the entitlement theory on the grounds of its possible inequalities.<sup>108</sup> Fourier held that a minimum provision is justified as a compensation for the loss of liberty. Nozick also claims that the something-similar-to-the-weaker- Lockean-proviso, combined with the rest that constitutes the principle of justice in acquisition normally leads to property, and that in cases where the Lockean (or alike) proviso is not met, it can be substituted as an element of the PJOA through compensation. So he should be really receptive towards the claim Fourier made. Nozick’s only argument against it is that the compensation is only required to those who are really worse off than they would have been without a system of property. This is an empirical claim that Nozick makes, as is the supposition that there is no such person. However, the counterargument that there is such a person, is just as empirical. Fourier does not provide an argument against the entitlement theory as such, he rather suggests a way in which it should be applied.

As Nozick’s “patterned” opponents do accept the proviso, Nozick may have felt the need to argue that it is not very likely that a theory of justice in acquisition (completed with something similar to the Lockean proviso) does not run afoul to the principles of his opponents. Nozick is arguing that even those scepticists have no reason to object against the entitlement theory on the ground that it’s freedom may lead to inequality of property distribution. A Lockean baseline can be incorporated in the PJOA and thus bar inequalities from entering into a completed entitlement theory.

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<sup>103</sup> As he admits at page 182. What Nozick says about compensation is also one additional argument against the conventional lecture of Nozick adopting the proviso. I will address this subject in this paragraph under the bold header: “compensation”.

<sup>104</sup> Nozick 1974, p. 178.

<sup>105</sup> Nozick 1974, p. 179-181.

<sup>106</sup> If this sentence is read in combination with the part where Nozick announces he will not say anything about the principle of justice in acquisitions, it provides another argument in favour of my interpretation of Nozick as not having adopted a proviso. Nozick apparently does not adopt a PJOA and he thinks himself that such a PJOA proceeds. the Lockean proviso, how can he have adopted that proviso without contradicting himself enormously?

<sup>107</sup> Nozick 1974, p. 179.

<sup>108</sup> Nozick 1974, p. 178, under the asterix.

Nozick does not care about this baseline himself; he only uses the baseline instrumentally, as an argument in favour of the entitlement theory. He might want the baseline to be as low as possible whereas Rawlsian equality favourers want it to be as high as possible. The only assumption he makes about the Lockean proviso is that something of the sort is needed in order for a theory to be adequate. Hence the establishment of the baseline needs: “more detailed investigation than we are able to give it here.”<sup>109</sup> The establishment of the baseline (that is assumed to be needed for its adequacy) is a political question for those who are willing to adopt an entitlement theory.

Yet this “instrumental baseline” argument is as much based on an induction of the meaning of the sentence that I quoted at the beginning of this paragraph, as is the opposite argument that Nozick agrees with the proviso for the proviso’s own sake. Neither the need for something similar to the Lockean proviso in the entitlement theory for its own sake, nor the need for the proviso on any other grounds can be based on this sentence alone. Hence, subsequent paragraphs address additional reasons.

#### 2.4.2 UNSPECIFIED

If Nozick would not be neutral about the exact content, he would himself have specified the exact content of the “new” Lockean proviso. Then, indeed it would be justified to speak of a Nozickean proviso, as Wolff does.<sup>110</sup> But Nozick did not draft a proviso or even a sketch thereof. He does not make any sketch about the outer appearances of the entitlement theory, apart from one single sentence that I called the similar-sentence. And that sentence, I pointed out in the previous sub paragraph, is ambiguous.

He says it himself at the beginning of the chapter where he warns his reader that he is not going to talk about the principle of justice in original acquisitions.<sup>111</sup> Why, if the Lockean proviso can be considered as crucial to the entitlement theory, should the contents of that proviso remain unspecified?

There is an answer to the question why Nozick does not specify this, but this answer forces one to drop the assumption that a specific principle of just original acquisitions or the Lockean proviso is a part of the entitlement theory. Nozick states:

But we do not need any *particular* developed historical-entitlement theory as a basis from which to criticize Rawls’ construction. If *any* such fundamental historical-entitlement view is correct, then Rawls’ theory is not. We are thus able to make this structural criticism of the type of theory Rawls presents and the type of principles it must yield, without first having formulated fully a particular historical-entitlement theory as an alternative to his.<sup>112</sup>

Thus the PJOA- definition shortage cannot be explained by mere negligence. Nozick’s reason to do so was that the entitlement theory is preferable with many more how-to-acquire-property definitions.

#### 2.4.3 DISCREPANCIES

Some critics, amongst which Wolff, have concluded for the various discrepancies between Locke’s thoughts on property and Nozick’s libertarian goals, that Nozick does not find the support he has been looking for in Locke.<sup>113</sup> Locke’s use of biblical authority in the preservation of mankind and that the world is a gift of God to men in common, are far from what Nozick’s entitlement theory is after. Considered this way, it must be absurd that Nozick makes no attempt to “clarify his position concerning the twin issues of the foundation of private property rights and his relation to Locke’s writings on property.”<sup>114</sup>

The discrepancies between Nozick and Locke are apparent. They provide even more reasons to consider the passages on Locke only as an example of the entitlement theory. Nozick’s aim is to come up with a theory that competes with Rawlsian theory of justice as fairness, rather than interpreting or reinventing Locke. The entitlement theory is capable of competing with the Rawlsian theory, almost totally independent of its exact

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<sup>109</sup> Nozick 1974, p. 177.

<sup>110</sup> Wolff 1991, p. 107.

<sup>111</sup> Nozick 1974, p. 150.

<sup>112</sup> Nozick 1974, p 202-3.

<sup>113</sup> Wolff 1991, p. 105, 106.

<sup>114</sup> Wolff 1991, p. 106.

details, as it starts from scratch and from a different scratch than Rawls. It can be filled in, for instance in a Lockean manner, but Nozick nowhere suggests that it has to be done.

#### 2.4.4 CONTRADICTION

If Nozick is read as if he were adopting a proviso that is similar to Locke's proviso, he contradicts himself in a very silly, unprofessional way. For he announced that he would not discuss the PJOA.<sup>115</sup> And twenty pages later he states that the PJOA must at the very least contain a similar proviso to the weaker interpretation he gave to Locke's proviso.<sup>116</sup>

Latter statement should then be even more surprising given the remark where Nozick explicitly says that special considerations such as the Lockean proviso depend on a notion of material property, as they enter with regard to such a specific notion of property.<sup>117</sup> Why then does Nozick come up with his own notion of property and with his own proviso?

This internal contradiction is solved, if we consider that Nozick gave a sketch of PJOA only. This sketch only entails that a PJOA would not be adequate without something that has a vague similarity with the weaker interpretation of the Lockean proviso. This Nozick-friendly reading coheres with Nozick's aims, resolves possible contradictions, moderates the importance of the original acquisition and shifts the focus to what should be considered as the most important part of the entitlement theory: the title requirement.

#### 2.4.5 CONSIDERATIONS

Nozick suggests in the paragraph "Locke's theory of original acquisitions" that we might have utilitarian reasons for introducing something similar to the weaker interpretation of the Lockean proviso.<sup>118</sup> Though he explicitly refutes to justify property in a utilitarian manner, he does justify the use of a Lockean proviso this way. Nozick, after a discussion concerning the meaning of the Lockean proviso, reflects upon the following:

Is the situation of persons who are unable to appropriate (there being no more accessible and useful unowned objects) worsened by a system allowing appropriation and permanent property? Here enter the *various social considerations* favouring private property [...]<sup>119</sup>

Nozick has four conditions that favour property in mind. That is odd, as it is not the justification of property in itself that was discussed in this paragraph. It is as if Nozick changes subject at every new page. Nozick was not wondering how to justify property, he started off with saying that he was not going specify the details of each principle.<sup>120</sup> He was talking about Locke's theory of acquiring, why then does he suddenly come up with the conclusion that there are various social considerations in favour of private property?

This may be considered as follows. Supposedly the entitlement theory that Nozick argues for, is an "opt out"-system. Liberal, democratic states already have a system that defines under which conditions property may be acquired. In order to explain some complexity of the entitlement theory, Nozick takes the Lockean proviso into consideration. Nozick here does not argue for the validity of the Lockean proviso but rather for its possibility, merely in order to show that the entitlement theory can be illustrated in different ways and that each is a competitor to a Rawlsian theory.

These considerations thus enter as a utilitarian justification for an entitlement theory, for a system of property. Utilitarian reasons may explain the intent behind the Lockean proviso, in a rather un-Lockean, godless way. But which other reason it exactly may be is a question that Nozick left open. Nozick was more concerned with circumventing the argument of those who want to restrict appropriation, than with the establishment of the exact contents of that restriction. If one assumes a Lockean theory, a proviso to appropriation may enter based on various social considerations. Establishing this limit makes the entitlement theory only less attractive to all those who disagree with the precise restriction. Leaving it open, illustrates its flexibility. Important though as property is, in an entitlement theory it is a mere detail. The entitlement

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<sup>115</sup> Kirzner remarks that this is rather strange in Paul eds. 1981, p. 402.

<sup>116</sup> Nozick 1974, p. 178.

<sup>117</sup> Nozick 1974, p. 179n.

<sup>118</sup> Nozick 1974, p. 177, 178.

<sup>119</sup> Nozick 1974, p. 177. Italics are mine, SP.

<sup>120</sup> Nozick 1974, p. 153.

theory cannot be rejected on the basis of details that are variable. Seen from this perspective, Nozick would be very unwise if he would fill in the entitlement theory with a specific notion of property.

The question remains, why there should be a restriction, that establishes under which circumstances property may be acquired, at all. I don't think Nozick may have held that the limit should be there for its own sake, or because of some godly estoppel that provokes inequalities. Embedded in the question what may result into property, is the question what may not lead to property.

This paragraph aimed to argue that Nozick neither meant to plead for a full-scale theory, nor for the proviso as an elementary principle. Nevertheless the argument I made in paragraph 2.3 is able to stand on itself. Even if Nozick did not say any of what I uphold, Nozick should have said this in order to make the point that his rudimentary version of the entitlement theory in general should be preferred above Rawls' principle as fairness.

## 2.5 CONCLUSION

The previous paragraphs already drew conclusions concerning what the principle of just original acquisitions maintained according to Nozick and what originality as an element in this principle necessarily maintains. By means of an overview upon which a further conclusion can be drawn, these conclusions are mentioned in the following sub paragraph. What consequences these conclusions entail for the entitlement theory, is addressed in a separate sub paragraph.

### 2.5.1 PREVIOUS CONCLUSIONS

It is thus already concluded that Nozick uses the Lockean proviso and the Lockean concept of property merely for illustrative purposes. Nozick does not use the Lockean property-concept as an argument for the entitlement theory itself, only in so far as it illustrates that the entitlement theory can be both historical and unpatterned. The proviso in itself is neither an argument for the entitlement theory. Though something like the Lockean proviso is needed in order to ensure a stable system of property, it does not need to be the proviso itself that bars people from unlimitedly acquiring. Nozick does not argue that the proviso is a value in itself.

That conclusions are already drawn does not mean that there is nothing to conclude upon that. The interpretation I upheld of the paragraphs on Locke comes along with another appraisal of the entitlement theory as a whole. As said earlier, others uphold that Nozick's theory is not as specified as it should be in order to compete with a Rawlsian theory. Contrary to this, I hold that Nozick wanted to use the Lockean proviso to illustrate the complex way in which the principle of just original acquisitions and the principle of just transfers can be intertwined. Nozick shows that we can have a theory of holdings that offers an alternative to a Rawlsian distribution theory. The contents of the proviso cannot and do not form a part of the entitlement theory. Nozick did not aim it to be so. He only aimed to argue that:

1. an entitlement can arise out of justly acquiring a holding (regardless how to),
2. an entitlement can arise out of a just transfer,
3. these are the only applications that lead to the entitlement of a holding and
4. that the two principles should be taken together, when one gives an ordeal about the justness of a holding, rather than as their separate parts.

If Nozick is interpreted as such, he can be considered a formalist, as far as the entitlement theory is concerned. Yet, although Nozick comes up with an entitlement theory as an argument against Rawls, this does not imply that the entitlement theory itself is anti-Rawlsian. The PJOA, in the sketchy way Nozick drafted it, is deprived of any moral imperative. It may thus be possible to substitute principles of original acquisition that are derived from Rawls' principle of justice as fairness, provided that it does not compromise the possibility of just voluntary transfers. These voluntary transfers are the crux of the entitlement theory, and will be discussed in the following chapter.

### 2.5.2 CONSEQUENCES FOR ENTITLEMENTS

I hold that Nozick does not incorporate dubious principles on the origin of property into his entitlement theory. This interpretation has consequences for the way in which the entitlement theory should be appreciated. This means that the entitlement theory itself is nothing but a structure that is deprived of any content. It is thereby intuitively attractive as it can be filled in with particular principles that are chosen within a political arena. The entitlement theory can be applied in a social or libertarian manner. Political arguments thus cannot be directed against the structure as such.

Whereas Rawls' theory of justice necessarily comprises the adoption of the theory either for the whole nine yards or not at all, the entitlement theory does not provide an entire program. As such it already provides the actors within the system with the choice to complete the entitlement theory according to their likings. Thereby some of the purposes Nozick had with the entitlement theory are fulfilled in advance:

1. The entitlement theory does not necessarily enforce a patterned division of holdings on the actors.
2. The entitlement theory does not proceed from end-state principles, the way in which Nozick sketched the theory, includes no such principle.

The crux of the theory of holdings does not lie in acquisitions. This is not only implied by the contents of the PJT that will be discussed in chapter 3. It follows already from two features of the PJOA. A first feature maintains that the word "original" in original acquisition, should not be taken to literally. Nozick doesn't say this but it follows from the fact that he refutes a stringent interpretation of the Lockean proviso and the fact that he asks himself where the historical shadow ends, as was concluded in paragraph 2.2. Not only because a transfer is justified rather easily and because voluntary transfers upset patterns, but also because the original acquisition is of minor importance to what is justly transferred *very often* and/or *a long time ago*. If this would not be the case, the entitlement theory would become irrelevant in practice, due to the sorites paradox.

A second follows from the combined paragraphs 2.3 and 2.4 wherein it was held that Nozick does not uphold the Lockean theory of just acquisitions. Nozick does not consider the necessital contents of any theory in particular, as more theories are possible and Nozick does not need to adhere to any in order to prefer them all above Rawls.<sup>121</sup>

As a cause of this, the entitlement theory does give the actors the liberty to adjust the theory of holdings according to their wishes. The entitlement theory is thus a solid competitor to Rawls' theory of distributive justice, as Nozick promised his readers. It shows that for his theory of entitlement, the question on how to establish private property to Nozick was, like the definition of property, less important to his entitlement theory. The crux of the theory of holdings lies in just transfers. Just transfers will be the subject of the following chapter.

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<sup>121</sup> Nozick 1974, p. 152.

### **3. TRANSFERS: WILL AND ERROR**

As argued in chapter two, the crucial part of the entitlement theory-argument, is neither situated in the Lockean proviso nor in the principle of just original acquisitions. The crucial part of Nozick's theory is the principle of justice in transfer, as it is this element that makes the entitlement theory better, as far as Nozick is concerned, than the theory of justice as fairness that Rawls presented. Nevertheless, the role of the principle of justice in transfer will be examined independently from the conclusions drawn in the previous chapter.

Nozick describes the topic concerning transfers in a theory of holdings such as the entitlement theory as follows:

The second topic concerns the *transfer of holdings* from one person to another. By what processes may a person transfer holdings to another? How may a person acquire a holding from another who holds it? Under this topic come general descriptions of voluntary exchange, and gift and (on the other hand) fraud, as well as reference to particular conventional details fixed upon in a given society. The complicated truth about this subject (with placeholders for conventional details) we shall call the principle of justice in transfer. (And we shall suppose it also includes principles governing how a person may divest himself of a holding, passing it into an unheld state.)<sup>122</sup>

In this chapter, some difficulties are addressed, concerning the principle of justice in transfer, as discussed by Nozick in *Anarchy, State and Utopia*. It will be argued that Nozick is more ambiguous on the subject of just transfers that he might have realized.

In order to do so, the first paragraph summarizes the way in which Nozick describes the principle of justice in transfer. When describing this principle a difficulty appears that Nozick does not take into account a ambiguity in his own formulation of the principle. This difficulty is signalled in paragraph 3.1, and concerns the assumption of voluntariness.

Paragraph 3.2 discusses Kirzner's conception of the PJT. According to Kirzner we should see his work:

as, so to speak, riding piggyback upon Nozick's entitlement theory. Despite the large critical literature that has grown up around Nozick's work, it seems to us that the basic features of that theory are still capable of commanding widespread assent.<sup>123</sup>

Nevertheless he argues that the entitlement theory and the PJT in particular, falls short of economic realism. In this paragraph it will be examined what appears to be the problem with the PJT, according to Locke.

Paragraph 3.3 focusses on the legal reasoning upon which Kirzner addresses part of his argument against Nozick. Kirzner addresses the theory of contract law, which, given the nature of the subject is certainly justified. It will sketch the background of Kirzner's claim that error is impossible as a criterion for PJT.

In paragraph 3.4 conclusions will be drawn concerning the interpretational difficulty that may arise out of the PJT, Kirzner's criticism towards the PJT and concerning the juridical viability of the PJT.

#### **3.1 NOZICK ON TRANSFERS**

As we have seen in chapter 1, Nozick's entitlement theory consists of three elements:

1. a principle of justice in original acquisition
2. a principle of justice in transfer and
3. a rectification principle that considers 1 and 2 as the only possible means of arriving at property and excludes any other means.

Chapter three focuses on what I take to be the most important element of the entitlement theory, the Principle of Justice in Transfer, because that is what, at least according to Nozick, makes Nozick's theory

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<sup>122</sup> Nozick 1974, p. 150-151.

<sup>123</sup> Kirzner 1989, p. 131.

preferable above a Rawlsian theory. Whereas Rawls argues to distribute all the goods in the world fairly, the entitlement theory leaves those who “hold” goods free to decide what to do with their “fair share”.<sup>124</sup>

As soon as the focus of this thesis shifts to the PJT, it becomes necessary to consider what this PJT maintains and what it should maintain. Hence, the first task in this paragraph is to examine what Nozick meant with the PJT and to specify what a PJT is.

### 3.1.1 TRANSFER AND VOLUNTARINESS

Nozick embroiders on the Principle of Justice in Transfer, PJT, at page 160 of *Anarchy, State and Utopia*. He there describes that “ignoring acquisition and rectification – we might say...” and thereafter follows a very detailed maxim about what it is that renders a transaction just. Since Nozick mentions himself that he does not look at acquisition and rectification<sup>125</sup>, it seems only natural to assume that this maxim deals with the principle of justice in transfer. The maxim is as follows:

From each according to what he chooses to do, to each according to what he makes for himself (perhaps with the contracted aid of others) and what others choose to do for him and choose to give him of what they’ve been given previously (under this maxim) and haven’t yet expended or transferred.<sup>126</sup>

According to this maxim, a transaction is just if (and only if) 1: the distribution beforehand was just and 2: the initiator chose the transaction. Each gives what he chooses and each gets what he has made or what others choose for him.

