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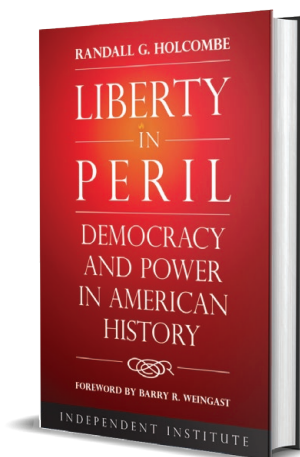
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Justice, Desert, and Disagreement

A Response to Alexander Rawls

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ADAM GJESDAL

In *A Theory of Justice* ([1971] 1999), John Rawls argues that moral desert should have a minimal role in accounts of distributional justice. In “*A Theory of Justice with Claims of Desert*,” Alexander Rawls argues via an internal critique that John Rawls’s disregard of claims of moral desert in the original position is misguided. An orthodox (John) Rawlsian should not find all of Alexander Rawls’s criticisms compelling. Yet the challenges Alexander Rawls raises lead to an interesting question he does not explore and that John Rawls never satisfactorily addresses, even in his later work, *Political Liberalism* ([1993] 2005). 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”? I suggest *that* question is one that political philosophers working within John Rawls’s theoretical framework ought to try to answer rather than trying to determine what the uniquely correct theory of distributional justice is.

Fairness and Desert

I start by laying out the *Desert Theory* that Alexander Rawls defends, contrasting it with the orthodox Rawlsian *Fairness Theory*, which holds that society ought to maximize

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the prospects of its worst-off members over a complete life. Both theories share a commitment to choosing principles of justice for regulating the basic structure of society from behind a veil of ignorance. The Fairness Theory's veil is constructed to make choosers fully insensitive to claims of desert from society's better-off members, leading choosers to attend only to claims of need from society's worst-off. In contrast, the Desert Theory would make parties behind the veil ignorant of their personal information but sensitive to both the claims of need from the worst-off and claims of desert from society's better-off. With respect to claims of desert and need, parties behind the Desert Theory's veil "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."

Alexander Rawls argues that the Fairness Theory's own theoretical commitments lead to endorsing the Desert Theory's construal of the veil of ignorance. For both theories, the veil of ignorance serves as a heuristic for ruling out morally irrelevant considerations from the choice of principles of justice. Knowing your own particular circumstances can distort your choice of principles, leading you to choose those that work in your favor. Making you ignorant of morally arbitrary considerations ensures impartiality in your choice behind the veil. Among these considerations, John Rawls includes claims of moral desert, such as claims to deserve our native endowments or our good moral character ([1971] 1999, 89). Alexander Rawls convincingly argues it is a mistake to rule out claims of desert from consideration on the basis of their moral arbitrariness. As he points out, the traits children develop as a result of good parenting are widely regarded as morally deserved. Other claims of desert, including to wages earned in a free market, are viewed by many natural-law theorists, including John Locke, as having a moral basis ("Venditio," in Locke 1997, 339–43).

According to Alexander Rawls, the fairness theorist has ample reason to permit parties to consider these claims in the original position. Doing so requires rethinking the veil of ignorance's informational constraints. The Desert Theory leaves much of the Fairness Theory's theoretical machinery in place while tweaking the veil's informational constraints. This minor adjustment plausibly leads to selection of different principles of justice than those the Fairness Theory favors.

But this argument against the Fairness Theory misses something important. As Alexander Rawls notes, John Rawls distinguishes between desert claims made against a background of just institutions and those made without that background. According to Samuel Scheffler, John Rawls holds that "people's deserts are in general to be identified with their legitimate institutional expectations" (2000, 966). To know what these legitimate expectations are, we must identify normative standards for assessing our institutions as just. These legitimate claims can be made only *after* we have identified principles of justice for regulating society in the original position. What we have legitimate claim to is an output of the theory for the Fairness Theory.

