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# *A Theory of Justice* with Claims of Desert

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ALEXANDER RAWLS

In “Basic Economic Liberties: John Rawls and Adam Smith Reconciled” (2021), Nick Cowen looks at the disjoint in John Rawls’s *Theory of Justice* between the absolute priority that Rawls gives to political liberty (which is not to bend in the slightest to any other concern) and the lack of priority he gives to economic liberty (which could possibly even be discarded). This disjoint is puzzling given the grounds Rawls offers for the extreme priority he places on political liberty: that it is necessary for the development of the moral faculties. How can this justification not also apply to economic liberty, which, if people have it, is what allows them to choose what to do with their lives—to seek out their best opportunities to create value and bring it to market, where they can share it and get paid for it?

Similarly on the spending side. People spend in search of what is worth doing, which requires that others be free to offer as products their discoveries of what is worth spending time and money on. Most of the searching out of value that people participate in, both by themselves and in concert with others, is mediated by economic liberty. So Cowen is asking a great question, and his answer is obviously right. Of course the moral-development grounds for upholding liberty are fully in play with economic liberty. If moral development is the reason why political liberty is so important, then economic liberty would on the same grounds be just as important.

This similarity between political liberty and economic liberty also extends to the other half of why liberty is important. Moral development tells you what you

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Alexander Rawls has been writing on public issues for forty years. His writings on liberty, crime control, economics, global cooling, the Flight 93 Memorial, and other subjects can be found at rawls.org and CrescentOfBetrayal.com as well as on his blog *Error Theory*. Alexander Rawls is the son of John Rawls, but he claims no special knowledge for his commentary on the elder Rawls’s *Theory*.

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would want to do if you were free; then after you know what you want to do, you also need freedom so that you can actually do those things—so that you can act for what is good and right. That doubles the argument for liberty, both political and economic, and Rawls is fully aware of this second half of the argument.

This awareness can be seen in Rawls's discussion of John Stuart Mill's argument for liberty. Mill argued that people need to have liberty so that, through experience, they can make progress in discovering what matters more than what, with the more-valuable things being what Mill called "higher ends." In relating Mill's view in *Theory of Justice*, Rawls acknowledges that liberty is needed not just to discover these higher ends but also to pursue them: "These are certainly forceful arguments and under some circumstances anyway they might justify many if not most of the equal liberties. They clearly guarantee that in favorable conditions a considerable degree of liberty is a precondition for the rational pursuit of value" (1971, 210).

Rawls's only complaint about Mill's sweeping argument for liberty is that he thinks the case for liberty can be made even stronger: "But even Mill's contentions, as cogent as they are, will not, it seems, justify an equal liberty for all" (1971, 210). Rawls wants to base liberty rights on even more solid grounds so that no individual's rights can possibly be traded away for anyone else's benefit, and this is what he is determined to achieve.

The Millian argument is actually very solid on individual rights. Mill's "progressive" utilitarian criterion is to maximize progress in the discovery and pursuit of value.<sup>1</sup> All such progress comes through liberty because if you don't have liberty, then you have no scope either to discover or to pursue value. Thus, if anybody's liberty gets omitted, then their contribution to progress in the discovery and pursuit of value gets truncated, and the total decreases.

Is it possible to concoct a scenario where truncating one person's moral progress could somehow enhance other people's moral progress, thereby breaking the utilitarian argument for liberty rights? Not in any realistic way, but there is nothing wrong with trying to make an even more infeasible argument for liberty rights, and that is Rawls's goal. It just makes his treatment of liberty even more disjointed. How does he get from this virtually libertarian position—determined to provide a stronger defense of liberty than Mill!—to the dismissal of economic liberty, at least at the level of guaranteed rights, that is his final position?

This is just one of several serious disjoints in *A Theory of Justice*. If one really wants to figure out how Rawls's theory might be reconciled with classical liberal values, it is this larger pattern of disjoints that needs to be addressed, and if Cowen doesn't mind my offering a roadmap, the claim here is that all of these disjoints stem

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1. Mill invoked "utility in the largest sense, grounded on the permanent interests of man as a progressive being" (1859, 11). "Permanent interests" can be taken as a reference to Mill's "higher ends": those things that one discovers through experience to be most important. Ends that are discovered to be less important are dropped (progress), while those that are discovered to be more important are retained, becoming permanent.

from one critical choice Rawls made when he reformulated the idea of justice as fairness that he had introduced in his earlier article “Justice as Fairness.”

**Rawls’s decision to interpret the veil of ignorance, where no one knows *any* of the particulars of his own life, as the stripping away of information about those things that are undeserved**

In his article “Justice as Fairness” ([1958] 1999b), Rawls offers a method for coming up with fair rules for games: just tell the players who are making the rules that they will be playing the game many times over from all of the different positions the game contains. That repeated-game aspect keeps players from tailoring rules to the advantage of the particular position they will be playing on any particular go round: “Thus each will be wary of proposing a principle which would give him a peculiar advantage, in his present circumstances, supposing it to be accepted. Each person knows that he will be bound by it in future circumstances the peculiarities of which cannot be known, and which might well be such that the principle is then to his disadvantage” (53).

People biasing rules in their own favor is what leads to unfair rules, suggests Rawls. Get rid of that bias, and you get fair rules, and when the game is justice, fair rules are just rules. Of course rule makers generally *do* work to tilt rules in their own favor. A way to remove that bias is huge so the repeated game is a great idea.

In *Theory of Justice* Rawls made a small change to his thought experiment and a huge change to his *interpretation* of the thought experiment. He changed the scheme for arriving at fair rules from a game where participants over time play all different positions in the game to a game where participants don’t know what position they are going to play. Deliberators are to choose principles of justice from an “original position” of choice behind a “veil of ignorance” about all the particulars of their personal circumstances. It’s the same great idea with the same purpose: to make it “impossible to tailor principles to the circumstances of one’s own case” (1971, 18), just stated slightly differently.

There was no need in *Theory of Justice* to come up with a different justification for this very similar scheme. Not being able to tilt rules in one’s own favor makes the rules fair, which makes them just, and this applies equally to both schemes, but in *Theory of Justice* a full second approach to interpretation and justification got layered on. Whole categories of the personal information that has to be kept from people if they are not to be able to tailor rules to their own circumstances are things that people are born with or born into and hence, in Rawls’s view, are things that they cannot be said to *deserve*, creating an opportunity to interpret the veil not just in terms of fairness but also in terms of desert, or lack of it.

In his initial outline of his theory of justice Rawls refers to those who are “better endowed, or more fortunate in their social position, neither of which we can be said to deserve,” and he deems it appropriate to “look for a conception of justice that nullifies the accidents of natural endowment and the contingencies of social circumstances as counters in a quest for political and economic advantage.” The idea

is to “[leave] aside those aspects of the social world that seem arbitrary from a moral point of view,” and this is what Rawls sees the veil of ignorance as accomplishing: it sets aside information that is “irrelevant from the standpoint of justice,” and “in this manner the veil of ignorance is arrived at in a natural way” (1971, 15, 18).

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.<sup>2</sup>

### **A theory of who deserves what that ceases to exist as soon as anyone can be said to deserve anything**

The appeal of adding a moral-relevance interpretation to justice as fairness is obvious. If all morally irrelevant information is gone then only what is morally relevant remains, leaving only pure justice, stripped of the clutter of people’s biased attempts to tilt rules to favor their own undeserved circumstances. Now *there* is a theory of justice, a discovery and purification of the element itself, a moon-shot opportunity to locate justice on the Periodic Table.

Any curious scientist would want to test this refining process and see if it pans out. Can it actually yield a largely purified sample of elemental justice whose properties can be discerned, like Henry Cavendish successfully identifying hydrogen to be a single flammable element? Or would it be a dead end, like Joachim Becher misidentifying phlogiston as the flammable part of all flammable things? Not all theories are correct. Progress comes from testing every propitious avenue, and Rawls’s starting point does look propitious.

