

Distributive and Retributive Desert in Rawls

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John Rawls rejects prejudicial conceptions of distributive desert on the grounds that such conceptions are immoral and impractical.¹ Prejudicial understandings of desert claim that desert can be understood prior to and independently of justice in social institutions, and take legitimate desert claims to provide standards for evaluating social arrangements. Some philosophers have interpreted Rawls's rejection of distributive desert as extending more broadly to all prejudicial moral concepts, in particular retributive desert. For instance, Michael Sandel (following a line of thought of Robert Nozick's) has argued that contrary to Rawls's explicit discussion of desert, Rawls is in fact committed to rejecting retributive desert; the bases (or grounds) for distributive desert are in fact the same bases of retributive desert.² Therefore, insofar as retributive desert is part of our commonsense moral outlook, the worry is that Rawls commits himself to a position too far removed from our considered moral convictions. In response to Sandel and other critics, Samuel Scheffler has argued that at least some of Rawls's reasons for rejecting a prejudicial notion of distributive desert do not commit him to further rejecting a prejudicial notion of retributive desert.³ Rawls, Scheffler claims, can reasonably and consistently endorse an asymmetrical account of desert; Rawls's attitude toward desert is therefore not as radical as it may initially seem.⁴ More recently, two philosophers have renewed the argument against Rawls's asymmetrical treatment of desert. Eugene Mills indirectly does so through challenging Scheffler's interpretation and defense of Rawls,⁵ while Jeffrey Moriarty directly attacks Rawls; because, contra Rawls, prejudicial distributive desert can be made sense of, Rawls fails to substantiate desert asymmetry.⁶

In this article, I examine and criticize the tenor of these discussions of Rawls. I think both camps—the opposing camp (Sandel, Nozick, Mills, Moriarty), and the supporting (Scheffler)—incorrectly assess how Rawls understands the relationship between justice and desert. Yet I share something important with Scheffler's view. I take Rawls to be correct in maintaining that distributive and retributive justice are asymmetrical; in this sense, my view is a supporting one. Justice ought not to be conceived as the satisfaction of legitimate desert claims, with distributive justice rewarding economic desert claims and retributive justice answering punitive desert claims. However, I argue that even though this asymmetry holds, Rawls is committed to rejecting prejudicial retributive desert, just as he rejects prejudicial distributive desert; in other words, he is committed to

endorsing desert symmetry. It is this last claim that positions me against Scheffler, and in agreement with those in the opposing camp. But unlike those in the opposing camp, who see the rejection of retributive desert as spelling disaster for Rawls's view, I see this rejection as an asset; Rawls's symmetry of desert is attractive and defensible.

I want to emphasize that this paper is about Rawls's thoughts on desert and about where I think those writing on Rawls's view of desert have gone wrong. Of these writers, I focus most extensively on Scheffler because I think he has done most in attempting to flesh out Rawls's comments on desert.⁷

I proceed as follows. Section One outlines Rawls's rejection of prejudicial distributive desert and Scheffler's interpretation of his asymmetrical position. Section Two discusses several problems for Scheffler's account. In Section Three I argue that Rawls's position requires him to reject retributive desert and that, independent of this symmetry, Rawls's later views on liberalism further commit him to rejecting retributive desert as a public justification for punishment. Finally I briefly mention how an appropriately liberal justification might look.

Section One

Desert plays a central role within some accounts of justice in social institutions. According to these accounts, justice exists when persons are treated in accord with their desert, where each desert claim has a corresponding desert base or relevant fact about the person in virtue of which they are deserving. "Desert," Joel Feinberg says, "is a moral concept in the sense that it is logically prior to and independent of public institutions and their rules."⁸ Desert, as some have put it, is prejudicial. It provides the standard that determines the justice of institutional arrangements. Entitlement-centered conceptions, by contrast, claim that institutions and practices establish conditions which set the standard for legitimate claims.⁹ Just systems are those which distribute benefits to individuals and groups who meet the entitlement generating criteria set out by the institutions. These two versions of justice can differ in their evaluation of social institutions. If a system publicly guarantees the members of an ethnic minority inferior health care, which it then delivers, it is just according to the entitlement-centered conception. However, if, from the standpoint of the desert-centered conception, the members of the minority were taken to deserve better treatment, this system would be deemed unjust.

It is worth briefly mentioning that Rawls can reject the desert-centered notion of distributive desert while refraining from endorsing a purely institutional theory by claiming that people deserve whatever *just institutions* dictate that they should receive, not whatever actual institutions dictate. Thus, as long as Rawls rejects prejudicial desert and defines desert in terms of just institutions and not vice versa, then he is not bound to endorse a purely institutional theory.¹⁰ This is evident from the fact that by defining desert *post*justicially, it would be possible to criticize actual institutions on the grounds that they have failed to act in accor-

dance with justice, even as they uphold their entitlement claims at the same time.¹² Furthermore, the idea of postjusticial desert allows us to maintain the distinction between desert and entitlement, which purely institutional theories are criticized for conflating. Hence rejecting prejusticial desert does not entail upholding a purely institutional view.¹²

So, then, what reasons does Rawls have for rejecting prejusticial desert? In Section 17 of *A Theory of Justice*, Rawls's initial rejection of desert is situated within a larger discussion of why the "difference principle" is an egalitarian principle of distributive justice.¹³

There is a natural inclination to object that those better situated deserve their greater advantages whether or not they are to the benefit of others. At this point it is necessary to be clear about the notion of desert. 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. In this sense the more fortunate have a claim to their better situation; their claims are legitimate expectations established by social institutions, and the community is obligated to meet them. But this sense of desert presupposes the existence of the cooperative scheme; it is irrelevant to the question whether in the first place the scheme is to be designed in accordance with the difference principle or some other criterion.