In contrast, the Desert Theory treats some of these claims as an input for the original position. This makes sense if the original position should permit parties knowledge of all nonarbitrary morally relevant information, but it can't do that and

perform its intended function. The original position is a device for selecting principles of justice to adjudicate competing claims, including those that have their basis in convictions of impartial morality (Rawls [1971] 1999, 194). All of the claims of moral desert Alexander Rawls would have us consider in the original position require some adjudication. The Desert Theory would have us attend to those claims behind a modified veil of ignorance before we have determined which principles of justice ought to regulate society. As I show here, this condition requires substantially modifying the original position.

Let me first clarify how desert claims generate disputes. Those Alexander Rawls focuses on involve competing claims between an individual and the state. A worker surely deserves a significant portion of her wages, but only a minority of theorists see that worker as deserving 100 percent of her pretax income. Her claim to her full wages earned must be balanced against the state's claim to a share of those wages, in part based on the need to fund the public provision of those goods and services that make mutually beneficial market transactions possible.¹ The state plays an integral role in making economic activity possible through enforcing contracts and protecting established property rights.² These services are necessary in large, complex societies and require funding through some form of taxation. Liam Murphy and Thomas Nagel argue that because these services are a necessary precondition for wealth-generating activity, we cannot appeal to an anarchic free market or to our pretax incomes as establishing the moral baseline of what we deserve, on which any compulsory taxation infringes (2002, 32–33). It makes little sense, they argue, to say we have a legitimate expectation to all of our pretax income. What we have a legitimate expectation to—what we justly deserve—must be determined by principles of justice.

Many theorists, including Alexander Rawls, deny the state has any such claim to a portion of our wages and view appropriation of a share of workers' wages as "partaking of" slavery.³ Such a denial is based in anarchic or libertarian views that are skeptical of state authority, including the legitimacy of the state's power to tax. But, as John Rawls notes, the Fairness Theory's original position is not designed to respond to skepticism of state authority. It offers a form of *social* contract theory, establishing a "system of common public law which defines and regulates political authority and applies to everyone as citizen" ([1993] 2005, 265). The framework presupposes that a just regime could sustain itself through some degree of compulsory taxation. Insofar as the Desert Theory adopts the social contract framework as well, it, too, must embrace this presupposition.

Now, this framework leaves open the exact form a just regime should take and what tax policies it can legitimately impose both to sustain itself and to bring about

1. The state may have other goals, such as pursuing distributive justice, that make taxation legitimate.

2. See, for example, North, Wallis, and Weingast 2009, 7.

3. Theorists with this view include Alexander Rawls (in this symposium) and Robert Nozick (1974, 169).

distributive justice. Principles of justice selected in the original position could favor a minarchist, night-watchmen state or a socialized one that fully controls the means of production or something in between. If one of these types of state is shown to be just on the basis of arguments from the original position, then citizens would have legitimate expectations to a share of their post-tax income consistent with the expectations established by that regime. But it is worth reemphasizing that we can determine what those legitimate expectations are only *after* we have selected principles of justice for regulating society's basic structure.

Modifying the Original Position

The desert theorist must substantially modify the Fairness Theory's original position to adjudicate competing claims of desert. Tweaking the veil of ignorance to weaken its informational constraints won't do the job. If the veil were weakened to allow knowledge of a distribution of desert claims and need claims throughout society, we would still need criteria for excluding some of those claims as inappropriate. Imagine the desert theorist taking inspiration from the economist John Harsanyi, whose arguments inspired John Rawls's design of the original position in *A Theory of Justice* (e.g., Rawls [1971] 1999, 118). Harsanyi defends a principle of distributive justice that maximizes average utility for all citizens.⁴ Unlike John Rawls, Harsanyi imagines a veil-type argument where we select principles of justice in knowledge of the overall distribution of utility among members of society but ignorant of who we will be in that distribution. John Rawls, in contrast, denies us knowledge of what percentage of the population belongs to the worst-off, which, he argues, would lead parties to seek to maximize the prospects of the worst-off ([1971] 1999, 134). The desert theorist could adopt a Harsanyi-style veil that selects principles of distributive justice in light of knowledge of the overall distribution of claims of desert and need in society.