Natural endowments and the circumstances a person is born into do appear to be undeserved; thus under the irrelevant-because-undeserved interpretation of the

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2. It isn’t that Rawls does not come back to the compound interpretation of the veil of ignorance at all. It’s just that when he does come back to it he follows roughly the same formula he used up front, where the two separate interpretations of the veil both get described in the same terms, so that they get melded together into one compound interpretation that is not explicitly acknowledged as such. This iteration comes in *Theory of Justice* section 24 (1971, 141) where Rawls details the veil of ignorance. Knowledge of particulars cannot be allowed because “then the outcome [of rule-choosing behind the veil] is biased by arbitrary contingencies.” Rawls next uses the same language of “arbitrariness” to refer implicitly to the veiling of what is undeserved: “The arbitrariness of the world must be corrected for by adjusting the circumstances of the initial contractual situation.” Thus the veiling of *all* particulars and the veiling of *undeserved* particulars both get subsumed under the same label of arbitrariness, recreating the compound interpretation of the veil, with both interpretations implicitly assumed to always be met.

veil the rule choosers in Rawls's "original position" are deprived of any knowledge of their particular endowments and family circumstances, as they need to be for the theory to work. They have only general information about the distribution of endowments and family circumstances, so the original "Justice as Fairness" criterion is met: the rule choosers cannot tailor rules to fit their own particular endowments and family circumstances.

But that is only a start. For the veiled-because-undeserved interpretation of the veil to hold up in general Rawls has to find a way to see *all* of the particulars of a representative rule chooser's life as undeserved. As soon as any of a person's particular circumstances can be seen to be even partially deserved, those particular circumstances are no longer morally irrelevant under the irrelevant-as-undeserved interpretation of the veil, meaning that knowledge of them would not be withheld in Rawls's original position under that interpretation of the veil. That person, now having some knowledge of his own circumstances, would be able to tailor rules to those circumstances, resulting in rules that are unfair and hence unjust: "Wait a minute. I'm a toiler in a salt mine? And I deserve something for that hard work? Well without salt everyone would die; thus all salt miners should be afforded mansions and servants."

Wherever there is a valid claim of desert, the veil of ignorance (interpreted as the paring away of information about what is undeserved) fails to materialize, allowing deliberators to tilt rules in their own favor, resulting in the perversion of justice. Nevertheless, Rawls found just what he needed to proceed: a *catch-all* grounds for classifying everything that results from a person's own efforts and character as undeserved. He does this by arguing that character itself is undeserved: "It seems to be one of the fixed points of our considered judgments that no one deserves his place in the distribution of native endowments any more than one deserves one's initial starting place in society. The notion that a man deserves the superior character that enables him to make the effort to cultivate his abilities is equally problematic; for his character depends in large part upon fortunate family and social circumstances for which he can claim no credit" (1971, 104).

This is the key point where the identity between the two interpretations of the veil of ignorance gets implicitly established for all cases. There is no explicit mention of the veil of ignorance here or any mention of how this catch-all argument against anyone ever deserving anything allows the veil, interpreted as paring away information about what is undeserved, to still veil all the particulars of everyone's life. But there probably should be such a mention because the viability of the theory depends on it. If the catch-all argument against desert fails, either massively or just at a few points, then the veil of ignorance in its layered form fails to materialize, creating the biggest disjoint in Rawls theory: he has given us a theory of who deserves what that ceases to exist as soon as anyone can be said to deserve anything.

Rawls does somewhat address this problem at the beginning of *Theory of Justice*, where he acknowledges that his approach "may not seem to tally with tradition." Under a traditional "concept of justice" there will be "a proper balance between

competing claims,” whereas his “conception of justice” takes a larger view, providing “a set of related principles for identifying the relevant considerations which determines this balance” (1971, 10). As it turns out, Rawls’s identification of the relevant considerations for determining the balance between competing claims ends up leading him to the conclusion that no claims of desert ever have any role to play in determining the balance of anything.

Knowing that this type of theory might seem unusual, Rawls does a spot check at the beginning to see if it is consistent with the traditional Aristotelian definition of justice, where people are not to be denied what is due to them, and his answer is yes: so long as people receive what *the theory* says they are due, that is enough to satisfy the general concept of justice as giving people what they are due (1971, 10–11).

In the case of Rawls’s theory, what this means is that even though nobody is seen as having any valid claims of desert, the theory does specify a distribution of rights, duties, and income that is their due, and Rawls is perfectly right to suggest that this distribution fits the general shape of any system of justice, where what people in the end are seen to be due comes after whatever balancing is to be done between competing claims. This general shape will be the same whether people have claims of desert to make or not.

But Rawls is not acknowledging here just how unusual his theory is and how precarious it is. The issue isn’t just that what people are due in his theory is the end result of a balancing between various claims; it is that if anyone has any valid claims of desert to make at all, then the central device of the theory, the veil of ignorance, fails to materialize and the theory collapses. It can provide no answer to what anyone is due. *That* is the deviation from traditional expectation. A theory of justice should be able to adjudicate claims of desert, but thanks to Rawls’s layered-on interpretation of his veil of ignorance, where it is seen as veiling what is undeserved, his theory fails this most basic test. Anything deserved is not veiled, and the theory fails. It cannot adjudicate claims of desert.

### **Building the annihilation of desert into the veil of ignorance creates a rigged game, the exact opposite of the fair deliberation that was intended**

Many readers must have found Rawls’s sweeping denial of desert a tough pill to swallow but still rooted for the theory because the veil of ignorance itself is so obviously right. How much easier it would be to find solutions if personal biases could be removed; motivating readers to give the benefit of the doubt to whatever seems to be required to get to that veil of ignorance, even entertaining the possibility that nobody ever deserves anything, and it could well have been the same for Rawls himself. The veil might even have come to him via the idea of excluding information about what is undeserved.

That is plausible given how big a role Rawls’s sweeping denial of desert plays in securing the strongly egalitarian principles he already wanted to embrace. In “Justice

as Fairness,” he 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. That domination in turn yields the certainty of conclusion that Rawls sees as necessary for any valid theory of justice.

Basic needs and liberties for every individual must be secured beyond all vicissitude (stronger than Mill). This is Rawls’s strongest conviction: “Each person possesses an inviolability founded on justice that even the welfare of a society as a whole cannot override” (1971, 3), but he needs a way to get there. When the stripping of all information about the particulars of everyone’s circumstances is interpreted as the stripping away of information about undeserved things, then the absolute priority of need over desert gets built right into the structure of Rawls’s new scheme for discerning what is fair, making the priority of need over desert invincible, as Rawls believes it must be. Add how this stripping away of morally irrelevant information appears to isolate elemental justice and it’s easy to see how Rawls thought he must be on the right track: purified justice yielding exactly what he thought it must.<sup>3</sup>

It is a noble effort, but the thesis here is that building the annihilation of desert into the very structure of the supposedly fair deliberation rigs the game. Instead of claims of need and claims of desert being deliberated upon within the fair scheme of deliberation and balanced against each other as the deliberators see fit, the structure of the game itself determines what weights will be given and in the most unfair way. With desert excluded, literally all of the weight is given to need, and this imbalance can be seen in the principles that are arrived at. Rawls’s “difference principle” literally maximizes the welfare of the neediest. The chosen principles of justice are tilted completely in favor of the only position whose interests are taken into account, exactly as the concept of “justice as fairness” was supposed to prevent.

If it is correct that nobody deserves anything, then it is okay that no claims of desert are accounted. No harm no foul. Thus the proof as always is in the pudding. Does Rawls’s catch-all argument against anybody ever deserving anything stand up to scrutiny?

### **We all are made in God’s image, and God is pure moral agency**

“[A person’s] character depends in large part upon fortunate family and social circumstances for which he can claim no credit” (Rawls 1971, 104).

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3. To be clear, Rawls himself never invoked the metaphor of isolating elemental justice and testing its properties. As noted above, he never even acknowledged that he had created a compound interpretation of the veil of ignorance. In particular, he did not explicitly mention again the idea that information about things that are undeserved should be excluded from the original position, yet this does remain a guiding principle throughout, being the obvious touchstone, for instance, for Rawls’s catch-all assertion that nobody deserves their own character. Further, the idea of only being interested in what is morally relevant is clearly a form of justification. If anyone doesn’t like the “elemental justice” metaphor, choose another, but the implicit form of justification remains.