Perhaps some will think that the person with greater natural endowments deserves those assets and the superior character that made their development possible. Because he is more worthy in this sense, he deserves the greater advantages that he could achieve with them. This view, however, is surely incorrect. 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 assertion 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 on fortunate family and social circumstances for which he can claim no credit. The notion of desert seems not to apply to these cases. Thus the more advantaged representative man cannot say that he deserves and therefore has a right to a scheme of cooperation in which he is permitted to acquire benefits in ways that do not contribute to the welfare of others.¹⁴

In the second paragraph of this passage, Rawls makes the following claims. He simply takes it as an uncontroversial fact that no one deserves his place in the distribution of native endowments. This means that no one deserves his natural traits relative to others. As a result of this fact, better situated persons cannot argue that they deserve greater economic advantages solely because of their position in the distribution. Also, because those who are better situated do not deserve their place in the distribution of traits, their position within the natural distribution does not generate a right to the establishment of institutional structures that give persons who possess those traits special advantages.¹⁵

Rawls continues his argument against basing distributive justice on claims of desert in Section 48:

The precept which seems intuitively to come closest to rewarding moral desert is that of distribution according to effort, or perhaps better, conscientious effort. Once again,

however, it seems clear that the effort a person is willing to make is influenced by his natural abilities and skills and the alternatives open to him. The better endowed are more likely, other things equal, to strive conscientiously, and there seems to be no way to discount for their greater good fortune. The idea of rewarding desert is impracticable.¹⁶

The main idea here is that rewarding desert understood simply as rewarding effort (i.e., where effort is desert's base) is problematic because the capacity to exert effort depends on facts over which individual persons have no control. Most obviously, effort depends on natural abilities; but it also depends on social circumstances. For example, persons who possess the natural traits required to become philosophers will most likely only draw upon these traits if being a philosopher is seen as a good, if there is a market rewarding philosophers for their efforts, if there is an educational system enabling them to adequately develop their capacities, if they are raised in the right family circumstances, and the like. Given these facts, there is no practical way to determine where effort begins and contingent circumstances end.¹⁷

All of this is to say that Rawls rejects prejusticial desert, the idea that desert is meaningful and legitimate outside of and prior to a just social and economic scheme. If desert were going to be prejusticial then it would likely have to rely on something presocial like one's position in the distribution of natural endowments or personal effort. In rejecting these, Rawls leads us to believe that desert cannot be prejusticial. Instead, if desert is to be made legitimate, the only possibility is a postjusticial sort of desert; recall Section 17's comments on how desert claims are satisfied when just institutions deliver what they say persons or groups are expected to receive; desert must ride piggyback on just institutions.

Some philosophers have interpreted Rawls as rejecting all prejusticial moral concepts. For example, T. M. Scanlon finds Rawls's arguments against prejusticial distributive desert so convincing that he simply assumes they apply to retributive desert as well.¹⁸ Michael Sandel, who is much less sympathetic to Rawls's philosophical project than Scanlon, also thinks the arguments Rawls presents against prejusticial desert in the context of distribution generalize to retributive desert. Sandel argues that because Rawls denies that persons deserve their natural traits, talents, and characters, and thus any benefit these incur, he is also committed to the position that persons' traits, and so on, cannot legitimately incur harm either.¹⁹ I will call this kind of concern the "Symmetry worry."²⁰ The worry is that Rawls's arguments against prejusticial distributive desert commit him to a rejection of prejusticial retributive desert, and indeed to rejecting *any* prejusticial conception of desert.

Scheffler finds the Symmetry worry troubling. I say this because Scheffler thinks that if Rawls is subject to the Symmetry worry, that is, committed to rejecting all prejusticial desert, then Rawls's position on desert is simply too far removed from our considered moral judgments.²¹ Desert judgments, and by extension responsibility judgments, are part of our fundamental moral landscape and

we should be extremely wary in accepting any argument that would undermine such a core moral feature of our lives.

What is Scheffler's plan of action? Scheffler argues that Rawls's rejection of prejusticial distributive desert can be derived from more independent premises than the ones at issue in Nozick's symmetry worry. Scheffler finds these premises in Rawls's second passage on desert discussed above, Section 48, where Rawls mentions at least three salient facts. First, persons' productive capacities depend on the contribution of others. Second, the economic values that correspond to such capacities are socially determined in that they depend on the number of people with similar capacities and the "needs, preferences, and choices of others."²² Third, peoples' aspirations for economic benefits are dependent on one another, for any assignment of material gains to one person or group has material implications for others.^{23,24} It is then incoherent to speak of prejusticial distributive desert, and, *a fortiori*, this idea lacks normative force. Scheffler contrasts these points to Rawls's comments on asymmetry in the same section.²⁵ Rawls writes,

No doubt some may still contend that distributive shares should match moral worth at least to the extent that this is feasible. They may believe that unless those who are better off have superior moral character, their having greater advantages is an affront to our sense of justice. Now this opinion may arise from thinking of distributive justice as somehow the opposite of retributive justice. It is true that in a reasonably well-ordered society those who are punished for violating just laws have normally done something wrong. This is because the purpose of criminal law is to uphold basic natural duties, those which forbid us to injure other persons in their life and limb, or to deprive them of their liberty and property, and punishments are to serve this end . . . Thus a propensity to commit such acts is a mark of bad character, and in a just society legal punishments will only fall upon those who display these faults.

