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Two theories of fairness

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TWO THEORIES OF FAIRNESS

A Thesis

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Louisiana State University and
Agricultural and Mechanical College
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by
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Abstract

In *A Theory of Justice*, John Rawls argues that justice is to be understood as fairness. The theory of justice as fairness is an ethical theory which argues that broad principles are able to capture the nature of what constitutes a just society. Rawls argues that all that is required for a society to be just is for it to be fair. A just society is one which has institutions which protect individual rights and liberties of all citizens and has a pattern of distribution of resources.

Rawls' institutional approach to justice has one problem. Rawls' theory of justice as fairness seeks to ignore the issue of moral desert. According to Rawls, a just society is not necessarily responsible for providing people what is intuitively considered their just deserts. Justice is an attribute of society and not individuals.

Rawls' treatment of the issue of moral desert reveals that his theory of justice as fairness is actually two theories of justice. The first is concerned with the hypothetical structure of an ideal society. The second is his theory of just institutions. In the ideal hypothetical society, Rawls can ignore the issue of desert. In actual social institutions, the issue of desert is more problematic. The issue of desert reveals that Rawls is committed to two theories of justice. The hypothetical theory does not need a theory of desert. The instantiation of the theory, as found in institutions, does require a working conception of desert.

Justice as Fairness: Introduction

In *A Theory of Justice*, John Rawls argues that justice is to be understood in terms of fairness. According to Rawls, a just society will be a society which is based upon principles. The principles are the best formulation of a social system which is not based upon personal interests or specific moral doctrines. Rawls gives two principles of justice which he argues are sufficient to make any society a just society. These two principles are to serve as the framework for the construction and reformation of institutions.

Rawls argues that the two principles of justice are sufficient for a just society. Included in Rawls' overall theory is a notion of institutional desert. An institutional theory of desert says that people are entitled to goods in accordance with the rules of institutions. An institutional theory of desert, such as Rawls', is designed to show how just social institutions distribute goods without taking into consideration the overall moral character of individuals.

For Rawls, the principles of justice as fairness and the organization of an institutional theory of desert make a society just. However, this formulation of a theory of justice is not completely sufficient. Rawls claims that the two principles of justice as fairness will be chosen by people in a social contract setting where all people do not know the specifics of their own or other's situations. People in this hypothetical situation will choose principles which are based upon a strong notion of equality. But since the people in the hypothetical situation are not real people with specific needs, it is problematic to say that these principles apply to real life societies and institutions.

People in actual situations are more likely to include personal interests in their decision making processes. It is questionable if the principles of justice as fairness can be used to address the more complex problems of actual societies.

This paper will do three main things. The first is to discuss Rawls' hypothetical theory of justice as fairness. The hypothetical theory, which Rawls' calls "formal justice," is based upon his discussion of the "original position" which serves as a foundation for the theory as a whole. The essential components of the theory of formal justice will be used to show how Rawls' hypothetical theory of justice as fairness is based upon a strong notion of equality.

The second part of this paper will discuss Rawls' theory of institutions. Rawls' theory of institutions shows how the principles of justice from the hypothetical structure are supposed to work in real life situations. Thus, the structure of both hypothetical institutions and more concrete institutions will be examined. By examining Rawls' theory of institutions, it will be shown that Rawls has another conception of justice as fairness. In the hypothetical situation, justice as fairness is best understood in terms of equality. Rawls is aware that in real life situations, people are not equal. Rawls' theory of institutions will show how Rawls addresses the issues of social inequalities. Rawls' discussion of institutions will show that he is committed to a different conception of justice as fairness.

The purpose of this paper is to argue that Rawls' theory of justice as fairness is actually two theories. In order to strengthen this claim, the issue of moral desert will be used to show how Rawls' two theories operate on different notions of desert. In the

hypothetical situation, desert is an easily ignorable problem; all people in the original position are devoid of any specific characteristics. People who do not know anything about themselves will be unable to make claims about what it is that they deserve.

Rawls' theory of institutions attempts to replace the issue of moral desert with socially legitimate expectations. These expectations are both provided by and dictated by the rules of institutions. What is fair in an hypothetical situation is not necessarily what is fair in an actual social institution.

By examining Rawls' theory of justice as fairness in regard to the issue of desert, it will be possible to show that Rawls is giving us two theories of justice as fairness. It should be noted that these two theories are not contrary nor contradictory. The two theories address two different scenarios and offer different conceptions about what constitutes fairness.

Justice as Fairness: Formal Justice

In a *Theory of Justice*, John Rawls gives a theory of justice where justice is to be considered in terms of fairness. The first part of the work is based upon Rawls' notions of formal justice. Formal justice is the purely hypothetical formulation of principles of justice which is meant to serve as a foundation for Rawls' latter claims. According to Rawls, formal justice can be found in an hypothetical social contract which Rawls calls "the original position." Rawls structures the original position in order to show how justice will be understood in terms of fairness. In formal justice, all hypothetical individuals will be more or less equal due to the restrictions Rawls places upon people in the original position.

Rawls' theory of justice as fairness is based upon a social contract theory. According to Rawls, a social contract is useful for discussing justice because a social contract lends itself to the formulation of principles of justice. Within any society, there will be different competing definitions of justice. Rawls' solution to this problem is to define social justice in terms of general principles. Principles of justice will be much broader in scope than specific definitions of justice. Principles will be much more readily agreed upon by people than specific definitions of justice. Rawls says, "these principles are to regulate all further agreement; they specify the kinds of social cooperation that can be entered into and the forms of government that can be established."¹ Justice constituted by principles will serve two functions. The first

¹ *A Theory of Justice*. The Belknap Press of Harvard University Press. Cambridge, MA. 1971. Pg. 9.

function is that it will provide a framework which can be more or less agreed upon by all members of society. The second function of a principle is that it outlines a code of moral conduct which does not need to be governed by specifics.

Rawls argues that principles of justice will be agreed upon in an hypothetical social contract which Rawls calls “the original position.” Rawls says:

thus we are to imagine that those who engage in social cooperation choose together, in one joint act, the principles which are to assign basic rights and duties and to determine the division of social benefits. Men are to decide in advance how they are to regulate their claims against one another and what is to be the foundation charter of their society. Just as each person must decide by rational reflection what constitutes his good, that is, the system of ends which it is rational for him to pursue, so a group of persons must decide once and for all what is to count among them as just and unjust.²

The original position is the hypothetical situation where people will agree upon principles of justice. There are two provisions which Rawls argues must be obtained for people in the original position to decide upon principles of justice as fairness. The first of these is that each person must be rationally capable of making decisions concerning what constitutes what is just and unjust. The second is that these rational people will be able to agree in advance on how society is to be structured. The reason Rawls gives these two criteria is that if a theory of justice as fairness is to work, it must be based upon principles which will be agreed upon by rational persons. If justice is understood in terms of principles, the people within society must make the agreement as autonomous beings.

² Ibid., Pgs. 11-12.

When autonomous rational people enter into a just agreement, as in the case of the original position, a great emphasis will be placed upon equality. In the original position, equality and fairness will appear according to the formulation of the principles. The original position is an hypothetical situation which does not need to correspond with any actual event, past or present. Rawls says:

among the essential features of this situation is that no one knows his place in society, his class position or social status, nor does any one know his fortune in the distribution of natural assets and abilities, his intelligence, strength and the like. I shall even assume that the parties do not know their conception of the good or their special psychological propensities. The principles of justice are chosen behind a veil of ignorance.³

People in the original position do not know specific details about themselves and others.

The principles of justice they will adopt will be ones which are based upon a definition of fairness that has its foundations in a strong, universal definition of equality. According to Rawls, the removal of all specific characteristics of people in the original position removes some of the problems which result when first person interests are the basis of decision making processes. If, as in the case of the original position, all people are autonomous, rational, and devoid of any individuating characteristics, this society will think of justice in terms of equality and fairness.