This argument is contingent on *fortunate* family and social circumstances. What about the person born into modest or terrible circumstances who nevertheless lifts himself up to heights of industry, accomplishment, civic engagement, and moral purpose? What about Benjamin Franklin, Alexander Hamilton, Frederick Douglass, Abraham Lincoln, Thomas Edison, and Condoleezza Rice? Are they not self-made men and women? And once that door is opened, aren't we all in large degree self-made, all morally responsible for our productivity, our beneficence, and our iniquity?

This is the basis of the American founding: that we all are morally equal in the sense that we all have the same moral agency, the same capacity to comprehend right and wrong, and the same moral responsibility for our actions. We all are made in God's image, and God is pure moral agency. Some inroads can be made into our "all men are created equal" presumption. Some people are judged incapable of full moral responsibility, but the inroads are shallow. Every normal adult is recognized to be in fundamental respects self-made. He is the adult he chooses to be. This is one of the most broadly held considered judgments of Western civilization, and Rawls's theory, which uses consistency with considered judgments as a criterion for judging whether a theory is on the right track, is way off from it.<sup>4</sup>

### **Sweeping desert into the cracks between generations**

Note also that Rawls's arguments against desert for moral character look only at whether the child can claim to deserve the family circumstances in which he is raised. This limitation ignores the moral claims of the parents, who are choosing to spend their own just deserts—the time and resources that they have eked out through honest work—teaching and preparing their children to live a productive life. That distribution of deserved resources can't be wiped off the slate just because the child can't be said to deserve it.

Not only do the deserts belong to the parents to spend on whatever they want, but this particular expenditure of resources is highly morally relevant. It is the ultimate act of love and generosity, dedicating a large part of one's life to the welfare of needy others, and one way or another it must be recognized as such in Rawls's "original position." If it is not the desert of the child, it must be the desert of the parents. Deserved resources can't be labeled undeserved by sweeping them into the crack between generations.

Can this counterargument be avoided by claiming that the parents don't deserve their good character either, so that the resources they spend inculcating good character in their children can also be seen as undeserved? To avoid the confusions that generational arguments can raise it is necessary to clarify terms.

There are two different notions of desert in play in Rawls's theory. There are claims of desert that, if they are valid, would have to be weighed by deliberators in

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4. "It seems to be one of the fixed points of our considered judgments that no one deserves ..." (Rawls 1971, 104).

Rawls's original position as they try to arrive at principles of justice (Rawls denies that there are any such valid claims of desert), and there is what the principles of justice that end up being chosen in Rawls's original position say that each person should receive. This distribution of resources has been determined to be just, and so people must be seen as having a legitimate moral claim to it, which is a kind of desert.

If this distinction between desert as it goes into the choosing of principles of justice and desert as it comes out of the chosen principles of justice is not carefully maintained, it is easy to fall into circular arguments. Rawls clarifies some of this distinction in his discussion of Aristotle's definition of justice, quoted earlier. There Rawls refers to what people are to receive according to a theory of justice as their "due."

Rawls returns to the distinction between desert going into his theory (what might be called "original" claims of desert) and desert coming out of his theory (what people are "due," or their "just deserts") just before he makes his catch-all generational arguments about nobody ever deserving anything. He wants to clarify that just because people can be said to deserve what they receive according to fairly deliberated principles of justice, this does not mean that they have any legitimate claims of desert that they bring to that fair deliberation.<sup>5</sup> In preparation to deny the latter he affirms the former, meaning that so long as the resources of time and money that parents devote to their children are acquired in accordance with just rules, those resources *are* to be seen as deserved in Rawls's theory.<sup>6</sup>

These deserved resources belong to the parents to distribute according to their own values. If they want to devote their resources to inculcating good character in their children, that gift has to be credited as deserved, or the state is simply stealing away the parents' deserved resources, which of course is theft from the child as well, and this is exactly what happens in Rawls's theory. "[U]ndeserved inequalities call for redress," says Rawls, citing "the principle of redress" (1971, 100), of which, he acknowledges, his theory partakes. More specifically: "The arbitrariness of the world must be corrected for by adjusting the circumstances of the initial contractual situation" (141).

Since parents' efforts to inculcate good moral character is Rawls's catch-all mechanism for classifying *all* inequalities as undeserved, these references to arbitrariness and undeserved inequalities that need to be redressed and corrected for are very much in reference to parents' efforts to be good parents. The good character that parents struggle to pass on to their children is to be compensatorily counted against their children, used to strip their children of claims of desert for what they go on to produce, and this "correction" applies not just to parents' efforts to nurture their children's character but also to family support for children in general.

5. "At this point it is important to be clear about the notion of desert." (Rawls 1971, 103).

6. "It is perfectly true that given a just system of cooperation as a scheme of public rules and the expectations set up by it, those who, with the prospect of improving their condition, have done what the system announces that it will reward are entitled to their advantages" (Rawls 1971, 103).

All of this argument is circular. So long as the investments that parents' make in their children's futures are distributions of justly earned resources, they are *not* undeserved and cannot properly be treated as something that society should try to correct for. Rawls did not address and doesn't seem to have noticed that when he went to a generational argument he was bringing both kinds of desert together, treating just deserts as if they are original claims of desert that he can deny, but there is no denying just deserts. That would be the theory denying itself.

Refer again to the context of history to see where humanity's actual considered judgments lie. All human progress has come through the heroic struggles of each generation of parents to provide for their children and to try to set them on productive paths in life. This is not just the history of the more fortunate; it is our common history, what all families that were able to survive and propagate had to do. Family circumstances are not devoid of desert; they are the heart of desert, the product of each generation's tremendous efforts to give their children the help they need so much for so long. Not only are these efforts morally relevant, but promoting them is the core objective around which every successful society has been self-consciously organized. Trying to offset and undo what every society struggles to promote is a far cry from "the fixed points of our considered judgments."

### **The compound interpretation of the veil of ignorance fails, but the simple justice-as-fairness interpretation remains fully intact**

Thus it seems that two of Rawls's three main categories of nondesert (moral character and family circumstances) fail in big ways that let large amounts of desert through. They are nets trying to hold back water, and under the interpretation of the veil as paring away information about what is undeserved, every valid claim of desert becomes something that deliberators in the original position know the details of. That allows them to shape rules to fit their own circumstances, creating a deliberation that is unfair and hence unjust. The veil of ignorance fails to materialize, and the theory collapses.

It almost seems as if the idea of excluding information about what is undeserved is backward. If anything, shouldn't the veil be fashioned so as to allow morally relevant claims to be viewed in Rawls's original position? Yet as soon as a morally relevant claim even exists, the veil fails to materialize, and unfair rules emerge. But don't try switching the polarity on what information is excluded. That won't work either. The veil works only if people don't know *anything* about their particular circumstances, whether those particulars can be seen as deserved or not. That is how the original idea of justice as fairness worked: as long as deliberators cannot shape rules to their own advantage, deliberation will be fair, and outcomes will be just. No further justification is needed.

This interpretation of the veil remains fully intact and operational when valid claims of desert are seen to exist. Deliberators in the original position would not

know what particular claims of desert they possess. They would have only general information about the kinds of such claims that people are likely to have and about their distribution across the population, allowing these claims to be weighed without anyone being able to tip rules to fit their own circumstances.

Not only would this original interpretation remain fully intact but it would for the first time be fully realized. It's not a fair deliberation if legitimate claims are being excluded. There is still more to say about how thoroughly Rawls's claim that nobody ever deserves anything fails, but we can already see that it fails badly when even a little bit of failure causes the compound interpretation of the veil to collapse, so we should accept that it has collapsed and that the only viable way forward in the Rawlsian framework is to jettison the layered-on veiled-because-undeserved interpretation of the veil of ignorance. Not only is this step necessary to avoid complete failure, but the result is a much more capable original position, ready and able to provide a fair balancing between claims of need and claims of desert.<sup>7</sup>

**Was Rawls's original goal in "Justice as Fairness" a fair balancing between claims of need and claims of desert *within* the fair scheme of deliberation?**

In "Justice as Fairness," there was to be "a proper balance between competing claims" (Rawls [1958] 1999b, 48). That is the same language Rawls uses for "a concept of justice" in *Theory of Justice*, but as for what those competing claims might be there is a significant divergence from *Theory*. In "Justice as Fairness," Rawls goes on to list three different "ideas" that principles of justice have to bring together: "liberty, equality and reward for services contributing to the common good" (48).