It may seem too obvious at first but it is important to notice that in this maxim as well as in the short maxim-version mentioned in the intro, the central element is “choice”. The justness of a transfer depends on:

- a) what a “distributing” person *chooses*;
- b) what others *chose* to give or to do for the “receiver”;
- c) what the receiver made for himself.

Secondly, it should be noted as well that b) is made dependent of another element: of what they’ve been previously given under this maxim. Thus the possibility of receiving property at a point in time  $t = 1$ , depends on the applicability of either a) or b) or c) at the point in time  $t = 0$ . This can be rephrased as another element, as follows:

- d) what others *choose*, they should be entitled to, according to the application of a) or b) or c) in a previous setting of holdings.

The interdependence between a) and b) on the one hand and d) on the other, is directly caused by the reflexiveness of the PJT. A holding’s being just depends on the title, that could be required through either a) or b) or c). The passage that I underlined, stresses that this additional d-element comprises what is crucial to the entitlement theory, a formal title-requirement, dependent of the possession of title under the previous set of holdings. Any distribution/set of holdings should arise out of a situation wherein the previous set of holdings was held under a just title.

A third thing that should be noticed that c) is an odd element in the principle of justice in transfer. “Each what he makes for himself” most likely refers to the principle of just acquisition, wherein property is just. To “make something for myself” is not a transfer of property to me but an original acquisition wherein I acquire something that was unheld before. Nozick is often thought to have adopted a certain PJOA that seems similar to this “what he makes for himself” and consists at least of the Lockean proviso, but I refuted this *infra* 2.1.3 and one of the reasons for it was that Nozick in the sentence that precedes the maxim, mentions that he ignores both acquisition and rectification.

So while Nozick announced that he would not address the PJOA, a few pages later he does superficially deal with the PJOA. Nozick can get away with this as he deals with the interdependence of PJOA and PJT in

<sup>124</sup> I put this in brackets as Nozick refutes the image that in the beginning everything is unowned. Viz. Nozick 1974, p. 149.

<sup>125</sup> Nozick 1974, p. 160.

<sup>126</sup> Nozick’s 1974, p. 160, Nozick mentions both the maxim, and the short version of the maxim at page 160.

a further stage, for instance in the example concerning the water well. As I already argued for in chapter 2.3, the discussion that follows after the formulation of this maxim, concerning Locke and the water well example, should be considered as an argument for the PJT instead of the PJOA.

Although it would have been clearer if Nozick did not refer to the contents of a possible PJOA, he does not need to leave it out, as he already announced that he does not deal with the contents of PJOA or the principle of rectification anyway. As this confusion concerning the PJOA in PJT is already dealt with in paragraph 2.2 extensively, I won't plunge into the same subject again. Leaving aside who is right in this interpretational matter, it can be concluded that embedded in PJT is a notion of PJOA: the Principle of Justice in Original Acquisition.

Ignoring possible difficulties concerning element c) we find that both a) and b) refer to a choice. Because of the way in which Nozick attributed this choice we can conclude that b) is empty of content, as it is nothing but the reverse of element a). This power to choose that entitles one to transfer an object, lies with the "distributor" only. If we step aside from the relationship with the PJOA, we may find that the way in which Nozick has formulated this maxim, leads to two difficulties.

The first difficulty appears from the maxims themselves. Strangely enough, the choice for a transfer has to be made by the distributor, i.e. the person that has the goods under control at first, *alone*. It does not say what the chosen one has to think of the transaction. This is not in every case problematic. Concerning a selling transaction, the chosen one obviously wants to buy and Nozick simply presumed that choice. The buyer chose to buy and the seller chose to sell. The choice of the other follows from the mutuality of the buying and selling process. But concerning gifts, the choice element is more complicated. Under the maxim as formulated above, it would even be in accordance with the PJT if we would choose to give our home-made litter and scrap to the neighbours by just simply throwing it over the fence.

That cannot be meant, and it therefore is reasonable to presume that the sympathy of both parties to the transfer is required, not only for buying but even for giving. This is only a minor difficulty as it can be read into the principle of justice in transfer without enormous consequences for the outcome. The difficulty for instance may be reasoned away as follows: if the "choice to do" does not concern the entire transaction but only to that extent wherein there is a commitment, whereby a commitment also lies upon the receiver to accept this gift, then there is no problem to accept the maxim.

This scholastical solution of introducing a distinction in order to reason away an undesired consequence, is not available for a second difficulty in the formulation of the maxim. This second difficulty is the subject of a separate sub paragraph. It will also turn out to be the subject of the remainder of this chapter, as the paragraphs thereafter zoom in an element of this problem: the Will.

### 3.1.2 CHOICE VERSUS WANT

Even if one ignores this first difficulty and assumes that a transfer is just when both parties have chosen to transfer, there remains a difficulty in Nozick's description of the principle on just transfer. Nozick seems to define the notions "voluntary" and "Free Will" as the "freedom to choose". This oddity cannot be reasoned away easily as it hits the core of the entitlement theory: what it is that renders a certain setting of property just. If the entitlement theory is based on the voluntariness of transactions, this leads to a different evaluation of a certain set of holdings than a choice-based entitlement theory would. This paragraph is concerned where and how this confusion is situated in the text of *Anarchy, State and Utopia*.

The main example of confusing these notions is found in the context of the Chamberlain-example.<sup>127</sup> Nozick here emphasises that each of the Chamberlain-spectators *chose* to give twenty-five cents of their money to Chamberlain. The third sentence thereafter immediately assumes that if these people *chose* to give their money, they thereby *voluntarily* gave it away and that the resulting distribution is consequently just.

Let us suppose that in one season one million persons attend his home games, and Wilt Chamberlain winds up with \$250,000, a much larger sum than the average income and larger even than anyone else has. Is he entitled to this income? Is this new distribution, D2, unjust? If so, why?

<sup>127</sup> Nozick 1974, at the middle of page 161. This example is considered in more detail *supra* 4.2.1. This is done because, as will be argued for, there is a discrepancy between the maxims(s) on the one hand and the Chamberlain example on the other. The maxim to me is more decisive in establishing what according to Nozick the contents of the principle of just transfer are. Kirzner, on the other hand, appears to presume the Chamberlain example to be constitutive, without mentioning this discrepancy. In order to follow Kirzner's drift, the example is dealt with extensively in chapter 4 that deals with Kirzner's interpretation of the PJT.

There is no question about whether each of the people was entitled to the control over the resources they held in D1; because that was the distribution, (your favourite) that (for the purposes of argument) we assumed was acceptable. Each of these persons *chose* to give twenty-five cents of their money to Chamberlain. [...] If D1 was a just distribution, and people *voluntarily* moved from it to D2, isn't D2 also just? <sup>128</sup>

In this example Nozick applies his principle of justice in transfer to a basketball game. At a certain point in time:  $t = 1$ , before the game starts, a just distribution D1 is assumed. At  $t = 2$ , when the game starts, a large number of tickets is sold to people who want to watch the game. Due to this transfer of money from the people to Wilt Chamberlain, a distribution D2 arose that left Chamberlain with a huge profit and so many others with a small loss.

At the end of the example, Nozick applies his maxim. Thereby he rephrases his maxim (for each as they choose to each as they are chosen) into something totally different. He rhetorically wonders that if D1 was just:

and people voluntarily moved from it to D2, transferring parts of their shares they were given under D1 [...] isn't D2 also just? <sup>129</sup>

This question points to the criterion that is crucial in voluntariness: "voluntas"; will. This is opposed to the "choice" that was required in the maxim!

At a first glance, choice and will might seem similar; for if I have chosen something, I probably wanted it. Nozick treats the notions "out of Free Will" and "Free Choice" as if they are synonymous. But a free will (in the meaning of "voluntary") and a free choice are not the same at all. A multiple-choice exam does not deal with will, it is not about whether I *want* a) rather than b) because a) fits with the colour of my hair, it's about which one I should *choose* or not. Whereas will points to want, a rather structural state of mind<sup>130</sup> within a person, choice is a more "objective" notion,<sup>131</sup> that refers to the circumstances at present, to the act that the people actually do.

Though in the Chamberlain-example the assumption that there is a coherence between will (their wanting/desiring a ticket) and choice (their buying a ticket) is rather likely, it is not necessarily so. Some spectators may have bought their ticket under false assumptions, for instance due to fraudulent ticket salesmen. They may have bought a ticket for The Wilt Chamberlain while they actually bought a ticket for a lousy basket-balling namesake. Or they accidentally bought a ticket for Wednesday while they wanted a ticket for Thursday. In all these examples they chose for a ticket that they did not really want to have. In that case the buyer was deprived of the "will" for the ticket, and he did not buy it voluntarily.

That it is natural to assume that a voluntary transaction takes into account the state of mind of the transactor, can be exemplified by some systems of contract law. Both the entitlement theory and contract law systems deal with the question under which conditions a transfer of property is justified. Especially when a certain system of law makes a transfer dependent on a title, it can be expected that it encounters the same problems as the Nozickean entitlement system does. This shall be illustrated in the following paragraph.

### 3.1.3 CONTRACT LAW ON WANTS AND CHOICE.

<sup>128</sup> Nozick 1974, p. 161, italics are mine, SP.

<sup>129</sup> Nozick 1974, p. 168.

<sup>130</sup> In the first version of this essay I wrote intention instead of state of mind. Anglo-Saxon contract law unfortunately has a different interpretation than what I had in mind: "For the purpose of construction of contracts, the intention of the parties is the meaning of the words they have used. There is no intention independent of that meaning", as appeared from Lewison 1997, para 1.02. I meant: "the meaning of what the parties meant, structurally, not at a given moment in time, and independent of the words they used." Why this might lead to confusion will appear out of the rest of this paragraph.

<sup>131</sup> Objective is an annoying word that implies all sorts of metaphysical positions. Here I mean objective in an unphilosophical sense, by ignoring the question what it is that makes a certain answer more objective. I do not want to enter the discussion of the possibility of multiple choice questions inter se. Whether the truth value of the "right" answer depends on the teacher, the book, or the way of the world is irrelevant. The example aims to show that of all possible more or less objective answers, my personal preference for the letter b or the longest answer is not going to help me when answering a multiple choice exam.

In order to show that voluntary and freely chosen are not, or at least not necessarily the same at all, this paragraph gives four case law examples that illustrate in which cases it can be said that will and choice do not converge.

In the civil codes of countries on the European continent, the so-called continental systems, or Civil Law systems, want and choice are two distinctive and crucial elements in interpreting the contents of a contract. Yet in Anglo-Saxon systems of law, also referred to as Common Law systems, the distinction is almost irrelevant. This is worth noticing, as the Chamberlain example reaches the core of contract law by considering under which conditions it is/should be possible to transfer property.<sup>132</sup>

There are numerous examples of contract case law that would lead to the conclusion that want and choice diverge. Consider for instance a 10-year-old child buying a motorcycle. This child may very much want to buy the motorcycle but if he comes home with it (leaving aside all practical details that may be involved in this), his parents most certainly will bring it back to the shop and ask the salesman whether he has gone mad. The child can want what he wants but since (in most continental countries at least) he is not formally allowed to make any transaction at all, he is not offered a choice. His parents will decide for him on whether to keep the motorcycle or not.

The opposite is also possible. One can choose without wanting either things or even without wanting anything. Suppose I sell aloe vera oil of which I claim it cures cancer. Does the person that buys both my product and my stories, really want the oil? He only wants to be cured and since he does not know whether it works or not he might take my word for it. If he later finds out it does not work at all, he most likely would not want to have it in the first place. He will think that if he knew then what he knows now, he never would have bought the oil. In other words: the choice was there but the will was absent.

It can also happen that both the seller and the buyer wanted something different than what they chose to. The following and final example really happened and became a famous case for lawyers in Germany.<sup>133</sup> A seller sold *haakjörinsköd*, (i.e. Danish for sharks meat) for what he mistakenly thought to it to be: whales meat. The buyer accidentally and independently of the seller thought the same. In such cases the rule of *falsa demonstratio non nocet* goes. The contract is not explained by the judge according to the letter but with regards to the intention of the parties. In short, it is not their choice (for sharks meat) but their will/want<sup>134</sup> (for whales meat) that is prevalent. The common intention of the parties trumps the objective meaning of the words used. According to Zweigert and Kötz, this is “rightly so”<sup>135</sup> because there has been no justifiable reliance on the objective meaning of the words. “It best answers the interests of parties to construe the contract as having the meaning they intended.”<sup>136</sup>

However, to say that the state of mind of both parties is constitutive for the contract is the Continental way of explaining the case. Common Law systems take the same view on the case in that it is unfair to let the contract prevail.<sup>137</sup> But, seen from an Anglo-Saxon perspective, the problem is not the erring will –in this case out of a lack of knowledge. The problem is rather the erring contract, for the contract did not match the will of the parties. In Anglo-Saxon systems this is an exception to the rule that the terms in the contract

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<sup>132</sup> In what way the Civil Law countries deal with the Will, is explained in more detail in chapter 4.2. This is addressed twice, because Kirzner claims that Will, or voluntariness, is an economically unviable means to determine whether a transaction is just. In chapter 4 it is thus considered in detail in what way voluntas may be a viable criterion. In this chapter I'll refer to the voluntas criterion only un-juridically, in order to explain generally that there *is* a difference between want and choice, at least for some systems of law.

<sup>133</sup> This case is referred to as: RGZ 99, 147.

<sup>134</sup> The word “will” in English has unfortunate connotations with testaments and with the word “shall”. There is a sense of obligatoriness involved in the English version that is absent in the German equivalent “Wille” the Dutch “wil”, the French “volonte” and the Latin counterpart: ?? that only refer to what the 1964 Oxford dictionary describes as “the faculty by which person decides or conceives himself as deciding upon & initiating action”.

<sup>135</sup> Zweigert & Kötz 1977, p. 404.

<sup>136</sup> Zweigert & Kötz 1977, p. 404, yet, as will be explained *supra*. Chapter 4.3, the criterion of “reliance” to which Zweigert and Kötz refer, is one that is very recent and not a necessary criterion.

<sup>137</sup> Zweigert & Kötz 1977, p. 404, Zweigert & Kötz give an example out of Treitel 7th ed 1988, p. 285, in that even the Common Law theorists accept the possibility of prevailing intentions. The example concerns a type error in the contract. Both systems would conclude that the intention has to prevail. The crucial difference is here that the Common Law lawyers conceive the error to be in the contract rather than in the intentions of the parties. So juridically the outcome is the same but there is an enormous philosophical difference. It boils down to the logical question to the origin of meaning. Is it in the words uttered or from the men who utter them? It will be dealt with in more detail in chapter 4.3.

prevail. Want is remarkably ignored in Anglo-Saxon contract law. There the basis of the contract between parties is the document upon which parties agreed with each other. In continental systems it is often the other way round, there it is the rule that the will is necessarily constitutive for a contract.<sup>138</sup>

The latter case of mutual error is perhaps the best example of the difference between will and choice. It also illustrates that the choice maxim would lead to declaring the transaction just (unless there is an exception to the rule), whereas the voluntariness-criterion would necessarily render the transaction the status of invalidity.

In the Chamberlain-example will and choice converge. I choose to buy a ticket to the game because I want to buy the ticket, for I want to see the game. In so many other examples will and choice are two different things. This calls for an examination on what Nozick exactly thinks that Free Will maintains. May be he did not realize that there is a difference between want and choice. But he might also think that the distinction is not justified. Nozick gives a libertarian account of the subject in his book *Philosophical Explanations*. This book will be considered in 3.1.4.

### 3.1.4 NOZICK AND FREE WILL

As said *infra* paragraph 2.5, the emphasis of chapter 7 of *Anarchy, State and Utopia*, is put on the principle of justice in transferring property, rather than on a particular concept of property. In paragraph 3.1 we have seen that Nozick, in the course of arguing in favour of this justice-in-transfer-principle, assumes that “voluntary”, “to choose freely” and “Free Will” are synonymous concepts.

Why is Nozick in general interested in Free Will? Nozick explains this in *Philosophical Explanations* in the introduction of chapter 4. According to Nozick, philosophers often treat the topic of Free Will as a problem about punishment and responsibility. This is however not Nozick’s interest in the discussion. His concern is rather that without a concept of Free Will, we are bound to determinism.<sup>139</sup> That undercuts our human dignity and thus Nozick considers it necessary:

to formulate a view of how we (sometimes) act so that if we act that way our value is not threatened, our stature is not diminished.<sup>140</sup>

Nozick thereby considers it his task to formulate a conception of human action that leaves agenthood valuable. He thus kicks off with two assumptions. A first is that the problem of the existence of the Free Will, or the opposed determinist point of view, is a problem concerning the way we *act*. Nozick holds that it is necessary to formulate a view on whether/how we can *act* so that preserve our human dignity.<sup>141</sup> This assumption includes the idea that determinism also concerns action. Determinism is the point of view that holds that “our *actions* stem from causes from before we were born”.<sup>142</sup>

The second assumption held that determinism is “bad”. Determinism affects our dignity, because “we are merely the playthings of external forces”.<sup>143</sup> From this remark it seems to me to be justified to conclude that this presumption plays a role in Nozick’s enthusiasm for the entitlement theory in *Anarchy, State and Utopia*, and his rejection of distribution theories. We can conclude on the basis of section 1 of chapter 4 that Nozick focuses on the freedom of choice in answering whether we possess Free Will. A reason behind Nozick’s haste to include the possibility of voluntary transfers into a distributive system/ system of holdings, may be that without Free Will we are the mere playthings of external forces. If we have to distribute goods according to a pre-set principle, we are according to Nozick the mere playthings of that principle.

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<sup>138</sup> The continental systems diverge amongst themselves enormously, whereas the Anglosaxon systems look alike, because they all derive from the English system from a recent date, whereas the first common heritage of the continental systems is the *codex iuris civilis*, as recovered in Bologna in the 13<sup>th</sup> century. Again, for more detail in this matter I have to refer to paragraph 4.3.

<sup>139</sup> Nozick 1981, p. 292.

<sup>140</sup> Nozick 1981, p. 291.

<sup>141</sup> Nozick 1981, p. 292.

<sup>142</sup> Nozick 1981, p. 291. (Italics are mine, SP.) This assumption can be found throughout the chapter and throughout literature on the existence of Free Will as well. The main argument in this chapter is directed against this assumption, viz. sup. par. 3.6.

<sup>143</sup> Nozick 1981, p. 291.

This is even more interesting if we take into account that Nozick complains about the term “distributive justice” as this term is, according to Nozick, not neutral.<sup>144</sup> Is Nozick’s own formulation of justice in holdings neutral? If part of the rejection of this term is grounded on the possible deterministic character of distributive justice, it is not. Yet this objection says more about Nozick than it does about the entitlement theory, and I leave it to others to examine this.