People in Rawls' original position will choose principles of justice according to strong notions of equality. Rawls says, "since all are similarly situated and no one is able to design principles to favor his particular condition, the principles of justice are the result of a fair agreement or bargain."⁴ Principles of justice are the foundation for what

³ Ibid., Pg. 12.

⁴ Ibid., Pg. 12.

Rawls says constitutes fairness. Principles chosen in the original position will be fair because the principles will allow for each person to receive his “fair share.” No one will have a greater advantage than any other person. No one has more influence over the others and no one can consider special interests. The rational people in the original position will not know more than is necessary in order to make decisions about what will be accepted as just.

According to Rawls, the term “justice as fairness” comes from examining the agreements made by individuals in the original position. Rawls says, “the original position is, one might say, the appropriate status quo, and thus the fundamental agreements reached in it are fair.”⁵ Principles of justice are based upon agreements made in the original position. The structure of the original position guarantees that decisions will be made so that the structure of a just society will be fair.

Rawls argues that people in the original position will not necessarily choose one principle of justice, such as the principle of general utility. Rather, people in the original situation will choose two separate principles of justice.⁶ Rawls says:

I shall maintain, instead, that the persons in the initial situation would choose two rather different principles: the first requires equality in the assignment of basic rights and duties, while the second holds that social and economic inequalities, for example inequalities of wealth and authority, are just only if they result in compensating benefits for everyone, and in particular for the least advantaged members of society.⁷

By choosing two separate principles, people in the original position will be able to claim

⁵ Ibid., Pg. 12.

⁶ Instead of choosing only one principle, such as the principle of average utility, rational people in the original position will choose two principles in order to not allow personal interests to interfere with the benefits of society as a whole.

⁷ *A Theory of Justice*. Pgs. 14-15.

that a just society is one where individual rights and liberties are protected despite social and economic inequalities. Rawls believes that the formulation of the two principles of justice as fairness will allow a just society to remain fair despite unavoidable inequalities in the overall social structure.

The Two Principles

Rawls argues that the people in the hypothetical original position will agree upon two principles of justice. Rawls gives two versions of the two principles. While the second formulation is more specific in nature, Rawls' first formulation will be sufficient for this discussion.⁸ Rawls says:

the first statement of the two principles reads as follows.

First: each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others.

Second: social and economic inequalities are to be arranged so that they are both (a) reasonably expected to be to everyone's advantage, and (b) attached to positions and offices open to all.⁹

Rawls says that the first principle is to take priority over the second. According to Rawls, in order for a society to be just, individual liberties must be protected for all members of society. By protecting individual liberties it is possible to say that all members of society are more or less equal. Rawls says that the first principle is prior to the second. The second principle deals primarily with social and economic differences which will be part of any society.

⁸ The second formulation of the principles of justice as fairness appears on pages 302-303.

⁹ Ibid., Pg. 60.

Rawls says, “by way of general comment, these principles primarily apply, as I have said, to the basic structure of society.”¹⁰ Rawls argues that the two principles of justice as fairness will be sufficient to create a society which is just. There are several reasons for this. The first is that people in the hypothetical original position will choose these principles by way of agreement. These two principles define what Rawls means by “justice as fairness.” As in the case of the original position, all persons behind the veil of ignorance are equal because they are ignorant of any knowledge of individual particulars. Rawls is aware that within any society, people will not be completely unaware of their social standing and economic wealth.

The second reason Rawls says the two principles of justice as fairness are sufficient is that they are the basis for the structure and regulation of just institutions.¹¹ According to Rawls, society is composed of institutions. It is through institutions which people govern themselves and distribute goods and wealth. The two principles of justice are to be used to both create just institutions and to make necessary changes in institutions which do not adhere to the two principles.

The two principles themselves apply to different parts of society. Rawls says:

as their formulation suggests, these principles presuppose that the social structure can be divided into two more or less distinct parts, the first principle applying to the one, the second to the other. They distinguish between the two aspects of the social system that define and secure the equal liberties of citizenship and those that specify and establish social and economic inequalities.¹²

¹⁰ Ibid., Pg. 61.

¹¹ A more complete discussion of justice and institutions will be the focus of the second chapter of this work.

¹² Ibid., Pg. 61.

According to Rawls, it is not necessary for all persons to have the same social and economic advantages. If an inequality does exist it must not further disadvantage the least well-off. Also, an inequality in the social structure must be to everyone's advantage.

Rawls says, "the second principle applies, in the first approximation, to the distribution of income and wealth and to the design of organizations that make use of differences in authority and responsibility, or chains of command."¹³ According to Rawls, a completely equal distribution of wealth--all people having exactly the same amount of wealth--is unnecessary. A completely equal distribution of wealth is impossible in any society. What is necessary, according to Rawls, is that all social positions be open to all.

Rawls says:

these principles are to be arranged in a serial order with the first principle prior to the second. This ordering means that a departure from the institutions of equal liberty required by the first principle cannot be justified by, or compensated for, by greater social and economic advantages. The distribution of wealth and income, and the hierarchies of authority, must be consistent with both the liberties of equal citizenship and equal opportunity.¹⁴

The ordering of the principles is designed to ensure that basic rights and liberties cannot be undermined in the service of social and economic distributions. Economic inequalities are just if and only if they do not make the least well-off even more

¹³ Ibid., Pg. 61.

¹⁴ Ibid., Pg. 61.

disenfranchised. Also, unequal distribution of wealth cannot compromise the basic rights and liberties of any group of citizens.

According to the two principles of justice as fairness, Rawls gives another conception of justice. Rawls says, “all social values--liberty and opportunity, income and wealth, and the bases of self-respect--are to be distributed equally unless an unequal distribution of any, or all, of these values is to everyone’s advantage.”¹⁵ It follows from this formulation of the theory of justice as fairness that society is both just and fair only if inequalities can be shown to be for the benefit of all citizens. If an inequality can be shown to be for the overall benefit of all citizens, then the society at large can still be said to be fair. According to the theory of justice as fairness, all that is necessary for a society to be considered fair is that basic rights and liberties are to be protected and resources distributed in accordance with the two principles of justice as fairness.

According to Rawls, there is an important reason for creating an hypothetical social structure, such as the original position, for defining justice. In this hypothetical structure all persons will be equal. Basic liberties and goods are the things which all people will want in the original position. For this reason, basic liberties are equally protected even when goods are unequally distributed. Rawls gives an example of this distribution, saying:

imagine, then, a hypothetical initial arrangement in which all the social primary goods are equally distributed: everyone has similar rights and duties, and income and wealth are evenly shared. This state of affairs provides a benchmark for judging improvements. If certain inequalities of wealth and organizational powers would make everyone better off than in this hypothetical starting situation, then

¹⁵ Ibid., Pg. 62.

they accord with the general conception.¹⁶

According to Rawls, an hypothetical model can be used for assessing whether or not a society is just. If a society adheres to the two principles of justice as fairness in a similar fashion to the society of the original position, the society can be said to be just. If it is the case that the society is not structured in accordance with the two principles, it is the case that the society can use the two principles in order to make necessary corrections.

Another important component of the two principles of justice as fairness is the ordering. Rawls says that the general conception of justice as fairness does not disallow a situation where people give up basic rights and liberties for greater economic or political advantages. According to Rawls, the ordering of the two principles of justice does not allow for this situation. Rawls says:

imagine instead that men forego certain political rights when the economic returns are significant and their capacity to influence the course of policy by the exercise of these rights would be marginal in any case. It is this kind of exchange which the two principles as stated rule out; being arranged in serial order they do not permit exchanges between basic liberties and economic and social gains. The serial ordering of principles expresses an underlying preference among primary social goods. When this preference is rational so likewise is the choice of these principles in this order.¹⁷

The two principles of justice as fairness are structured so that basic rights and liberties are more important than economic gains. For Rawls, to protect rights and liberties above social gains is the fundamental way to ensure that a society is just. If individual rights and liberties are the main interest of institutions, inequalities in economic and social status can be more or less justified. For Rawls, individual rights and liberties are all that

¹⁶ Ibid., Pg. 62.

