The Epistemological Argument against Desert

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Most contemporary political philosophers deny that justice requires giving people what they deserve. According to a familiar anti-desert argument, the influence of genes and environment on people's actions and traits undermines *all* desert-claims. According to a less familiar – but more plausible – argument, the influence of genes and environment on people's actions and traits undermines *some* desert-claims (or all desert-claims *to an extent*). But, it says, we do not know which ones (or to what extent). This article examines this 'epistemological' argument against desert. It gives reason to believe that it fails, emphasizing the importance of justice relative to efficiency and attempting to construct a practical way of measuring desert.

Despite its intuitive plausibility as a distributive criterion, most contemporary political philosophers deny that justice requires giving people what they deserve.[1] The most familiar anti-desert argument derives from extreme doubts about the robustness of human agency.[2] According to it, the influence of natural and social factors such as genes and environment on people's actions and traits completely undermines *all* desert-claims. Since no one deserves anything, the argument goes, desert cannot be used as a distributive criterion.

This argument has received much attention;[3] I will not add to that here. Instead, I want to consider a related argument – one that derives from less extreme doubts about human agency. According to it, the influence of natural and social factors on people's actions and traits undermines *some* desert-claims (or all desert-claims *to an extent*). But, it says, we do not know which ones (or to what extent), and since we cannot measure people's deserts, we cannot reward them. Let us call this the 'epistemological argument' against desert. In my opinion, this

[1] See, for example, John Rawls, *A Theory of Justice* (Cambridge, Mass., 1971); Robert Nozick, *Anarchy, State, and Utopia* (New York, 1974); T. M. Scanlon, *What We Owe to Each Other* (Cambridge, Mass., 1998); and Michael J. Sandel, *Liberalism and the Limits of Justice*, 2nd edn. (New York, 1998).

[2] Geoffrey Cupit, in *Justice as Fittingness* (Oxford, 1996), says: '[t]he most significant objection [to desert-based distributive theories] is . . . based on the claim that desert presupposes a responsibility we simply do not have' (p. 55). See also Samuel Scheffler, 'Responsibility, Reactive Attitudes, and Liberalism in Philosophy and Politics', *Philosophy and Public Affairs* 21 (1992). Scheffler advances a different kind of anti-desert argument in 'Justice and Desert in Liberal Theory', *California Law Review* 88 (2000); reprinted in his *Boundaries and Allegiances* (New York, 2001).

[3] See, for example, Nozick, *Anarchy*; George Sher, *Desert* (Princeton, 1987); and Alan Zaitchik, 'On Deserving to Deserve', *Philosophy and Public Affairs* 6 (1977).

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argument is more plausible than its more extreme cousin. But it has received less attention. This article's goal is to draw attention to the epistemological argument, reveal its assumptions, and show how it can be defeated. I will argue that rewarding desert is not so difficult that it should be rejected as a distributive criterion.

I. FORMULATING THE EPISTEMOLOGICAL ARGUMENT

The epistemological argument is found first in Henry Sidgwick's *The Methods of Ethics*. He says 'the Requital of Desert . . . constitutes the chief element of Ideal Justice'.[4] But, he goes on, this formula for justice encounters serious practical difficulties (hence it is only ideal). According to Sidgwick, what people deserve is an amount of benefits equal in value to the value of their productive contributions. But not just any contribution counts. It must be a contribution that is the result of one's own free choices, 'for there seems be no justice in making A happier than B, merely because circumstances beyond his own control have first made him better'.[5] Here, Sidgwick says, we become entangled in the problem of free will. If there is no free will, then no one's contribution is freely produced, and no one deserves anything. Thus, it may seem that we must solve the problem of free will before going further. Sidgwick denies this, saying:

> the difference between Determinist and Libertarian Justice can hardly have any practical effect. For in any case it does not seem possible to separate in practice that part of a man's achievement which is due strictly to his free choice from that part which is due to the original gift of nature and to favouring circumstances . . .[6]

His point is that, even if there is free will, we cannot reward desert. The existence of free will does not mean that *all* of one's achievements are fully freely caused, or even that *some* of one's achievements are fully freely caused. It means, rather, that all of one's achievements are *partly* the result of one's free choices and *partly* the result of one's '[natural gifts] and . . . favouring circumstances'. Since desert requires freedom, a person can be deserving in virtue of *that part* of his achievement which is the product of his free choices, not *that part* which is the product of natural gifts and circumstances. But, Sidgwick says, we cannot 'separate' one part from the other. Since we cannot tell what people deserve, we cannot reward their deserts.

[4] Henry Sidgwick, *The Methods of Ethics*, 7th edn. (Indianapolis, 1981), p. 283.
[5] Ibid., p. 284.
[6] Ibid., p. 285.