The chapter in *Philosophical Explanations* that is devoted to free will, shows that for Nozick the freedom of the will is proven when the freedom of choice is proven. To possess Free Will is to be able to *act* as chosen. As appears from the following quote, the freedom of choice *is* Free Will, for Nozick. Consider the following excerpts of chapter 4 section I (all Italics are mine, SP):

However, even if such views are rejected, the nature of this other mode of knowledge, by self acquaintance, is unclear; an adequate theory showing how it is possible, would take us into issues far removed from the present concern without helping us especially with the *topic of Free Will*. *Our problem is that we are puzzled about the nature of free choices*, so any inside knowledge we may have of such knowledge due to and in making them obviously hasn’t served to clear up our puzzles about their nature.<sup>145</sup>

If the absence of causation entails randomness, then the denial of (contra-causal) Free Will would follow immediately. However, ‘uncaused’ does not entail ‘random’ To be sure, the theorist of *Free Will has to explain wherein the act not causally determined is non-random*, but at least there is room for this task.<sup>146</sup>

Free Will is to be explained differently, *by delineating a decision process that can give rise to various acts* in a non-random non arbitrary way; whichever it gives rise to – and it could give rise to any one of several- will happen non arbitrarily.<sup>147</sup>

We have sketched a view of how Free Will is possible, of how *without causal determination of action a person could have acted differently* (in precisely that same situation) yet nevertheless does not act at random.<sup>148</sup>

The above remarks in italic all presume a definition that explains Free Will through the existence of free choices, and this freedom of choices is explained as the ability to act as desired.<sup>149</sup> Concerning this conception of free will as a problem of the possibility of free action, the following can be remarked against a range of libertarian philosophers,<sup>150</sup> apart from Nozick. Nozick’s argument of the self-subsuming decision procedure focuses on the possibility of free action. Whether we can act freely may be a philosophical topic in its own right, but it does not, or only partly, relate to will,<sup>151</sup> so it is neither an answer to whether we have Free Will or not. Even if our actions are caused, causally determined, set and given from the start, this does not by itself preclude the possibility of free thoughts and desires.

It can be concluded on the basis of these excerpts in *Philosophical Explanations*, that it is very least likely, that Nozick referred to free choice rather than free will in the Wilt Chamberlain-example. Yet it has to be noted that there is leeway for other interpretations that may lead to a different PJT and thus to a different entitlement theory. That different entitlement theory Nozick did not argue for, so that he can neither be said to be in favour or against it. On top of that, whatever Nozick appeared to think of the Free Will, it does not necessarily affect the way in which we should appreciate the entitlement theory. This will appear once Kirzner is discussed in relationship with the PJT. That is shown in the following paragraphs.

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<sup>144</sup> Nozick 1974, p. 149.

<sup>145</sup> Nozick 1981, p. 303.

<sup>146</sup> Nozick 1981, p. 299.

<sup>147</sup> Nozick 1981, p. 305.

<sup>148</sup> Nozick, 1981, p. 307.

<sup>149</sup> Nozick thereby places himself in a long tradition, others of the same strand are Stephan Körner, Hud Hudson, Michael Rosen, Henrik Walter, viz Timmermann 2003, p. 20 n. 1, and also Colin Campbell 1968, p. 36 Inwagen in Watson 1982, p. 49 Chisholm in Watson 1982, p. 25. Ayer in Watson 1982, p. 15

<sup>150</sup> Such as: Clarke 2003, p.3, Ayer in Watson 1982, p. 15, Watson 1982, p. 2, Sidgwick *Method of Ethics*, book 1 ch. 5, par. 4. Inwagen 1999, p. 341, and those in the footnote hereabove.

<sup>151</sup> The word “will” in this sense refers to the meaning of the word will as in the corresponding Old English Willa, the German Wille, the Czech vůla, the Latin voluntas, etc. etc.

### 3.1.5 CONCLUSION

In paragraph 3.1.1 we have seen that Nozick assumes in *Anarchy, State and Utopia*, that a voluntary transfer in from Nozick's point of view appears to be a transfer for which I have chosen. This appeared to be a difficulty because *voluntariness* not so much points to someone's choice to transfer an object but rather to his wanting to transfer the object.

That this is not, or at least not necessarily the same, has been considered in paragraph 3.1.2, by considering an analogous system of entitlement: the entitlement requirement in transferring an object that is found in continental systems of property law. As opposed to Anglo-Saxon (i.e. Common Law countries) systems of law, continental systems recognize a difference between the choice for a transaction and the will (i.e. want, desire) for an action.

The question then popped up what the issue of "Free Will" means according to Nozick, whether it refers to want or to choice, especially concerning the principle of justice in transfer. A transfer is just according to Nozick, if it is done voluntarily. This may mean that it occurred voluntary because I freely wanted it, but also that one has chosen to transfer.

Whichever element is decisive: want or choice, is not apparent from *Anarchy, State and Utopia*. On the basis of *Philosophical Explanations*, it may however be concluded that it is likely to say that "Free Will" to Nozick's mind has more in common with free choice/acts than with free minds.

## 3.2 KIRZNER ON TRANSFERS: ERROR, TRUST

This paragraph will consider Kirzner's main reason for his preference for the necessity of something like the finders-keepers ethic. Kirzner claims that he is riding piggyback upon Nozick's entitlement theory.<sup>152</sup> Although he criticises in particular its "treatment of original acquisition" and "its acceptance of the moral logic supporting the Lockean proviso", Kirzner considers that his finders-keepers theory has a firm basis in the entitlement theory.<sup>153</sup>

This basis concerns the dependence of transfer from property in the title requirement. Kirzner quotes Nozick partially as he says:

Whatever arises from a just situation by just steps is itself just."<sup>154</sup> The sketch I have given of a finders-keepers approach to distributive justice, fully accepts and depends upon this framework of the entitlement theory.<sup>155</sup>

Kirzner claims that his theory differs from Nozick's entitlement theory in details concerning the principle of justice in transfer and of justice in original acquisition. He refutes Nozick's reliance on a Lockean basis for original acquisition. I held in chapter two that Nozick does not at all rely upon a Lockean basis for original acquisitions. Nozick refers to Locke only as an example of a possible principle of justice in original acquisition, that is neither an end state principle nor a patterned principle, in order to show the interrelatedness of that principle with the principle of justice in transfer.<sup>156</sup>

As far as this is concerned it can be concluded that Kirzner would not or should not reject Nozick on the basis of a mere reference to Locke in his discussion of the entitlement theory. But there is another difficulty that Kirzner has with the entitlement theory. This concerns the voluntariness requirement in the principle of justice in transfer.<sup>157</sup> In the following, this difficulty will be examined more closely.

In order to do so, what it is in the Principle of Justice in Transfer (or PJT) that is criticised by Kirzner, is firstly examined. That criticism will induce another juridical investigation, concerning the theory of the source of bindingness of contracts, as this may answer into what extent the voluntariness criterion is economically viable. Paragraph 3.3 will conclude upon the validity of Kirzner's argument against the PJT.

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<sup>152</sup> Kirzner 1989, p.131, 164.

<sup>153</sup> Kirzner 1989, p. 164.

<sup>154</sup> Nozick 1974, p. 151, Kirzner 1989, p. 164.

<sup>155</sup> Kirzner 1989, p. 164.

<sup>156</sup> Viz. 2.4, for a summary of the argument, see 2.5.

<sup>157</sup> Kirzner 1989, p. 164.

### 3.2.1 KIRZNER INTERPRETING NOZICK

Kirzner's main criticism on Nozick is concerned with the incoherence of the entitlement theory, most notably the principle of justice in transfer on the one hand and the free market on the other. Nozick's entitlement theory may present a justification for a market in equilibrium but such markets are only hypothetical. In order for the theory of entitlement to be successful, Kirzner holds that an additional ethic is required. He holds that his finders/keepers ethic is sufficient for this purpose.

In order to examine the problem Kirzner has with the PJT, it is necessary to reflect upon Nozick's thoughts of that principle and about the way in which Kirzner interprets the PJT. As said above, in the introductory paragraph to this chapter, Nozick's and Kirzner's conception of the principle of justice in transfer diverge. Whereas Nozick probably held that a free choice is prevalent, Kirzner shifts the emphasis in the principle of justice in transfer to the voluntariness of transfer.

This divergence, caused by Nozick's ambiguousness, is already thoroughly examined in chapter three. In this paragraph the problem which criterion was in Nozick's mind when he described the PJT, can be ignored as we will presume what Kirzner holds true.

In doing so however, it is necessary to consider the Chamberlain-example in more detail than I've done so far. This should be done, because Kirzner (whilst drawing his argument) took this example of the PJT into consideration rather than the maxim. Thus, the following is devoted to the Chamberlain-example.

### 3.2.2 THE CHAMBERLAIN EXAMPLE

Leaving aside the maxim of Nozick, Kirzner concentrates on the Free Will of the person buying a ticket to a basketball game. He does so based on Nozick's Chamberlain Kirzner takes the voluntariness-prerequisite from the Wilt Chamberlain example, rather than from the "maxim" Nozick drafted a page earlier. In this example, Nozick held that a distribution D1, the assumed most favourable distribution is under threat due to a basketball season.<sup>158</sup> At the end of the season, a different distribution will arise out of D1, namely distribution D2.

Wilt Chamberlain plays in a team and he is promised a reward at the beginning of the season that consists of an admission of twenty-five cents from the price of each ticket for a home game. Given Chamberlain's "great gate attraction", he will attract a large number of spectators. For this season after the great distribution, Nozick estimates the number of spectators at one million. One season of playing basketball thus leaves Chamberlain with the sum of \$250,000 that is substantially larger than the income of anyone else.

Is he entitled to this income? Is this new distribution D2, unjust? If so, why? There is *no* question about whether each of the people was entitled to the control over the resources they held in D1; because that was the distribution (your favorite) that (for the purposes of the argument) we assumed was acceptable. Each of these persons *chose* to give twenty-five cents of their money to Chamberlain. [...] If D1 was a just distribution, and people voluntarily moved from it to D2, transferring parts from their shares they were given under D1 (what was it for if not to do something with), isn't D2 also just?<sup>159</sup>

The example Nozick gives considers two distributions, one of which, i.e. D1, is assumed just. D1 may be just under some principle of justice in original acquisition regardless which, of under the principle of justice in transfer or even under a Rawlsian theory of justice or any other system at all. Given this first and presumed just distribution, Nozick cannot think of any reason why a voluntary transfer of those justly distributed goods, could not be just in the second instance, D2.

Can anyone else complain on grounds of justice? Each other person already has his legitimate share under D1. Under D1, there is nothing that anyone has, that anyone else has a claim of justice against. After someone transfers something to Wilt Chamberlain, third parties *still* have their legitimate shares; *their* shares are not changed.<sup>160</sup>

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<sup>158</sup> Nozick 1974, p. 161.

<sup>159</sup> Nozick 1974, p. 161. Note that he defines the crux of the justness lying in the choice element whereas three sentences later the crucial point appears to be the voluntariness. See for the difference between that also *infra* paragraph 3.1.

<sup>160</sup> Nozick 1974, p. 161.

Nozick holds that any socialist objection referring to the unfairness of having so much, can be undercut by an additional presumption that Chamberlain lives in a socialist society and plays games in his spare time. The objection why someone may work *overtime* in a society that already distributed goods according to everyone's needs, Nozick objects in his turn that people may care about things other than needs:

I like to write in books that I read, and to have easy access to books for browsing at odd hours. It would be very pleasant to have the resources of the Widener Library in my backyard.<sup>161</sup>

As it seems unlikely that any society will ever provide the luxury to anyone who so desires, to have Widener Libraries in their backyards, Nozick holds that persons either must do without some extra things they want, or they be allowed to do something extra to get some of these things. He rhetorically wonders:

On what basis could the inequalities that would eventuate, be forbidden?<sup>162</sup>

The above leads Nozick to the conclusion how property would occur, even in a socialist society, provided that it does not forbid doing as desired with what was gotten under D1. It can be done but not without interfering with the private lives of the participants of that society. A society that distributes according to a patterned principle i.e. if every additional 10% of IQ leads to 10 % additional income, it either has to be re-established time and again whenever transfer led to a different distribution or it has to be forbidden to make any transfer that intrudes with the patterned principle.

The general point illustrated by the Wilt Chamberlain example is that no end-state principle or distributional patterned principle of justice can be continuously realized without continuous interference with people's lives.<sup>163</sup>

Kirzner, as noticed in the introductory paragraph, does hold that there is a problem with considering voluntariness as a criterion establishing the justness of a transfer. He does so for external, economic reasons. His argument roughly boils down to the idea that prohibiting involuntary transfers would be the same as introducing the doctrine of *justum pretium*; fair price.

Before this subject can be dealt with, it is necessary to address what voluntary means, according to Kirzner. This has to be done as it was concluded in paragraph 3.1.5 that it is ambiguous whether Nozick understood voluntariness as "freely chosen" or "freely wanted". There is no specific definition given in the Chamberlain example, other than the choice maxim, that does not point to voluntariness.<sup>164</sup> The following paragraph aims to explain voluntariness that Kirzner assumes that Nozick assumes.

### 3.2.3 VOLUNTARINESS

Whereas Nozick in the Chamberlain example defines voluntary as freely chosen, Kirzner appears to embrace another definition that is more related to the "volunta" or the Will (i.e. Want). This appears for instance out of the following:

After all, he deliberately erred; he deliberately risked his money; he gladly took his chances; every transaction which he entered was a wholly voluntary one.<sup>165</sup>

It also appears from the next excerpt:

Now Nozick has not, attempted in his book the task of specifying the details of the principles of justice in transfer. The general outlines of his position on the justice of market transfers are however clearly implied.<sup>166</sup>

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<sup>161</sup> Nozick 1974, p. 162.

<sup>162</sup> Nozick 1974, p. 162.

<sup>163</sup> Nozick 1974, p. 163.

<sup>164</sup> This mystification was already dealt with *infra* chapter 3.1.

<sup>165</sup> Kirzner 1981, p. 389.

<sup>166</sup> Kirzner 1981, p. 384. Nozick explains this at page 153. He does not say "in my book" however. Nozick may have meant that he is not going to explain the justice in transfer-principle in the following paragraph. He seems to explain the principle in some detail two paragraphs later, at page 160, where he says "Ignoring acquisition and rectification

In both excerpts, Kirzner assumes that Nozick means voluntariness. As is shown in chapter three, voluntariness as a criterion is not clearly implied in Nozick's text. Although Nozick's text at places does acknowledge that an act of transfer should occur voluntarily, it also holds that acts of transfer should occur along with the desire of those who choose to transfer.

As said earlier,<sup>167</sup> the PJT does not clearly imply anything. It uses two totally different criteria in almost random order. The reader is left in the dark concerning the question about which of the two Nozick upholds. On the basis of *Philosophical Explanations*, however, it was concluded in the previous chapter that it is most likely that Free Will, as far as Nozick is concerned, involves the possibility of free choice *only*. It is likely that Nozick held that a "voluntary act" can be translated as an "act for which is chosen".

But since Kirzner presupposes that voluntariness -taken in its continental form, i.e. referring to the notion of want (*voluntas*) rather than choice- is the criterion Nozick uses, the latter part of this paragraph will presuppose this as well.

Voluntariness, for the sake of Kirzner's Nozick-interpretation means the:

willingness to transact in full awareness of all relevant circumstances<sup>168</sup>

For Kirzner, the criterion of the Wilt Chamberlain example (i.e. the voluntariness-criterion) is only appealing at first sight. Upon a second instance it becomes clear that it neglects the possibility of error and Kirzner holds that the occurrence of error is inescapable in a market disequilibrium. Kirzner borrows the word equilibrium from Austrian liberal economist Friedrich Hayek.<sup>169</sup> He defines an equilibrium as a situation of correct foresight. In an equilibrium, Kirzner holds, it would indeed be easy to defend voluntariness.<sup>170</sup>

But it is now well understood that the function of equilibrium models is hardly to portray the real world state of affairs. Rather, such a model serves to illuminate the nature of the equilibrating market forces which are at work during the states of disequilibrium, which, in fact, prevail at all times.<sup>171</sup>

Such a market disequilibrium thus arises out of the presumption that people profit from others erring. Kirzner explains this by means of an example. Before equilibrium is obtained, many prices for the same good may be simultaneously paid and accepted by different buyers and sellers. The disequilibrium situation then generates a spontaneous equilibrating tendency toward the elimination of such gratuitous price differentials. The existence of such a price differential constitutes an opportunity for entrepreneurial profit and that opportunity will be grasped until prices have become uniform throughout the market.<sup>172</sup>

Kirzner concludes from this that the equilibrating process rests heavily upon the errors of others. For in a market disequilibrium those who paid the higher prices are clearly unaware of the existence of lower prices, whereas those who asked the lower prices were unaware of their possibility to ask a higher price. Kirzner concludes:

[T]he equilibrative aspects of the market process depend, in an essential way, upon the lure of the profits made possible by the errors of those with whom the entrepreneur deals.<sup>173</sup>

This conclusion is not only valid for single product markets. The insights gained from this example, according to Kirzner, apply to the most complicated of all markets.<sup>174</sup>

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we might say [...]" and thereafter follows the maxim: *from each as they choose to each as they have chosen*. It thus appears that Nozick devoted more attention to the subject of the principle of justice in transfer than Kirzner here holds true.

<sup>167</sup> Inf. 3.1.5.

<sup>168</sup> Kirzner 1989, p. 107.

<sup>169</sup> Hayek defined an equilibrium in a lecture in 1936 as a situation in which "the different plans which the individuals composing [a society] have made for action in time are mutually compatible", Hayek 1937, p. 41 Kirzner defines it as the "state of correct foresight", Kirzner 1981, p. 386.

<sup>170</sup> Kirzner 1981, p. 386.

<sup>171</sup> Kirzner 1981, p. 386.

<sup>172</sup> Kirzner 1981, 386-387.

<sup>173</sup> Kirzner 1981, p. 387.

<sup>174</sup> Kirzner 1981, p. 387.

The coordination and allocative properties of competitive markets depend entirely on the attractiveness of pure entrepreneurial profit opportunities; such opportunities arise only out of the less than perfect omniscience of those from whom entrepreneurs buy, and of those to whom they sell.<sup>175</sup>

This quotation explains what Kirzner considers as the impossibility of the will-criterion. For the criterion considers: either there is an error that is serious, and no transaction has been made because of a lack of will, or the error is not so grave and the transaction is valid, because the will was there.

If the market depends heavily on the exploitation of profit opportunities made possible only by the errors of others and *if* goods purchased from sellers who sold only as a result of error, and money received from buyers who bought only as a result of error, be considered unjustly acquired -then surely the justice of the market has been unsalvageably compromised. It will not do to declare that transactions entered into in error, -being involuntary- are excluded by definition from the class of market transactions- since a market process without “erroneous” transactions is unthinkable.<sup>176</sup>

Voluntariness, to Kirzner’s mind, wrongfully presupposes an errorless world. If we took voluntariness to be a criterion, no contract would be settled because most arise out of error. Nobody could profit from any contract for they all would have to be concluded at the only price people are willing to pay: the market price. And therefore Kirzner considers will as an impossible criterion unless errors that characterize the market in disequilibrium do not affect the voluntariness of the transaction completed.<sup>177</sup> As voluntariness according to Kirzner is inherently tied to the notion of error, the next sub paragraph examines what is understood under error.

### 3.2.4 ERROR

The definition of error is not the only definition given by Kirzner of voluntariness in the principle of justice in transfer. He also gives a definition of what the denial of voluntariness means. Kirzner claims in his *Entrepreneurship, Entitlement and Economic Justice*, that involuntary transactions undermine regular market transactions. He does so by linking the voluntariness of a transaction to transactions based on error. An involuntary action is one based on a serious error,<sup>178</sup> and that involuntary action is under (Kirzner’s interpretation of) the entitlement theory invalid. Either the transaction consisted of an error that was grave, and that outlawed the transaction, or the error was not so serious and should be born by the one who took the risk.