¹⁷ Ibid., Pg. 63.

needs to be equal in society for a society to be considered just. The second principle, while addressing a wider range of social institutions, is secondary to the first. Rawls is aware that within any society, different people will have different economic and social advantages. Due to the ordering of the two principles of justice as fairness, economic advantages cannot take precedence over individual liberties.

Social Positions

According to Rawls, the two principles of justice as fairness apply to society at large. Just institutions will be structured in accordance with the two principles of justice as fairness. Similarly, the two principles apply to people in relevant social situations. Rawls says, “another thing to bear in mind is that when principles mention persons, or require that everyone gain from an inequality, the reference is to representative persons holding the various social positions, or offices, or whatever, established by the basic structure.”¹⁸ According to Rawls, people in the original position are best understood as nameless and not specific individuals. Under Rawls’ formulation of the original position the assignment of rights and duties in an institution of any sort is the assignment of rights and duties to various positions within the social structure. Rawls says that in different institutions, there will be different expectations of different persons. A fluctuation of expectations and responsibilities is an inevitable consequence of alterations and changes in the overall framework of the institution.

Rawls argues that, in order for justice to be present in a society, it must be present in institutions. These institutions are created and governed by agreement of members. In

¹⁸ Ibid., Pg. 64.

order for all members of an institution to be more or less equal, individual freedoms and liberties need to be protected in accordance with the first principle. Rawls says:

now the second principle insists that each person benefit from permissible inequalities in the basic structure. This means that it must be reasonable for each relevant representative man defined by this structure, when he views it as a going concern, to prefer his prospects with the inequality to his prospects without it. One is not allowed to justify differences in income or organizational powers on the ground that the disadvantages of those in one position are outweighed by the greater advantages of those in another. Much less can infringement of liberty be counterbalanced in this way.¹⁹

According to Rawls, economic inequalities are to be considered at least permissible when people can agree that the inequality is, in some way, to their benefit. Rawls says that economic inequalities are permissible if it can be shown that it is better that the inequality to exist than not in this sense. In theory, an inequality in the economic structure of a society can be considered beneficial. If it can be shown that the economic inequality is beneficial to everyone, and that basic rights and liberties are not infringed by the inequality, the economic inequality can be seen as beneficial to the society as a whole.

By stating that the definition of persons in the hypothetical, formal theory of justice as fairness applies to multiple social institutions, it is possible for Rawls to claim that the basic formulation of the theory justice as fairness can go beyond the original position and that it can be shown how the theory applies to more concrete social settings.

The Veil of Ignorance

There is one other aspect of Rawls' theory of formal justice as fairness which needs to be discussed. This component is the veil of ignorance. Rawls says:

¹⁹ Ibid., Pgs. 64-65.

somehow we must nullify the effects of specific contingencies which put men at odds and tempt them to exploit social and natural circumstances to their own advantage. Now in order to do this I assume that the parties are situated behind a veil of ignorance. They do not know how the various alternatives will affect their own particular case and they are obliged to evaluate principles solely on the basis of general considerations.²⁰

According to Rawls, people in the original position naturally fall behind the veil of ignorance. People in the original position do not know the specifics of their and other's social circumstances. The lack of knowledge of individual specifics is what Rawls calls "the veil of ignorance" The veil of ignorance is a necessary component of the stipulations which Rawls' places on the knowledge of persons in the original position.

One reason for Rawls' proposing the veil of ignorance is that he wants people in the original position to agree upon principles of justice rather than a specific definition of justice which may be either too broad or too narrow to establish a contractual society which is fair. If any special contingencies are allowed in the decision making process, it may be the case that the society will be formed around specific needs and interests instead of principles of justice. Rawls says, "as far as possible, then, the only particular facts which the parties know is that their society is subject to the circumstances of justice and whatever this implies. It is taken for granted, however, that they know general facts about human society."²¹ Any sort of general information about human society--political theory, economic theory, psychology and sociology--is known by people in the original position. Rawls says that in order for society to incorporate a theory of justice, the

²⁰ Ibid., Pg. 137. The argument in the next section appears latter in the text. It is being used here because this formulation of the veil of ignorance is the most sequentially complete formulation in the text.

²¹ Ibid., Pg. 137.

principles of justice must be such that men will adhere to them. The principles of justice as fairness are principles which persons situated behind the veil of ignorance would most likely agree upon.

Rawls is aware that the veil of ignorance may be problematic. Rawls says:

some may object that the exclusion of nearly all particular information makes it difficult to grasp what is meant by the original position. Thus it may be helpful to observe that one or more persons can at any time enter this position, or perhaps, better, simulate the deliberations of the hypothetical situation, simply by reasoning in accordance with the appropriate restrictions.²²

The original position and the veil of ignorance is an hypothetical situation. It is not necessary that the original position ever historically existed. The original position is meant as a device upon which the principles of justice are to be found.

According to Rawls, the original position and the veil of ignorance have an important consequence. Rawls says, “no one knows his situation in society nor his natural assets, and therefore no one is in a position to tailor principles to his advantage.”²³ In the original position, there is not a typical sort of bargaining game. In a typical bargaining game, persons with different interests negotiate with others to both get what they want and what other people want. These interests are based upon individual specific circumstances. In a normal bargaining game, people negotiate based upon the specifics of their situations. In the original position, however, no specifics are known. People in the original position are forced to negotiate and reach agreements based on general knowledge and principles which are agreed upon.

²² Ibid., Pg. 138.

²³ Ibid., Pg. 140.

For these reasons, the restrictions of the veil of ignorance and the original position show how Rawls is able to make his formulations of justice based upon principles.

Rawls says:

the restrictions on particular information in the original position are, then, of fundamental importance. Without them we would not be able to work out any definite theory of justice at all. We would have to be content with a vague formula stating that justice is what would be agreed to without being able to say much, if anything, about the substance of the agreement itself.²⁴

Rawls' theory of justice as fairness is one which is a theory about people agreeing on principles. These principles are, for Rawls, what defines a just society. The two principles of justice as fairness will not be agreed upon by persons who are not functioning in some sort of social vacuum; knowledge of particulars will create a completely different notion of justice. Rawls' theory of justice as fairness is based upon a notion of negotiation which is based upon principles and generalizations. The theory of justice as fairness is meant to be as general as possible in order to give a definition of justice which can be utilized by as many different persons as possible.

Rawls says, "now the reasons for the veil of ignorance go beyond mere simplicity. We want to define the original position so that we get the desired solution. If a knowledge of particulars is allowed, then the outcome is biased by arbitrary contingencies."²⁵ Rawls says that if specific contingencies are allowed into the decision making process, a theory of justice will be based upon personal interests and not on the

²⁴ Ibid., Pg. 140.

²⁵ Ibid., Pg. 140.

two principles of justice. According to Rawls, the theory of justice as fairness is the best theory of justice because it is not based upon personal interests.

Justice as Equality

To summarize, Rawls' theory of formal justice is based upon an hypothetical situation known as "the original position." Persons in the original position are unaware of specific personal considerations and interests. They find themselves behind a veil of ignorance. Persons in the original position will construct a theory of justice which is not based upon personal interests. Under these restrictions, people will agree to principles of justice which address different aspects of social life. The first principle governs the protections of rights and duties so that individual liberties are equal to all citizens. The second principle concerns economics and the possibility for people to hold various social positions. According to the second principle, inequalities in economics and social position are permissible provided that individual liberties are not compromised, the inequality can be shown to be to everyone's advantage.