It is clear that the distribution of economic and social advantages is entirely different. These arrangements are not the converse, so to speak, of the criminal law, so that just as the one punishes certain offenses, the other rewards moral worth. The function of unequal distributive shares is to cover the costs of training and education, to attract individuals to places and associations where they are most needed from a social point of view, and so on . . . To think of distributive and retributive justice as converses of one another is completely misleading and suggests a different justification for distributive shares than the one they in fact have.²⁶

Here Rawls claims the criminal law and just distributions of shares are qualitatively distinct because they have different aims. The criminal law aims to uphold natural duties. We can make sense of the idea that individual criminals behave immorally even in the absence of laws. However, the aim of a just distributive scheme is not to reward persons for moral goodness but rather to shape society in a desirable way. This is evident from Rawls's rejection of prejusticial distributive desert. Since we cannot make sense of the idea of individual distributive desert, we cannot justify a system on the grounds that it rewards such desert. Thus individuals cannot say that on the basis of some natural trait or effort that they deserve some amount of income or distributive share. We must instead understand desert postjusticially. Persons can only demand a particular share when this coheres with

what goods just institutions publicly announce they will deliver. According to Rawls, economic inequalities are ultimately justified, not because of those individuals' traits or characters, but because the inequalities benefit the least advantaged in society (although, it should be noted, this paper's argument does not rest upon one's acceptance of the difference principle). Thus, Rawls's arguments for retributive and distributive justice rely upon different premises to establish different conclusions; the former cites a moral standard independent of justice, the latter does not. This asymmetry makes Scheffler conclude that Rawls's theory "takes an asymmetrical attitude towards the role of desert in the distributive and retributive contexts."²⁷

Section Two

I now turn to some problems for Scheffler's account. Recall the Symmetry worry. If Rawls thinks that the traditional bases for desert, one's position in the distribution of native endowments or one's type of character, need be deserved "all the way down,"²⁸ then Rawls's attempt to maintain the asymmetry between distributive and retributive desert appears to fail. For if, as a result of an undeserved base (e.g., one's place in the natural lottery), a person violates another's rights, then it would seem this violator cannot deserve punishment. Note that the Symmetry worry stems from Rawls's idea that because persons do not deserve their position within the distribution of natural traits, they therefore do not deserve any treatment (whether distributive *or* punitive) based on those traits. Scheffler's response to the Symmetry worry is that "Rawls may perhaps have yielded to the temptation to offer an argument that was too strong for his own purposes."²⁹ In other words, Scheffler treats the Symmetry worry as completely valid. Scheffler then goes on to defend Rawls's asymmetry by way of Section 48. There, Rawls offers a different kind of argument against prejusticial desert than Section 17's concerning the natural lottery.

There are at least two problems with Scheffler's move. The first is that his motivation is misguided. Rawls never makes the argument that the Symmetry worry attributes to him, namely that all the bases for desert must themselves be deserved. If Rawls made this argument, he would be making a very general argument and thus be taking controversial sides on, among other things, issues in metaphysics. For instance, his argument would imply that that no one deserves his or her traits or character because of properties that causally determine traits and characters.³⁰ However, the scope of Rawls's argument is narrower than the Symmetry worry suggests: "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."³¹ This is a claim about the moral import of differences in people's talents. Rawls's concern is here limited to persons' relative positions in hierarchies of talent; he is not concerned with the relationship of persons' talents to the underlying structures of reality. He is saying, for instance, that no one deserves to be *more* intelligent or ambitious than anyone else, because persons cannot claim

credit for natural facts about themselves, nor for how those facts are valued (e.g., that intelligence is a virtue). Therefore the Symmetry worry, which includes substantive commitments on metaphysical issues, is ill-founded because it is too general in scope. Once we are clear about the import of Rawls's discussion of desert and native endowments, we will see that Scheffler need not give up on Section 17's argument.

One might however push the Symmetry worry harder by pointing out Rawls's comments about the moral arbitrariness of the natural lottery's outcome.³² Doesn't this indicate that Rawls thinks all talents and vices are morally vacuous concepts? So, deeply metaphysical or not, isn't Rawls's position subject to the Symmetry worry, hence making Rawls a defender of a radical view on moral responsibility (namely, rejecting it)? To see how Rawls is not endorsing a radical view, it is important to remember the context of Rawls's discussion of the natural lottery. The main idea is that people are not entitled to a certain distributive sum or institutional scheme that favors them based on their talents. Rawls does not suggest however that the talented not benefit. By extension, it would then seem that people are not entitled to a certain punishment or institutional scheme that punishes based on their vices. Likewise, this does not imply that punishments are not meted out to the vicious. So like persons in an efficient economy who benefit from their talents, a just legal system punishes wicked characters. The key point is that what makes a distributive sum or institutional scheme just is not giving individuals their deserts, but rather adherence to the difference principle. By extension, what makes a punishment or punitive institutions just is not giving criminals their deserts, but rather adherence to some other principle (to be explained later).³³ Talents and vices are morally arbitrary in the sense that they do not generate certain kinds of rights, like to a certain monetary sum or a particular kind of punishment. This does not mean we should refrain from morally responding to the gifted or vicious as responsible agents. We can praise or blame, but such attitudes do not determine the sum of distributive shares, the type or amount of punishment, nor whether the share or punishment is just. I repeat, Rawls is not subject to the Symmetry worry, which seems at least in part motivated by a fear that Rawls's view is too radical; it is radical because it requires withholding praise and blame for the talented and wicked, or eschewing the idea of moral responsibility. As far as I can see, nothing Rawls says suggests he is radical in this sense.