A "proper balance" would seem to be a fair balance, as would result from a weighing of the competing claims within a fair scheme of deliberation where no one is able to tilt rules in favor of his or her own circumstances, and this would be the same in both "Justice and Fairness" and *Theory*. The difference is that "Justice as Fairness" seems to recognize "reward for services contributing to the common good" as a claim to be balanced. That claim would be a claim of desert. A claim of reward is a claim to deserve, or to have earned, a reward. Claims of need are also there in the original justice as fairness. Need arises at the extreme of inequality, so need is there under the "idea" of equality, suggesting a fair balancing between claims of need and claims of desert.

Rawls does not directly say in "Justice as Fairness" that reward for contribution is one of the claims to be balanced, but he comes very close, which is very different

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7. Given Rawls's lack of explicitness about the dual interpretation he applies to his veil of ignorance, some might doubt that he really intended for the veil to be seen as screening out information about what is undeserved. I believe that intention would surprise pretty much everybody: "I thought the reason people don't know about their particular circumstances behind the veil is because nobody deserves their particular circumstances? Didn't Rawls say that?" He certainly suggested it, but because he was not explicit, it is always possible that he did not intend it, in which case we still arrive at the present juncture. Rawls's arguments for why nobody has any legitimate claims of desert are still subject to wholesale failure on many fronts, so that the only way forward is to set aside any interpretation of the veil of ignorance as veiling what is undeserved.

from what he says in *Theory of Justice*, where there is no recognition within the original position of any valid claim of desert, including any claim to reward for contribution. Some very good *reasons* to reward contribution are recognized in *Theory of Justice*, and they go into deciding what people are *due*, but no valid claims of desert are recognized, no original claims of desert that get balanced against other claims within the fair scheme of deliberation.

It does seem as if that might have been the plan, though, and going forward it is the only plan that is viable. The attempt to deny that anyone deserves anything is at least a huge failure. Either claims of desert are acknowledged and addressed within the original position, or the theory collapses. On the positive side, if this was the original plan, and Rawls let himself get sidetracked by the wonderful prospect of putting elemental justice on the Periodic Table, then that earlier glimmer, the goal of achieving a fair deliberation between claims of need and claims of desert, the chance to look through a new moral microscope and see what it reveals on this central question, still awaits. It's as if Galileo failed to point his telescope at Jupiter and see its moons or to point it at the sun and see its spots. It's time to take the lens cap off of Rawls's fair deliberative scheme.

### **What happens to “reward for contribution” in *Theory of Justice*?**

In “Justice as Fairness,” the primary candidate for claims of desert is clearly reward for contribution. In *Theory of Justice*, Rawls assumes that he has successfully dispensed with claims of desert, so he doesn't look at reward for contribution as a source of such claims, but he does look at their history. Economic theory demonstrates that wages equal marginal productivity in competitive markets and hence provide reward equal to contribution, and, as Rawls notes, “The idea that competitive prices under normal conditions are just or fair goes back at least to medieval times” (1971, 271). Later in *Theory* he connects market reward to the natural-rights tradition: “Accepting the marginal productivity theory of distribution, each factor of production receives an income according to how much it adds to output (assuming private property in the means of production). In this sense, a worker is paid the full value of the results of his labor, no more and no less. Offhand this strikes us as fair. It appeals to a traditional idea of a natural right of property in the fruits of our labor. Therefore to some writers the precept of contribution has seemed satisfactory as a principle of justice” (308).

Rawls himself is pretty close to this position: “There is no presumption, then, that following the precept of contribution leads to a just outcome *unless* the underlying market forces, and the availability of opportunities which they reflect, are appropriately regulated” (1971, 308, emphasis added). The provisos here concern equal opportunity and the answering of claims of need, and the suggestion is that if mechanisms are in place that address these concerns (in particular by having an efficient competitive economy that allows people to be productive and answer their

own needs), then the precept of contribution perhaps *could* be presumed to lead to a just outcome.

Rawls also leans heavily on reward for contribution in section 43 of *Theory of Justice*, which lays out what he thinks his principles of justice would actually call for in practice: namely, a flat tax either on income or consumption with exemptions for expenditures on basic needs, together with a transfer department to cover remaining claims of need (1971, 278–89). Under these institutions the great bulk of income distribution is achieved through reward for contribution in the form of market income.

Most importantly, although Rawls does not consider whether anyone can claim to deserve reward for contribution, his history lesson sneaks over and taps on the point where such claims would originate: the “natural right of property in the fruits of our labor.” That natural right is a derivative of liberty rights. If someone else can claim to own the fruits of your labor (without your selling those fruits to him), that is the same as his claiming to own that much of your labor, which in that degree is asserting ownership of you as his slave, making you in that degree unfree.

That creates a strong claim, especially in a Rawlsian analysis, because Rawls gives highest priority to liberty, but the closest Rawls comes to analyzing market income in terms of desert is when he denies that reward for contribution even correlates with desert or moral worth:

[I]n determining wages a competitive economy gives weight to the precept of contribution. But as we have seen, the extent of one’s contribution (estimated by one’s marginal productivity) depends upon supply and demand. Surely a person’s moral worth does not vary according to how many offer similar skills, or happen to want what he can produce. No one supposes that when someone’s skills are less in demand or have deteriorated (as in the case of singers) his moral deservingness undergoes a similar shift (1971, 311).

This can be seen as a back-up argument against taking desert seriously in the original position, suggesting that no one would want to be paid according to desert or moral worth anyway. But Rawls’s argument here does not hold up and is actually very revealing of just how pervasive valid claims of desert must be.

Moral deservingness *does* shift with market value, so long as we are talking about the singer’s moral deservingness *for pursuing singing as an occupation*. This argument comes straight from the Millian view of liberty, which Rawls well understands, where people use their liberty to make progress in the discovery and pursuit of value. People’s choices about what to do with their life are a product of their moral agency: their effective or not so effective efforts to figure out where value lies and what of it may be reachable so that they can live a productive and happy life.

Thus pursuing a career in singing when one has the chance to create a lot of value in that way is a moral choice, leading to a substantial creation of value that

is directly attributable to one's moral agency, and the same is true if one continues to devote oneself to singing when one is no longer able to produce much value through that activity. One could search out other more productive ways to use one's changed abilities. If one doesn't do so, that too is a moral choice, directly attributable to one's own moral agency.

In the Millian view, moral agency plays a lynchpin role in everything a person does. We are moral animals. We have the capacity to witness, comprehend, and discover value as well as to act for it, to gain it for ourselves, and to bring it to market, where we deliver value to others and prosper in exchange. Maybe a person has great talent, but it still takes moral agency to use that talent, to direct it to a valuable purpose, which is where market income comes from. Thus reward for contribution in particular can always be attributed in substantial degree to the contributor's moral agency.

That creates a strong correlation between market value and desert or moral worth. Moral agency invested the personal resources that created the value, so the moral agency deserves credit. That doesn't mean we should see the reward as being for the moral agency instead of for the contribution. Buyers look at the value that a product has for themselves, not at the effort it took to bring the product to market. But it does mean that we should see the reward as deserved, if not completely then at the very least in large part. The guiding role that moral agency plays in value creation means that everyone must be seen as having strong claims of desert for the market income they receive.<sup>8</sup>

This conclusion is also supported by what can be said about the fixed points of the long-considered judgments of mankind. As Rawls acknowledges, market income as a reward for value provided has been considered to be a primary measure of desert at least since medieval times, perhaps the primary measure. To consider all such claims of desert to be invalid is again way out of touch with accepted values, providing another reason to reject that position.