The formulation of formal justice as fairness is one which is based upon a strong notion of equality. Inequalities, particularly in the economic sphere of society, are a necessary consequence. However, no such inequalities can compromise individual liberties even if the people in a society agree that a compromise of liberty will be advantageous to everyone's economic well being. This notion of equal liberty is the foundation for Rawls' overall theory.

The second chapter will be an examination of Rawls' theory of just institutions. Rawls' overall theory of justice as fairness is a theory of distributive justice. However,

Rawls' theory of formal justice serves as the foundation for his overall theory. Upon further examination of Rawls' theory of just institutions the inequalities which are permitted by the second principle of justice will be shown to require that Rawls' has two different notions of what constitutes fairness. The first one is found in the original position. The first conception of fairness is based upon a strong notion of equality. Because people in the original position do not know the specifics of themselves and society at large, it naturally follows that their notion of fairness is based upon a strong or naïve notion of equality. However, a just distribution according to the rules of institutions cannot claim to hold to the strong notion of equality. Individual interests are part of the distributional aspect of social institutions. The second theory of justice as fairness is one which claims that society is just if the distribution of goods is "as fair as possible."

Justice as Fairness: Institutions

Rawls' theory of justice as fairness can be divided into two different theories. The first of these is the hypothetical structure which is called formal justice. Formal justice is based upon an hypothetical social contract called the original position. In the original position, all persons will agree on two principles of justice which will serve as the basic structure for society. According to Rawls, these two principles of justice can serve as a model or list of criteria to determine if a society is just or unjust. Rawls says that these principles will determine if a society is just or not on the basis of whether the institutions in the society adhere to the principles of justice. The second theory of justice as fairness is known as distributive justice. Distributive justice concerns institutions in a society. According to Rawls, if an institutions adheres to the principles of justice as fairness, it will be a just institution. The most important way to determine if an institution is just is if it distributes goods in accordance with the second principle of justice.

This chapter will do several things. The first is to explain Rawls' notion of what constitutes a just institution. This portion of the paper will be based upon Rawls' discussion of hypothetical institutions. The second issue will be to explain how Rawls' notions of an hypothetical, just institution apply to his theory of actual institutions. The third part of this section will show how Rawls' definition of justice as fairness is not the same for the original position and his theory of more concrete institutions.

In the framework of Rawls' theory of justice as fairness, institutions are considered the central focus. Rawls says that the principles of formal justice apply to institutions. Rawls says:

we have seen that these principles are to govern the assignment of rights and duties in these institutions and they are to determine the appropriate distribution of the benefits and burdens of social life. The principles of justice for institutions must not be confused with the principles which apply to individuals and their actions in particular circumstances.²⁶

Rawls says that the two principles of justice as fairness apply to institutions. One way in which the principles apply to institutions is that the principles are meant as a model to create a society with a just structure. The principles serve as a guide for creating institutions.

Rawls defines an institution as a public system of rules which has various offices and goals. These rules define what is permissible and what is not. The rules of an institution also govern what the institution does and what its members are responsible to do. According to Rawls, there are two possible notions of an institution. The first of these is that of an abstract object. The second is that of the abstract object established or concretized in a society. Rawls says, "it seems best to say that it is the institution as realized and effectively and impartially administered which is just or unjust. The institution as an abstract object is just or unjust in the sense that any realization of it would be just or unjust."²⁷ Rawls is concerned primarily with actual institutions. According to Rawls, it is actual institutions to which the two principles of justice apply.

²⁶ Ibid., Pg. 54.

²⁷ Ibid., Pg. 55.

Rawls says:

in saying that an institution, and therefore the basic structure of society, is a public system of rules, I mean then that everyone engaged in it knows what he would know if these rules and his participation in the activity they define were the result of an agreement. A person taking part in an institution knows what the rules demand of him and others. He also knows that the others know this and that they know that he knows this, and so on.²⁸

The rules of conduct for members of an institution are public. This aspect of Rawls' theory of just institutions is meant to insure that people involved in the institution are accountable for their actions. If the rules of the institution are public, all persons involved will be responsible for acting in certain ways.

Rawls says that it is also possible to make the distinction between the rules of an institution and the rules of society at large. According to Rawls, it is conceivably the case that one or more rules of an institution be unjust and the institution as a whole be just. Also, an institution itself may be unjust while society at large is just. Rawls says, "there is the possibility not only that single rules and institutions are not by themselves sufficiently important but that within the structure of an institution or social system one apparent injustice compensates for another. The whole is less unjust than it would be if it contained but one of the unjust parts."²⁹ According to Rawls, if one unjust rule or institution exists in a social structure, it need not be the case that the entire system is unjust. This aspect of Rawls' theory of formal institutions is important because Rawls says that the principles of justice can be used to make changes in an institution to make it

²⁸ Ibid., Pg. 56.

²⁹ Ibid., Pg. 57.

more just. An institution may become more just if legislators make changes to the rules of the institution which bring the rules closer to the two principles of justice.

To further explain how justice exists in society, Rawls gives an hypothetical scenario. Rawls says:

now let us suppose a certain basic structure to exist. Its rules satisfy a certain conception of justice. We may not ourselves accept its principles; we may even find them odious or unjust. But they are principles of justice in the sense that for this system they assume the role of justice: they provide an assignment of fundamental rights and duties and they determine the division of advantages from social cooperation.³⁰

According to Rawls if a social structure exists and administrative individuals such as judges or legislators agree to it and the overall system of rules is adhered to, then the society is just. The general concept of justice only demands that all persons come to an agreement about what is just and what is not. Thus, they have “a system of justice.” If there are people inside or outside of the society that disagree with the overall system, this disagreement does not make the society unjust.

Rawls explains this point further by saying, “if we think of justice as always expressing a kind of equality, then formal justice requires that in their administration laws and institutions should apply equally (that is, in the same way) to those belonging to the classes defined by them.”³¹ This is Rawls’ definition of formal justice. Rawls defines formal justice as the instantiation of the two principles of justice as fairness. These principles apply to everyone in the same way. According to Rawls, the consistency of rules, just or unjust, is more important than the rules being just.

³⁰ Ibid., Pg. 58.

³¹ Ibid., Pg. 58.

Rawls says:

moreover, even where laws and institutions are unjust, it is better that they should be consistently applied. In this way those subject at least know what is demanded and they can try to protect themselves accordingly; whereas there is even greater injustice if those already disadvantaged are also arbitrarily treated in particular cases when the rules would give them some security.³²

Adherence to rules, just or unjust, is important because obedience to rules is the best way for the individual to know what is expected of him.

The issue of obedience to rules, just or unjust, is a complicated issue. Rawls says, “in general, all that can be said is that the strength of the claims of formal justice, of obedience to system, clearly depends upon the substantive justice of institutions and the possibilities of their reform.”³³ According to Rawls, if the institutions of a society are based upon principles similar to the two principles of justice as fairness, the society has the possibility to reform unjust rules and institutions without compromising the integrity of the social structure as a whole. If the system of rules, or charter of an institution, is just, obedience to the system will be just.

According to Rawls’ theory of formal justice, examination of institutions is the central way to determine if a society is just. The theory of formal justice is the foundation for Rawls’ discussion of distributive justice. By comparing formal justice and institutional distribution of goods, the second version of Rawls’ theory of justice as fairness will be identified.

³² Ibid., Pg. 59.

³³ Ibid., Pg. 59.

