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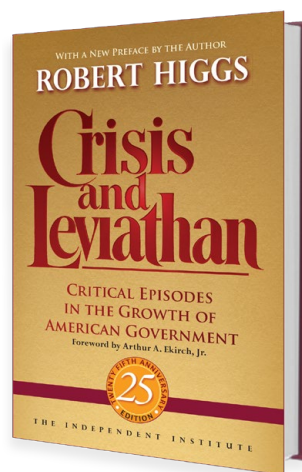
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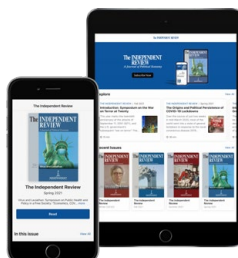
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# Desert? You Can't Handle Desert!

— ♦ —  
MICHAEL C. MUNGER

“It was all Mrs. Bumble. She *would* do it,” urged Mr. Bumble; first looking round to ascertain that his partner had left the room.

“That is no excuse,” replied Mr. Brownlow. “You were present on the occasion of the destruction of these trinkets, and indeed are the more guilty of the two, in the eye of the law; for the law supposes that your wife acts under your direction.”

“If the law supposes that,” said Mr. Bumble, squeezing his hat emphatically in both hands, “the law is a ass—a idiot. If that’s the eye of the law, the law is a bachelor; and the worst I wish the law is, that his eye may be opened by experience—by experience.”

—Charles Dickens, *Oliver Twist*, emphasis in original

I’ve always thought *desert* is a ass. I don’t mean the dry places or the verb that involves fleeing comrades in the face of the enemy. I mean the requirement that things, good or bad, must be *deserved*. John Rawls (1971, 1997) made desert a centerpiece of this theory of “fairness as justice.” The “man of system” often imagines he can design a society where desert rules all; I hope that his eyes will be “opened by

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experience—by experience.”<sup>1</sup> The most a society can hope for, in my view, is a set of convention-based entitlements that create expectations that coordinate the activities of individuals without oppressing their liberties.

But then I’m a Humean being, and ideal theories of all stripes leave me cold. F. A. Hayek, in some ways David Hume’s disciple, celebrated the potential for emergent conventions that respected property rights and a presumption in favor of liberty as the best means of assuring the prosperity and flourishing of all. This flourishing included, perhaps more than most, the poor. My own version of the emergent selection of political systems is based on “rule utilitarianism” (Harsanyi 1977), which “says that we can produce more beneficial results by following rules than by always performing individual actions whose results are as beneficial as possible” (Nathanson n.d.).<sup>2</sup>

The (excessive) privileging of concerns about desert and justice over utility can have unintended effects that lead to Pareto-inferior outcomes, meaning that literally everyone is worse off, perhaps substantially so. The best of intentions focusing on fairness to the exclusion of all else harms the entire society, even those who are least well-off. Consider David Schmidtz’s celebrated parable “Desert Town,” in which he tells of a driver passing through a small town:

I pulled over. The cop pulled in behind. Walked to my window, peered inside, asked for my license and registration.

“New in town?”

Yes, I said. Got in five minutes ago.

“Know what you did wrong?”

“Sorry. There was no stop sign or stop light. The cars on the cross street were stopped, so I kept going.”

The cop shook his head. “In this town, sir, we distribute according to desert. Therefore, when motorists meet at an intersection, they stop to compare destinations and ascertain which of them is more worthy of having the right of way. If you attend our high school track meet to-

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1. Adam Smith’s ([1776] 1981) “man of system” is reincarnated in every generation and is re-created in the breast of even the most well-meaning and otherwise innocent characters. Remember when Frodo, upset at Gollum’s perfidy, says Gollum does not deserve to live? The conversation went like this:

FRODO: Now at any rate [Gollum] is as bad as an Orc and just an enemy. He deserves death.

GANDALF: Deserves it! I daresay he does. Many that live deserve death. And some that die deserve life. Can you give it to them? Then do not be too eager to deal out death in judgement. For even the very wise cannot see all ends. (Tolkien 1988, 70)

In other words, desert is a ass.

2. A version of “rule utilitarianism” that economists imagine they invented is the “time-consistency problem,” where the best rule to follow over time is different from the best thing to do in any one instance because of the incentive problems created (for example, by negotiating with terrorists).

morrow night, you'll see it's the same thing. Instead of awarding gold medals for running the fastest, we award them for giving the greatest effort. Anyway, that's why the other cars honked, because you didn't stop to compare destinations." The cop paused, stared, silently.