Still though, this is not yet to say that Scheffler's general aim, to defend Rawls's purported asymmetry between distributive and retributive desert, fails. However, I do think Scheffler fails to substantiate the grounds for an asymmetry of desert. Recall that in Section 48 Rawls mentions three key premises. People's productive capacities depend on others, the corresponding economic values of these capacities are socially determined, and people's aspirations are dependent on others. Rawls concludes that the idea of prejudicial distributive desert is incoherent and therefore illegitimate. In the same section, Rawls also mentions retributive justice. He argues that by virtue of the fact that criminal acts would be wrong even in the absence of legal institutions, retributive and distributive justice

are asymmetrical. Retributive justice seeks to punish persons as individual violators of natural duties, while distributive justice does not aim to reward persons as individual upholders of natural duties. Scheffler infers from this asymmetry that Rawls's theory is not committed to rejecting prejusticial retributive desert. And I agree. But it does not follow that Rawls is committed to accepting prejusticial retributive desert either.³⁴ Scheffler certainly never gives us any reason to interpret Rawls as endorsing prejusticial retributive desert. Rawls is instead merely committed to a prejusticial understanding of wrongdoing. We have an idea of wrongdoing that need not presuppose justice and legal rules. However, a prejusticial understanding of wrongdoing does not entail a conception of prejusticial retributive desert. For instance, one could hold that wrongdoing consists in violations of natural right while simultaneously claiming that wrongdoers only deserve punishment in virtue of just penal institutions.

Section Three

The question now is: Are there grounds that commit Rawls to rejecting prejusticial retributive desert? I think there are and for two reasons, the first of which is based on Section 17's argument, which Scheffler's interpretation prevents him from employing. Understood properly, Section 17 claims that no one deserves his place within the distribution of native endowments. For instance, no one deserves to be smarter than others or have a more industrious disposition than others. Again, this does not mean that persons cannot receive benefits on the basis of their possession of such traits. A smart person can secure desirable employment limited to those with a high degree of intelligence and can legitimately receive the benefits of an academic career. Rawls's point is simply that being smarter does not entitle one to a certain distribution of benefits. "Differences in natural talents by themselves are not a reason for *any* pattern of distribution."³⁵

Although Rawls clearly has only distributive desert in mind when discussing native endowments in Section 17, I think the same point equally applies in the retributive context. That is, no one deserves traits we would usually classify as vicious, like being naturally insensitive to others' suffering or more prone to violence than others. Again, this follows from the claim that no one deserves his place in the distribution of natural endowments. But if no one deserves to be crueler or less sensitive than others, then likewise it is not possible to make a claim to punishment based solely on the fact that one has broken the law because they are crueler or less sensitive. It is worth mentioning that we reach the same conclusion when we substitute choice for native endowment. For surely, persons' characters influence their choices.³⁶ So because persons do not deserve their characters, it is not possible to base a claim to punishment, based solely on the fact that they are the type of person who would choose to break the law. In either case, undeserved native endowments and characters make prejusticial retributive desert morally inappropriate.³⁷

The following objection might now be raised: How is what I am saying different than the Symmetry worry? Am I not also interpreting Rawls as saying that people do not deserve some treatment (say, punishment) unless they also deserve the underlying desert base (say, viciousness)? Here it bears mention that I am not saying we must totally reject the concept of desert because it cannot be deserved all the way down. Instead, following Section 17, I think we should reject features of a conception of desert when they make desert incongruent with our considered judgments, and accept them when they make desert congruent. When desert is understood prejusticially, that is, according to native endowment or effort, it seems evident it does not cohere with our judgments; thus, we should reject it. Because individual persons cannot claim credit for their native endowments or the circumstances in which they were raised, they do not deserve things based on their endowments or circumstances. However, when desert is understood postjusticially, I think it should be accepted. People do truly seem to deserve the distributive share just institutions promise them. The legitimacy of a given desert claim follows from whether it accords with just institutions. And what makes economic institutions just, according to Rawls, is their conformity with the two principles of justice (again, my article does not hinge on endorsing these principles). Furthermore, it seems that because our considered moral judgments demand employing the idea of moral responsibility, we cannot completely reject the idea of desert to which responsibility is fused. Thus, even if we really are metaphysically determined, it is one of our fixed points of consideration that we hold each other morally responsible, that we believe individual persons deserve certain kinds of treatment. The task left to us is forming a conception of desert that does not run afoul of our other commitments, such as the belief that natural endowments are undeserved by their bearers. Rawls's postjusticial desert does just this. Thus, I think Rawls is committed to desert symmetry insofar as his reasons for rejecting prejusticial distributive desert equally move us to reject prejusticial retributive desert. However, contra Sandel and other critics, I have argued that desert symmetry does not entail rejecting commonsense moral judgments in favor of a radical thesis about metaphysics or personal responsibility. The Symmetry worry then fails because there simply is no cause for worry.