Distributive Justice and Institutions

Rawls says that the principles of justice as fairness are to be understood as the framework for a society. Concerning how the two principles apply to society at large,

Rawls says:

it is a conception for ranking social forms viewed as closed systems. Some decisions concerning these background arrangements is fundamental and cannot be avoided. In fact, the cumulative effect of social and economic legislation is to specify the basic structure. Moreover, the social system shapes the wants and aspirations that its citizens come to have. It determines in part the sort of persons they want to be as well as the sort of persons they are. Thus an economic system is not only an institutional device for satisfying existing wants and needs but a way of creating and fashioning wants in the future.³⁴

Rawls says that economic systems are to be viewed as a central component to the overall structure of society. The economic structure of society deals with relevant wants and needs of a society. For this reason, the instantiation of Rawls' theory must in some way include conceptions of relevant economic and political goals and standards. The second principle of justice as fairness is meant to address this issue.

According to Rawls, there is an educational aspect of a just institution. Rawls says:

a just system must generate its own support. This means that it must be arranged so as to bring about in its members the corresponding sense of justice, an effective desire to act in accordance with its rules for reasons of justice. Thus the requirement of stability and the criterion of discouraging desires that conflict with the principles of justice put further constraints on institutions. They must be not only just but framed so as to encourage the virtue of justice in those who take part in them. In this sense, the principles of justice defines a partial ideal

³⁴ Ibid., Pg. 259.

of the person which social and economic arrangements must respect.³⁵

According to Rawls, if a person obeys the rules of a just institution, his behavior will be more or less virtuous. Obedience to the rules of a just institution instill in an individual the correct behaviors.

According to the principles of justice as fairness, derived from the formal institutions and the original position, it is often the case that various people in a society will have to disregard personal interests if they are in conflict with the stability and structure of society as a whole. This, however, does not mean that at any given time society should be reformed because various individuals claim that their personal interests are not met. Rather, it is a necessary component of society that the precepts of justice be maintained. In order to do this, a social institution must both meet legitimate needs and wants of citizens and define what a citizen is to need and want. All that is necessary for this situation to be acceptable is that the institutions of society adhere to the two principles of justice as fairness.

The instantiation of Rawls' theory is found in the working of institutions designed to address contingencies in the structure of society. According to Rawls, it is the purpose of institutions to allocate and distribute resources. Rawls says that in order for the distribution of goods to be just, the structure of institutions must be founded on the two principles of justice. While specific circumstances will vary depending on the institution and the society at large, the distribution of goods must be done in accordance with the two principles of justice in order to maintain fairness in society.

³⁵ Ibid, Pg. 261.

Regarding the potential for the change in a person's social status, Rawls makes the distinction between fair and formal equal opportunity. Rawls says:

the political process is conducted, as far as circumstances permit, as a just procedure for choosing between governments and for enacting just legislation. I assume also that there is fair (as opposed to formal) equality of opportunity. This means that in addition to maintaining the usual kinds of social overhead capital, the government tries to insure equal chances of education and culture of person similarly endowed and motivated either by subsidizing private schools or by establishing a public school system. It also enforces and underwrites equality of opportunity in economic activities and in the free choice of occupation. This is achieved by policing the conduct of firms and private associations and by preventing the establishment of monopolistic restrictions and barriers to the more desirable positions.³⁶

Rawls is aware that in a society there will be inequalities of social and economic positions. In accordance with the first principle of justice as fairness, which states that a society is just if it upholds and protects basic liberties, a society will have a just distributional scheme if it allows for fair equal opportunity for all citizens. Rawls makes a distinction between fair equal opportunity and formal equal opportunity. Fair equal opportunity means that all citizens have the hypothetical potential to change their economic and social status by just means. Fair equal opportunity does not necessarily have to be actualized in society. It only means that citizens have the potential for advancement. Formal equal opportunity means that all citizens do, in fact, have the same degree of opportunity. Rawls says that in order for a society to be just, it is necessary only that all persons have fair equal opportunity.

³⁶ Ibid, Pg. 275.

According to Rawls, the responsibility of just distribution is divided among four different branches of government.³⁷ These branches of government form what Rawls calls “background institutions of distributive justice.” These branches are formed to create a just distribution of goods and service. Rawls says, “it is clear that the justice of distributive shares depends on the background institutions and how they allocate total income, wages, and other income plus transfers.”³⁸ The background institutions of distributive justice are to be designed to provide a fair distribution of goods. While it is unnecessary and impossible that all people have the same amount of wealth, it is necessary that the economic position of all people is arranged in a way which is fair. The inequalities of any economic system are to be considered just if wealth is distributed so that the least well-off are not made worse off. Rawls says, “whether the principles of justice are satisfied, then, turns on whether total income of the least advantaged (wages plus transfers) is such as to maximize their long-run expectations (consistent with the constraints of equal liberty and fair equality of opportunity).”³⁹ All that is necessary to insure that the overall social system is just is that the distribution of wealth should not be at the expense of those who have the least. By protecting the base needs of the least well-off, Rawls says that society will be just.

Rawls says, “so far I have assumed that the aim of the branches of government is to establish a democratic regime in which land and capital are widely though not presumably equally held. Society is not so divided that one fairly small sector controls

³⁷ The discussion of the four branches can be found on pages 275-280. Since this paper is concerned only with Rawls’ overall theory, a discussion of the specific nature of the four branches is unnecessary.

³⁸ Ibid., Pg. 277.

³⁹ Ibid., Pg. 277.

the preponderance of productive resources.”⁴⁰ The institutions are to be arranged so that economic wealth, including property, is not owned by only the most wealthy members of society. Rawls understands that one way to insure that the least well-off are not made worse off is to allow them to own property and their own means to make money. According to Rawls, while it is impossible that all persons have the same wealth, it is possible to insure that distribution of wealth enables all people to meet their basic needs.

According to Rawls, the two principles of justice as fairness does not say whether a capitalist or a socialist regime is better. It is the case that either a capitalist or a socialist government will be able to meet the criteria of the two principles of justice as fairness. As in the case of a capitalist society, fluctuations in the market which require different distributions of wealth can be considered just if the institutions adhere to the two principles. Rawls says, “to be sure a competitive scheme is impersonal and automatic in the details of its operation; its particular results do not express the conscious decision of individuals. But in many respects this is a virtue of the arrangement; and the use of the market system does not imply a lack of reasonable human autonomy.”⁴¹ In a capitalist society, the economy of a competitive market is just in so far as the background institutions of just distribution regulate changes in market value so as not to further impede upon the least well-off. It may be the case that in order to protect the least well-off, government regulatory institutions may focus attention on the price of goods and services. By doing so, it may be possible for the society to protect the least well-off without limiting the overall profit of competitive pricing. If goods and service which are

⁴⁰ Ibid., Pg. 280.

⁴¹ Ibid., Pg. 281.

essential to basic needs are made accessible to all, it is possible for the economic structure of society to be just.

Rawls also argues that the theory of justice as fairness puts limits on benevolence and altruistic motivation. Rawls says, “it supposes that individuals and groups will put forward competing claims, and while they are willing to act justly, they are not prepared to abandon their interests.”⁴² Rawls says that in order for justice to exist in society, it must come from agreement. For this reason, people are responsible for negotiating with one another to further personal goals and goals of society at large. If the agreements are made in accordance with the two principles of justice, the social agreements will be just.

Two Theories of Fairness

While Rawls bases his theory of institutions upon his theory of formal justice, there are a few reasons why he appears to be committed to two different theories. The first of these is that in formal justice, particularly the original position, all people are equal since they do not know the specifics about their situation and personal interests. According to the theory of just institutions, people are aware of their social and economic situation. This means that they know of their respective interests. People know that they are not socially equal to one another. According to Rawls, knowledge of particulars is a necessary component of the theory of just institutions. The recognition of inequalities among citizens is also to be considered a positive thing. All that a theory of justice as fairness is responsible for doing is find at least one way in which all people will be more or less equal. Rawls’ solution to this is the first principle of justice as fairness which

⁴² Ibid., Pg. 281.

protects equal rights and liberties for all people. Rawls argues that the inequalities which appear in any society can be justified if the inequalities are social and economic in nature. Inequalities in the system are to be considered fair if the inequalities do not infringe upon the rights and liberties of the least well-off. Under the Rawlsian theories of justice as fairness, inequalities in institutions are necessary and fair.