This Harsanyi-inspired Desert Theory faces many of the same objections lev-
eraged against the economist's original theory of distributive justice. For Harsanyi, only some individual utilities should count in the social calculus: we do not want a principle of distributive justice that maximizes average utility gained from perverse, malevolent, or antisocial activities. John Rawls rejects Harsanyi's average utilitarianism as lacking a satisfactory explanation for why certain utilities ought to be excluded from the distributive social calculus (Rawls 2001, 100 n. 22). The same exclusionary problems arise when the theory is modified to maximize satisfaction over claims of desert and need. Some desert claims ought to be excluded—such as those that appeal to an anarchic baseline as establishing desert or those that are outlandish or crazy. The desert theorist must do further work to provide a satisfactory basis for exclusion. I suspect we need principles of justice to do this work: that is, we must know

4. This principle, Harsanyi writes, is "an expression of what sort of society one would prefer if one had an equal chance of being 'put in the place of' any particular member of the society" (1953, 435).

which claims express legitimate expectations made against a just regime in order to determine which to exclude. If I'm right, we have the following problem. The Harsanyi-inspired approach is supposed to help us balance claims of desert against claims of need *before* we have selected principles of justice in the original position. Yet that approach seems to presuppose we already know what those principles are. The desert theorist must address this issue should he pursue this path to modifying the original position.

A different way of modifying the original position would incorporate bargaining behind the veil. Bargaining theories have been prominent in the social contract literature since David Gauthier's *Morals by Agreement* appeared in 1986. The idea is that different participants in a cooperative scheme of action bargain over the distribution of the surplus that results from their interaction. The desert theorist's bargain behind the veil would involve parties standing in for different economic agents that vary in how deserving they are of these benefits. Some work hard and are very deserving; others shirk or free-ride and deserve little but can claim a share of cooperative surplus to satisfy basic needs. In this framework, individual agents must have initial endowments that represent their payoff should no agreement occur. The point of the agreement is to leave each person better off than he or she would be otherwise by engaging in productive activity on his or her own.

On Gauthier's analysis, the no-agreement point is determined by parties' initial endowments in a Lockean state of nature, where these endowments are acquired without taking advantage of any other person (1986, 200–201). But this design won't help the desert theorist insofar as the kinds of claims he is interested in—that is, claims to a percentage of one's wages or of one's inheritance—presuppose the existence of a complex economic order structured by state intervention in the market. We cannot specify agents' initial endowments, construed as morally deserved bundles of resources, without reference to the economic order we are trying to evaluate. And if we want to model distributive justice as a bargain between the deserving and the needy, we need some basis for determining who belongs in each category. We can't simply take at face value citizens' actual claims to deserve the resources they have or to need a share of others' resources. We need some standard to adjudicate disputes over whether claims of moral desert mask acquisitions gotten through economic parasitism or exploitation. We need this standard before any bargain between the deserving and the needy can get under way if we are to have any hope that the result of that bargain tells us something about distributive justice.

All this is to say that much work needs to be done if the Desert Theory is to achieve its aim. It isn't just a matter of "fix[ing] a couple of bad connections" to make the lights come on in John Rawls's original position. The Desert Theory instead calls for a major renovation of the theoretical structure. I do not know if this renovated structure will, in fact, shed more light on foundational issues of justice than the one constructed in *A Theory of Justice* does. Harsanyi's modified veil and Gauthier's bargaining theory have been around for decades, and each has received sophisticated

modifications and updates along the way.⁵ But there is no consensus in the scholarly literature that any of these argumentative designs are superior to John Rawls's own.