One of Kirzner’s arguments against the entitlement theory is based on the impossibility of a distinction between serious and non-serious errors. The voluntariness principle illicitly all error whereas according to Kirzner most market transactions do not occur in a state of equilibrium and errors happen continuously. In order to understand the full reach of this objection, it is necessary to consider what error is, according to Kirzner. Kirzner defines error in several different ways at page 390 of *Entrepreneurship, Entitlements and Economical Justice*:

a decision being made in unwitting ignorance of pertinent information.<sup>179</sup>

Along similar lines he defines error in *Discovery, Capitalism and Distributive Justice* as:

activity undertaken without taking advantage of all the information which is at one’s disposal.<sup>180</sup>

At page 389 however:

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<sup>175</sup> Kirzner 1981, p. 387.

<sup>176</sup> Kirzner 1981, p. 387-388.

<sup>177</sup> Kirzner 1981, Kirzner points this out at the top of page 388.

<sup>178</sup> Kirzner in Paul eds. 1981, p. 385.

<sup>179</sup> Kirzner in Paul eds. 1981, p. 390.

<sup>180</sup> Kirzner 1989, p. 28.

to have really erred (in the sense of having consented to do something which he did not really wish to do).<sup>181</sup>

From these two formulations it appears that Kirzner's definition of error halts between two thoughts. It firstly hinges on a decision that is based on unwanted (unwitted) lack of information. In this meaning the notion is related to discoveries, because -according to Kirzner- a discovery is correcting a previous error.<sup>182</sup> Secondly it also involves consenting to do something I did not wanted, which would be the opposite of voluntariness. This is not the same and it should be explained whether these two definitions are each others complements or whether a divergence excludes one of the two.

This second definition embraces more than the first to the respect that it proceeds from the word "consent". If I say that I made a decision, my consent is not necessarily present, even though I may have made the decision in unwitting ignorance. Yet the first also embraces more than the second definition. It includes an objectified notion of information that is opposed to the wish of the erring actor in the second definition.

Is there a Kirznerian error when I decided upon unwitting imperfect information and nevertheless I wish to do this decision and I thereby express my consent? Is error necessarily tied to an action, whether a decision or an act of consent, (nodding) or is it possible to err in thoughts, wants or desires?

The usefulness of the notion of error in determining whether voluntariness is a successful criterion, depends on the used definition of error. When the word "error" is used as a criterion for establishing which transactions are just, it must be specified where error begins and where it ends, as otherwise the notion loses its unique selling point as a criterion. If there are solid reasons to use "error" as a criterion but the applicability of error is undestined in virtually every circumstance, then the criterion 'cucumber' could have equally been applied.<sup>183</sup>

Suppose that we deal with error as the exact opposite of the voluntariness criterion. Some errors by parties are precluded from exoneration in advance. The will (as non-error criterion) implies a certain limit whenever this criterion should not be applied. A first apparent limit to the criterion would be the "rationality" of the contracting parties. A party must be able to cope with regular transactions, whether he wants them or not. A market participant has to know what risks he takes for himself.

The limit implies that anyone who is unable to estimate transactions along with their interest, such as a child or a mad person, is assumed to be unable to form a will that can lead to a contract. Irrationally behaving people are assumed to make erroneous transactions. They may have a will to conclude a contract that is so irrational that nobody could seriously expect that will to be well formed.

But the normal, sane adults, according to Kirzner, can -under the entitlement theory combined with Kirzner's interpretation- also get rid of their contract if a party did not want it in retrospect. Error in one of Kirzner's definitions is related to ignorance. The thought is that in most regular transactions, at least one party *has to be* ignorant towards the price that should be paid. Otherwise the ignorant party would not have entered the contract at all. The higher price from the point of view of an ignorant buyer, or the lower price as seen from the ignorant seller, is the "punishment" for the error of the ignorant.

This line of argument does not take into account that for most regular transactions, that ignorance, if indeed culpable, is not necessarily something that is to be regretted. It can be taken up into the economical/utilitarian/rational calculus whether it makes sense to invest scarce time into a thorough market examination in search for the best price. This may appear from the following example.

Suppose student S is in the Mensa of the University of Amsterdam. S is desperately longing for a package of Vitamel Red Fruit. S knows that buying such a package in the Mensa would require S to pay 1 Euro and 25 cents and that the exactly same package at the discount, would cost a mere 93 cents. S may even know that when the package is on sale, it can even be priced substantially lower than that. But still S is in the Mensa and the nearest cheap supermarket is miles away. What would S do?

Under Kirzner's version of the entitlement theory, consisting of the two-legged definition of error, this transaction may count as an error. S has been ignorant, as he did not discover the possibility of taking a Vitamel package along with him when he left home, or because S did not discover a small and cheap supermarket in the vicinity of the university Mensa.

<sup>181</sup> Kirzner in Paul eds. 1981, p. 389.

<sup>182</sup> Kirzner 1989, p. 29.

<sup>183</sup> Note that it is this same principle that introduces the relative need for a proviso of whatever kind to limit the acquisition of property, as discussed in chapter 2.4.1, under the header adequacy.

I must admit I sometimes make the grave “error” of buying the package of Vitamel myself. Although I may be swindled out of error, caused by ignorance, I really *want* to pay more than I should. This voluntariness may have a relationship with non-error but voluntariness does not equal non-error.

Even if S did not know anything about Vitamel-pricing I still might be triggered to buy it at the Mensa, just because S want to have it as soon as possible. The prices in the Mensa are higher but not necessarily unfair and although it may be conceived as an error that S buys the package, this does not necessarily preclude S from willing the package.

The above makes it hard to accept that a market necessarily depends on error, as Kirzner claims. Either the definition of error is so broad that the statement loses effect, or the definition of error is specific in which case the market does not depend in error.

Nevertheless, Kirzner argues that market transactions necessarily reflect errors. In an economist model of supply and demand, the market is in equilibrium and there are no errors made on the market. That model is one that upholds the state of correct foresight, Kirzner argues along with Hayek.<sup>184</sup> Kirzner upholds that Nozick’s entitlement theory assigns little room for divergence of any other price than the cost of the production.<sup>185</sup>

As a consequence he argues that the only logical possibility to defend general morality of market transactions (i.e. not adopting the *justum pretium* doctrine) is to say that errors that are typical for the market in disequilibrium, do not affect voluntariness at all. On this basis Kirzner starts to examine the juridical plausibility of the voluntariness criterion that according to him, does not illicit transactions that depend on error in market disequilibrium. The next paragraph 3.3 looks into this matter extensively. Before that is done, conclusions are drawn from what is said previously.

### 3.2.5 CONCLUSION

We’ve seen in the above two things. A first is a conclusion we already stumbled upon in 3.1, that the Chamberlain-example proceeds from the thought that a voluntary transfer equals a transfer for which is chosen. Kirzner’s argument against Nozick’s principle of justice in transfer is directed against the voluntariness-element, although it can be strongly doubted whether this was indeed an element of Nozick’s entitlement theory.

The conclusion of 3.1.1 should be born in mind that although voluntariness and free choice can overlap each other, they do not cohere. It is both possible to choose an unwanted transfer and to want an unchosen transfer. Whereas I held in 3.1.1 that the crux of Nozick’s PJT is that a transfer is just when it is *chosen*, Kirzner thinks, as discussed *infra* 3.2.3, that Nozick’s PJT embraces that a *voluntary* (i.e. a *freely wanted*) transfer is a valid transfer. Thereupon he argues against this requirement of voluntariness.

Preceding on the thought however, that Nozick may have held a voluntary-theory of a PJT, Kirzner’s main objection against *this* theory was, that it was economically unviable. Kirzner’s main argument against the requirement of voluntariness, is economical and equals criticism towards the medieval system of *justum pretium*. If anybody can retreat his promises on the sole basis of his wishes, making promises is not interesting. But there is also a juridical aspect, as Kirzner considers under which conditions transfers can be justified and when not. Kirzner acknowledges that, when he says:

The question of erroneously made decisions has, of course, been treated thoroughly by jurists in regard to the law of contracts.<sup>186</sup>

This is a statement that is hard to disagree with. We’ve already seen that there are parallels between PJOA and property law<sup>187</sup> and between the PJT and contract law.<sup>188</sup> The statement offers an additional reason to dive into the parallels between the entitlement theory on the one hand and existing systems of contract law on the other.

Now that is made clear that Kirzner aims his economically and juridically unviable- argument against a PJT that is based on wants, it will be possible to examine in what way continental legal systems, that hold the intentions of parties as constitutive for the contents of a contract, are economically viable.

<sup>184</sup> Kirzner in Paul eds. 1981, p. 386.

<sup>185</sup> Kirzner in Paul eds. 1981, p. 392.

<sup>186</sup> Kirzner in Paul eds. 1981, p. 390.

<sup>187</sup> Viz. inf. chapter 2.2.2.

<sup>188</sup> Viz. inf. 3.1.5.

### 3.3 VIABILITY OF VOLUNTARINESS

In this paragraph it will appear that Kirzner examines briefly to what extent an erroneously made decision is dealt with in contract law. Contract law for this purpose should be considered as widely as possible. The word contract, in several legal systems is a specific term that may relate to a mutual agreement,<sup>189</sup> or to a mutual juridical/juristic act<sup>190</sup> or to a promise or a set of promises.<sup>191</sup> For the purpose of Kirzner's essay, contract law is considered up to the extent that it validates erroneous decisions.<sup>192</sup>

This paragraph considers contract law more broadly than Kirzner could do in his article. It is divided into three subsections. A first explains the related problem in the entitlement theory and in contract law. In this subparagraph two solutions are supposed. Each is considered in more detail in subsequent sub paragraphs.

#### 3.3.1 CONTRACT LAW AND ENTITLEMENTS: PARALLELS

The main question that arises in contract law, differs by no means from that of treaties, juridical acts in general, or of the main objection Kirzner raises concerning Nozick's principle of justice in transfer. What is it that constitutes a contract/treaty/juridical act/transfer, on what basis can its contents be established in retrospect, what is it -if any- that makes the contract "binding", (how) does *pacta sunt servanda*, or in other words: why would a contracting party have to stick to his words, supposing that he has to do so at all?

Although Kirzner argues that voluntariness is an impossible criterion to establish whether a contract was just, it has also been argued that the will of the parties is what makes the parties stick to the contract. Therefore the will is and should be the source where to look in order to determine whether a contract was just.

What should for instance be done in the case of mutual error, such as the *haakjöringsköd*-case<sup>193</sup> if a contract is said to exist and both parties in retrospect disagree with the letter of the contract, should the contracting parties then decapitate each other? In the Hobbesian state of nature, without the terrour of some Power there may be no other option than to fight for it.<sup>194</sup>

There are two less bloody answers that may establish the contents of a contract whenever that is contested, both involve the terrour of some Power, or a referee that determines the contents of the pact independently from desires of the parties to a pact. That independent referee can either proceed from the made decision, or he can take the will of the party/parties as primary source for whether there was drafted a contract and what is in it.

Roman law and systems that derived from it (most on the continent of Europe) take the latter approach. England and other countries with an Anglo-Saxon inspired system of law, take the words of the contract as the source in order to establish whether a just contract was made. Whereas the first manifests itself on the piece of paper on which the pact was drafted, the other does not manifest itself other than in the hearts and minds of the contracting parties. Both options occur in modern day systems of contract law, and both sometimes fall short, as also noticed by Beale, Hartkamp, et. al:

Freedom of contract entails that a person is free to decide whether or not to bind himself by contract and to determine the content of his commitment. The corollary of that principle, namely *consensus ad idem*, means that intention will suffice, without there being any requirement as to form. These two principles, which still underpin the European systems of law, are generally speaking accounted for as being a manifestation of the philosophical principle of Free Will, that is

<sup>189</sup> As in the French *Code Civil* and the Italian *Code Civile* resp. article 1.101 and article 1321, see also Beale, Hartkamp et.al. 2002, p. 2.

<sup>190</sup> As in the Dutch and the German civil codes, resp. art. 6:213 and § 305, viz. Beale, Hartkamp et. al. 2002, p. 2.

<sup>191</sup> As in the American *Second Restatement on Contracts*, § 1, note that the English legal system does not have a definition of contracts, which is inherent to their system of law-making by lawyers.

<sup>192</sup> Kirzner 1981, 390-392, Kirzner supposes that erroneous decision, caused by ignorance of either of the parties, does not render a contract legally invalid. This statement will be refuted *supra* 4.3 as non- Anglosaxon counterparts of his examples in *do* invalidate contracts.

<sup>193</sup> The *haakjöringsköd*-case was already dealt with in 3.1.3.

<sup>194</sup> Hobbes 1997, p. 93. "For the Lawes of Nature (as *Justice, Equity, Modesty, Mercy*, and (in summe) *doing to others, as wee would be done to,*) of themselves, without the terrour of some Power, to cause them to be observed, are contrary to our naturall Passions, that carry us to Partiality, Pride, Revenge, and the like. And Convenants, without the Sword, are but Words, and of no strength to secure a man at all".

to say the creative force of the will. It is true that those fundamental principles have been under assault for the past 100 years. Disputes have proliferated.<sup>195</sup>

Subsequent paragraphs briefly consider the background of these two options and a third alternative that may be an answer to the defect of these options. The last subparagraph will draw conclusions from this legal theory, concerning the entitlement theory and Kirzner's objections to it.

### 3.3.2 THE WILL OF CONTRACTING PARTIES

That will/want/intention of parties should be constitutive for whatever is determined in a juridical act, has had strong foothold in the civil law of most European countries on the continent. Most European countries share a tradition in adapting Roman law. This has been a result of the Europe-wide study and where possible applicability of the *Codex Juris Civilis* that set off in the 11<sup>th</sup> century in Bologna.<sup>196</sup>

Yet despite this common heritage traditions went along in their own direction and the French and the German system differ of style in an important respect as a consequence.<sup>197</sup> In order to consider what a will-theory looks like in modern practice, it is thus necessary to make a difference between a Latin and a Germanic tradition.

The will, ideally, has binding force from within itself. If a contracting party wants to fulfil the obligations under the contract, he will do so, or at least do his best in order to fulfil his promise. But what is it that ensures that the parties will stick to their word if their will changes? Or what if they only said there was a will but this will was actually absent? In order to force parties to stick to their words, the doctrine of cause has been an answer.

The French, Quebecois and Italian system are based on the doctrine of cause that originates from Roman law.<sup>198</sup> This doctrine ensures the seriousness of the engagement that was under threat by the adopting the will-principle (i.e. the idea that the will of both parties is constitutive for the contract). "Cause" is an additional requirement for a contract, although this is sometimes only partially admitted in the civil codes, such as the Quebecois:

The Quebec Civil Code, that defines cause in art. 1410 as "The reason leading each of the parties to enter into contract" formalizes the conditions to a contract in art. 1458 as follows:

A contract is formed by the sole exchange of consents between persons having capacity to contract, unless, in addition, the law requires a particular form to be respected as a necessary condition of its formation, or unless the parties require the contract to take the form of a solemn agreement.

It is also of the essence of a contract that it have a cause and an object.<sup>199</sup>

Thus, a contract is formed by the sole exchange of consent, but its essence is that there is a cause and an object. In that sense a contract is formed by a cause and an object, as well as by the consent of the parties. The French civil code art. 1108 enlists four conditions to the "validity of an agreement", apart from the consent of the party who binds himself, these are: the capacity of contract, a definite object which forms the subject matter of the agreement and a licit cause for the obligation.<sup>200</sup>

What is a cause? According to Carbonnier it is:

A concept such as that of interest, which might have been a more appropriate translation of *causa*, clearly brings out the unity of purpose underlying Article 113; interest must exist, must be serious and must also be legitimate<sup>201</sup>

The cause is the interest of the one who makes a promise. (The already addressed "object" is the interest of the one to whom a promise is made)

<sup>195</sup> Beale, Hartkamp et al. 2002, p. 114.

<sup>196</sup> Koschaker 2000, p. 57-59.

<sup>197</sup> Zweigert and Kötz 1998, p. 132.

<sup>198</sup> Beale, Hartkamp et al. 2003, p. 127.

<sup>199</sup> As quoted in English by Beale, Hartkamp et al. 2003, p. 128, org. in French: Carbonnier 1955, par. 64.

<sup>200</sup> Beale, Hartkamp et al. 2003, p. 128.

<sup>201</sup> Beale, Hartkamp et al. 2003, p. 129, the French version is found in Carbonnier 1955, par 64.

Often a distinction is made between a subjective and an objective cause. The objective cause, said to originate in Roman law, is always the same for the same class of contract. In mutual contracts it is the prospect of the consideration of the other party. In a gratuitous contract it is the intent to give something without demanding anything in return. Subjective cause is the intent, the individual motive of the promising party that differs in every contract.<sup>202</sup>

In practice this means that a sales contract of something that is forbidden has an unlawful cause, and is thereby invalid. If I buy a bicycle and I do not pay the money in return because that would be involuntary, and the seller then complains, the judge takes into account that the contract the seller went into, is without cause, as a result there is no contract and the delivery of the bicycle is an unjustified enrichment at my benefit, that I have to return.

An outright voluntarist theory of justifying transfers has most notably been held by the famous German lawyer Savigny and adherent to the Historical School of Law. The Historical School maintained that rather than embracing the French method of drawing up an Napoleonic and a-historic system of what law should be like, law is embedded in history and should grow organically.<sup>203</sup>

According to Savigny, contractual obligations, should be recognised and enforced because they were the will of the promisor.

Vertrag überhaupt ist die Vereinigung Mehrerer zu einer übereinstimmender willenserklärung, wodurch ihre Rechtsverhältnisse bestimmt werden.<sup>204</sup>

Kötz however mentions,

Many of the outworks of his “will-theory” have now been abandoned; in particular we recognize today that while recognition must be accorded to the manifestation of a person’s will –his “declaration”– what is binding is not what was willed but what was expressed, that he is bound not in the sense he intended but in the sense in which what he said would reasonably be understood by the addressee in the context in which he said it.<sup>205</sup>

Although the theory of Von Savigny to the letter has been abandoned, there are modern day adepts of the underlying thoughts, Kötz holds.

This objection to the basic idea of the will-theory is not, however, crucial: autonomy does not necessarily mean that one may disregard the interests of others or disclaim the import properly to be accorded to what one says.<sup>206</sup>

The German author Werner Flume and the American Charles Fried propound cognate theories.<sup>207</sup> Fried defends in his *Contract as Promise* the position that a promise is the primary source of bindingness, i.e. the reason why parties stick to their contracts. Thereby he adheres to the will-tradition.

### 3.3.3 THE DECISION OF CONTRACTING PARTIES

Mere promises aren’t binding under Anglo-American “Common Law”. This follows from the assumption that it would be a breach of the freedom of contract to establish whether the reason for contracting parties to enter into a contract is sound. If a party to a contract does not stick to his words, he may expect a claim to reparate damages, but there is no obligation to do as promised.

The resulting problem is that there is no reason to make a promise when the other end of the deal is neither guaranteed nor enforceable by law. One has to be really sure to enter into an engagement. Thus Common Law rests its case upon consideration. Consideration means that something of value must have been given in exchange for the promise to be enforced.<sup>208</sup>

<sup>202</sup> Beale, Hartkamp et. al. 2003, p. 129.

<sup>203</sup> Zweigert and Kötz 1998, p. 138-139.

<sup>204</sup> Von Savigny 1974, p. 7.