My second reason for thinking Rawls would reject prejusticial retributive desert is more political in orientation. Often, the concept of retributive desert does not merely designate the trivial claim that only the guilty can be legitimately punished, but also the fact that punishing the guilty, defined as coercively infringing criminals' basic rights and liberties as a response to wrongdoing, constitutes some intrinsic good.³⁸ Briefly examining Rawls's understanding of public reason can help us determine whether Rawls's later political theory allows for the concept of retributive desert, understood as a moral debt that can only be paid through making criminals suffer, to contribute to the political justification of punishment. It should be noted that the answer to this question is not based on Rawls's own explicit remarks about retributivism in his later political theory, for he has none. Instead, I am applying some of his later thoughts to the question of retributivism.

In “The Idea of Public Reason Revisited,” Rawls says, “The idea of public reason specifies at the deepest level the basic moral and political values that are to determine a constitutional democratic government’s relation to its citizens and their relations to one another.”³⁹ This kind of reason is public in three ways:

As the reason of free and equal citizens, it is the reason of the public; its subject is the public good concerning questions of fundamental political justice, which questions are of two kinds, constitutional essentials and matters of basic justice; and its nature and content are public, being expressed in public reasoning by a family of reasonable conceptions of political justice reasonably thought to satisfy the criterion of reciprocity.⁴⁰

Now, the idea of the reasonable and the criterion of reciprocity are linked, and this link is worth highlighting. Citizens are reasonable when they view each other as free and equal and are prepared to propose and subject themselves to fair terms of cooperation. The criterion of reciprocity is met when citizens propose those terms with the aim that other citizens can also reasonably accept them.⁴¹ This means that, given the fact of reasonable pluralism or the idea that society is composed of persons endorsing an array of comprehensive doctrines, the criterion of reciprocity can be met only when citizens express their fundamental political views in terms they expect other citizens who share different comprehensive views could reasonably endorse; the body of these organized views is what Rawls means by the family of reasonable conceptions of political justice. As such, the criterion of reciprocity is a criterion of good will and thus presupposes an array of competing, yet reasonable, political conceptions.⁴²

Because punishment deprives persons of their liberty, and liberty is clearly one of the deepest political values of a liberal society, it seems correct to maintain that punishment is a matter of basic justice.⁴³ Basic justice concerns the “structure that specifies and secures citizens’ equal basic rights and liberties and institutes just political procedures.”⁴⁴ The question I would like to now ask is: Could reasonable citizens sincerely invoke the idea of prejusticial retributive desert (defined again as a moral debt with a corresponding *prima facie* duty to make criminals suffer) in justifying punishment? Put more formally: Does the idea of retributive desert meet the criterion of reciprocity and is this idea sufficient justification for depriving persons of their basic liberties?⁴⁵

From the standpoint of public reason, the standpoint of the liberal state marked by the fact of reasonable pluralism, I think the answer to these questions is “no.”⁴⁶ I say this because it seems impossible for persons or groups who believe retributive desert is sufficient reason to incarcerate criminals to express this idea to persons or groups who do not share this belief in terms they can reasonably be expected to endorse.^{47,48} If this is the case, then advocates of retributive desert must confine these beliefs to what Rawls calls the background culture, the space of civil society where persons can pursue their comprehensive doctrines without needing to further meet the criterion of reciprocity.⁴⁹

If, then, retributive desert cannot be the public justification for punishment, what would a public justification look like? I think Rawls provides us with some hints in the section entitled “The Rule of Law” in *A Theory of Justice*. There Rawls argues for what he calls Hobbes’s thesis.⁵⁰ This thesis is that even in a well-ordered society where persons share a common sense of justice citizens may nevertheless suspect that others are not doing their part, thus causing the society to break down. An authorized public and judicial interpretation of rules or laws is established to circumvent such social decay through coercively and uniformly enforcing a set of penalties. “By enforcing a public system of penalties government removes the grounds for thinking that others are not complying with the rules.”⁵¹ This is a forward-looking type of justification. Punishment is the tool used in upholding natural duties and is clearly in direct contrast to retributivism’s backward-looking type of justification.⁵² Because rational citizens are presumed to want others to uphold natural duties so that they can maximize liberty, their consent for a system of legal punishment is predicated upon the fact that they think the loss of liberty the punitive system incurs upon them would be less than the loss they would incur in the absence of such a system.⁵³ And even though Rawls does not discuss justifications for punishment in *Political Liberalism*, I think this key premise is one that all rational (and therefore all reasonable) citizens could be expected to endorse (the premise that free and equal citizens seek to maximize liberty), and thus it provides us with a standard of public justification for punishment. Citizens can disagree, of course, about the specifics of how to understand this justification, but it will no doubt limit the range of potential justifications.⁵⁴ And it bears mention that if the idea of retributive desert is recast as the noncontroversial idea that legitimate punishment presupposes criminal guilt, then it does pass public muster, for surely rational citizens would not consent to a legal system unless it punished the guilty only.⁵⁵ Still though, this idea is significantly different from the traditional notion of retributive desert. Just because it is a necessary requirement that legitimate punishment presupposes guilt does not mean there is a *prima facie* good in making criminals suffer. On this revisionist take on retributive desert, the major justificatory work must lie elsewhere, and it appears that understanding punishment as the main coercive mechanism upholding the rule of law serves just this function.