Pluralism and the Moral Microscope

Alexander Rawls refers to the original position as a “moral microscope” that can help us put “elemental justice on the Periodic Table.” It has been fifty years since *A Theory of Justice* was published. That is plenty of time for scholars to improve upon the microscope, look through it, and describe what they see, if the metaphor is at all apposite. The continued disagreement over the precise features of that element, despite attempts at improving our investigatory tools, suggests the metaphor might be misleading. Rejecting the metaphor doesn't entail rejecting the idea that there is a “true” or “correct” justice. It instead means rejecting the idea of political life structured around consensus on what correct justice is. Scientists can use tools to observe, describe, and secure consensus among their peers regarding the basic features of chemical elements. Justice is not like that even for theorists who share a commitment to impartial analysis. If it is out of the question that theorists employing tools of impartial analysis will reach consensus on the precise features of justice, it is unimaginable that ordinary citizens, not all of whom are committed to reasoning carefully about these matters, will agree among themselves.

This leads us from *A Theory of Justice* to John Rawls's later work, *Political Liberalism* ([1993] 2005). That work is centrally concerned with justifying exercises of political power to reasonable citizens who disagree about fundamental matters of the good and justice. Disagreements about justice do not always take center stage in the book, but John Rawls is clear that they are an important, persistent feature of political life in free societies (xlvi–xlvii, 450). In this later work, he continues to regard what I call the “Fairness Theory” as having “a certain special place in the family of political conceptions,” but he adds that “this opinion of mine is not basic to the ideas of political liberalism and public reason” (451 n. 27). There is scholarly discussion of how the theory of political liberalism can be construed in a way consistent with this remark.⁶ Taking the remark at face value, political liberalism does not presuppose that all citizens regard the Fairness Theory as “correct,” “true,” or, in the terms John Rawls uses, “most reasonable.” It is possible, though, that while ordinary citizens disagree about the precise features of justice, John Rawls holds out hope that theorists can come to regard the Fairness Theory, or a variation thereon, as the best description of liberal justice. So perhaps the later work sustains the hope that we can, in Alexander Rawls's words, observe “elemental justice” through the “moral microscope.”

5. For recent bargaining theories, see Michael Moehler's *Minimal Morality* (2018) and Ryan Muldoon's *Social Contract for a Diverse World* (2016). For an updated utilitarianism, see Hun Chung's essay “Prospect Utilitarianism” (2017).

6. For discussion, see Gaus and Van Schoelandt 2017.

In other work (Gjesdal n.d.), I have defended the coherence of a “pluralist” interpretation on which theorists’ disagreements concerning what elemental justice looks like are impossible to fully adjudicate. Looking through the microscope, one theorist might see the Fairness Theory, for example, while another sees some form of the Desert Theory, but neither is, by his or her own lights, committing any error in calling things as he or she sees them. The pluralist interpretation is distinctive in holding that for at least *some* of these theoretical disputes, the theory of political liberalism has no resources for saying either party is wrong. I have argued that in these scenarios political liberals should bite the bullet and embrace the counterintuitive view that both are right. By “political liberals,” I refer to theorists with austere metaphysical commitments. Political liberals not only are committed to avoiding disputes over the nature of the good or truth but also avoid committing themselves on a range of disputed foundational matters internal to liberal theory—for example, the best interpretation of the demands of reciprocity between citizens. Taking a precise stand on these matters is necessary for defending a precise account of distributive justice, such as the Fairness Theory’s difference principle, instead of alternatives that require a less-demanding social minimum for the least privileged. The political liberal, with her austere commitments, can coherently describe liberal justice as taking the imprecise form of what John Rawls calls the “family of liberal conceptions” ([1993] 2005, xlvii, 450), but her austerity precludes her from defending a single articulated theory within this family as uniquely correct or most reasonable.