"I'm sorry, Officer" I said at last. "I know you must be joking, but I'm afraid I don't get it."

"Justice isn't a joke, sir. I was going to let you off with a warning. Until you said that." (2006, 31)

In terms of ideal theory, the "system" of Desert Town makes sense: Why should one driver, for no good reason, be allowed to go while others wait? What if someone else is in a hurry? It's not fair. The problem is that deciding what justice dictates is costly; in a way, it's like R. H. Coase's (1937) famous observation about markets and firms. Coase asked, "If markets are so great, why are there firms?" The answer was transaction costs: although markets do generate information about relative scarcity through the price mechanism, using that mechanism is costly. It is often much cheaper and better all-around to rely on a dumb system like a boss's orders, at least in local settings.

Well, "justice" and "fairness" are pretty great. A political theorist version of Coase might ask, If social justice is so great, why is there so much unfairness? The answer is a version of transaction costs: figuring out what is just in every instance and to the third decimal point is actually *unfair*. The traffic system in Desert Town is Pareto inferior—that is, literally everyone is strictly worse off—to a dumb system such as traffic signals, in which lanes take turns based on red and green lights. That's an example of *rule utilitarianism*: with traffic lights, the longest anyone must wait is one minute. With the "stop and justify" system, the shortest anyone must wait is five minutes. Everyone is better off under the fair-but-unjust system. A society, choosing as a group, *should* select the rule that results in the greatest aggregate benefit. Citizens likewise have a moral obligation to obey such rules, at least in "normal" or "standard" circumstances.<sup>3</sup> In our case, that would mean that the use of the stop-light, as a substitute for "stop and justify," would normally make everyone better off.<sup>4</sup>

3. This is an important aspect of rule consequentialism, a subset of rule utilitarian thought. As Brad Hooker puts it, "Rule-consequentialist decision procedure: At least normally, agents should decide what to do by applying rules whose acceptance will produce the best consequences, rules such as 'Don't harm innocent others,' 'Don't steal or vandalize others' property,' 'Don't break your promises,' 'Don't lie,' 'Pay special attention to the needs of your family and friends,' 'Do good for others generally'" (2016). In the broadest terms, then, my argument harks back to the essential insight of constitutional political economy (Brennan and Buchanan 1985): societies cannot (usefully) expect to select *outcomes* because the costs and friction involved in doing so create rampant and destructive rent seeking to control the authority to make those discretionary choices. Societies must instead operate at one remove, selecting *rules* within which outcomes emerge (Buchanan and Tullock 1962).

4. The "normally" condition is a nod to David Hume and to James Buchanan's "relatively absolute absolutes." For a discussion, see Boettke and King forthcoming; for a debate over the epistemic requirements of a "public-reason" elaboration of "justice as fairness," see Gaus 2011 and Munger 2017b.

In this symposium, we consider the problem of desert and the closely related topic of economic liberty based on an essay submitted by Alexander Rawls (Yes, Alexander is the son of the late, deservedly celebrated, John Rawls). The Rawls piece is putatively a response to an earlier paper in *The Independent Review* by Nick Cowen (2021), but it proved so interesting (in the editors' opinions) and the issues so fundamental to a variety of current debates that we suggested Rawls should join those other debates as well. We then invited three other scholars, with a variety of viewpoints, to weigh in by responding to the Rawls piece, among them Nick Cowen, who had started things off.

Alexander Rawls (referred to hereinafter as A. Rawls to distinguish him from J. Rawls) credits Cowen's original concern over a seeming tension bordering on a contradiction: given the primacy of the "liberty principle" in the "fairness as justice" paradigm, why does the distinction between political liberty—than which J. Rawls will acknowledge nothing greater—and economic liberty and property entitlements do so much of the analytic work? A. Rawls attributes this tension and the various other jarring disjoints in J. Rawls's analysis to a single and probably overly simple premise: J. Rawls reinterpreted his "veil of ignorance" (Rawls 1971) device to mean the "stripping away of information about those things that are undeserved." Notice the effect: liberal political liberties are protections of equality, or at least the mythical equality, of individuals before the law. These liberties, because they are equal, are congenial with the veil of ignorance.