It appears to be the case that Rawls has two conceptions of fairness. The first of these is found in the original position. The imaginary people in the original position are equal because they are not actual people. Rather, the people in the original position serve as a device for Rawls to show how it is possible for people to agree upon his two principles of justice. If, as in the case of the original position, all people know nothing about themselves, they will agree to a formulation of society which assumes that all people are, by nature, equal. They are equal in that it is possible for anyone to be the least well-off. Due to the restrictions Rawls places on people in the original position, they have no choice but to agree upon principles of justice which are based upon a strong notion of equality.

When Rawls moves into the more complex theory of just institutions it is impossible to hold onto the strong notion of equality which is the basis for the theory of formal justice. Rawls' theory of just institutions is aimed at actual institutions, not hypothetical ones. According to Rawls' theory, actual institutions are made up of actual people who perform various functions and obey specific rules. Actual people will be aware of their personal interests. They will be aware of the inequalities which exist in society. Even though it can be said that people in actual institutions will be able to agree

upon the two principles of justice, this agreement can only come from individuals who operate under some process similar to the veil of ignorance.

For Rawls, the inequalities in society do not nullify his theory of justice as fairness. However, fairness and a strong notion of equality cannot justify the structure of Rawlsian institutions. The institutions which Rawls describes operate under a weak definition of equality. This weak notion of equality only requires three things. The first is that basic rights and liberties are protected by just institutions. The second is that all people have fair equal opportunity to wealth and social positions. Fair equal opportunity does not mean that all people will have the same access to goods and services; fair equal opportunity only requires that it be possible that all people have the same opportunities. The third thing which the weak notion of equality demands is that any inequalities in the social structure do not further disenfranchise the least well-off.

According to Rawls, the weak notion of equality is sufficient for an actual society to be just. The weak notion of equality is, within Rawls' theory of justice and institutions, sufficient to declare a society fair. The weaker notion of equality can be considered to be similar to the phrase, "as fair as possible." Rawls is aware that actual societies can both be unequal in distribution of wealth and opportunities and still be as fair as possible. The two principles of justice as fairness are designed so that a just society will be one which is to be considered as fair as possible.

The two notions of equality, the strong and the weak, are not contradictory. The strong notion of equality argues that all people are mostly equal and any society which adheres to this notion of equality will be fair. The weak notion of equality says that all

that is necessary for things to be equal is that social positions and wealth be “as fair as possible.” Nor are the two notions of equality contrary. The weaker version of equality is best understood as an elaboration of the consequences of the second principle in actual institutions and society at large. The two notions of equality are best understood as part of two different theories of justice as fairness. All that Rawls requires for a society to be just is that it be as fair as possible.

There is a second concern about Rawls’ theory of justice as fairness which shows how Rawls is actually committed to two theories. Rawls theory of justice is one which has an institutional notion of desert. An institutional theory of desert has nothing to do with the moral character of the individual. In the next chapter, Rawls’ theory of justice as fairness will be shown to be one which does not adequately address the issue of desert. There are several reasons for the inadequate treatment of desert. The first is that the theory of justice as fairness is meant to allow for many conflicting notions of morality and human worth. For Rawls, a society will be a just society if it takes into consideration any possible accounts of morality so long as these considerations do not undermine the overall structure of the society as a whole. Individual claims to moral desert could conceivably compromise the overall structure of the society. The second reason for Rawls’ avoidance of the issue of desert is that the philosophical issue of desert is very problematic. Rawls is aware of this. Rawls claims that in his sense of justice it is the society at large, rather than specific individuals, which is just or unjust.

Justice as Fairness: Desert vs. Legitimate Expectations

The issue of moral desert is problematic. Rawls' theory of justice as fairness is a theory which is designed to create a theory which does not need to include a notion of desert. In the original position, moral desert is non-essential; people in the hypothetical original position are basically devoid of any knowledge of their specific circumstances. Without knowledge of specific contingencies, the distributional scheme of the original position is one which is based upon the strong notion of equality. All people will receive basically the same thing, namely, the protection of individual rights and liberties. The distribution of goods will be similar in principle; everyone will receive similar shares. Without any prior notion of individual specific characteristics, the protection of rights and liberties and a restriction on allowable inequalities for all citizens will be sufficient.

Rawls' theory of just institutions is more complicated. According to Rawls, the rules of institutions apply to all people in the same ways. People are expected to obey the rules of institutions. In return, institutions are supposed to distribute the goods of society in such a way that the distribution is for the benefit of all people. Rawls says that all that is necessary for a distributional scheme to be just is that any inequalities in the distribution cannot make the least well-off even worse off. If the distribution of goods is to everyone's advantage, this distribution is "as fair as possible."

The issue of moral desert calls into question Rawls' theory of institutions. In the original position, the question of moral desert can be avoided in favor of a just distributional scheme which is based upon ignorance of particulars. The original position

is a hypothetical framework which does not need to have ever existed. In actual institutions, which Rawls says that the theory of justice as fairness is supposed to address, the issue of desert needs to be addressed. Intuitively, a just social ordering will reward and punish individuals on the basis of moral actions. Rawls' solution to this is to provide an institutional theory of desert. According to Rawls, society does not need to be concerned with moral desert. For Rawls, a just institution will address the issue of "legitimate expectations." Legitimate expectations are similar to entitlements. Rawls' theory of institutions argues that people can say they are entitled to certain things. All people are entitled to these goods regardless of their overall moral character. Similarly, a just institution will distribute goods in such a way that does not take into consideration the overall moral character of the individual.

Initially, Rawls' distinction between moral desert and legitimate expectations seems sufficient to say that Rawls' theory of institutions does not need to include a theory of desert. This is not the case. There is a conception of institutional desert in Rawls' theory. While it may be possible to ignore the issue of desert in the original position, it is impossible to ignore it in actual institutions.

This section will do several things. The first is to show how Rawls' theory of the original position can function without a conception of desert. The second is to show how Rawls' theory of institutions does include a theory of legitimate expectations. The third is to show how legitimate expectations and desert are sufficiently similar enough to argue that they operate in the same way. This will be done by examining the work of George Sher and what he calls "desert-claims." Finally, if it can be argued that Rawls' theory of

institutions is committed to some form of desert and the original position can function without a notion of desert, it will be possible to conclude that Rawls actually has two theories of justice as fairness.

The Original Position Revisited

According to Rawls, the original position is designed to show how, in an ideal society, people will agree upon the two principles of justice as fairness. The hypothetical people in the original position do not have any knowledge of the particulars of their or any other persons positions. The hypothetical people are behind the veil of ignorance. Because the people in the original position are devoid of particular characteristics, they will choose to create social agreements in accordance with the two principles of justice. The first principle says that individual rights and liberties are to be equal for all citizens. The second principle says that social and economic inequalities are to be structured in ways which do not make the least well-off even worse off. These two principles are to serve as the foundation for a just society.

The two principles of justice as fairness do not include a notion of moral desert. According to Rawls, people often associate economic wealth and social position with the moral characteristics of the individual. Rawls rejects the problem of moral desert. Rawls says, “now justice as fairness rejects this conception. Such a principle would not be chosen in the original position. There seems to be no way of defining the requisite criterion in that situation. Moreover, the notion of distribution according to virtue fails to distinguish between moral desert and legitimate expectations.”⁴³ According to Rawls,

⁴³ Ibid., Pg. 310-311.

moral desert does not need to be included in a theory of justice. Particularly in the case of the original position, the two principles of justice as fairness are to be considered sufficient to create a society which does not take into account the moral character of specific individuals.