### **Liberty versus liberty: How Rawls can claim to be maximizing liberty even as he holds back on economic liberty**

Claims of desert are grounded in liberty (confiscating the fruits of someone's labor is the same as confiscating that person's labor, which partakes of slavery). Claims of need are also grounded in liberty, according to Rawls, which accounts for the extreme priority that he places on answering claims of need. As he puts it in *Political Liberalism* ([1993] 1996), no political conception of justice can be considered

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8. A tangential question warrants clarification here. If moral agency, empowered by liberty, creates claims of desert, this might seem to imply that slaves, having little to no freedom to discover and pursue value according to their own will, have no claims of desert to the fruits of their labor. In actuality, they have a claim to much more than the fruits of the labor that has been forced upon them. They have a claim to all of the value that they would have produced had they been free to follow their own discoveries of value. That is what was stolen from them—not just what they did produce but what they would have produced and the life they would have lived.

viable unless it contains “measures ensuring all citizens have adequate all-purpose means to make use of their freedoms” (223).<sup>9</sup>

One implication is that with these two kinds of claims having the same basis, it is obviously untenable to give full weight to one and no weight to the other. Where they are in conflict, claims of need and claims of desert need to be balanced against each other. A second implication is that because they have the same basis, conflict can be expected to arise between them. Rawls identifies the key point of conflict in his critique of an income distribution that is determined solely by markets:

A competitive price system gives no consideration to needs and therefore it cannot be the sole device of distribution. (1971, 276)

There is with reason strong objection to the competitive determination of *total* income, since this ignores the claims of need and an appropriate standard of life. (1971, 277, emphasis added)

Since the market is not suited to answer the claims of need, these should be met by a separate arrangement. (1971, 277)

Markets are very good at answering *most* claims of need. This has been well understood since Adam Smith described the invisible hand by which market incentives induce people to efficiently provide for each other’s needs (Smith 1776, bk. IV, chap. 2, para. 9). Policies can also be implemented that minimize the amount of need markets leave unanswered. A society, for instance, can keep wages at the bottom of its economic ladder from falling too low by building border walls that keep its unskilled labor market from being flooded by the world supply of unskilled labor. The extreme efficacy of this obvious step was discussed by Vice President Joseph Biden’s adviser Jared Bernstein: “One thing we learned in the 1990s was that a surefire way to reconnect the fortunes of working people at all skill levels, immigrant and native-born alike, to the growing economy is to let the job market tighten up. A tight job market pressures employers to boost wage offers to get and keep the workers they need. One equally surefire way to sort-circuit this useful dynamic is to turn on the immigrant spigot every time some group’s wages go up” (quoted in Kammer 2016).

Other policies can also enhance the effectiveness of free markets for answering claims of need: pro-growth policies such as the uncorking of energy supplies, the elimination of one-sided trade deals so that manufacturing can come back home, plus strong enforcement of laws against force, fraud, and antitrust. All of these create a rising tide that lifts all boats.<sup>10</sup>

9. Rawls uses a slightly different formulation in “The Idea of Public Reason Revisited” ([1997] 1999a): “measures ensuring for all citizens adequate all-purpose means to make effective use of their freedoms” (582).

10. The rising-tide metaphor was popularized by John F. Kennedy, whose speechwriter, Ted Sorensen, says he got it from the Cape Cod Chamber of Commerce (the speech can be found at <https://www.presidency.ucsb.edu/node/236260>). Sorensen recounts the source in his memoir *Counselor: A Life at the Edge of History* (2008, 227).

But substantial claims of need may still remain, and Rawls makes a compelling argument for why these claims should always be given priority. As with anything else, the first increments of liberty are the most important. The amount of freedom you gain from your first \$10,000 of income is much larger than the amount of freedom you gain from your hundredth \$10,000 of income, and if through a modest compromise of economic liberty rights (some loss of the liberty rights one has in the fruits of one's own labor) the worst extremes of need can be overcome, that sounds like it must be a good trade-off.

Unwillingness to risk what one has on a better-than-even-money chance of gaining more is the definition of risk aversion, and where the liberty interests attached to need are at stake, Rawls argues that these first increments of liberty are so important as to create extreme risk aversion. If those who are deliberating on principles of justice can come up with a system that combines "a satisfactory minimum" with reasonable efficiency, then Rawls suggests that "there may be little reason . . . for trying to do better." "This line of thought," he says, "is practically decisive if we can establish the priority of liberty . . . . For this priority implies that the persons in the original position have no desire to try for greater gains at the expense of the equal liberties" (1971, 156). "Equal liberties" here center on the answering of claims of need. If needs are not met, there is no liberty. Thus maximum equal liberty becomes for Rawls a matter of guaranteeing as high a minimum as possible.

This is how Rawls can see himself as a stronger protector of liberty than Mill even while he is at the same time weak on the protection of economic liberty. He is convinced that the greater danger to liberty is the failure to answer claims of need, and he is determined to set up an analysis that guarantees this priority. Even Mill's progressive utilitarianism is not certain enough because there is still a theoretical possibility that claims of need could be outweighed.

Rawls's compound interpretation of the veil of ignorance allows him to get rid of all possibility that claims of need can ever be outweighed. That deliberators behind the veil don't know anything about their particular circumstances is a reflection of the idea that nobody has any claims of desert to the products of their own labor/liberty. Thus the only interest in economic liberty that gets accounted behind the veil is the value of liberty for answering claims of need. That guarantees that claims of need get fully served. Inviolability achieved, but notice how far Rawls has twisted the meaning of liberty: all the way around to where the most extreme possible priority for equality ends up being called "maximum equal liberty."

### **"When words lose their meaning, people lose their freedom" (Confucius)**

Need manifests at the extremes of inequality. When Rawls identifies the answering of claims of need as a liberty interest, he obviously risks conflating liberty with equality, two values that are traditionally regarded as in competition with each other. Rawls him-

self in “Justice as Fairness” lists liberty and equality as “ideas” that have to be combined, arguably listing them as competing claims that have to be balanced against each other.

In the American tradition especially, there is a strong conviction that liberty must take priority over equality. As James Madison wrote in “Federalist No. 10,” “Liberty is to faction what air is to fire. . . . From the protection of different and unequal faculties of acquiring property, the possession of different degrees and kinds of property immediately results” ([1787] n.d.). We can’t have both liberty and economic equality. We have to pick one or the other, and, as the preamble to the Constitution declares, America chooses “to secure the blessings of liberty.” That is our society’s considered conviction.

*Theory of Justice* goes against tradition not just by viewing claims of need as a liberty interest but also by making claims of need the only liberty interest that gets considered, at least in the economic sphere. The other economic liberty interest, a right not to have the fruits of your labor confiscated (effectively confiscating your labor itself), is written out of Rawls’s theory through the premise that nobody has any valid claims of desert. Deserving reward for what you contribute is the moral bar to slavery, but by construction there are no valid claims of desert in Rawls’s supposedly fair scheme of deliberation.

When the equality interest is the only liberty interest that is taken into account, of course, the starting point is going to be equality, which Rawls represents with the aforementioned principle of redress: “that undeserved inequalities call for redress” (1971, 100). Immediately that principle is at odds with the American presumption that trying to stop inequality will block liberty, and we choose liberty. Because only undeserved inequalities are to be redressed, this principle could possibly be squared with American liberty, depending on what is considered “undeserved,” but then according to *Theory of Justice* all inequalities are held to be undeserved, practically inverting the American priority of liberty over equality.

The question for Rawls, then, becomes why *any* inequality should be allowed. The answer, calculated entirely in terms of claims of need, is that allowing inequality allows for incentives that create productivity, which can be used to answer more claims of need. Thus it is rational, when only claims of need are considered, to allow inequality so long as it can be used to increase the welfare of the least well-off, but no further. By design, there are no other claims in play to pull the balance in any other direction, leading to Rawls’s difference principle, which maximizes the welfare of the least well-off.

Inviolability is achieved, and it gets called “maximum equal liberty,” but the argument is based entirely on the one part of *equality* that can be interpreted as a liberty interest. It is not really liberty that is being maximized. It is a part of equality that is being maximized: the redress of the most extreme inequalities, leaving the bulk of liberty unaccounted for. That creates a serious disjoint with American liberty and leaves the American concept of liberty readily violable. Rawls’s “inviolability” applies only to the one part of liberty that he accounts for.