Economic liberties, however, inevitably honor differences because of division of labor (and that's a good thing; in fact, it's the heart of the matter). Some of these differences seem to be based on little more than luck; others are likely based on unearned and undeserved genetic endowments or differences in privilege or circumstance. None of the latter can survive the Procrustean leveling scythe of the veil of ignorance, and so all must be eliminated in the "fair" society. But because economic differences are censored from the setting in which fairness is decided (according to my analogy, by a group of people arguing at an intersection over who gets to go first), they cannot be employed as rhetorical tokens in the world of realized institutions. In other words, I do not get to go first at the Desert Town intersection simply because I happen to be richer than you are.

Let me be clear: A. Rawls is not arguing that this claim about the difference between political and economic liberties is defensible; he is simply pointing out that it is the implication of deploying the "veil of ignorance" device in the way that J. Rawls does in fact deploy it. As A. Rawls puts it in his essay,

This creates a compound interpretation of the veil. There is the original interpretation from "Justice as Fairness" where leaving out morally arbitrary information that is irrelevant from the standpoint of justice just means keeping the particulars of the rule choosers' own life circumstances away from them so that they can't tilt rules in their own favor. But now that same withholding of information is

also to be interpreted as keeping people from knowing those things about their own lives that are deemed to be morally irrelevant because they are undeserved. *These ideas are quite different, but starting at this early point they get joined together, and they remain together throughout.* At no point in Rawls's *Theory of Justice* are they ever distinguished from each other. *The implicit presumption throughout is that both these interpretations are always satisfied, which leaves Rawls's theory in a precarious position.* (emphasis added)

In his article "Justice as Fairness" (1958), J. Rawls was already fixed on the idea of maximizing the welfare of the least well-off, *which is obviously much easier to arrive at if no one can be said to deserve anything.* Getting claims of desert out of the way allows whatever other distributional concerns are in play—primarily claims of need—to dominate.

Overall, A. Rawls does not really take issue with Cowen's claim about the problem of Rawls's bifurcation of economic and political liberties, but he would question whether Cowen's contention of having "reconciled" Rawls and Smith can be sustained. The use of the veil of ignorance in the way A. Rawls describes it means that Cowen's reconciliation is not really consistent with the character of the place J. Rawls gives to that assumption. Cowen's statement may be a useful statement, but it is no longer J. Rawls's statement in any recognizable form; it is something else.

Our two outside responders, Adam Gjesdal and Chad van Schoelandt, raise some important concerns and extend the consideration of what I have called the "desert is a ass" position. Gjesdal asks, "What good is a theory of justice—in particular one that adopts a controversial stance on distributional matters—when after fifty years of exhaustive discussion there is still vigorous, reasoned disagreement regarding whether that theory is 'correct?'" My own view is that the problem (along the lines suggested by A. Rawls, actually) arises from an eliding of notions of fairness based on *outcome* into notions of fairness based on *process*. If one accepts the "rule utilitarianism" claim I made at the outset, then literally any outcome that obeys the optimized process rules is fair; this is the basis of Robert Nozick's (1974) (in)famous "Wilt Chamberlain" example. But if "justice as fairness" requires certain patterns of distribution in outcomes, then the very basis of fairness is different, and so are its implications. A. Rawls explores that conflict in some depth (though I am paraphrasing the nature of the conflict to fit it into my own framework developed here). What does Gjesdal add, then?

Gjesdal picks up an important loose thread and tugs it in a way that unravels a big part of J. Rawls's claims. Notions of fairness about institutions are to be judged by the conformity of actual outcomes with the "legitimate expectations" citizens have, based on the authentically fair and just institutions. But, of course, those expectations are the *output*, or consequence, of those institutions. But desert theory treats these expectations as inputs for the evaluation-as-just part of selecting institutions in the first place. That seems like a problem.



Before now, I had not fully appreciated the depth and power of the objection Gjesdal raises in his essay, though I have had some fun with a version of it in the classroom, as I discuss in Munger 2017a. I bought scratch-off lottery tickets for my class (about 120 students) and handed them out, but I said that before we scratched off the “veil of ignorance” that make all lottery tickets equal in expectation, we had to decide how to divide the wealth that would result. The students always (I did this five or six times) voted to let each person keep the winnings of his or her own lottery ticket, with all the inequality that implies.

But I had secretly enlisted the aid of a confederate in the class. After the “everyone is entitled to his or her own ticket” vote, I had my undercover actor leap up, throw her (I always chose women because it seemed more believable somehow) bookbag in the aisle, and shout, “I won \$10,000!” And then she would run out of the room yelling.