Conclusion

In this article, I have argued, against Samuel Scheffler, that Rawls is committed to rejecting prejudicial retributive desert. He is so committed for two reasons. First, Rawls’s argument in Section 17 of *A Theory of Justice* against prejudicial distributive desert equally applies in the retributive context. Because persons do not deserve their place in the distribution of native endowments or their type of character, they cannot claim certain treatment (whether to receive a certain distributive share or some punishment) based solely on this place or character. They must instead invoke other facts, like what justice has given them a legitimate

expectation to receive. Second, Rawls is committed to rejecting retributive desert understood as a public justification for punishment. This is because retributive desert, understood as a moral debt that gives sufficient reason to impose punishment, cannot be expressed in these terms while at the same time being reasonably expected to gain assent from a polity marked by the fact of reasonable pluralism. By contrast, a theory of punishment can gain assent when it is based on Hobbes's thesis. This is so because crime threatens to undermine the laws safeguarding liberty, a value all rational citizens seek to maximize. When punishment is justified as the mechanism that upholds and restores law, it is expressed in terms citizens from all reasonable comprehensive doctrines can endorse.

I would like to warmly thank Linda Radzik and R.J. Leland for being so generous and helpful in their comments on earlier drafts of this paper, as well as Tim Aylsworth, T.J. Kasperbauer, and David Wright for their insightful suggestions and camaraderie. Also, thanks to two anonymous referees for their extremely helpful comments on an earlier draft.

Notes

¹ John Rawls, *A Theory of Justice* (Cambridge, MA: Harvard University Press, 1971).

² Michael Sandel, *Liberalism and the Limits of Justice* (Cambridge: Cambridge University Press, 1982), 89–90.

³ Samuel Scheffler, "Justice and Desert in Liberal Theory," *California Law Review* 88 (2000): 965–90. It is also worth noting that in the articles discussed in this paper the term "asymmetry" refers to denying the validity of distributive desert, while accepting retributive desert.

⁴ Nozick and Sandel, then, can be understood as holding Rawls to a symmetrical view of desert.

⁵ See Eugene Mills, "Scheffler on Rawls, Justice, and Desert," *Law and Philosophy* 23 (2004): 261–72.

⁶ See Jeffrey Moriarty, "Against the Asymmetry of Desert," *Nous* 37 (2003): 518–36. I strongly disagree with Moriarty on this point, that the way to establish desert symmetry is by showing that prejudicial distributive desert makes sense. I do not think it makes sense, but nevertheless I do believe in desert symmetry. Mills also argues—via a different route than Moriarty—that since we can coherently speak of prejudicial distributive desert, Scheffler cannot be right in dismissing it.

⁷ More specifically, I do not discuss Mills's and Moriarty's criticisms in the main body of the paper (but rather only in several of the footnotes) or at length because both of their articles assume that Rawls (or rather, just Scheffler in the case of Mills) is committed to endorsing desert asymmetry. Insofar as I show this assumption to be false, I think the need to extensively deal with their articles is largely obviated.

⁸ Joel Feinberg, "Justice and Personal Desert," in *Doing and Deserving* (Princeton, NJ: Princeton University Press, 1970), 55–94, at 87.

⁹ *Ibid.*, 63–64.

¹⁰ Scheffler, "Justice and Desert in Liberal Theory," 979.

¹¹ Rawls does not use the term "postjusticial"; the expression is Scheffler's. Rawls instead speaks of "legitimate expectations." I find Scheffler's use of the term postjusticial helpful because it contrasts nicely with prejudicial.

¹² *Ibid.*, 979.

¹³ Rawls's difference principle is the view that economic inequalities are to be arranged to the greatest benefit of the least advantaged. For example, paying some persons a higher salary than others is justified because it serves to maximize the position of those who make least. Rawls, *A Theory of Justice*, 75–83.

¹⁴Ibid., 103–04.

¹⁵Here I follow Samuel Freeman's interpretation of Rawls's discussion of the natural lottery. Freeman is quick to point out that, contrary to a popular take on Rawls, interpreting Rawls as a luck egalitarian (or as being committed to luck egalitarianism) is wholly mistaken. Luck egalitarianism is the theory that because natural traits are not deserved, people cannot benefit from their traits at all. Supporters of this theory believe the arbitrary distribution of native endowments requires an equal distribution of its consequences. Samuel Freeman, "Rawls and Luck Egalitarianism," in *Justice and the Social Contract* (Oxford: Oxford University Press, 2007), 111–42, at 116–17.

¹⁶Rawls, *A Theory of Justice*, 312.

¹⁷Of course, this does not imply that we should not reward people for developing these traits and skills, but only that our doing so does not depend solely on them or their effort. This point plays a significant role later in the paper.

¹⁸T. M. Scanlon, Jr., "The Significance of Choice," in *The Tanner Lectures on Human Values VIII*, ed. Sterling M. McMurrin (Salt Lake City, UT: University of Utah Press, 1988), 149, 188.

¹⁹Sandel, *Liberalism and the Limits of Justice*, 92.

²⁰Robert Nozick first raised a version of the Symmetry Concern. See *Anarchy, State, and Utopia* (New York: Basic, 1974), 224–25. His version is that Rawls endorses the view that desert bases need to be deserved "all the way down." But Nozick himself did not extend his interpretation to the retributive context. However, it is precisely this extension that I have in mind when I use the term "Symmetry worry."

²¹Scheffler, "Justice and Desert in Liberal Theory," 988.

²²Ibid., 985.

²³These three points are Scheffler's rendering of the relevant ideas in this passage, which I think are correct. Scheffler, "Justice and Desert in Liberal Theory," 985.