### Failing to account for claims of desert makes Rawls's analysis utilitarian

Inviolability, says Rawls, “does not allow that the sacrifices imposed on a few are outweighed by the larger sum of advantages enjoyed by many. Therefore in a just society the liberties of equal citizenship are taken as settled; the rights secured by justice are not subject to political bargaining or to the calculus of social interests” (1971, 4).

This is Rawls's brief against utilitarianism, but as can be seen in his analysis of risk aversion, he treats redistribution of the income of the better-off in precisely the utilitarian fashion: by looking to see where it creates the largest sum of advantages. The issue here isn't that Rawls neglects to weigh the welfare of the better-off; it is *how* he weighs it. Each deliberator is asked to think of the different positions she could end up occupying in society as if a single person—the deliberator herself—will occupy each position. The deliberators then apply their own assessments of what is a bad risk to decide what distribution they would be most comfortable with, treating resources as their own to move around between these different versions of their own lives (subject to the losses incurred as redistribution distorts incentives).

But the least well-off and the better-off are different people. One of them cannot be sacrificed to the other, as Rawls so eloquently states, but then he does this very thing. It is just out of sight because he is not accounting for the individual claims that are being swapped around. Nobody deserves anything is the assumption, so resources can be freely moved without leaving a mark. There is no infringement on what anyone deserves.

If the nobody-deserves-anything claim were tenable, that might justify the utilitarian way Rawls treats different lives as if they are parts of one life, but there is no getting around that he is indeed treating different lives as if they are parts of one life. This is another major disconnect with Rawls's own fundamental assertions, and again the disconnect springs entirely from the interpretation of the veil of ignorance as obscuring what is undeserved.

Claims of desert are liberty interests (interests in owning one's own life, in not being a slave); thus they *have* to be part of the “the liberties of equal citizenship” that Rawls says have to be “taken as settled” and not subjected to “the calculus of social interests.” To spare claims of desert from this utilitarian calculus they just need to be recognized. Then the thing deserved (market income) can't just be taken from one person and given to another as if both are part of one life. The utilitarian trading of one person's life and liberty for another's gets blocked, and this is necessary. To avoid the kind of utilitarian, teleological, nondeontological theory that Rawls sees as illegitimate, claims of desert *have* to be recognized.<sup>11</sup>

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11. Rawls's annihilation of desert does not just limit deliberation within his “original position” to claims of need. It also informs his argument that natural liberty does not tend to yield a just distribution (1971, 72), and his argument for fair equality of opportunity (1971, 72). These arguments don't go away if Rawls's annihilation of desert is found to be untenable. They just in this case have to contend with and reconcile with claims of desert.

## A life of one's own

There is a great little book by David Kelley called *A Life of One's Own* (1998). Kelley starts with the premise of self-ownership and spins out the liberty and property rights that follow if one is to take self-ownership seriously. In Rawlsian terms, self-ownership leads to claims of desert, and Kelley shows how hard it is to justify infringements on self-ownership. In particular, how can people rightly be forced to give up anything to help other people? Each has a duty to charity, Kelley believes, but charity is only charity if it is freely given. Thus he calls for a system of private charity only, and the claims of self-ownership that this system is based on are hard to overcome.

The upshot is a picture of inviolability based on self-ownership that is almost a mirror image of Rawls's *Theory of Justice*. Where Rawls recognizes only claims of need and completely denies claims of desert, Kelley recognizes only claims of desert and completely denies claims of need, at least as creating any collective obligation. But these two theories are not opposites. They are two halves of a complete theory, one that recognizes both claims of need and claims of desert, and Rawls's idea of a fair deliberative scheme is ideally suited to bringing these two halves together, whether this was Rawls's original idea or not. Just interpret the veil of ignorance as veiling *all* personal information about rule choosers in the original position, regardless of whether they have moral claims to make or not. Then the two types of claims can be fairly balanced against each other.

Kelley's half of the complete theory is the half that coincides with the presumptions of American constitutional liberty, wherein if there is conflict between liberty and equality, liberty is the presumptive winner unless there is some exception that proves the rule. America's objective is to secure the blessings of liberty, and if this creates inequality, so be it, leading to a somewhat extreme priority in favor of liberty over equality. Rawls has the opposite priority and is also quite extreme about it, weighing only the one aspect of liberty that is normally seen as a concern for equality.

To force these two halves to confront each other just simplify the veil so that it is no longer conditional on nondesert but strips away all particulars of everyone's circumstances so that no one can tip rules in his own favor, no matter how much people on average can expect to deserve. Then the two halves are locked in the same room together, in the same person, where they can't help but feel each other's weight as they are balanced against each other in a search for the best accommodation between them. This balancing is no longer utilitarian. The idea of not knowing one's place is no longer used to view each different life as a part of one's own life. Rather, it is used to allow two very different kinds of claims, possessed by different people, to be weighed against each other in a single mind that is able to fully appreciate each kind of claim by facing uncertainty about which position one will be in.

**Those with the greatest claims of need will in general be those with the fewest claims of desert**

The first thing to emerge when both claims of need and claims of desert are accounted for is the dramatic separation between the holders of these different kinds of claims and the much larger size of the group that will primarily have claims of desert. For any society to survive a large majority of people have to be pulling their own weight, while the people who end up needing substantial assistance will by definition be those who for whatever reason fail to pull their own weight. Thus, for the most part, those who have the most claims of need will have the fewest claims of desert. They will in general be the least deserving.

Not always. People can do great things that they never get rewarded for (the problem of incomplete markets), and many important exchanges of value don't go through markets at all. Even under perfect market conditions, market income is only a rough first approximation of contribution. Still, generally speaking, the least well-off *will* tend to be the least deserving: they will tend to have the fewest claims of desert. For the most part the reason they will be poor because they are the least productive, and just as Rawls attributes much of a person's productivity to good character inculcated by parents, so too lack of productivity is often the result of bad upbringing or bad choices, where people fall into drug use or criminality or various kinds of dissolution.

We absolutely want to keep people from falling into these failed states. We want to give them the help they need to become productive if possible both for their sakes and for our own. Our collective prosperity is a boon to us all, and the higher each of us can go the better. As Samuel Butler wrote in *Erewhon* (1872), it is the lack of money as much as the love of money that is the root of all evil (17). But helping those who need help requires being very realistic about the nature of the problem: that the people who need the most help are also for the most part the least productive and in that sense the least deserving. They can be said colloquially to deserve some help, but that is a claim of need, not of desert.

All societies have had to face the problem of the unproductive poor, some of whom can easily be helped and some whose lack of productivity is more intractable, whether by unwillingness or by inability. "The poor will always be with you," said Jesus as he urged charity at every turn.<sup>12</sup> We must try to raise each other up, but we must not lose sight that the vitality of society comes from those who are carrying the weight. A prosperous economy created by the productive is the only thing that makes it possible at all to worry about the unproductive.

Recognizing claims of desert brings the reality of this situation into view and shows how out of sync Rawls's analysis really is. The productive person is denied all claim to his productivity in order to guarantee the claims that the unproductive person makes on the productive person's productivity. The premise that nobody

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12. Matthew 26:11, Mark 14:7, and John 12:8.

deserves anything turns off the light so that the injustice here cannot be seen. Turn that light back on, recognize that market income can broadly be said to be deserved, and Rawls's principles of justice suddenly look very much like the result of a rigged game. All of society is to be arranged to maximize the welfare of the least deserving? How is that giving people what they deserve? Talk about a disconnect. Only by keeping claims of desert out of sight is this arrangement the least bit plausible.

Not that the difference principle is all wrong. The principle itself is just a principle of rationality: that in the pursuit of an objective (in Rawls's case, increasing the resources of the least well-off) steps should not be taken that are counterproductive to that objective (i.e., making the least well-off poorer). The problem in Rawls's theory is that although the difference principle is justified by the need to answer claims of need, Rawls continues to apply the principle regardless of whether claims of need remain unanswered. Thus disjoint is stacked on top of disjoint, and, like every other disjoint, this one also springs from the common source: that claims of need are the only claims that are accounted for in Rawls's theory, so even when they are exhausted they still are held to outweigh the unrecognized claims of desert. Bring those much more extensive claims of desert into view and the picture changes dramatically.