There would be dead silence for a moment. Then one of the students, unprompted, would raise his (it was always a guy, I’m sorry to say) hand and ask, “Can we revote? Because that’s unfair. Nobody deserves \$10,000 all to themselves.” Since there were other, legitimate “winners” on the scratch-offs (once \$100 in fact), the total winnings of \$10,000 shared equally by the number of students in the class would be \$75 each or so.

But notice the inversion, which in retrospect I was not clever enough to identify until Gjesdal pointed out in his current essay what was actually going on. On one hand, our notion of fairness is the *ex ante* equality of the lottery: behind the veil of ignorance of identical scratch-offs, distributed at random, the *process* is clearly “fair” in the sense that everyone has an equal chance. Our institutions and moral intuitions regarding desert might be constructed on those grounds, and everything would go through, though the result would be an unequal distribution in the end (Lomasky 1990). The problem is that once the veil of ignorance is lifted, the differences in the *outputs* of the process are laid bare, and the *ex post* problems of desert are highlighted. The “winner” did not *deserve* the \$10,000, and in fact by construction the example really does approximate J. Rawls’s intuition that the factor that led to the unequal distribution is *entirely morally arbitrary*: it was literally a lottery. What is congenial with *process* fairness is repugnant to *outcome* fairness.

Van Schoelandt takes a different approach, one that has already been developed at some length (Gaus 2016), but his explanation is much clearer and more persuasive. Van Schoelandt argues that the focus of J. Rawls’s lucubration is an ideal theory of a cooperative society based on justice of a particular kind—derived from fairness—but that A. Rawls asks a rather different question: What is the place of justice in a society where it cannot be assumed that “productive cooperation” is universal and, in particular, where cooperation and solutions to collective-action problems are not independent of incentives? But then, of course, the answers given by J. Rawls and A. Rawls are different “because they ask different questions.”

This is not a dismissive observation, however, because, as Van Schoelandt notes, many (many!) followers of J. Rawls have presumed to venture into the world of non-ideal, realized institutions to make prescriptive and proscriptive claims about laws, taxes, and regulations. Once one has crossed that Rubicon, then the claims and concerns raised by A. Rawls become not just allowable but also essential. Van Schoelandt comes close to inverting Gjesdal's question: where Gjesdal asks how we can still disagree if J. Rawls has a coherent theory, Van Schoelandt asserts that pluralism about theories of justice is a constraint—any just system must allow and give expression to diverse and possibly contradictory notions of justice and desert.

Finally, we have the paper by Nick Cowen, whose fault it is we are doing all this in the first place. Where A. Rawls's project is to integrate a nonideal theory of desert into J. Rawls's notion of "justice as fairness," thereby at least partly rehabilitating an important lack in the original, Cowen wonders whether we need desert at all. Since I think "desert is a ass," my bias is, of course, in favor of this perspective. If "justice as fairness" really *must* exclude—as morally arbitrary—sources of inequality as justifications for income and power differences in the realized world of institutions, then so much the worse for the theory. The reasons are close to those highlighted in Schmidtz's "Desert Town" example: the epistemic requirements of discovering and implementing desert based on moral significant factors would take up far too many evenings.<sup>5</sup>

And this leads me to my own conclusion: the "Desert Town" example is more Millian than truly Rawlsian because John Stuart Mill was literally looking for a utilitarian solution, whereas J. Rawls was conjuring ideal theory. But the connection is tantalizing because Rawls does let utilitarianism in through the kitchen window in the form of the difference principle: differences in wealth and primary goods can be justified only by bigger/biggest improvements for those who are least well-off. Rehabilitating the "fairness as justice" theory with a plausible and empirically grounded conception of desert, as A. Rawls attempts, is important. But the problems our responders point out, ranging from the sources of legitimate expectations to the limits of ideal theory to epistemic problems of discovery, are real. It is a pleasure to recommend to you our symposium on justice as fairness. It is especially fitting to do so in this centenary year of John Rawls's birth and 50th anniversary of his landmark book, *A Theory of Justice*; moreover, it is an honor to be able to present the reflections of Rawls *filis* on Rawls *père*.

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5. This is a paraphrase of Michael Walzer, who said, "Socialism, Oscar Wilde once wrote, would take too many evenings. This is, it seems to me, one of the most significant criticisms of socialist theory that has ever been made" (1968). Whether Oscar Wilde ever said anything like this is debated. But Walzer said it, and he's right: the epistemic problems of any imposed "patterned" system more than dissipate any supposed gain in justice and prosperity the system might produce in its proponents' imagination.



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