<sup>205</sup> H. Kötz, *European Contract Law*, at 7-9 as quoted in Beale, Hartkamp et al. 2002, p. 115.

<sup>206</sup> H. Kötz, *European Contract Law*, at 7-9 as quoted in Beale, Hartkamp et al. 2002, p. 115.

<sup>207</sup> H. Kötz, *European Contract Law*, at 7-9 as quoted in Beale, Hartkamp et al. 2002, p. 116.

<sup>208</sup> See *Restatement (1<sup>st</sup>) §75(1) Restatement (2d) §17 (1)*.

In practice this for instance means that if I promise to build a swimming pool with a staircase of three steps in exchange for an amount of money, and I build in a staircase of only two steps, judges won't enforce me to build three steps if I prefer to leave it this way and pay damages instead. If my client wants to ensure himself of receiving a pool with a three-stepped staircase, he would have to ask for a consideration.

Another example of such case law is that of the *Eccles v. Bryant* -case. Herein, parties agreed to the sale of a house and while the purchaser send a contract to sign, the vendor changed his mind and didn't. In this Judgement Lord Green considered that:

When an exchange takes place by post and a contract comes into existence through the act of exchange, the earliest date at which such a contract can come into existence, it appears to me, would be the date when the later of the two documents to be put in the post is actually put in the post. Another view might be that the exchange takes place and the contract thereby comes into existence when, and not before, the respective parties of their solicitors receive from their "opposite numbers" their parts of the contract. [...] I am afraid I cannot accept that. It seems to me to be a contradiction of terms to speak of that as an exchange...<sup>209</sup>

From this judgement appears that under English law, a mere intention to conclude a contract does not satisfy to constitute a contract. An agreement in principle, or a gentlemen's agreement or the like, is without effect.

Under English and American law, Kirzner's statements that the gullible may be cheated and that a contract is not binding until it is closed, may hold ground. But that does not mean that the Common Law tradition it not severely criticized.<sup>210</sup>

Fried argues that the doctrine of consideration is too internally inconsistent to offer an alternative for his conception of contract law as promise. He bases himself on the idea that the doctrine of consideration tries to combine two propositions that are contradictory. These are:

- A) the consideration that in law promotes a mere promise into a contractual obligation is something, or the promise of something, given in exchange for promise.
- B) The law is not at all interested in the adequacy of consideration. The goodness of the exchange is for the parties alone to judge -the law is concerned only that there *be* an exchange.<sup>211</sup>

He upholds that the classic conception of consideration tries to combine exchange with freedom of contract. That this cannot be done, Fried shows by a various number of examples.

### 3.3.4 TRUST, RELIANCE, FAITH

The above two approaches differed from each other in that the one supposes that the want of the promising party constitutes his obligation, whereas the other believes that one is only bound by the words he uttered. Yet they both have the same starting point: the promising party. The above accounts both are based on the idea that the promising party should do as he has told he would do.

There is also a less rigid answer that appears to undercut the rigidity of the first two and that is treated as a panacea by some legal theorists. That less rigid answer embraces the justified trust of the other party. Then the basic foundation for a contract proceeds from the promisee rather than the promisor. Systems that do so, uphold that what constitutes a contract is the reliance of the other party to that contract.

Although it has been claimed that a reliance theory owes a lot to the consideration theory,<sup>212</sup> this cannot easily be upheld as the mere establishing of the importance of reliance does not answer the question what it is that binds parties to a contract. Nevertheless Fried argues that reliance alone cannot explain the force of a promise:

<sup>209</sup> *Eccles v Bryant* [1948] Ch 43. CA.

<sup>210</sup> Fried argues that he is not alone in his criticism, by addressing Lord Wrights call "Ought the Doctrine of Consideration to Be Abolished" from Common Law 49 *Harvard Law Review* 1225 (1936) and Samuel Willingston's "Model Written Obligations Act" (only in force in Pennsylvania). On top of that he refers to comparativists Dawson and von Mehren who concluded that Common Law as well as French and German law make a distinction between gratuitous promises and true bargains. Viz. Fried 1981, p. 36.

<sup>211</sup> Fried 1981, p. 29.

<sup>212</sup> Beale, Hartkamp 2002, p. 123.

There is reliance because a promise is binding, and not the other way around.<sup>213</sup>

Kirzner's argument that voluntariness as a criterion for just transfers would be economically unviable should arouse suspicion under (at least) Dutch lawyers. Voluntariness is precisely the Savignian criterion used to settle the contents of a transaction.<sup>214</sup> How come this is not seen as an impossible criterion in the Low Lands?

Let us presuppose a market in disequilibrium in a system of law like the Dutch. The market is based on the so called "willstrustdoctrine"<sup>215</sup>, a doctrine that tells under which circumstances "will" is constitutive for juridical acts such as contracts, namely those situations wherein the other party could not have trusted the existence of will of the will-lacking party. The doctrine adheres to the reliance theory for an answer on the establishment whether a party had a defect will.

How does the doctrine work in practice? To establish a juridical act, the will has to be declared and intended to a juridical consequence, according to article 3:33 BW. Case law led to the conclusion that to answer the question how the contract is determined, one must not only look at the linguistic explanation of the terms in the contract but also at the meaning that parties in given circumstances could mutually and reasonably attach to the terms in the contract and on the basis of what they could reasonably expect of one another.<sup>216</sup>

Want (or will, for all that matters) cannot be assumed in every transaction. Then the will-criterion would be useless.<sup>217</sup> This is settled in different cases but noteworthy to me seems the case of *Offringa/Vinck*.<sup>218</sup> Offringa bought a house that had cracks in the walls. Offringa noticed the cracks and Vinck noticed that his client noticed. So Vinck did not mention that he knew that these cracks were serious and would require Offringa to build new foundations –a costly operation– under the house to prevent it from collapsing. Under such circumstances, the Dutch Supreme Court settled that a buyer cannot withhold the need of such an expensive operation, that the will amongst which the buyer bought the house was ill formed and that the transaction was invalid.

In any market where contracts are concluded on the basis of the intention of parties, a definition must be established between when parties have a will (and when this leads to a contract) and when they have not (and when this does not lead to a contract). The limit between the examples of the *Mensa* and of *Offringa/Vinck* lies there where the buyer has a justified trust in the offer made.<sup>219</sup> I cannot complain to the *Mensa* stating that I did not want the Vitamel I bought if I only knew it would be cheaper somewhere else. If I did not know I could have known. In the case of the house however, the ignorant buyer is saved, since he is not to blame for his ignorance on the matter. And the danger of particular cranks cannot be accepted as common knowledge.

The Dutch willstrustdoctrine thereby solves the riddle of buying a second hand car, for the buyer may have faith in that the car does not fall apart as soon as he drives out of the showroom, but he cannot expect a refund if he does not like the colour any more. For in that case the salesman was justified in having the faith that a pink car is really what the buyer wanted, whereas the salesman cannot claim to have thought the buyer wanted a wreck. Likewise, the ignorance of another car-dealer buying the wreck, cannot lead to invalidity of the contract. For the buying car-dealer could have known the car was a wreck and the salesman therefore may be justified in thinking that the buyer wants a wreck.<sup>220</sup>

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<sup>213</sup> Fried 1981, p. 19.

<sup>214</sup> This criterion is laid down in 1981 in the so-called Haviltex-criterion (arising out of the case: HR 13-03-1981, *Ermes c.s./Haviltex*) as well as in the Civil Code: 3:33 i.o. 3:35 BW). Like Nozick's PJT this does not go for contracts only. Nozick's PJT deals with any transfer of goods/objects/plots of land. The Haviltex criterium applies to all juridical acts.

<sup>215</sup> This is extremely literally translated from the Dutch "wilsvertrouwensleer" into the Double Dutch "willstrustdoctrine", because it comprises in one word that it is a doctrine based on will, limited by trust. A more English-ish term would either neglect the content or be needlessly long. The criterion is to be found in article 3:33 that should be read conjointly with 3:35 of the Netherlands Civil Code: BW.

<sup>216</sup> The case mentioned is: HR 13-3-1981, to be found in NJ 1981, 635. The Dutch version of the Haviltex-criterion and the relevant articles in the Civil Code will be attached as supplements to this essay.

<sup>217</sup> If a certain criterion leads to the applicability in every circumstance, it serves no use as a criterion, viz *infra* 2.4.1 and 3.2.3.2.

<sup>218</sup> The *Offringa/Vinck & Rosberg* case is a verdict from the Dutch supreme court: HR 10-4-1998 that can be found in the magazine NJ 1998, 666.

<sup>219</sup> Nb. this is where the limit is put by Dutch law. It does not necessarily need to be there.

The above examples illustrate that error can in some cases lead to an ill-formed will, as happened in the case of Offringa/Vinck. For regular transactions however, such as buying drinks in the restaurant of the university, this will of both parties can justifiably be assumed by both. Hence the doctrine is called: “willstrustdoctrine”.

### 3.3.5 ON ANGLO-SAXON LEGALITIES IN KIRZNER’S ARTICLE

Kirzner at points makes statements about The Law that can only be made within the Anglo-Saxon system. This seriously affects the validity of his arguments in favour of the economic inviability of the voluntariness criterion.

When Kirzner states that:

[...] when sellers would not have sold at the prices they accepted had they known the true eagerness of buyers elsewhere in the market- are in the legal literature, not seen as affecting the validity of transactions completed.<sup>221</sup>

he is simply ignoring legal theorists of continental systems. Continental law systems may in such a case conclude to an affected validity of the contract. In the example Kirzner addresses, he upholds that the will theorists would be forced to adapt the contract according to any change of mind from any of the contracting parties. Kirzner holds that The Law does not invalidate transactions if one of the parties enters under mistaken assumptions concerning market conditions.<sup>222</sup>

A little further in the same text he quotes: ““Tacit acquiescence in the self-delusion of another, if nothing is said or done to mislead, or silence which does not make that which is stated false, draws with it no legal liability”, we are told.”

Kirzner wants to show by addressing contract law that the voluntariness criterion is beyond legal reality. He maintains that the legal literature would not see the example of an ignorant seller (one who erred out of lack of knowledge, one who underestimated the eagerness of other market participants) as affecting validity of completed transactions. But in systems of law that do take the will as constitutive for contracts, the applicability of the will-criterion is made of dependent of cause<sup>223</sup> or trust.<sup>224</sup>

One example of the tacit acquiescence that *does* lead to legal liability is the case of Bink, or actually the two cases of Bink. In the first Bink case mother Bink tried to be a good mother by deciding to secure her son so that he received a large amount of credit to invest in a business that was on the brim of bankruptcy. If her son went broke, she would ensure the bank that her son’s debts would be paid. The son went broke and the mother, who never realised that her son got a high-risk loan, never would have entered the contract if she knew what hung over her head. The Dutch Supreme Court explicitly rejected the complaint that de Bank did not cause Mrs Bink’s misconceptions.<sup>225</sup> It stated furthermore that the combination of Mrs Bink underestimating the risk and the fact that the bank is a professional credit procurer who could have estimated the risk properly whereas Mrs Bink had a personal relation to her secured son, that under these conditions the contract is invalid, if the Bank does not satisfyingly prove that it informed Mrs Bink.<sup>226</sup>

Kirzner proceeds on the thought that tacit acquiescence does not lead to liability, with an example of a landowner. Another landowner buys the land whilst being ignorant of the fact that a railroad is intended to pass through it, says Kirzner. In the *Jacob v. Goutailler* case the French Supreme Court, upheld precisely the opposite. In this case, Mr and Mrs Jacob had a contract to buy a house from Mr and Mrs Goutailler. After a year the Jacobses wanted to get rid of the contract, as an establishment of a piggery was imminent. Due to this pigfarm, their bank did not provide them with the loan necessary to pay for their house. If the Jacobs’s

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<sup>220</sup> This is settled in the case of *Schirmeister/ de Heus*, wherein a well known jurist and collector of old cars bought himself an occasion that previously had been total-loss. In this case, though Schirmeister did not want a broken car, what normally would render a transaction to be invalid. I.c. the salesman was justified in thinking Schirmeister did want a broken car, given his expertise.

<sup>221</sup> Kirzner 1981, p. 390.

<sup>222</sup> Kirzner 1981, p. 390.

<sup>223</sup> Viz. 3.3.2.

<sup>224</sup> Viz. 3.3.4.

<sup>225</sup> Hr 1-6-1990, NJ 1991, 759, cons. 3.3.

<sup>226</sup> Hr 1-6-1990, NJ 1991, 759, cons. 3.4, note that Mrs Bink invoked the *dwaling*-article (literally “wandering”, it here means error, but then a specific notion of error).

knew that there was a pig farm planted within a distance of 100 metres, they never would have bought the house. The court held in a reasoning similar to the one in the Bink-case that:

Whereas however, deceit may consist and take the form of silence on the part of a contracting party who conceals from the other party a fact which, had it been known by the latter party, would have caused him not to enter the contract.<sup>227</sup>

Another Anglo American legality that Kirzner mentions, is the phenomenon of “at arms length”. In order to stress the economical impossibility of the voluntariness-criterion, Kirzner remarks that the negotiating parties neither have a duty to take care of their counterparts.<sup>228</sup> Whereas lying is illicit, you do not have to tell an ignorant buyer for instance that a pig farm will arise on your plot of land. Kirzner concludes from this that

The law thus takes hard-boiled view of commercial transactions-an attitude often loosely and imprecisely identified as the *caveat emptor*-which does not see a mistake (except where it was *induced* by one’s trading partner) as a legitimate cause for the invalidation of a completed transaction or commitment.<sup>229</sup>

When negotiations are “at arms length”,<sup>230</sup> we must realize that this is a legal notion that may occur in proper law theory but it is not known as such in continental systems. The mere notion only occurs in Anglo-Saxon systems. It does not really ‘fit’ alongside the earlier examples as in the previous cases wherein a gullible was cheated, there already was a contract, the negotiating state did already pass. When negotiations are at arm’s length, a process of negotiation can always be terminated for reasons of own interest, even in a relatively late phase. English and Scottish law uphold that there is no such thing as a general duty to negotiate in good faith. Parties are free at any time to terminate their negotiations.<sup>231</sup>

It is only Common Law that upholds the thought that negotiations cannot be binding and that this follows from the idea that parties cannot be forced into a contract, and that in continental law systems (although there are differences per system) *do* allow reparations for ruthlessly ending negotiations. Overarching Treaties on Contract Law, such as the Principles of European Contract Law and the Unidroit Principles, both uphold the position that a party is free to negotiate and that he is not liable for the failure to reach an agreement, unless negotiations are broken off contrary to good faith.<sup>232</sup> Under German law only the party who breaks off negotiations is liable.<sup>233</sup> The French recognize that it is contrary to good faith to break up a contract for no good reason.<sup>234</sup> Italian law goes a step further by supposing that fault is not necessary for compensation.<sup>235</sup> All these systems uphold that compensation can be rewarded only for the costs a party made during the negotiation. Only the Dutch law system went a little overboard by supposing that breaking off a contract in the last phase of negotiations, requires the terminating party to pay compensation in a positive interest, from which the party that did not break off, has been deprived.<sup>236</sup>

A third Anglo Americanism concerns cheating. One cannot say as Kirzner does,<sup>237</sup> that the law says that gullibles can be cheated. In the Bink-case, it can be doubted whether the bank “cheated” on Mrs Bink. Thus the following quote of Kirzner may not sound all too incomprehensible.

But Nozick’s demonstration of the justice of the free market cannot, surely, be pronounced complete if the *voluntariness* [italics by I.K.] of market transfers, upon which Nozick’s case depends, can possibly remain under a cloud. What does one say to the critic who argues that the

<sup>227</sup> Cass Civ 3, 2-10-1974, Bull. civ. III. 330, D 1974, IR. 252, RGLJ 1975.669, annotated by Blanc, see also: Beale, Hartkamp et. al. 2002, p. 412.

<sup>228</sup> Kirzner illustrates this by a quotation from Williams, Kerr *On Fraud and Mistake*, Sweet and Maxwell, London 1929.

<sup>229</sup> Kirzner in Paul eds. 1981, p. 391.

<sup>230</sup> Kirzner mentions the term at page 391.

<sup>231</sup> Viz. The English case of *Walford v. Miles*, [1992] 2 AC 128, further at Beale, Hartkamp et. al. 2002, p. 241-243.

<sup>232</sup> Viz. PECL art 2:301 and Unidroit art. 2.15.

<sup>233</sup> See Beale, Hartkamp et. al. 2002, p. 254 or BGH 25-11-1992, NJW 1993.520 or BGH 10-6-1970, NJW 1970.1840.

<sup>234</sup> Beale, Hartkamp et. al. 2002, p. 256, Cass. civ. 3, 3-10-1972, Bul. civ. III.491.

<sup>235</sup> Beale, Hartkamp et. al. 2002, p. 259-261, Cass It. 17-6-1974.

<sup>236</sup> Beale, Hartkamp et. al. 2002, p. 262, Hr 18-6-1982, NJ 1983, 723, annotated by Brunner.

<sup>237</sup> Kirzner makes this claim at page 392.

law permits the gullible to be cheated? [...] And, in the broadest of senses, can it not be said that the market process *depends* on (at least a mild form of) “cheating”?<sup>238</sup>

The following case clearly prohibits mild forms of cheating, such as the not telling relevant information. If the Bink-case may not have satisfactorily refuted that ignorance should be punished, it may follow from the following case.

It is possible, under Dutch law at least, that even a future circumstance of which the buyer is not aware but may influence the sale, has to be told by the salesman. The Dutch Supreme Court, *Hoge Raad* in a case called *Booy/Wisman* already established this in 1966.<sup>239</sup> In this case a seller did not tell that the crane on sale did not meet the weight requirements for the permit that the buyer desired. The Hoge Raad supposed that the seller should have told to his client that the crane was of no use for him.

Though the rejection of the permit had not happened during the concluding of the contract, it was bound to happen and the assurance of the salesman that it would not be a problem to receive the permit rendered the contract invalid. For the buyer could have expected such a statement to be true. In short, there is an obligation to call the attention of the opposite parties to facts or circumstances that lie properly within his knowledge, within continental systems.

It is on the basis of these Anglo Saxon legalities that Kirzner predicted a low pressure area above the field of the voluntarified PJT.

But Nozick’s demonstration of the justice of the free market cannot, surely, be pronounced complete if the *voluntariness* of market transfers, upon which Nozick’s case depends, can remain under a cloud.<sup>240</sup>

From the above it may however be concluded that in law-systems that are based on the will principle, it is not –or at least not necessarily– allowed to cheat the gullible. There is no intrinsic juridical objection against applying voluntariness as a criterion for establishing the justness of transfers. Voluntariness is in fact used as such a principle in continental systems of law, for precisely the same end. And by this the sun seems to break through the clouds that hung over the voluntariness criterion for the principle of just transfers.

### 3.4 CONCLUSION ON KIRZNER’S INTERPRETATION

In this chapter I summarized and argued in favour of the principle of justice in transfer. I will summarize the conclusions drawn in previous paragraphs before something in general is said on the PJT and its function in the entitlement theory.

#### 3.4.1 SUMMARY

First of all, I argued that Nozick was ambiguous in drafting his principle of just transfer. It can either point to free choices, as Nozick did in a maxim or to voluntariness, as Nozick referred to in the Chamberlain example. I held that these two notions are not the same and that it thus is not, or at least not initially clear what Nozick meant. In relation to this, I concluded on the basis of *Philosophical Explanations*, that it is unlikely that Nozick meant the Chamberlain-example to be of any other content than the maxim that precedes the example.