This problem is seen also in Rawls's argument for the difference principle as a reasonable basis for securing the cooperation of all parties. The least well-off are satisfied because their welfare is maximized, and this is supposed to satisfy the better-off as well because why else would anyone work with them? "The difference principle, then, seems to be a fair basis on which those better endowed or more fortunate in their social circumstances could expect others to collaborate with them when some workable arrangement is a necessary condition for the good of all" (1971, 103).<sup>13</sup>

In Rawls's telling it is the more productive people who must be concerned to secure the cooperation of the less productive people. Flip on the light so that both claims of need and claims of desert are visible, however, and it is obvious that Rawls is inverting reality. It is the person begging for help who is hoping to secure cooperation/assistance. If we lose touch with such commonsense understanding—that the needy are the supplicants—it is a sure sign that we are on the wrong track.<sup>14</sup>

Rawls's intent here is sound. He is looking for a way to support generous feeling from those who have more toward those who have less. That way just turns out to be backward once we recognize the untenability of his nobody-deserves-anything premise and the full picture starts coming into view, with claims of desert included.

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13. Rawls's "scheme of cooperation" argument is one of the two main justifications he provides for the difference principle (the other being his risk-aversion argument). It first appears in section 3 of *Theory of Justice*, "Main Idea of the Theory" (1971, 15), and provides much of the rationale for Rawls's strong presumption in favor of equality.

14. One can think of circumstances where the better off might be forced into the role of supplicants, if they happen to be outnumbered by an angry mob for instance, or by a tyrannical electoral majority, but then we are talking about coercive power, and as Rawls notes: "...to each according to his threat advantage is not a principle of justice" (1971, 141).

The actual source of generosity has to come from within the mind of the person who has earned the claims of desert, and that viewpoint cannot even be addressed until claims of desert are recognized.

This difficulty is easy to solve. Just recognize claims of desert. All of the serious disjoints in Rawls's theory disappear with this simple fix, turning it from half a theory into a complete theory.

### **Terms of trade-off**

After the lights are turned on so that both need and desert are visible, the next step is to figure out the terms of trade-off between them. Before a deliberator behind the simplified veil can assess whether in her mind answering a particular claim of need outweighs the desert that must be given up to answer that claim of need, she has to know how much of each to put on the scale. In Rawls's analysis of risk aversion he assumes that he can reduce claims of need by simply taking some resources from the better-off and transferring them to the poor, to whom they are much more valuable. In Rawls's (utilitarian) calculation, even if there is a substantial loss in the transfer as price distortions reduce productivity, the much greater value of the resources to those in need should far more than offset the loss. But is this true? Will giving people money for being poor really lead to a reduction in poverty?

In fact it is extraordinarily difficult to come up with assistance programs that don't throw more people into poverty than they lift out of poverty. Consider some examples. Unemployment insurance usually pays people more than half their salary not to work and dumps the financing burden on employers, thus decreasing employment on both ends. Some people are helped, but there is no doubt that far more people are hurt, and the same is true for all employer mandates. At least corporate taxes take only a cut from profits. Employer mandates impose before-tax costs that turn companies from profitable to unprofitable, making them disappear.

Social Security takes the money people would save and invest for their own retirement and spends it on other people's retirement, with the result that no one's retirement is backed by investment assets, impoverishing everyone.

From its inception, America's primary welfare program, Aid to Families with Dependent Children (AFDC), offered aid only on the condition that fathers were "deceased, absent, or unable to work" (Project Legal Renaissance 2016). There could be no man supporting his children in the picture, thus incentivizing single women in effect to marry the government and as a result destroying family life for the neediest people of all races. Since President Lyndon Johnson expanded AFDC as part of his Great Society program, out-of-wedlock births have soared. As reported by the Brookings Institution, "In 1965, 24 percent of black infants and 3.1 percent of white infants were born to single mothers. By 1990 the rates had risen to 64 percent for black infants, 18 percent for whites" (Akerlof and Yellen 1996). AFDC wasn't the only culprit in this scenario, but it was certainly a major culprit, and the

breakdown of families does more than anything else to keep children from developing the education and good character to be productive and prosper. Our terrible welfare programs are the biggest *source* of claims of need in America.

How about giving money away no strings attached, as San Francisco does with its \$588 per month General Assistance Program for street people? The result: San Francisco had three times more drug-overdose deaths than COVID deaths in 2020 (Sandberg 2020; Hurley 2021). It is subsidizing self-destruction.

Of course many recipients are powerfully benefited by San Francisco's generosity, but in an assessment of that generosity's overall effect the people with bad character also have to be considered. Throwing money at bad character doesn't create good character; it just enables the bad character.

In sum, there are serious incentive problems on both sides of any aid program. Giving aid always undermines the market incentives that answer the great bulk of claims of need, and the people that aid programs are trying to help tend to be those who react most perversely to distorted incentives. Offer support to people who are unemployed and instantly you are giving them incentive to be unemployed, and the people who take it will usually be those who have the least desire to be productive.

Thus the problem is framed. Deliberators behind the simplified veil are aware that they will most likely turn out to be among the large productive majority who are pulling their own weight and will be asked for help by those in need. They will feel the weight of those appeals for help because they also contemplate being in the position of need, but they abhor the waste in it, the creation of dysfunctional incentives that easily do more harm than good for those they are trying to help, and they also feel the weight of their own claims of desert. It is *their* money that others are asking for, and they would like for that claim of ownership to be as fully recognized as the claims of need.

This is what the Rawlsian choice point becomes once the theory is adjusted so that it is capable of adjudicating claims of desert, as it would seem that any theory of justice must be able to do. Is it still Rawlsian? Should it be called Rawls-Kelleyan? A full theory of justice instead of two half theories? First, let's see what this full theory reveals. If it's sunspots and the moons of Jupiter then both the Rawlsians and the Kelleyans might begrudgingly accept the hint of a possibility of some association.

### **The full theory yields a full solution: billing all aid to the account of the recipient**

As soon as claims of need and claims of desert are considered side by side, it becomes clear that they operate along different dimensions that should allow them in large degree to accommodate each other. Just look at what people in the private sector do when they need help. They seek a loan, which may require repayment on an agreed-upon schedule or may be open-ended, with the principal accumulating interest at market rates until paid off. Loans allow people to receive assistance while maintaining incentives for responsible behavior. People don't seek more assistance than they actually need because they have to pay it back.

Loans also fully honor claims of desert. There is no transfer of ownership of the property that is loaned. That is what “to loan” means. The resources are on loan. They still belong to the people who made the loan. That means, in turn, that there is no transfer of ownership of the labor that went into creating the property that is loaned, which means there is no slavery.

This, then, is the obvious starting point and model for how to answer claims of need and claims of desert at the same time. Many of those in the most need will not offer sufficient prospects of repayment to qualify for commercially viable loans, but government aid could still largely follow the private model and by doing so preserve as far as possible the answering of both claims of need and claims of desert at the same time.

Whether the aid be for health care, welfare, unemployment benefits, Social Security, food stamps, or anything else, just bill all government assistance to the account of the recipient, to be paid back with full market interest according to an ability-to-pay formula over the life of the recipient. That approach keeps incentives to responsible behavior as intact as possible. When a person who loses his job has the opportunity to receive unemployment insurance payments, he will be much less likely to take more aid than he actually needs if he has to repay it.

For all who foresee in the long run pulling their own weight, this scheme provides full incentive not to take more aid than is actually needed, and this maintenance of incentives will make it tenable in many cases to let people be the judge of their own state of need. For those who fall more deeply into arrears, aid would have to be more strictly limited to government-assessed basic needs. Diminishing prospects of repayment would provide diminishing incentive for responsible behavior, but incentives would still be somewhat intact, and the limitation of aid to more strictly assessed needs would constitute a kind of incentive of its own.