It is because people in the original position are devoid of any specific characteristics that Rawls can claim that there is no need for a theory of moral desert. The hypothetical people are essentially equal; no one can make claim to any sort of entitlements which are different than his fellows. For this reason, it is possible for Rawls to argue that the two principles of justice as fairness will be logically agreed upon. The first principle deals with the equal protection of rights and liberties which everyone can say they can expect. The second principle is to protect the least well-off in the original position because it is possibly the case that any person can become the least well-off. Rawls can argue that the two principles of justice as fairness do not need to address the issue of desert because people in the original position are morally the same, for all they know.

Rawls is correct in arguing that people in the original position do not need to take moral desert into consideration. It is because they lack specific characteristics that the two principles will be sufficient to construct a just and equal society. Moral desert only becomes a factor in society when, because of specific actions or characteristics, people can make claim to receive specific benefits. People in the original position can legitimately expect the same things.

Institutions and Legitimate Expectations

According to Rawls, it is institutions which determine what people are entitled to and not any conception of their overall moral character. Rawls argues that people participate in the rules and structures of institutions. These rules determine the purpose of the institution. For Rawls, obedience to the rules of an institution is how people can make legitimate claims for what they are to receive. Rawls says, “having done various things encouraged by the existing arrangements, they now have certain rights, and just distributive shares honor these claims. A just scheme, then, answers to what men are entitled to; it satisfies their legitimate expectations as founded upon social institutions.”⁴⁴ According to Rawls, a just distributional scheme as outlined by the rules of social institutions will sufficiently say what it is that people should receive. In order for the distribution to be just, all that is necessary is that it corresponds with the two principles. Moral desert is not a factor which determines who receives what or who should receive what. “Legitimate expectations” are a function of the rules of an institution.

Rawls says:

moreover, none of the precepts of justice aims at rewarding virtue. The premiums earned by scarce natural talents, for example, are to cover the costs of training and to encourage the efforts of learning, as well as to direct ability to where it best furthers the common interest. The distributive shares that result do not correlate with moral worth, since the initial endowment of natural assets and the contingencies of their growth and nurture in early life are arbitrary from a moral point of view. The precept which seems intuitively to come closest to rewarding moral desert is that of distribution according to effort, or perhaps better, conscientious effort.⁴⁵

⁴⁴ Ibid., Pg. 311.

⁴⁵ Ibid., Pg. 311-312.

Rawls argues that the theory of just institutions does not need to include a theory of moral desert. If moral desert is included as part of a principle of the structure of a just institution, moral desert will imply that there is some degree of moral character that is necessary for an individual to receive the benefits of society. The first principle of justice as fairness says that it is the responsibility of the society to protect all basic rights and liberties for all people. The protection of rights and liberties is to be done regardless of the moral characteristics of the individual. A principle based upon strong notions of moral desert will compromise the idea that all people are to have the same sorts of rights and liberties. Instead of the moral character of the individual serving as a guide for benefits and punishments, Rawls argues that it is better to use a notion of participation to decide who is to receive what. Rawls says that it is possible to reward people for obeying institutional rules depending on their overall participation in the society. An individual's participation will not necessarily be based upon the moral attributes of the person.

Rawls says, "in a well-ordered society individuals acquire claims to a share of the social product by doing certain things encouraged by the existing arrangements. Legitimate expectations that arise are the other side, so to speak, of the principle of fairness and the natural duty of justice."⁴⁶ The rules of a just institution will give credibility to claims made by members of society. If a person behaves in accordance with the rules of an institution, the rules of a just institution will be able to argue what it is the person can expect from others in the social arrangement. People will receive what the rules of the institution say they will receive. While the distribution of goods does not

⁴⁶ Ibid., Pg. 313.

necessarily have to be equal, economic goods will be distributed in such a way that the least well-off are not made worse off.

Rawls' theory of legitimate expectations is a form of argument usually used to support an "institutional theory of desert." As in the case of Rawls' theory of institutions, people are entitled to receive what an institution says that they will receive due to both behavior and the institutional rules of distribution. While Rawls' theory of just institutions does not include a theory of moral desert, it does say that people in a society can expect to receive certain things which institutions say they will receive. Similarly, people can make claims about what they are entitled to receive in accordance with institutional rules.

Rawls' distinction between moral desert and legitimate expectations does not rid his theory of institutions from some notion of entitlements. Rawls argues that it is a just distribution of shares which people can say they are entitled. The distribution of shares is different from the protection of basic equal liberties. The protection of liberties is an attempt to make all people more or less equal. The distribution of shares does not correspond to a strong notion of equality; the distribution of shares only means that social goods will be made available, or given, to the general population in accordance with the rules of institutions. Similarly, a just distributional scheme will take into consideration participation and obedience to rules as determining factors for the distribution of goods.

It appears to be the case that Rawls' theory of just institutions includes a theory of desert. Rawls is correct in saying that his theory of the original position does not need to take into consideration moral desert. However, Rawls' discussion of legitimate

expectations show that he is in some way committed to some conception of rewards and punishments. Rewards and punishments call into question the issue of desert. Rawls' theory of just institutions argues that people are entitled, in some way, to something. However, Rawls' notion of legitimate expectations is inadequate to fully capture what Sher calls "desert-claims."

Sher and Desert-Claims

Desert, by George Sher is one of the most complete philosophical works addressing the issue of desert. Sher argues that the issue of desert is often ignored in many ethical works. Sher's work is designed to address the complexities of the issue of desert and show how some conception of desert is a part of most ethical theories.

According to Sher, there are four main problems with the issue of desert. Sher says that the first problem is one which is often associated with retributive justice. Sher says that when someone does something wrong, desert seems to dictate that they be punished in some way. Similarly, if we reward someone, it is usually done because someone is said to deserve something. Sher says, "however, punishing people typically involves harming them, either by causing them pain or by depriving them of their freedom, property, or life. Harming people in these ways is not morally permissible."⁴⁷ Sher argues that it appears to be morally dubious to say that someone deserves to be harmed or punished because what he has done to someone else. Sher says that this aspect of desert is an example of the problem of the connection between desert and moral obligation. Many "desert-claims" say that if x does y , then z ought to happen. If desert-

⁴⁷ *Desert*. Princeton University Press. Princeton, New Jersey. 1987. Pg. 3-4.

claims are based upon obligations, it must be the case that other people are responsible for giving a person what is his due.

The second problem of desert-claims is that many of these assertions do not include any notion of obligation. Many desert-claims do not say who is responsible for doing something to a deserving agent. Sher says:

for, in many cases, what is striking about desert-claims is precisely that they do not imply anything about what particular persons ought to do. When we say that an especially hard-working self-employed farmer deserves to succeed, or that a person of fine moral character deserves to fare well, we typically do not mean that anyone is obligated to take steps to provide what is deserved.⁴⁸

According to Sher, many desert-claims are not structured in such a way as to say who is obligated to provide for the deserving agent. This seems contrary to many desert-claims. A typical desert-claim says that if x does y , z should happen to x . If there is no one who can or does give x what he deserves, it is questionable whether such desert-claims can be legitimate assertions. If there is no one who is responsible for giving someone what a desert-claim says he is entitled to, a desert-claim may just be an empty statement which carries no moral significance.