Secondly, I have denoted that Kirzner is of the opinion that Nozick’s principle of just transfer is based on voluntariness. He criticizes Nozick as he supposes that the voluntariness principle is economically and juridically unviable, as a cause of which the entitlement theory remains under a cloud. I argued that despite this presumption of economical inviability, continental systems of contract law do hold that the reason why parties are bound to a contract, lies within their will/desire to be bound by this. In this respect, I argued that Kirzner at places makes statements about ‘The Law’ in order to object to the voluntariness criterion, whereas

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<sup>238</sup> Kirzner 1981, p. 392.

<sup>239</sup> HR 21-01-1966, NJ 1966, 183, note that the case law derives from the time when the Old BW was still applicable and when in Dutch law, the doctrine of cause was upheld rather than the “willstrustdoctrine”. Viz. inf. 4.2. The case is nevertheless still relevant jurisprudence.

<sup>240</sup> Kirzner in Paul eds. 1981, p. 392.

those statements only hold for the Anglo-American system of law and at the same time, this voluntariness criterion is applied by most continental systems, in one way or another.

### 3.4.2 SHOULD THE ENTITLEMENT THEORY BE REFORMULATED?

A serious reformulation of Nozick's theory is not required, unlike Kirzner claims. Firstly, because of the conclusion already drawn *infra* 3.1.1, we cannot assume whether Nozick considered will as *the* criterion. He may have presumed, and in 3.1.4 it was concluded that this was rather likely, that choice is constitutive instead of voluntariness.

Secondly, even if he did base the PJT on voluntariness (i.e. freely wanted), that is not an impossible criterion. The reason therefore is that the voluntariness criterion is not as economically unviable as the *justum pretium*- doctrine, it is actually applied in many European systems of law and systems based thereof.

It just needs to be settled in one way or another (i.e. via the doctrine of cause or the doctrine of reliance, by means of a civil code or jurisprudence etc.) under which circumstances voluntas is assumed. This job seems more of a juridical exercise on the precise definition and consequences of will than a philosophically relevant question. Nozick's main goal was not to define and settle want as a criterion for contracts concluded in a free market. His goal was merely to show that it is possible to have a theory of justice of holdings that is historical and unpatterned which can be used for his defence of the minimal state.

Thirdly, if it is juridically settled under which circumstances there is will and under which there is not, the theory on principles of justice in transfer via voluntariness is not economically viable, despite markets being in disequilibrium. This is shown by the mere juridical practice in other systems of law, such as the Dutch and the French, as the voluntariness criterion did not lead to a *kladderatsch* of the capitalist system.

Fourthly, the assumed incoherence with juridical reality is based on a false comparison between a principle of justice based on will on the one hand and an Anglo American conception of the legal system on the other. Such a principle of justice does cohere with other law systems that precede from the same principles.

These four reasons lead to the conclusion firstly that the will-criterion can be used as a principle of justice in transfer. Secondly, we may ultimately conclude that Nozick's entitlement theory is not such an academic, unrealistic theory and that it does not need any additional ethic, like the finders-keepers ethic that Kirzner suggests.

## **4 KIRZNER, DISCOVERIES AND THE FINDERS-KEEPERS ETHIC**

Kirzner extends the reach of the entitlement theory by adding another element to it: the finders-keepers ethic. He believes that this is necessary because the entitlement theory as such

does not-at least without significant reformulation-solve all the difficulties that may be alleged to exist in respect of the justice of the market.<sup>241</sup>

I have argued in chapter three that there is no need to add such an element. Kirzner's main objection is rooted in an understanding of the contents of the PJT that is only one of more possible and on top of that is neither a likely interpretation. Besides that I argued that the interpretation that he did give, was not as economically and juridically unviable as Kirzner supposes.

The finders-keepers ethic might still have an additional value as a useful -though unnecessary- element of an entitlement theory. Nozick's aims were to convince that because of the Principle of Just Transfers, the entitlement theory is a better option than Rawls' theory of justice. What will remain of this, when we complete the Principle of Just Original Acquisitions with the finders-keepers ethic? This chapter considers the desirability of adopting a finders-keepers ethic by firstly considering what a finders-keepers ethic taking Kirzner's perspective on the PJOA into account.

### **4.1 THE FINDERS-KEEPERS ETHIC AND ITS FOUNDATIONS**

Kirzner explores the ideas of Nozick in an article in Paul's *Reading Nozick*, and in his book *Discovery, Capitalism, Distributive Justice*. Problems with the original acquisition principle are mentioned in the last part of the article. The article poses that Nozick lacks the enthusiasm to qualify cases of original acquisition as a justification of the finder-creator/finder-keeper ethic.

Kirzner suggests the finders-keepers ethic in his article on Nozick's *Anarchy, State and Utopia*, and needs to touch on the subject of discoveries only briefly. Yet the plausibility of the finders-keepers ethic depends on the way in which discoveries are appreciated. Kirzner, also notes that the interest in adhering to a finders-keepers ethic hinges on the notion of discovery.

Nozick's limited recognition of the exemption of discovery from the Lockean proviso does not appear to go nearly enough. For Nozick even appropriation of an object following its discovery may, we have seen, be considered to worsen the situation of those (possibly in later generations) who "would have" found the object for themselves. But our insight into the "creative" aspect of discovery suggests a different view on the matter[...]<sup>242</sup>

It appears once more from the above quote that Kirzner takes Nozick to have "adopted" the Lockean proviso and that Nozick thereby has a fully completed entitlement theory. However, I argued in chapter 2.3 that Nozick does not use the Lockean proviso as a foundation of his entitlement theory. The Lockean element only serves to illustrate the complex interdependency of the principles in this theory. As said in chapter two, Nozick does not recognize the Lockean proviso as a valuable principle in itself. In this sense, whatever conclusion Kirzner reaches regarding the Lockean proviso, it can never lead to a revision of Nozick's entitlement theory.

The quotation also shows that Kirzner adds a link between the principle of original acquisition and discoveries. Crucial in this is the creative element that is said to be embedded in discoveries. In the article, Kirzner has not got the room to explain this in detail. He embroiders on the subject in his book *Discovery, capitalism, distributive justice*. This book aims to direct attention to discoveries as an aspect of economic justice.

Before we can discuss the added value of the finders-keepers ethic, the foundations of that ethic, that Kirzner proposes, have to be discussed. Kirzner considers this to be founded on discoveries and widespread moral

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<sup>241</sup> Kirzner in Paul eds. p. 386.

<sup>242</sup> Kirzner in Paul eds. 1982, p. 403-4.

intuitions.<sup>243</sup> The following subparagraph looks at Kirzner's discussion of discoveries in this book, as discoveries are a foundation of this ethic.

#### 4.1.1 ON WHAT A DISCOVERY IS

Kirzner explains the notion of discovery by means of examples. In a first example, Jones finds himself trapped in a deep hole.<sup>244</sup> Jones then, becomes aware of lumber, old nails and a hammer. This discovery enables him to build a ladder. The situation has to be distinguished from a production process in which the ladder is produced. Unlike a production process, the discovery of the lumber is unpremeditated and involves good fortune. The construction is created through Jones's alertness and resourcefulness, rather than by accident, since Jones recognizes the value of the found materials.

In a production process, the opposite would be case. A production process is undeliberate, the output is extracted from inputs, the intended product arose entirely from the input.<sup>245</sup> The output is expected and merely unfolding from the input. Discoveries however, are a novelty, a creative element is inherent in a discovery. Someone who discovers, creates a thing *ex nihilo*.<sup>246</sup> Discoveries are to be distinguished sharply from the ordinary production process.

Discoveries also have to be distinguished from search. When I find Smith's telephone number in the telephone directory, it cannot be called a discovery.<sup>247</sup> The process of search is inherently deliberately planned. I know where to look for Smith's telephone number. Whereas searching involves awareness of ignorance, one is not aware of his ignorance prior to a discovery.<sup>248</sup> Kirzner explains the difference between search and discovery also via the notion of error.<sup>249</sup> Not knowing a telephone number is not necessarily erroneous. An error is for Kirzner a term reserved for:

[A]ctivity undertaken without taking advantage of all information which is at ones disposal.<sup>250</sup>

Error is thereby linked with the notion of discovery rather than search. Search does not immediately involve an error. Not knowing a telephone number is not necessarily an error, unless I forgot the number, or if I am culpable in any other sense. Yet a discovery is, according to Kirzner, always a correction of a previous error. A discovery necessarily constitutes the correction of previous error.<sup>251</sup>

A discovery is then not only a question of good luck. It is also caused by our *alertness* in grasping the opportunities that are given. Alertness comes as a special surprise in case of discoveries, whereas alertness in the production process is a factor that is taken into account. A discovery is a correction of an error. And there are lots of opportunities that are continually overlooked by all of us. In this sense production and discovery are more related to each other than the earlier distinctions would suggest. As Kirzner says:

Once we recognize that in reality a surprise-free environment is virtually unthinkable, we have irrevocably smudged the sharpness of the line of distinction separating production from discovery.<sup>252</sup>

We can conclude that according to Kirzner, crucial elements of discoveries are that they involve alertness and good luck, and that they can be distinguished from sheer production or from search, that involve no surprises.

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<sup>243</sup> Kirzner 1989, p. 132.

<sup>244</sup> The example can be found at page 21-23 of Kirzner 1989.

<sup>245</sup> Kirzner 1989, p. 24.

<sup>246</sup> Kirzner 1989, p. 25.

<sup>247</sup> Kirzner 1989, p. 25.

<sup>248</sup> Kirzner 1989, p. 28.

<sup>249</sup> See *infra* chapter 3.2.3 on Kirzner's definition(s) of error.

<sup>250</sup> Kirzner 1989, p. 28.

<sup>251</sup> Kirzner 1989, p. 29.

<sup>252</sup> Kirzner 1989, p. 37.

#### 4.1.2 MORAL INTUITIONS

A second basis of the finders-keepers ethic is widespread moral intuitions. Kirzner elaborates on the relevance of these intuitions in *Discovery, Capitalism, Distributive Justice*. Kirzner there refers to discussions on the role intuitions can play.<sup>253</sup> These discussions arose out of Rawls' assumption that intuition plays a large role into reaching the reflective equilibrium.

He denotes that philosophers who are sceptical about intuitions claim that relying on moral intuitions thereby practice politics masquerading as philosophy.<sup>254</sup> As Kirzner however does not aim to reach for reflective equilibria, he holds that he is less vulnerable to this critique.<sup>255</sup>

Thus Kirzner enables himself to rely on these intuitions. In what follows, he argues that our intuition of property is primordial. He argues that even those who want to abolish private property sometimes rest their case on that moral sense that just title to holdings may not be invaded without injustice and this apparently is closely related to the moral imperative that excludes robbery and plunder.<sup>256</sup>

Kirzner describes this moral intuition as follows:

[I]t seems to be the case that for most of us, there is a profound difference between the moral revulsion one feels in regard to robbery and plunder of that which is rightfully another's, and whatever moral outrage one may feel about a refusal to share one's wealth equally with others (or to see to it that others so share their wealth), or about other possible ethical failings.<sup>257</sup>

This distinction between the desirability of protesting against robbery on the one hand and the desirability of other moral achievements on the other, strengthens Kirzner in his idea that there is an intuitive imperative in favour of property. Taken together with the remarks Kirzner made concerning discoveries, he hopes to have defended capitalist justice beyond the scope of Nozick's own account.

#### 4.1.3 THE FINDERS-KEEPERS ETHIC

The finders-keepers ethic is closely related to Kirzner's ideas on discoveries. In order to examine Kirzner's claim that the finders-keepers ethic is more than a possible principle of just original acquisitions, it is necessary to elaborate on the subject.

It can be preliminary remarked that this definition diverges from the average use of the colloquium "finders-keepers". The remark is commonly made when a child drops his belongings and another picks them up, thereby shouting that he found it and thereby can keep it, leaving the loser weeping. The lost object was then previously owned by someone who already had a just title to the object. If this average use of the colloquium were to be applied in an entitlement theory, one would lose his title to a belonging via losing it; whereas another, by finding it, would receive a title to that object. Considering that Kirzner holds that the finders-keepers rule is relevant for unowned objects, rather than lost objects, the rule that Kirzner proclaims, differs from the average use of the proverb.

Kirzner's own definition of the ethic maintains that this ethic asserts the status of an unowned object. He says that in order to introduce the plausibility of this ethic, it is necessary to adopt the view that, until a resource has been discovered, it has not existed at all.<sup>258</sup>

The finders-keepers-rule asserts that an unowned object becomes the justly owned private property of the first person who, discovering its availability and its potential value, takes possession of it.<sup>259</sup>

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<sup>253</sup> Kirzner 1989, chapter six.

<sup>254</sup> Kirzner 1989, p. 132, 133.

<sup>255</sup> Kirzner 1989, p. 133.

<sup>256</sup> Kirzner 1989, p. 134, Kirzner refers to John Roemer.

<sup>257</sup> Kirzner 1989, p. 135.

<sup>258</sup> Paul eds. 1982, p. 395.

<sup>259</sup> Kirzner 1989, p. 98.

The finders-keepers ethic, arises from the object being unowned. It serves, like Locke's PJOA, to offer possible grounds for legitimate private property.<sup>260</sup> Kirzner holds that the finders-keepers ethic has a universal relevance,<sup>261</sup> which is why literature on economic justice should not neglect the subject. He argues that he finders-keepers rule:

if it does not quite compellingly and unequivocally establish itself as *the* philosophical standard for economic justice, yet appears to satisfy widely shared ethical intuitions concerning justice in the context of discovery.<sup>262</sup>

This is a challenging statement that needs further exploration. In order to do so, the following two sub paragraphs firstly explore the relationship between discoveries and the finders-keepers ethic and secondly we relate this finders-keepers ethic to the concept of error.

#### 4.1.4 FINDERS-KEEPERS AND DISCOVERIES

Kirzner's argument in favour of the finders-keepers ethic is closely related to his ideas concerning discoveries.<sup>263</sup> Kirzner establishes this as follows:

In order to introduce plausibility into the notion of finders-keepers, it appears necessary to adopt the view that, until a resource has been discovered, *it has not*, in the sense relevant to the rights of access and common use, *existed at all*. On this view it seems plausible to consider the discoverer (of the hitherto "non-existent" resource) as, in the relevant sense, the *creator* of what he has found.<sup>264</sup>

Kirzner then parallels this finders-keepers ethic, based on discoveries, to "The economic insight that the discovery of a hitherto unknown market use for an already-owned resource or commodity constitutes the discovery of a hitherto *un-owned* element associated with that resource" This is of importance for a further claim that Nozick makes and that again is illustrated by an example.<sup>265</sup>

Supposedly an entrepreneur sells oranges for \$5 and after some time had passed, he discovers that he could sell the same oranges for \$12 if he converts these oranges into juice. He then "created" this additional value in orange juice through his discovery of this new market.<sup>266</sup> On the basis of this example, Kirzner presumes that any price differential – that is discovered by the entrepreneur – constitutes a discovery.<sup>267</sup>

Though the intuitive appraisal of the finders-keepers ethic may depend upon the notion of discovery, it also depends on the notion of error. The relationship between error and the intuitive plausibility of the finders-keepers colloquium is addressed in the following paragraph.

#### 4.1.5 FINDERS-KEEPERS AND ERROR

It is closely related to Kirzner's remarks on error and that in ordinary market transactions, erring is prevalent. I earlier contested this view on erring and transactions.<sup>268</sup> Here the relevant part is that Kirzner deduces from the impossibility of using error (or to be more accurate, *voluntariness*) as a criterion for justice in transactions, that the finders-keepers ethic becomes intuitively obvious and a useful complement of the Entitlement Theory:

Precisely to the extent that error might, in the eye of the critic, be held to erode the meaningful voluntariness of market transactions, a finders-keepers rule may be held to neutralize the ethical problems so raised.<sup>269</sup>

<sup>260</sup> Kirzner signalises this as well at Kirzner 1989, p. 99.

<sup>261</sup> Kirzner 1989, p. 18.

<sup>262</sup> Kirzner 1989, p. 98.

<sup>263</sup> Viz. inf. 4.1.3.

<sup>264</sup> Kirzner in Paul eds. 1981, p. 397.

<sup>265</sup> Kirzner in Paul eds. 1981, p. 397.

<sup>266</sup> Kirzner in Paul eds. 1981, p. 398.

<sup>267</sup> Kirzner in Paul eds. 1981, p. 398.

<sup>268</sup> Viz. inf. 3.2.3.

<sup>269</sup> Kirzner 1989, p. 105.

It may be defended, Kirzner argues, against those who uphold that the voluntariness-criterion outlaws any error that those errors that are made in full awareness, do not count.<sup>270</sup> But then a counter objection may be that there is a difference between erring out of surprise and those that do not surprise anyone.<sup>271</sup>

It is at this point that Kirzner invokes the finders keepers rule to uphold the voluntariness as a criterion. Kirzner holds that it is undesirable to invalidate contracts in case of genuine surprise. Thus he says:

It now becomes obvious that the market participants who have gained as a result of these errors (made by others) may, surely, claim that their gain [...] represents a *discovery*, to which justice, as defined in a finders keepers rule, assigns them full title. Those surprised by these discoveries can hardly claim to have suffered injustice.

As I already argued, Kirzner's presumption that "The Law" does not invalidate market transactions in which one of the parties entered under mistaken assumptions concerning present or future market conditions, only upholds in Common Law countries and countries that derive their law from that.<sup>272</sup> Other systems of law may invalidate contracts wherein parties erred by surprise or about present or future conditions. That English and American law prefer a different outcome does not mean that countries that do outlaw undesired contracts, are on the verge of economic collapse or live under a *justum pretium* doctrine.<sup>273</sup>

Kirzner firstly elucidates that if error is outlawed, it would be possible to abandon almost any contract. Kirzner gives the example of renting a house near the sea and abandoning it if it appears to rain during ones holiday. One could then still be able to maintain the position that erring is a possible criterion, by stating that only erring in case of genuine surprise should be a reason to abandon a contract. But even then, Kirzner finds an unjust example of the use of such a criterion. A transactor who erred may insist that he did not assume the risk, thereby did not want the contract and can abandon it.<sup>274</sup> After this, he concludes that the finders-keepers rule becomes obvious.<sup>275</sup>

Kirzner says:

It now becomes obvious that the market participants who have gained as a result of these errors (made by others) may, surely, claim that their gain (grasped at the apparent expense of those surprised by others) represents a *discovery*, to which justice, as defined in a finders-keepers rule, assigns them full title. Those surprised by these discoveries can hardly claim to have suffered injustice.<sup>276</sup>

Kirzner might be convinced but there is no binding reason upon anyone to accept this intuition. But even if it were strictly necessary to prevent erring in transactions from invalidating contracts, there are many counterexamples thinkable that suggest the counter-intuitivity of the finders-keepers theory. What if I find a cure for aids, that would save millions of lives in the South- African continent, can I then keep the recipe to myself in order to ensure myself of the revenue of the high-priced medicines sold in western countries?