Because not all debts will be repaid this system would still be costly, but the fact that incentives are maintained as far as is possible for the amount of aid that is given makes it the least costly way of providing any given level of aid. It will provide the most aid bang per aid buck spent, implying that whatever aid is given, it should be given this way.

That conclusion stands first as a simple economic fact separate from the moral question of how much aid should be given or the need to answer claims of desert, but billing aid to account is not just the most efficient way of giving aid. It also satisfies the moral requirement to honor claims of desert as far as possible. Here the fact of maximum efficiency means that the burden that is placed on claims of desert by the answering of claims of need gets minimized for the amount of aid given. Further, although a burden is placed on claims of desert, there is still no transfer of ownership. The debts are always still owed, even if they never get paid. The books are always kept straight about who owes whom, which itself is very important. Those who sacrifice their liberty to charitably answer other people’s claims of need are not deprived of the moral credit for their charity, and they are protected against the tendency of

those who owe to want to escape their debt and answer generosity with ingratitude and entitlement.

When aid is given away, it is natural for the recipients to think that they must be owed—otherwise, why are they being paid?—and when people wrongly think they are owed, they can find all kinds of illegitimate ways to take. It is actually quite dangerous to say that nobody deserves anything. It opens the door to the thieves, including the most ambitious criminals, the totalitarian communists, to present themselves as legitimate. With billing aid to account, everyone will know to the dollar the magnitude of their debt to society and the magnitude of the generosity with which they have been treated.

**When claims of desert are accounted, the needy and the self-sufficient are both on the same side when it comes to favoring free market capitalism over socialism**

When deliberators behind a Rawls-Kelleyan veil of ignorance put themselves in the position of the majority who are productive enough to pull their own weight, they will want to live in a society with a free market economy, reasonably regulated to protect property and to secure competitive rather than oligarchic market conditions. They will understand that their productivity gives them large claims of desert that it would be greatly to their benefit to receive, and they will understand that a competitive market economy with broad economic liberty rights will achieve this result, rewarding them with market income roughly equivalent to their marginal productivity.

Not only that but economic liberty will allow them to maximize their productivity, and the rewards that their productivity earns, by allowing them to seek out their own most valuable occupations. Similarly for the less productive. They also have their opportunities for productivity and reward maximized by economic liberty, but they receive the added benefit that when they are unable to pull their own weight the fellow countrymen whom they can go to with requests for assistance will be more prosperous and better positioned to offer them aid if everyone has economic liberty. The better off also like it that the worse off have liberty, since it gives the worse off the best chance to pull their own weight and not need so much help. Since our prosperity comes from each other, everybody has strong incentive to want everybody to have lots of liberty.

This is the case for economic liberty just in terms of the advantages for the different parties, but there is also the weight of the moral claim. Self-ownership gives people a moral claim to the fruits of their own labor. These moral claims cannot be curtailed simply by not letting people pursue labor of their own choice to begin with, and Rawls' original position (if claims of desert are allowed in) fully captures this. Everybody is going to want unfettered opportunity to be productive and get rewarded for it, both to reap the rewards for contribution that liberty provides, and because they want to live their own lives. Choosing liberty is choosing self-ownership. Otherwise one is choosing to be a slave, which is what communism is: the system of universal slavery.

## **The needy aren't the only ones who should be required to pay back government largesse when they are able**

Billing aid to account is such an effective instrumentality that we shouldn't apply it just to aid for the needy. That wouldn't be fair anyway, when there are so many other recipients of government largesse as well. Why should the needy be the only ones to have to pay it back? This scheme should be applied to middle-class welfare, upper-class welfare, corporate welfare, and all government largesse that is meted out to any identifiable recipient. All largesse should be billed to the account of the recipient and be repaid with full market interest according to an ability-to-pay formula. That would put a crimp on inefficient government pork.

The legitimate roles of government are those necessary activities that cannot be efficiently coordinated by voluntary private action. When coordination through the offices of government can reap such efficiencies, the beneficiaries would be glad to pay for them. They get more value than they pay for. That is what an efficiency is: a gain in value.

Pork, in contrast, is typically very inefficient, wasting large amounts of taxpayer money to put a few dollars into the pockets of some special interest. Think of the vast taxpayer resources that subsidize the burning of food crops as automobile fuel. The fact that this industry would not be profitable at all without massive subsidy means that it consumes more value than it produces. It does boost corn prices, providing some help to farmers, but it makes everyone else worse off. If the corn farmers got billed the actual cost of the few dollars that end up in their pockets, they would be losing a hundred dollars for every dollar they receive and would say, "No, thank you."

Applied systematically, this scheme of billing aid/largesse to the account of the recipient would automatically limit government to its proper role of actually enabling efficiencies. Aid to the needy isn't the only place where we need to have less waste along with more freedom and less buying of both voters and representatives, and it could even be politically viable. Universal billing of government largesse to the account of the recipient would gore everyone's ox at once, so that although each individual would lose the inefficient perks he or she receives under the current system, all would be freed from the greater burden of having to support everyone else's inefficient perks, making everyone a net gainer.

### **Billing aid to account will become a backstop to private charity**

If government aid has to be paid back over the recipient's lifetime according to an ability-to-pay formula, that will make private aid relatively more attractive because it generally does not require repayment. Private charity can offer this greater generosity and still remain effective because it can impose conditions that public aid cannot. Public aid must treat people equally under the law, which greatly limits the behavioral conditions it can impose, but churches and other private groups can impose whatever conditions they think genuine help requires.

As David Kelley notes, private charity had a long and very active history in America, taking care of orphans, widows, and the sick, as well as providing education, food, and shelter for the needy long before the federal government started getting involved in the 1930s. The advent and huge growth of government-sponsored aid have displaced much of that private charity but American private giving is still generous. If the billing of government aid to the account of the recipient does make private charity more attractive to the needy then private charity might make a comeback.

In that case government aid would become a residual, a backstop to private charity, and the reconciliation between the answering of claims of need and claims of desert would become even more complete, but it will be complete enough in any case.

Simply getting rid of current aid schemes that throw vastly more people into poverty than they lift out would give us a more prosperous society with fewer claims of need. Moving to effective aid schemes that maintain incentives to responsible behavior will make us yet more prosperous and less needy, but without trampling claims of desert. That keeps incentives intact on the supply side, which also contributes to prosperity. No longer will we be treating the diseases of our body politic by the equivalent of medieval bloodletting. Our medical practice will actually make us healthy instead of sick.

All of this emerges quite straightforwardly from a fair balancing of claims of need and claims of desert, an objective that Rawls seems to have had in mind sixty years ago until he decided to layer onto his veil of ignorance the idea that nobody deserves anything. This idea guaranteed the conclusions he wanted to arrive at, but it was a shortcut that left him with only half a theory, accounting only for claims of need and never having a chance to even consider how claims of need can be reconciled with claims of desert.

But he did build the framework for a fully correct theory. It's an architectural masterpiece waiting for the lights to be turned on. Take off the untenable layered-on interpretation of the veil as paring away information about what is undeserved, follow the roadmap to desert that Rawls himself built into his theory (reward for contribution), and the whole thing is illuminated. The Millian understanding of how liberty enables moral agency to pursue the discovery of value: that's in Rawls's theory. The history lesson that reward for contribution has been broadly seen as the primary category of desert since medieval times: that's from Rawls. Even the distinction between original claims of desert and just deserts needed to catch the circularity in Rawls's generational argument is from Rawls.

He wasn't trying to hide anything. He put forward every relevant element that he could discern in the best way he could figure out how, and he did a great job. All the necessary components are there. He just crossed up some of the wiring so the lights don't come on. Fix a couple of bad connections so that claims of need and claims of desert finally get adjudicated together, and a full theory of justice emerges.

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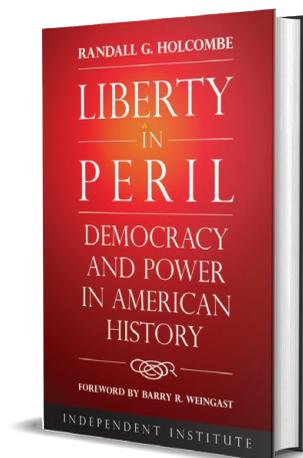
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