²⁴It is worth mentioning that Moriarty conspicuously does not mention these last two facts in his second "metaphysical" and "epistemological" arguments. His arguments attack the first fact regarding contribution. See Moriarty, "Against the Asymmetry of Desert," 526–33. Space does not permit summarizing each argument; however, it does not matter; I can grant Moriarty that there is a fact of the matter about the value of what each individual contributes (the upshot of the second metaphysical argument), and we can know that fact (the upshot of the second epistemological argument). But neither argument speaks to the second and third point discussed above, points I take to be sufficient in illustrating why prejudicial desert is conceptually inappropriate. To take just the third: because each person's economic aspirations seems correlated to facts like the distribution of benefits, the distribution of benefits should take priority in an analysis of people's aspirations. In order for prejudicial desert to warrant conceptual merit, it would need to be able to explain individual persons' economic aspirations without appeal to the distribution of benefits; but this seems unlikely if not impossible. Mills also seems to offer a similar line of argument as Moriarty on this point, but does seem to address this third fact, when he states "insofar as citizens' material prospects are not interconnected in the contingent but ubiquitous ways that Scheffler discusses, benefits should be distributed in proportion to prejudicial moral worth." See Mills, "Scheffler on Rawls, Justice, and Desert," 270. He does not articulate what such a principle would look like, but states (1) that if it could be found, it would be invulnerable to Scheffler's argument, and (2) in the absence of such a principle, Mills states it is impossible to distinguish distributive and retributive justice. In response to (1), like my response to Moriarty, it seems that such a principle would have to be indexed to something pre-social, or at least pre-economic, and it appears quite unlikely or impossible to generate one; for how can an economic aspiration be defined in terms of non-social or non-economic facts? In response to (2), we can distinguish between the two types of justice because distributive justice is not defined in terms of natural duties; that is, we make sense of distributing economic benefits without reference to excellently performing natural duties. By contrast, we (at least often, e.g., in the case of murder) cannot make sense of retributive justice without reference to wrongdoing, that is, violations of natural duties.

²⁵ Scheffler, "Justice and Desert in Liberal Theory," 977–78.

²⁶ Rawls, *A Theory of Justice*, 314–15.

²⁷ Scheffler, "Justice and Desert in Liberal Theory," 987.

²⁸ This expression is Nozick's, see *Anarchy, State, and Utopia*, 225. Nozick uses it, however, only in the context of distributive justice. It is rather Sandel who extends this attributed idea to the retributive context.

²⁹ Scheffler, "Justice and Desert in Liberal Theory," 988.

³⁰ Rawls does seem to think that people are entitled to their native capacities, as the first principle of justice suggests. See *Justice as Fairness, A Restatement* (Cambridge, MA: Harvard University Press, 2001), 75. The first principle states "Each person has the same indefeasible claim to a fully adequate scheme of equal basic liberties, which scheme is compatible with the same scheme of liberties for all," 42. It is a consequence of this principle that the basic rights and liberties, specified by the freedom and integrity of the person, offer persons complete control over their natural capacities. I follow Freeman on this point. Freeman, "Rawls and Luck Egalitarianism," 116.

³¹ Rawls, *A Theory of Justice*, 104. My emphasis added.

³² *Ibid.*, 72, 74. I thank an anonymous reviewer for encouraging me to address this point.

³³ See the later discussion of Hobbes's thesis.

³⁴ Moriarty appears to make a similar kind of false assumption when he tries to motivate his inquiry into desert asymmetry through focusing on justice asymmetry, as if establishing justice asymmetry is sufficient for desert asymmetry. It is also worthy mentioning that Moriarty does not think justice asymmetry is possible; yet he ignores Rawls's and Scheffler's discussions of natural duties in generating the asymmetry. See Moriarty, "Against the Asymmetry of Desert," 525–28.

³⁵ Freeman, "Rawls and Luck Egalitarianism," 116.

³⁶ And even if persons' characters do not determine their choices, it does not seem possible to separate non-character-informed choice from character-informed choice. It might be argued—as a reviewer for this journal has—that Kant's example of the moral misanthrope provides a counterexample. But surely, even if this conceptual distinction between character choice and non-character choice is possible, in most cases it is too difficult to apply this distinction; most of the time it is not so clear whether we act from the moral law or from our characters. Furthermore, there is the epistemic difficulty in making the distinction in the first place; can we actually know whether the misanthrope acts from the moral law and not from his character? And lastly, as I shall explain later, Rawls would disqualify a justification for punishment that hinged on controversial metaphysical premises. Invoking this Kantian objection in a public punitive justification would be illegitimate because of its controversial nature, namely its assumption of metaphysical freedom.

³⁷ More practically speaking, legitimately imposing a specific punishment presupposes a just punitive scheme. For determining what kind and length of punishment an individual deserves presupposes a punitive scheme, and only a punitive scheme provides the guidelines to determine the type and length of sentence. Moreover, it is impossible to determine a just sentence unless that scheme is itself just.

³⁸ This is the position often attributed to retributivists like Herbert Morris, Jeffrie Murphy, and Jean Hampton. See Herbert Morris, "Persons and Punishment," *The Monist* 52 (1968): 475–501; Jeffrie Murphy and Jean Hampton, *Forgiveness and Mercy* (Cambridge: Cambridge University Press, 1988), chapters 1 and 3.

³⁹ John Rawls, "The Idea of Public Reason Revisited," in *Political Liberalism* (New York: Columbia University Press, 2005), 440–90, at 441–42.