On this analysis, some disputes over the nature of distributive justice end in dialectical stalemates. The reasons one disputant can give another for adopting his favored view eventually run out. When stalemates occur, you have two rival views, each of which is in wide reflective equilibrium for a different person. This sets a very demanding standard that is consistent with regarding nearly all distributive theories as out of equilibrium for everyone. Reflective equilibrium is a social achievement.⁷ So what is in wide reflective equilibrium for one citizen will likely be so for many others as well—many, but not all. Pluralism, as characterized here, holds that the set of all theories of liberal justice that are in wide reflective equilibrium for *some* citizens will include multiple members. I identify this set as a proper subset of all those theories that belong in what John Rawls calls the “liberal family.” Many conflicts over what belongs in this proper subset of the liberal family will result from one interlocutor failing to recognize that what is in reflective equilibrium for him need not be so for another. From his own perspective, he will think he is right and his interlocutor wrong. But from the austere, impartial perspective of political liberalism, both may be right in viewing different liberal theories of distributive justice as in reflective equilibrium for him or her.

Pluralism entails rejecting the metaphor of seeing elemental justice through a moral microscope. Theorists committed to impartial analysis will disagree about

7. Rawls says that the “full justification” of a conception of justice reflects everything “we would say—you and I—” about justice ([1993] 2005, 67). I take it that “full justification,” which involves embedding a conception of justice in a citizen’s wider set of beliefs about the good and truth, is the same thing as wide reflective equilibrium (Rawls [1993] 2005, 386).

which microscope to use in their inquiries into the nature of distributive justice, and they will disagree about what they see when they look through the lens. What is more, some of these disagreements will be unadjudicable from a suitably impartial perspective. This leads to a question about the point of theorizing. Why try to articulate and defend *the* correct theory of distributive justice when, from an impartial perspective, no one theory is uniquely correct for all citizens? The theoretical enterprise has value insofar as it narrows down the scope of disagreement, revealing the range of theories that, by at least *some* citizens' lights, survive careful scrutiny and reside in reflective equilibrium for them. It would be foolish to expect that in the future all citizens in a free society will agree on which theory is correct. The most we can realistically hope for is that citizens recognize which liberal theory they regard as correct for them and advocate for public policy that is just by their own lights.

References

- Chung, Hun. 2017. Prospect Utilitarianism: A Better Alternative to Sufficiency. *Philosophical Studies* 174, no. 8: 1911–933.
- Gaus, Gerald, and Chad Van Schoelandt. 2017. Consensus on What? Convergence for What? Four Models of Political Liberalism. *Ethics* 128, no. 1: 145–72.
- Gauthier, David. 1986. *Morals by Agreement*. Oxford: Clarendon Press.
- Gjesdal, Adam. N.d. Agnosticism and Pluralism about Justice. Unpublished manuscript.
- Harsanyi, John C. 1953. Cardinal Utility in Welfare Economics and in the Theory of Risk-taking. *Journal of Political Economy* 61, no. 5: 434–35.
- Locke, John. 1997. *Locke: Political Essays*. Cambridge, U.K.: Cambridge University Press.
- Moehler, Michael. 2018. *Minimal Morality: A Multilevel Social Contract Theory*. Oxford: Oxford University Press.
- Muldoon, Ryan. 2016. *Social Contract Theory for a Diverse World: Beyond Tolerance*. New York: Routledge.
- Murphy, Liam, and Thomas Nagel. 2002. *The Myth of Ownership: Taxes and Justice*. Oxford: Oxford University Press.
- North, Douglass C., John Joseph Wallis, and Barry R. Weingast. 2009. *Violence and Social Orders: A Conceptual Framework for Interpreting Recorded Human History*. Cambridge, U.K.: Cambridge University Press.
- Nozick, Robert. 1974. *Anarchy, State, and Utopia*. New York: Basic Books.
- Rawls, John. [1971] 1999. *A Theory of Justice*. Rev. ed. Cambridge, Mass.: Belknap Press of Harvard University Press.
- . 2001. *Justice as Fairness: A Restatement*. Cambridge, Mass.: Harvard University Press.
- . [1993] 2005. *Political Liberalism*. Exp. ed. New York: Columbia University Press.
- Scheffler, Samuel. 2000. Justice and Desert in Liberal Theory. *California Law Review* 88:965–90.