The acceptability of the ethic crucially depends on the status of what Kirzner calls "error" of those who did not make the discovery. Regardless how and to what extent, there are two ways in which this status of error can be compromised. A first considers whether the non-discoverers are culpable of negligence, or whether they could not help that they did not discover it. There is another reason that involves the status of common knowledge and common sense. Was it a thing that could be discovered by anyone or did it depend on the discoverers rare qualities.

Kirzner gave the example of Jones who discovered lumber, nails and a hammer at the bottom of the hole he fell into. In this example Jones could keep the ladder he built, as he discovered it. If Smith fell in the same hole along with Jones, and wife Jones started to exploit his entrepreneurial lumberjack-qualities, Smith

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<sup>270</sup> Kirzner 1989, p. 105.

<sup>271</sup> Kirzner 1989 p. 106.

<sup>272</sup> Viz. inf. 3.3.5.

<sup>273</sup> It may be recalled that Kirzner argues in Paul eds. 1981, p. 394, that Kirzner's main ground for the economic inviability of contracts was: that prices in a market that is necessarily in disequilibrium, necessarily reflect the very errors which have occasioned our concern. It is in other words through error that a price comes into existence and outlawing error would thereby necessarily mean that the doctrine of one just price is upheld. Yet although the Dutch criterion of "dwaling" does outlaw errors by mistake, there is to my knowledge not a system for fixed prices, with the exception of scientific books and that is about to be banned.

<sup>274</sup> Kirzner 1989, p. 106.

<sup>275</sup> Kirzner 1989, p. 107.

<sup>276</sup> Kirzner 1989, p. 107.

would fall asleep, Jones could -according to Kirzner- charge Smith even a monopoly prize for climbing the ladder. Could Jones do that as well if Smith fell in a coma rather than asleep? Kirzner's intuition might say yes but mine would say no, as Smith is not to blame for falling in a coma.

Apart from culpability, there is another thing that bars the finders-keepers colloquium from being applied too easily. Here we enter into a realm of the finders-keepers rule that seems to bring questions that are also raised under patent law. One cannot ask a patent for knowledge that was already part of common knowledge, as the discovery either already happened or was in such a manner bound to happen that it has little to do with the entrepreneurial discovering abilities of the discoverer.

Again, the wide scope that error may mean, avenges itself. If this error is "punishable" by honouring discoverers of the non-error with a patent to their discovery, it will depend on what may count as error, namely all those cases wherein the will of one of the parties was absent, to what extent the finders keepers theory is accepted.

From the above it may be concluded that the finders-keepers ethic is not as intuitively attractive as Kirzner makes us believe, and that the finders-keepers ethic is not necessary in order to prevent errors from invalidating contracts. But it certainly cannot be concluded that the finders-keepers ethic is impossible.

It is a principle that explains how property can be acquired and as such it may be implemented as a PJOA, a principle of just original acquisitions, in the Entitlement Theory. It may even be read in combining with the Lockean principle of acquisition and the proviso. The entitlement theory then may be (but it does not *have* to be) completed so that it allows property to arise from labour, or from discovery, provided that the rest is not worsened. The Lockean proviso, that is rejected by Kirzner in favour for his finders-keepers ethic, may come in handy when the neighbours start to dig for gold in my garden under Kirzners ethic and the adjacent presumption that whatever they find there, they may keep.

In fact, discoveries already may lead to a title, in some entitlement systems of property law.<sup>277</sup> For instance, under the Dutch article 5:13, half of a treasure I discover, becomes mine. The other half is for the owner of the ground. Article 5:4 rules in general that objects that belong to no one and are found, become the property of the one who discovered them. Whether and to what extent a finders-keepers ethic should be adopted, seems a matter of personal taste.

## 4.2 KIRZNER ON NOZICK AND ACQUISITIONS

The previous chapter considered Kirzner's relation with transfers and the principle of just transfers, PJT. As a consequence, Kirzner's interpretation of the PJOA was not discussed. Before Kirzner's critique on Nozick can be considered, I will examine what Kirzner presumes that Nozick said concerning acquisitions and the principle of just original acquisitions, or PJOA. I'll start with a general remark concerning the relationship between Kirzner and Nozick.

A second way in which this is done, is by considering in detail what Kirzner presumes concerning the PJOA. A third point of attention concerns a detail of that PJOA: the sorites paradox as described under paragraph 2.2. What does Kirzner presume concerning the relationship with Nozick and sorites? The last paragraph of this chapter is a bridge to paragraph 5.1 and discusses the relationship of the finders-keepers ethic in an entitlement theory. Whereas Kirzner considers the finders-keepers ethic as an additional element to the entitlement theory, it will be argued that it can best be considered as a PJOA.

### 4.2.1 DISTRIBUTING MANNA

Like Nozick, Kirzner refuses to discuss the justness of what people come to own in terms of distribution. Nozick considers that there is no central distribution.

What each person gets, he gets from others who give to him in exchange for something, or as a gift.<sup>278</sup>

He furthermore rejects Rawls's principles of fairness precisely because they treat objects as manna that fell from heaven, which they, according to Nozick, do not.<sup>279</sup>

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<sup>277</sup> Viz. *infra* 5.1.3.

<sup>278</sup> Nozick 1974, p. 149.

<sup>279</sup> Nozick 1974, p. 198-9 and page 160.

As argued for under Chapter 2, Nozick –deliberately– neglects how initial ownership arises on purpose, in his chapter on distributive justice. How the object initially came into existence is not so much Nozick’s concern. Nozick does not tell how objects can be originally acquired. This leaves his complaint of distribution theories intact, the objects that have to be distributed, did not come falling out of the sky. They came either from a previous set of holdings or were previously unowned.

Kirzner considers, like Nozick that there is no central distribution, yet he –unlike Nozick– immediately ties this up to the discovery process.

My dissatisfaction in this book with the standard notion of income distribution is rooted, not in the decentralization out of which the pie is spontaneously created and “distributed” but in the circumstance that what is distributed is never in fact fully known, prior to its distribution.<sup>280</sup>

So at first sight, Kirzner and Nozick seem to agree in refuting the “distributing of the social pie-perspective”. Kirzner however, does not agree with Nozick. For Kirzner, the pie is created through a process of discovery. To underscore this thesis, Kirzner attempts to show that a) the capitalist market process is a discovery process and that b) the discovery character of the capitalist process thoroughly undermines the relevancy of standard discussions of distributive justice under capitalism.<sup>281</sup>

This latter statement is in the former chapters of this thesis shown to be too enthusiastic, concerning Nozick’s entitlement theory. Kirzner thinks that entitlement theories treat what is to be distributed as initially existing.<sup>282</sup> He illustrates this via the following quotation from Nozick, concerning the:

situation is *not* one of something’s getting made, and there being an open question of who is to get it. Things come into the world already attached to people having entitlements over them.<sup>283</sup>

Kirzner rephrases this as meaning that the entitlement over a productive resource entails corresponding entitlements to the produced resources. Nozick then has a productive view on distribution, wherein the output directly results from the input, as expected.<sup>284</sup> Nozick only considers the things in the world as pre-existing. Nozick ignores the discovery aspect of the social pie and, like Rawls, Nozick in Kirzner’s view treats the world as a social sky-fallen pie.

Kirzner thereby stabs his fellow combatants (against the sky-fallen pie distributors) in the back, as he failed to notice that Nozick made no statement on *how* pie slices should be acquired. In order to establish whether a pie slice is justly owned, one has to look either to how the slice was gotten or how it was otherwise acquired, for instance through a discovery.

Although Nozick does not say how the pie came about, he does look at the history of the pie and thereby does not treat the pie as a given. The pie may be given by someone else, but it can also be discovered, lying in the bushes. Or the baker created the pie from pie-ingredients *ex nihilo*. Nozick does not fill in under which precise principles one can come to originally own a pie. It might be done through a principle of discovery. Nozick upholds that things come into the world with entitlements clinging to them.<sup>285</sup>

On this flawed conclusion, Kirzner bases his idea that the entitlement theory sees production as pure production and is thereby slicing up a pre-existing pie.<sup>286</sup> For Kirzner, the only difference between Rawlsian distributions and Nozick’s entitlements is that the first distributes through a central authority whereas the entitlement theory distributes the pie through the original owners of resources. It is a rather odd conclusion as Nozick rejects the idea of a social pie.<sup>287</sup> The difference in Nozick’s and Kirzner’s rejection of the pie is that Nozick rejects it as it is blocking voluntary transactions in principle. Distributing the pie equally, prohibits people from giving away their equal share.<sup>288</sup>

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<sup>280</sup> Kirzner 1989, p. 9.

<sup>281</sup> Kirzner 1989, p. 10.

<sup>282</sup> Kirzner 1989, p. 14.

<sup>283</sup> Kirzner 1989 at p. 145 quotes Nozick 1972, p. 160.

<sup>284</sup> Viz. *infra*. 5.1.1.

<sup>285</sup> Nozick: “Things come into the world already attached to people having entitlements over them.” in Nozick 1974, 60.

<sup>286</sup> Kirzner in Paul eds. 1981, p. 146.

<sup>287</sup> Nozick 1974, p. 149, 160, 198.

<sup>288</sup> Kirzner 1989, p. 145. The argument is explained in further detail at page 194.

#### 4.2.2 NOZICK AND ACQUISITIONS

As so many other authors, Kirzner assumes that Nozick holds the Lockean theory of original acquisition to be true, that Nozick by addressing the Lockean principle within the context of the entitlement theory adopts this Lockean theory of original acquisition and the accompanying Lockean proviso as if they are an element of the entitlement theory.

Interpreting Nozick as is done in chapter two, leads to difficulties regarding Kirzner's interpretation of the entitlement theory. The reader of his article *Entrepreneurship, Entitlement and Economic Justice*, may come across the following quote:

For Nozick, the justice of holdings depends "historically" on the justice of the original acquisition from the unheld state *and* on the justice of each of the subsequent transfers of the holding.<sup>289</sup>

Kirzner here understands Nozick differently than I did in chapter two. His interpretation would be that Nozick, regarding the justness of an owned object, would look at the original acquisition of that object and to all the subsequent other transfers. I don't think that each subsequent transfer is as important to Nozick, because of the sorites-paradox. Thinking otherwise would force the entitlement theorist to rectifying every wrongful transfer, up to the beginning of time. This also goes for the original acquisition in the unheld state.

The unheld state, for the purpose of the entitlement theory, did not only occur at the beginning of time, when people firstly started to appropriate. The working of the principle and the difference between my and Kirzner's interpretation of PJOAs can be illustrated by means of the Jones example.

Kirzner comes up with an example of Jones, who by accident finds himself in a deep hole.<sup>290</sup> In the deep hole lies a ladder, wood and nails at his disposal. According to Kirzner we would all agree that Jones discovered the ladder. He produced it with discovered materials. The discovery of the material was unpremeditated as Jones did not deliberately search for it, and the discovery of the ladder-possibility in it was deliberate<sup>291</sup> and can be contributed to Jones' alertness and resourcefulness.<sup>292</sup> The discoverer then can be seen as the creator and originator of what he discovers. What he finds he may keep and Jones thereby should become the owner of the ladder, according to Kirzner.

If Jones would build a ladder from (what appear to be unowned) pieces of wood, the ladder arises out of an unheld state, as Kirzner admits. The ladder was created *ex nihilo*.<sup>293</sup> The object was acquired, rather than purchased, as the objects weren't transferred because they weren't owned before, Kirzner admits as well.<sup>294</sup> What is it then, that does not turn the finders-keepers ethic into a PJOA?

The only thing that for Kirzner apparently turns the finders-keepers ethic into something different than the PJOA is that it is not justly acquired from nature.<sup>295</sup> But the PJOA is neither a principle that deals with retrieving objects from nature only. The word nature does not occur in the definitions of the entitlement theory that Nozick gave and it neither appears in the paragraphs that deal with Locke. The only thing that turns a PJOA into a PJOA is that it is acquired from a previously unheld state.

That unheld state does not necessarily mean that it has to be acquired from nature, it does not even mean that nobody held the ladder before. It is on the contrary possible that under the PJT, objects (re-)enter an unheld state, for instance because its (former) owner dumped it, or because the ladder was lost for so long that the owner does not have an interest in recuperating it anymore. This appears from the following in Nozick's *Anarchy, State and Utopia*:

...we shall call this the principle of justice in transfer. (And we shall suppose it also includes principles governing how a person may divest himself of a holding, passing it into an unheld state.)<sup>296</sup>

The ladder came about by Jones's building it. Jones can be said to own the ladder, for instance under the Lockean PJOA, as Jones put his labour into it. Another possible principle could be a finders-keepers ethic.

<sup>289</sup> Kirzner in Paul eds. 1982, p. 401. Italics are mine, SP.

<sup>290</sup> Kirzner 1989, p. 20.

<sup>291</sup> Kirzner 1989, p. 21.

<sup>292</sup> Kirzner 1989, p. 22.

<sup>293</sup> Kirzner 1989, p. 40 - 44.

<sup>294</sup> Kirzner 1989, p. 396.

<sup>295</sup> Kirzner 1989, p. 396.

<sup>296</sup> Nozick 1974, p. 150-151.

Jones then could be said to own the ladder he built because Jones created it *ex nihilo*. Such a proviso would also be historical, as it refers to a circumstance (i.e. the creating) in the past,<sup>297</sup> and unpatterned, because it does not make a distribution dependent of a natural dimension (although not entirely because it can be argued that entrepreneurial qualities that Kirzner admires in a discovery and upon which the ethic is vested, are genetic.)<sup>298</sup> Nozick might accept such a principle as a possible or co-possible PJOA, provided that it is historical, unpatterned and that it has an adequate proviso.<sup>299</sup>

#### 4.2.3 SORITES II

It is held in chapter two of this thesis, that Nozick is not sure about how long the entitlements last and that he implicitly refutes to wipe out all past injustices.<sup>300</sup> There it was concluded that it would be very unlikely to assume that Nozick thinks that London has to be returned to the Celts and so on, especially since Nozick wonders about the possible drastic consequences himself. It therefore cannot be immediately concluded that via an original acquisitions, all subsequent patterns are prefixed.

Despite the above, Kirzner concludes that Nozick considered the first original acquisition as a foundation of the entitlement theory.

In the totality of all original acquisitions from nature, then, there lie implicitly and embryonically the complete subsequent patterns of income and wealth distributions over all future time.<sup>301</sup>

He thereby ascribes a sorites-paradox in Nozick's entitlement theory, that is not there, as we argued for *infra* 2.2. It would be the opposite of the sorites paradox we considered in paragraph 2.2, for that paradox went back in time. The paradox that Kirzner reads into Nozick takes the following for (whereby x stands for owning a thing): Presuming that x is just under the PJOA, and x + 1 will be just under the PJT, if x + 1 is justly transferred x + 2 will be just.

If Kirzner is right in ascribing this paradox to Nozick, then it may be argued that the entitlement theory is a patterned theory, which Nozick rejected as a starting point for theories of holdings (a.k.a. distribution theories).<sup>302</sup> After all, property was a natural phenomenon, decided upon from the start when things were firstly owned. On closer examination, there are there are three reasons why subsequent patterns of income are not determined from day one.

A first is that the origin of an acquisition is taken more original in the quote of Kirzner I gave above, than is logically sound. What is the origin of an acquisition? If the Lockean principle of acquisition would be presumed, the milk was originally acquired by the owner of the cow who made my milk, as it was his cow how originally acquired the milk. But if such a principle is taken literally, the original acquisition of my glass of milk, becomes the first owned cow, in whenever it was when farmers started to own cows.

A second is, that Nozick builds in a precondition that prevents ownership, that does not violate the PJOA initially and that subsequent transfers of ownership do not violate the PJT, from arising if the combining of principles leads to a violation of an earlier assumed PJOA. Nozick illustrated this with the well-example. Suppose that a monopolist: Uncle Sam, justly acquires a well under an original acquisition principle (for instance: the Lockean). Then Uncle Sam buys all other water wells and each well is justly purchased. Then, the combined result of owning of all water wells can in retrospect violate the principle of just original acquisitions.<sup>303</sup> An entitlement is thereby, according to Nozick, always provisional. Property does not arise out of the mere transaction itself, it arises only if there is a title. The precise principles that the title consists of, are not filled in by Nozick, for good reasons, though we know it has historical and unpatterned.<sup>304</sup>

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<sup>297</sup> Nozick 1974 describes the condition for a principle to be historical at p. 155: "historical principles of justice hold that past circumstances or actions of people can create differential entitlements or differential deserts to things".

<sup>298</sup> Nozick 1974. p. 156: "Let us call a principle of distribution patterned of ot specifies that it is to vary along with some natural dimension, weighted sum of natural dimensions, or lexicographic ordering of natural dimensions".

<sup>299</sup> This prerequisite of a PJOA is formulated at page 178.

<sup>300</sup> Nozick 1974, p. 152, viz. inf. par. 2.2.

<sup>301</sup> Kirzner 1989, p. 145.

<sup>302</sup> See *infra* par. 2.1.1.

<sup>303</sup> Note that the principle of original acquisitions in question is the Lockean proviso and that Nozick does not accept this proviso but uses it as an example, see *infra* 2.3.

<sup>304</sup> See *infra* 2.3 and 2.4.

Thirdly, given that Nozick does not explicitly hold in his text that the originality of ownership is rather strict, it is still possible under the Nozickean entitlement theory that objects are stolen or by any other means not justly owned and become just after many, decreasingly illicit transfers.

The past thus does not dictate the future, at the very least not in such a way that mankind is able to fully predict what will happen.<sup>305</sup> It would be in contradiction with Nozick's belief in Free Will (as a phenomenon that equals the possibility of a free choice) to establish such determinism. But there may be a point in the thought that the outright determinist would not see the same benefit in the entitlement theory that Nozick does. For determinists, every theory is equally patterned, just as our choice for one theory above the other.

#### 4.2.4 ACQUISITIONS AND THE THIRD WAY

The above puts Kirzner's remarks on the entitlement theory in a rather different setting. Kirzner himself sees his finders-keepers ethic as a third possibility that Nozick wrongfully ignored. It is a principle that in his view could stand alongside the PJOA and the PJT.

The framework of Nozick's definitions sees things as being held either as the result of original acquisitions from an unheld state, or else as the result of acquisition by transfer from a previous holder. Our discussion has pointed out a third possibility: that of a thing being held as the result of the holder's having, in the relevant sense, "created" it *ex nihilo* – i.e. by finding it.<sup>306</sup>

As I interpreted Nozick, it makes more sense to consider the finders-keepers ethic to be a formulation of a possible PJOA. Kirzner's ethic defines how to acquire property (namely: goods can be acquired if they are discovered) and rather than from a transfer, such property arises *ex nihilo*, i.e. originally.

This is independent of the argument I made in chapter 2 that Nozick did not address the precise content of PJOA as he found that several interpretations are possible, amongst which the Lockean theory on original acquisitions.<sup>307</sup> Even if one upholds that Nozick thought that the Lockean theory of acquisition is indeed a principle of original acquisition, it is obvious that Kirzner's principle is a PJOA that competes with the Lockean, rather than a new and essential element of the entitlement theory.