⁴⁰ *Ibid.*, 442.

⁴¹ *Ibid.*, 446.

⁴² Political good will presupposes competing political conceptions because it is a value that eschews conceptions of the truth. If a political group sought to impose its political agenda as the one and only true political agenda, then such a group would lack good will. It would also be unreasonable.

- ⁴³In the case of our own legal system the central place of punishment is illustrated by its being addressed in the Bill of Rights via the due process and cruel and unusual punishment amendments.
- ⁴⁴Rawls, *Political Liberalism*, 229. Rawls contrasts matters of basic justice, which concerns the acquisition of political power and its limits, and may not be explicitly stated as a constitutional essential, with matters of social and economic inequalities, which address the social and economic background institutions appropriate to citizens conceived as free and equal. Rawls also states that it is easier to determine whether the principles of basic justice are satisfied than the principles covering social and economic inequalities.
- ⁴⁵Although Jeffrie Murphy does not discuss the tension between liberalism and retributive desert in Rawlsian terms, he does outline the tension in a compelling way. See Jeffrie Murphy, "Retributivism, Moral Education, and the Liberal State," *Criminal Justice Ethics* 4 (1985): 3–11, at 7. See also Stanley C. Brubaker, "Can Liberals Punish?" *American Political Science Review* 82 (1988): 821–33.
- ⁴⁶For the same reason, Rawls rejects moral desert in the distributive context: "Having conflicting conceptions of the good, citizens cannot agree on a comprehensive doctrine to specify an idea of moral desert for political purposes." Rawls, *Justice as Fairness*, 73.
- ⁴⁷Here one might object that it is possible for retributivists to state their position to persons who adhere to different reasonable comprehensive doctrines in terms they could endorse, for example, terms about the need to respond to wrongdoing, or treating others as responsible. And this is true. But then retributivists are not using their language of suffering in the public forum, and it is this language that I have in mind (in this section) when I discuss whether retributivism has a role to play in public reason.
- ⁴⁸Again, I think it is warranted to extend Rawls's discussion of moral desert in the distributive context to the retributive context: "Having conflicting conceptions of the good, citizens cannot agree on a comprehensive doctrine to specify an idea of moral desert for political purposes." Rawls, *Justice as Fairness*, 73.
- ⁴⁹Just to clarify, persons are not banned from expressing a view in the public sphere in terms derived from their comprehensive doctrine. Persons can do this, but in order to meet the criterion of reciprocity, they must in good faith expect that persons with different comprehensive doctrines could endorse these views. By contrast, the criterion of reciprocity does not govern over the affairs of the background culture.
- ⁵⁰Rawls, *A Theory of Justice*, 240. More recently Claire Finkelstein has employed Hobbes's thesis in a similar manner. See her article, "A Contractarian Approach to Punishment," in *The Blackwell Guide to the Philosophy of Law and Legal Theory*, ed. Martin P. Golding and William Edmundson (Malden, MA: Blackwell Publishing, 2005), 207–20, at 216.
- ⁵¹Rawls, *A Theory of Justice*, 240.
- ⁵²Recall the forward-looking justification earlier quoted: "This is because the purpose of criminal law is to uphold basic natural duties, those which forbid us to injure other persons in their life and limb, or to deprive them of their liberty and property, and punishments are to serve this end . . ." Rawls, *A Theory of Justice*, 314–15.
- ⁵³*Ibid.*, 241.
- ⁵⁴One theory of punishment that interestingly appears to be in many ways congruent with this justification is Jean Hampton's expressive theory of punishment. For Jean Hampton, the purpose of punishment is its role in publicly recognizing the equal worth of the victim and wrongdoer. This recognition is implicit in Rawls's discussion of the aim of punishment—to restore legal stability that has been undermined because people take advantage of their fellow citizens whom (presumably) they see as beneath them. See Jean Hampton, "Correcting Harms Versus Righting Wrongs: The Goal of Retribution," *UCLA Law Review* 39 (1992): 1659–1702.
- ⁵⁵One might think Hobbes's thesis entails viewing punishment as a mere penalty, that is, deflating the concept of punishment of its moral core, its stress on responsibility. In fact, there is no such entailment. Just because the system of punishment is ultimately justified on forward-looking grounds does not mean we are barred from legitimately invoking the language of responsibility

and outrage in meting out punishment; we may indeed deploy this language, while at the same time refraining from using traditional retributivist terms. For personal responsibility is one thing; the good in making wrongdoers suffer is quite another. All we need to invoke responsibility is the value of liberty, see Rawls, *A Theory of Justice*, 241. And I would guess that if our commonsense intuitions about punishment are retributive in some sense, they are retributive in this moral responsibility respect, not the suffering respect. Further proof that Hobbes's thesis is not opposed to moral responsibility is that Hobbes's thesis is motivated by the need to enforce natural duties, to hold others accountable. I thank an anonymous reviewer of this journal for suggesting I clarify this point. For a discussion of the difference between a penalty's forward-looking outlook versus a punishment's backward-looking outlook, see Brubaker, "Can Liberals Punish?" 823–24. One more point. Even if I am wrong and responsibility necessarily invokes some kind of retributive desert, this does not mean that judgments of retributive desert are proven legitimate. For a list of some major problems facing retributivists on this front see Russ Shafer-Landau's article "Retributivism and Desert," *Pacific Philosophical Quarterly*, 81 (2000): 189–214.