The third problem with desert is that many desert-claims are founded in the past. When we say that a hard worker deserves recognition or a criminal deserves punishment it is somewhat problematic. Sher says, “in all such cases, we imply that past actions or events bear directly on what ought to occur now or in the future. But this backward-looking orientation, though often noticed, is itself extremely puzzling. For why should

⁴⁸ Ibid., Pg. 5.

past acts or events function in this way?”⁴⁹ The relation between desert-claims and the past is problematic. There is not sufficient justification to say that what someone did provides grounds to say what should happen to them now. The backward-looking aspect of desert-claims does not provide sufficient causation that if x does y , then z must happen. Prior actions do not sufficiently justify what will happen, even if we believe that something should happen.

The fourth problem with the issue of desert is that many desert-claims are based upon actions. When a person is said to deserve something, it is usually because the person acted in a certain way. Sher says:

yet persons could not perform such actions if they were not born with suitable initial sets of abilities, or if they were not conditioned to acquire the relevant character traits or trained to develop the relevant skills. Since person can claim credit for neither their native abilities nor their conditioning and training, all the actions that determine desert are made possible by various factors that are themselves undeserved.⁵⁰

If people deserve something because of their actions, and people perform the action on account of factors which they do not deserve, it seems problematic to say that people do deserve something. Sher says that all desert-claims are, in some way, based upon the idea of reciprocity for actions. If it is the case that people cannot claim they are responsible for the means to perform certain actions, it is questionable if they can make claims about what they deserve.

Sher's discussion of the four main problem of desert-claims show why the issue of desert is often ignored in many ethical theories. If a desert-claim is a legitimate moral

⁴⁹ Ibid., Pg. 5.

⁵⁰ Ibid., Pg. 5-6.

assertion, it must carry some sense of obligation. It must also include a plausible causal connection. Most desert-claims are based upon actions, positive or negative. In order for a desert-claim to be a legitimate moral assertion, it must include some notion of the value society places upon the action and how an individual action affects society in general.

According to Sher, there are two common approaches for dealing with the issue of desert. The first of these is utilitarianism. The second of these is institutionalism. John Rawls' *A Theory of Justice* includes an account of institutional desert. Sher says, "in his major work, *A Theory of Justice*, Rawls argues that desert of reward and recompense are also artifacts of social institutions which in turn are justified in quite different ways. Instead of imposing constraints upon our choice of social institutions, personal desert is only established by such institutions."⁵¹ According to Rawls' discussion of the just distribution of goods, Rawls argues that people receive "just deserts" only if these "just deserts" are part of the rules of institutions. The main reason for the Rawlsian institutional approach to desert is that Rawls wants desert to be based upon legitimate institutional expectations and not the moral character of the individual. Legitimate expectations do say that people do deserve some thing. Like desert-claims, legitimate expectations can be formed as moral assertions in the structure of if x does y , then z should happen.

According to Sher, the institutional approach to desert has several problems. Sher says, "if desert-claims do reflect only the demands of institutions, then we will not be

⁵¹ Ibid., Pg. 14. While Sher discusses both utilitarianism and institutionalism, this part will focus on Sher's discussion of Rawls' institutionalism.

able to justify any desert-claim that lacks an institutional base.”⁵² Sher says that if desert-claims are part of the rules of institutions, the possible number of legitimate desert-claims is limited. In the case of punishment, if someone commits a wrong which is not forbidden by an institutional rule, there is no justification for claiming a person deserves punishment. No list of institutional rules will be able to cover all areas of legitimate desert-claims.

Sher has a second objection to the institutional justification for desert-claims. Sher says, “furthermore, if desert is determined by the demands of institutions, then it will be unintelligible to criticize institutions on the grounds that they themselves are insensitive to desert. We will be unable to say, for example, that certain acts should be criminalized precisely because those who perform them deserve to be punished.”⁵³ If institutions are the foundation for desert-claims, it may be the case that it is impossible say that a desert-claim addresses a specific individual in actual situations not governed by the rules of institutions.

Sher admits that these two concerns may miss the point of the institutional approach to desert. According to Rawls, it is not necessary for an actual institution to be able to justify its rules addressing desert. For Rawls, the distinction between fair and formal equal opportunity is a solution to the problems of institutional desert. According to Rawls, it is not necessary for all people to have the same opportunities nor receive equal treatment under the distributional scheme of actual institutions. All that is

⁵² Ibid., Pg. 15.

⁵³ Ibid., Pg. 15.

necessary is that it is possible that in an ideal society all people could conceivably receive the same benefits.

However, Sher says that the ideal institutional approach does not solve the problems of the institutional theory of desert. Sher says:

the ideal institutional account raises a further worry. Precisely because it does detach justification from the demands of actual institutions, this account lacks justificatory impact of its simpler relative. Since actual institutions clearly impose actual demands, any desert-claim which they undergrid will receive a recognizable sort of justification. Since merely possible institutions do not clearly impose actual demands, the justification they provide are correspondingly less clear.⁵⁴

According to Sher, if it is an ideal institution which justifies the claim that desert is derived from the rules of institutions, it is questionable if an ideal institution will have rules which apply to actual situations. While it may be the case that an ideal institution is one which desert-claims are sufficiently justified, it will be much more difficult to say how an ideal institution justifies desert-claims in actual institutions.

There is a specific reason why Rawls takes the institutional approach to the issue of desert. According to Sher's fourth problem of desert-claims, it appears to be the case that people behave in a certain fashion due to training, natural abilities, moral education, or any other thing which they themselves do not deserve. Rawls is aware of this problem. Rawls' treatment of the issue of desert, namely to bypass the issue of moral desert and argue for "legitimate expectations," is an attempt to give a theory of justice which does not fall into some of the problems and consequences of other moral theories which include strong notions of desert.

⁵⁴ Ibid., Pg. 16.

Sufficient Reasons

Whether or not an institutional approach is sufficient for addressing the problems of desert is open to further debate. However, it is the case that Rawls' theory of just institutions does include a theory of "desert." In a Rawlsian institution, desert-claims are to be understood as "legitimate expectations." These legitimate expectations address what someone can say he is legitimately entitled to receive from a just institution. Legitimate expectations can be formed as an assertion which says if x does y , then z should happen. It is the case that legitimate expectations are moral assertions even if they do not specifically address the moral character of the individual. However, legitimate expectations do claim that an institution should do z if x does y .

It is because Rawls' theory of institutions contains a conception of desert that it is possible to say that Rawls has two theories of justice as fairness. While Rawls can say that the issue of desert is not important to the original position, there appears some conception of non-Rawlsian desert in his theory of institutions. In the hypothetical original position, all people are more or less equal. They deserve basically the same things. There are no strong contingencies or rules to say who deserves what and why it is they deserve something. Rawls is aware that people in actual situations will perform actions based upon specific, individual characteristics. It is assumed that people will act in accordance with the rules of institutions to their best abilities. Even though Rawls' theory of just institutions is an attempt to avoid the issue of personal desert, personal desert is part of the structure and the rules of just institutions. It does not have to be the case that goods are equally distributed to all citizens. This is impossible. But Rawls'

theory of institutions does argue that certain actions, positive or negative, which affect the society as a whole should be either rewarded or punished. It is the rules of these institutions which determine who is to receive what and why.

Rawls' *A Theory of Justice* can be understood as two theories addressing two different subjects. The split can also be seen textually. The first half of the book deals almost exclusively with the hypothetical theory of justice founded in the original position. The second half of the book addresses how actual institutions should operate given the findings of the initial theory. There are many instances, such as Rawls' distinction between fair and formal equal opportunity, where Rawls claims that the purely speculative arguments of his theory can justify his claims concerning actual situations. However, as Sher argues, it is not necessarily the case that Rawls can make the connection. Rawls' hypothetical theory can operate on its own. Rawls' theory of just institutions is a stronger argument if he does not try and connect the two theories. The problem of desert is one example of how Rawls' theory of justice as fairness should be read as two theories.

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