Kirzner can consider his ethic as a new element, because he presumes that a PJOA is a principle that deals with acquisitions from state of nature. He upholds that the PJOA reigns only over those objects that are never held before. In the following, Kirzner explains his view as follows:

It should be noted that ownership-by-creation is quite different from ownership-by-just-acquisition-from-nature (as the latter is spelled out in, say, Nozick's entitlement theory). Ownership by acquisition occurs against the prior background of *given* unheld resources (even if no one is aware of their very existence). Acquisition is, in fact, a kind of "transfer" (from nature to the first holder) Ownership by creation, on the other hand, involves no notion of transfer at all.<sup>308</sup>

The following passage in *Anarchy, State and Utopia* may lead to the conclusion that the PJOA does not concern acquisitions in the original state only:

The subject of justice in holdings consists of three major topics. The first is the *original acquisition of holdings*, the appropriation of unheld things. This includes the issues of how unheld things may come to be held, the process or processes, by which unheld things may come to be held, the things that may come to be held by these processes, and so on.

As in any principle of original acquisition, the finders-keepers ethic defines under which conditions a certain form of property would arise, i.e. *be acquired*. Apart from that the finders-keepers theory also describes how property would arise *ex nihilo*, before the discovery, the undiscovered is unowned. The discoverer, who would become the owner of his discovery, would also become the first, original owner. Thus it present at least some form of a principle of original acquisition. What more conditions are necessary for a principle of original acquisition than a principle on how property is acquired *ex nihilo*, out of the blue?

<sup>305</sup> Leaving aside such rare examples as Nostradamus.

<sup>306</sup> Kirzner in Paul eds. 1981, p. 401.

<sup>307</sup> Viz. inf. par. 2.1.2.

<sup>308</sup> Kirzner in Paul eds. 1982, p. 396.

Furthermore, Nozick holds that the benefits of an entitlement theory are shown even without such a full-scale property acquiring theory.<sup>309</sup> The entitlement theory (of which many are possible) was only brought up as a defence against a Rawlsian theory of justice. Nozick couldn't have said anything structural about possible PJOAs without diverging the discussion away from the original subject: the preferable character of entitlement theories above distribution patterns.

Kirzner's finders-keepers ethic has all the features of a PJOA, that is different from Locke's putting labour into it principle, but might serve the same goals in the entitlement theory as the Lockean theory of acquisition did. It justifies the appropriation of an object from a previously unheld state. Nozick could have introduced the finders-keepers ethic instead of the Lockean ethic in order to show the complexities of the entitlement theory he mentions.<sup>310</sup> If he did, it might have been objected that his entitlement theory, unlike Nozick's, is unfair to those who do not have the wits to invent or other entrepreneurial profit themselves.

Kirzner also comes to the conclusion that the scope of his ethic seems to be:

confined largely to acquisition of unowned objects from nature, like seashells on the beach.<sup>311</sup>

He then argues that the scope of the finders-keepers ethic is much broader. The finders-keepers-rule also relates to the broader issue of the legitimacy of private property in general, as the Lockean principle of property through labour does.<sup>312</sup> This to me seems no reason to not consider the finders-keepers ethic as a theory on original acquisition.

This again may best be explained through a comparison with Dutch Law, as the recovering of clamshells or other objects is a principle that sets forth how to acquire property. The principle in question is encoded in article 5:4 of the Dutch civil code: BW. In that article is embedded the principle that he who takes into possession an unowned object, acquires its property, as do other, similar principles: such as the recovering of treasure in art. 5:13 BW, in *vermenging* i.e. confounding, art. 5:15 BW, *vruchtgebruik* (a sort of usufruct) in art. 5:17 BW.

Article 3:80<sup>2</sup> BW then ensures that via this or any other in the civil code mentioned possibility of acquiring, an *algemene titel* i.e. "general title" is acquired, that in turn, allows the owner to *overdragen*, i.e. "transfer" his object in article 3:83 BW. The parallel with Nozick's entitlement theory is striking as both make a strong distinction between acquiring property and transferring property, and both conjoin these two notions through a title requirement.

Yet Kirzner establishes the following:

Of course, it is by no means the case that theories of economic justice are in general satisfied with a defence of capitalist justice grounded in nothing more than some Lockean-type legitimisation of original acquisition. But an *entitlement theory* of capitalist justice, such as that expounded with such persuasive verve by Robert Nozick, would appear to be capable of resting on a finders-keepers basis for original acquisition in exactly similar fashion, at least, as the way in which Nozick rests his own case on Lockean original acquisition.<sup>313</sup>

This passage shows how much the idea that the finders-keepers ethic is more than an original acquisition theory, is vested on the idea that Nozick *adopts* the Lockean proviso. And, as I already concluded *infra* par. 2.3.3, Nozick does not adopt the Lockean proviso. The proviso is only instrumentally addressed to show what complexities can come along with an entitlement theory –regardless its form. Kirzner is right in saying that the entitlement theory can also rest on a finders-keepers basis. Nozick denied this at no point. Yet, precisely because the finders-keepers ethic fits into the entitlement theory in exactly the same way as the Lockean theory of acquisition does, it is nothing more than a PJOA.

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<sup>309</sup> Nozick 1974, p. 202-203.

<sup>310</sup> Nozick 1974, p. 174.

<sup>311</sup> Kirzner 1989, p. 98.

<sup>312</sup> Kirzner 1989, p. 98-99.

<sup>313</sup> Kirzner 1989, p. 100.

### 4.3 CONCLUSION

This chapter considered the additional value of the finders-keepers ethic for a voluntarist version of the entitlement theory, even though it was concluded under chapter 3 that Nozick did not presume the entitlement theory and that it was concluded in chapter 4 that the finders-keepers theory is not necessary for the reasons Kirzner suggests.

Paragraph 4.1 examined further what Kirzner's finders-keepers ethic consists of. In order to do so it examined the two main foundations of the ethic, these were discoveries and moral intuitions. After that was done, the relation was considered between the finders-keepers ethic and discoveries. By doing so it appeared that the additional value Kirzner's finders-keepers ethic may have, draws heavily upon his appraisal of The Law that was refuted earlier in 4.3.

Although the finders-keepers ethic is not necessary for applicance of an entitlement theory, it can be a useful element to it. It's use should however not be seen as a third option that is in between the PJOA and the PJT. It may serve as a specific principle of just original acquisition, instead of or along with the Lockean version of the PJOA. In fact, causal systems of law that allow for acquisition via discovery, such as the Dutch, already partially adopted this ethic.

It is however, unwise to throw overboard any Lockean principle of acquisition and self-ownership, and declare the finders-keepers ethic as the only applicable PJOA (or third option, for all that matters) together with the PJT. Under such a system it would be possible to originally acquire property via entrepreneurial qualities only. Others may dig for treasures and other discoveries at anyones expense. That allows for a society that is run by a few who monopolistically exploit their discoveries.

In paragraph 4.2, three conclusions were drawn upon Kirzner's interpretation of Nozick. Firstly it was concluded that the "unheld state" for Kirzner equals a sort of Nozickean state of nature. It was concluded that according to Kirzner Nozick falls in the trap of the sorites paradox and that Kirzner considers his finders-keepers ethic as a third option, in between the PJOA and the PJT, whilst there is no reason why his ethic would not classify as a PJOA.

Kirzner argued that the pie is created through a process of discovery. Now that Nozick does not fully recognize the importance of discoveries, Kirzner supposes that Nozick treats the goods in the world as if they are pre-existent. From this can be concluded that Kirzner stabs his fellow combatants (against the sky-fallen pie distributors) in the back, as he failed to notice that Nozick made no statement on how pie slices are originally acquired.

## **5 CONCLUDING REMARKS**

The assessment of the entitlement theory that I gave in this thesis, gave rise to an array of conclusions, some were more radical than others. These conclusions are summed up in 5.1. What may be ultimately concluded from these conclusions concerning the appraisal of the entitlement theory will be addressed in 5.2.

### **5.1 SUMMARY OF PRE-CONCLUSIONS**

The purport of this essay was to critically examine the reach of the entitlement theory. Of all the things Nozick has said in his *Anarchy, State and Utopia*, the entitlement theory is the most influential. Up to now, this has been caused by the reception of the much-discussed principle of just original acquisitions. In the course of considering the main theme of the book, I came to a radically different interpretation of the entitlement theory than conventional. A quick reminder: The theory consists of a principle of just original acquisitions (PJOA) a Principle of Justice in Transfer (PJT) and a rectification principle that precludes property from arising out of any other source than PJOA or PJT.

I argued in chapter 2.2, that the Entitlement Theory also consists of a break on a possible sorites paradox. There should be something that bars an in conjunction applied PJOA and PJT that lead to a just acquisition/transfer from falling into a downward spiral. Thus, if there is anything to say about the contents of a PJOA, it should be that the scope of its originality is rather limited.

The entitlement theory is drafted as an argument against Rawls and as such, I held in chapter 2.5 that the PJOA is of minor importance. Nozick did neither embrace the Lockean PJOA (nor the accompanying Lockean proviso) as if it were its own. Locke is rather used as an example of such a principle that is given in order to show a complexity. That complexity might arise if the combination of repeated PJOA and PJT application on property, would lead to a situation that is in violation of the earlier adopted PJOA.

Chapter three considered Nozick's perspective on the principle of just transfers. It appeared that there is a major confusion whether the words "Free Will" point to the possibility of choices and free actions only, or whether "Free Will" points to a freely formed mental state, to freely formed wants wishes, desires.

Nozick took the choice-side, probably without realizing that there is another. Nozick in *Anarchy, State and Utopia*, gave an ambiguous criteria for the source of contracts. Either the in maxims presented "free choice" or the in the Chamberlain-example presented "voluntariness", is the criterion that establishes the justice of a contract. Given Nozick's interpretation of the Free Will debate in *Philosophical Explanations*, no other conclusion can be justified than the one that holds the free choice just. A contract that is entered into voluntarily for the sake of the Nozickean entitlement theory means that it is freely chosen.

Chapter three also examined the consequences of both criteria for the entitlement theory. Kirzner was a source of inspiration to this part of the chapter. He held that voluntariness is an economically unviable criterion for the establishment of a binding contract. That it is not so bad as it may seem, I have illustrated by an examination of systems of contract law. The English and other Anglo-Saxon-inspired systems of contract law uphold a construct that is called *consideration*. These systems maintains that the primary source (if not the only source) relevant for determining the contents of a contract the wording of the contract itself. The only means that ensure a party that the other will fulfil his promise, is the consideration, a sort of guarantee on paper or otherwise that ensures the promise of parties.

Other systems of law uphold other doctrines, most inspired by the idea that it is the will of parties that makes them stick to their promise. That these countries do not live on the rim of total economic collapse under a reign of the *justum pretium* doctrine, is because they have other means to "objectivize" (in a juridical sense) the will. The French system and similar systems adhere to the ancient Roman doctrine of cause. This doctrine maintains that a party must have an interest in the contract and that it otherwise is invalid. Some systems try to combine the two extremes. One such example is the Dutch willstrustdoctrine. It maintains that the primary source constitutive for contracts is the will of parties, and immediately limits this source by the "justified trust" of the other party. An absent will is not assumed if the other party had good reasons to rely on the utterances of the will-lacking party.

It is the Anglo-American system that Kirzner refers to when he upholds that the law finds no ground to invalidate market transactions into which one of the parties entered under mistaken assumptions, other than explicit deceit. Other systems of law do invalidate contracts on other grounds than explicit deceit. That for

these reasons the grounds under Kirzner's objection against the voluntariness-criterion, fall short, means that the finders-keepers ethic he suggests, is not necessary for this reason alone.

Whether there is any necessity of adopting the finders-keepers ethic on the sole grounds of its unique qualities as an ethic, has been under investigation in chapter 4. A possible ground for anything similar to the finders-keepers ethic may be that, as often is argued, Nozick does not justify a system of property. Opposed to this, *infra* 2.3 it was concluded that Nozick does not need to defend property, as he argued that now that we have it, there must be solid reasons to get out of it, rather than to get into it.

In the remainder of chapter four we've seen that Kirzner's main reason in favour of the finders-keepers ethic is related to discovery. One may keep what he can find because the existence of a discovered object can be attributed to the one who found it. The discoverer created *ex nihilo*.

To show that this is indeed just, Kirzner bases himself on Moral Intuitions. We have a primordial moral intuition in favour of property. Problematic in this is whoever rests his case on the basis of an intuition, that any counter-intuition proves the opposite. Be that as it may, Kirzner argues that his finders-keepers ethic is desirable as a third way, as it holds the middle between the principle of just original acquisition on the one hand and the principle of just transfers on the other. This statement can neither survive for long. Nozick considered that a the topic of just original acquisitions concerns issues as how unheld things may come to be held. That this is logical may also appear from a comparison with entitlement systems of law that have similar concepts of property. The finders-keepers ethic thus is at best a possible PJOA.

A last conclusion in chapter 4 concerned Kirzner's reasons for inserting the finders-keepers ethic into the entitlement theory. Kirzner argues that his finders-keepers ethic is an argument against those who uphold the thought that all objects in the world are part of an enormous pie that should be distributed as equally as possible. As may have appeared from paragraph 2.3.1 and 4.1.1, Nozick refutes this pie idea as well.

Kirzner holds that the "pie" is not pre-existent but rather created through a process of discovery. Kirzner supposes that the pie is pre-existent, as Nozick supposes that things come into the world already attached to people having entitlements over them. By saying so, Kirzner stabs his fellow combatants in the back. The sentence he quotes is put out of context as it is precisely meant to show that objects are not sky fallen pies. He should have taken Locke and the Lockean proviso as an enemy instead. What may be learned from the conclusions drawn in chapter 1-4, is the topic of the next paragraph, that contains the final conclusion.

## 5.2 FINAL CONCLUSION

Both Nozick's entitlement theory as entitlement theories in general, leave citizens free to distribute according to individual desires. The principle of just transfer intrinsically leaves people free to do with what they own, and that may be limited through the adoption of some principles of just original acquisition, but whether and to what extent this is limited, is a choice that is left open for any society to inflict upon.

So it is logical that Nozick does not hinge on a particular pre-fixed theory on how property arises under what conditions. If he already presented a (for the argument unnecessary) full-scale theory, everybody would disagree and the argument against Rawls that an entitlement theory is in general preferable would come under a cloud. Everybody would come up with a better theory than Nozick's thereby ignoring that the entitlement theory was an argument rather than a fully applicable theory of property and transfer. But aside from these interpretational matters, what is the use of saving entitlements from philosophical oblivion?

The relevance of the entitlement theory should be seen in the dawning of a new era that arose out of the Cold War sunset. Whereas Rawls' justice as fairness appeals more to those who consider themselves left-winged or worse, libertarians and other die-hard capitalists mostly supported Nozick's entitlement theory. But the Cold War is over. Although the terms "left" and "right" have not left the public debate; these terms today seem to correspond with human rights protection versus public safety, rather than with social safety versus tax cuts. Any discussion on the meaning of property is as obsolete as the debate on mutual deterrence.

Walls have collapsed, curtains opened and this thesis enlited the entitlement theory to a level that supersedes its previous Cold War context. Nozick may be libertarian; entitlements are not. Entitlements take the angle out of the debate on fair property distribution by postponing the quest for an ultimate definition of the right to property via a formal title construct. I hope to have showed in this thesis that this is already apparent in Nozick's work, but even if it were not, the entitlement theory still stands on its own and can be completed in a more liberal or in a more social manner.

Entitlements may serve as an argument for systems of property in an era wherein "peoples" democracies are replaced with economies that are all more or less capitalist. Nozick's entitlements are relatively ignored, compared to Rawls theory of justice, in the contemporary philosophical debate. Even though Nozick's general system outline is somewhat more in contact with 21<sup>st</sup> century liberal reality than the Rawlsian semi-communistic ideal of equal distributions.

Precisely therein lies the rub that Nozick's entitlement theory can be compared with existing systems of law of the European continent, whereas Rawls' system of equal distribution may best be compared with the long gone systems of the Soviet Union and its satellite's states. Whereas the Rawlsian system leads to and has lead to abstract discussions concerning the possibility of clamshell auctions, original positions, blindfolds and the like, the Nozickean entitlement theory addresses questions that are of modern day practical relevance, for instance under international property law.

For instance: there is no agreement between any of the European states as to what it is that leads to property and what not. Yet lots of these systems make the transfer of objects subject to an entitlement. Thus if I found a treasure under Kirzner's ethic it would become mine entirely, under Dutch law it becomes partially mine and partially that of the owner of the plot of land, whereas country X may have subjected in its civil code that a found treasure is state property. Although the PJOAs may differ, the title is the same and can be recognized in other entitlement systems.

The relevance of the entitlement theory may appear from the desire of continental academics and companies that operate on an international level, to harmonise the European systems of Contract Law into a European Civil Law. Attempts of that kind already have been there by the Lando Commission and the subsequent Principles of European Contract Law (an optional system for international parties to a contract, that does not harmonise the idea of property but does arrange under what conditions transfers are just). It has been argued that Common Law and Civil Law are too different to be harmonized.<sup>314</sup> The entitlement theory is able to provide both European systems with a common background.

Entitlements are able to ensure cooperation in transfers that is necessary on a trans-atlantic level. They can unite the socio-liberal contract systems that are commonplace in continental Europe, with the Anglo-American liberal/libertarian contract system. Maybe the Nozickean entitlement theory offers a solid basis in order to find that harmony, to harmonize systems of property law and contract law, that on the European

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<sup>314</sup> Legrand 1997, 2002.

continent are combined in the notion of private law. May be it could supersede to this mutual harmony, without the infinite quest for an ultimate best definition of property. Maybe the question of just transfer necessarily precedes the discussion of property. And yet it is obvious in advance that any quest for any foundation will be proven to be pointless in the light of future circumstances, if that isn't obvious already.

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	Plas/Valburg	Hr 18-6-1982, NJ 1983, 723
	Van Lanschot/Bink	Hr 1-6-1990, NJ 1991, 795
	Schirmeister/De Heus	Hr 15-4-1994,NJ 1994, 614
	Offringa/Vinck	Hr 10-4-1998, NJ 1998, 666
English	Eccles v. Bryant	[1948] Ch 43. CA
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French	Chalet for Sale	Cass. Civ. III, 3-10-1972, Bull. Civ. III, 491
	Pig farm	Cass. Civ. III, 2-10-1974, Bull. Civ. III 330
German	Negotiations by letter	BGH 10-6-1970, NJW 1970.1840
	Oolitic Stones	BGH 25-11-1992, NJW 1993.520
	Haakjöringsköd	RG 8-6-1920, RGZ 99.147
Italian	Installation of machinery	Cass. It. 17-6-1974, No. 1781, Foro Padano 1975.I.80

## RELEVANT SITES

Description	Site
The site of the Max Planck institute contains primary works on the history of law, amongst others Von Savigny	<a href="http://dlib-pr.mpier.mpg.de/">http://dlib-pr.mpier.mpg.de/</a>
The site by Ted Honderich contains primary works on the PAP-principle and other libertarian literature on the free will.	<a href="http://www.ucl.ac.uk/~uctytho/">http://www.ucl.ac.uk/~uctytho/</a>
The site of Matthias Storme, containing essays amongst others "property law in a comparative perspective".	<a href="http://www.storme.be/">http://www.storme.be/</a>
Url from which Sidgwick's texts can be obtained.	<a href="http://www.la.utexas.edu/research/poltheory/sidgwick/">http://www.la.utexas.edu/research/poltheory/sidgwick/</a>
Google link to online classical works of philosophy.	<a href="http://directory.google.com/Top/Society/Philosophy/Online_Texts/">http://directory.google.com/Top/Society/Philosophy/Online_Texts/</a>
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