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John Rawls also endorses the epistemological argument.[7] He says:

> The precept which comes intuitively 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.[8]

Rawls implies in this passage that people can be deserving, but only in so far as they can claim credit for that in virtue of which they are said to be deserving. That is why effort is intuitively the best measure of desert. A person has more control over her effort than, say, her actual achievements. But, Rawls says, even effort is imperfect as a measure of desert, because it, too, is 'influenced' by factors outside a person's control, such as her 'natural abilities and skills'. So, a person can at most claim partial credit for her effort. To reward desert, then, we must be able to isolate that portion of her effort – or indeed any of her achievements – for which she can claim credit. Against this, Rawls says that 'there seems to be no way to discount' for the effects of 'good fortune' on performance, and hence that 'rewarding desert is impracticable'. He concludes that desert should be rejected as a distributive criterion.[9]

[7] In ascribing the epistemological argument to Rawls, I follow G. A. Cohen, 'On the Currency of Egalitarian Justice', *Ethics* 99 (1989); and Robert Young, 'Egalitarianism and Personal Desert', *Ethics* 102 (1992). Writers who ascribe to Rawls the belief that no one deserves anything include Nozick, *Anarchy*; Sher, *Desert*; Scheffler, 'Responsibility'; and Zaitchik, 'On Deserving'. They cite this passage: 'It seems to be one of the fixed points of our considered judgements 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 upon fortunate family and social circumstances for which he can claim no credit. The notion of desert seems not to apply to these cases' (Rawls, *Theory*, p. 104). I do not think Rawls is saying here that no one deserves anything, however. He says that people do not deserve their native abilities and starting places in society, and implies that they do not deserve anything in virtue of their native abilities and starting places. He then says that people's characters depend *in part* on these factors. The 'in part' qualifier is revealing. If Rawls believed that no one deserves anything, then he would have said that people's characters depend *entirely* on their native abilities and starting places. But if, as he actually says, people's characters depend *in part* on these factors, then they also depend in part on their free choices. Thus Rawls leaves it open in this passage that people can be deserving (in virtue of their free choices).

[8] Rawls, *Theory*, p. 311–12.

[9] Rawls does not do away with the concept of desert entirely; he reinterprets it. He says that when people do what a just distributive scheme says it will reward, they 'deserve' – that is, they are entitled to and can legitimately expect – the promised rewards (*Theory*, p. 103). This sense of desert is different than the one under consideration here. We are using the term in its familiar, *pre-institutional* sense. For more on the pre-institutional character of desert, see Joel Feinberg, *Doing and Deserving* (Princeton, 1970); and David Miller, *Principles of Social Justice* (Cambridge, Mass., 1999).

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Richard Arneson is the most recent endorser of the epistemological argument. Unlike Sidgwick and Rawls, who appeal to the argument in the context of a discussion of social justice generally, Arneson appeals to it in the narrower context of a discussion of social welfare payments. His target is the conservative political view that only the deserving poor (i.e. those who are badly off through no fault of their own) should receive welfare payments. Arneson gives several moral reasons for rejecting this view, but it is the practical reason he gives that interests us here. This is his claim that we cannot differentiate the deserving poor from the undeserving poor (i.e. those who are at fault for being badly off). He says:

> The factors that make it easy or difficult, and more or less costly, for an individual to behave as she ought are densely intertwined with aspects of her circumstances for which it is sensible to hold her accountable. Sorting out these factors and deciding to what degree an individual is truly deserving can be hard, even intractable, even in a small-scale and local context that does not stretch out over time.[10]

He goes on: '[i]f we cannot know whether people are deserving we cannot reasonably reward them for it'.[11] Arneson concludes that desert cannot be used as a criterion for distributing social welfare payments.

There are minor differences in Sidgwick's, Rawls's and Arneson's versions of the epistemological argument. But they share a basic structure, which it will be useful to summarize. The argument begins with a characterization of human agency. People's actions, traits and achievements – their potential desert-bases – are the product of two forces. The first is what Sidgwick calls 'gifts of nature' and 'favouring circumstances'. These are the native abilities and social circumstances that vary so much from person to person. The second force is free choice.[12] The argument next says that determining what people deserve requires prying these two forces apart, for, it assumes, people can be deserving only in virtue of that part of their achievement which is the product of their own free choices, not in virtue of that part which is the product of natural gifts and favouring circumstances. But, it continues, prying these forces apart is 'impossible in practice', 'impracticable', or

[10] Richard Arneson, 'Egalitarianism and the Undeserving Poor', *Journal of Political Philosophy* 5 (1997), p. 349.

[11] Ibid., p. 334.

[12] Some may wonder whether, in distinguishing between (i) free choice and (ii) natural and social factors, supporters of the epistemological argument are tacitly endorsing incompatibilism. I do not think they are. The 'free' in 'free choices' can be analysed along either compatibilist or incompatibilist lines.

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'intractable'. It follows that rewarding desert should not be one of the state's distributive goals.[13]

II. THE EPISTEMOLOGICAL ARGUMENT'S CONCEPTION OF DESERT

As we can see from this summary, the epistemological argument makes two key assumptions about desert. The first is that desert requires responsible agency. People are said to be deserving only in virtue of actions they freely perform, i.e. those for which they can 'claim credit'. The second is that the proper account of desert is, to use Arneson's phrase, 'fine-grained' with respect to natural and social factors. What matters for desert is not achievement *per se*, but the percentage of achievement that is due to free choice. (The second assumption can be thought of either as a refinement of, or as an addition to, the first one. Natural and social factors might be said to undermine responsibility and desert, or desert only.)

Both of these assumptions have been challenged. Consider first the claim that the proper account of desert is fine-grained. Arneson says that when a fine-grained account is compared to a coarse-grained account – i.e. one that does not discount for natural and social factors – 'it is clear that the coarse-grained account cannot be the proper measure of the true deservingness of an individual'.[14] But some deny this. According to David Miller, although 'voluntary control is a necessary condition for desert . . . the extent of desert may depend not merely on factors subject to voluntary control but also on other traits – native ability, say'.[15] Miller favours a coarse-grained account of desert for pragmatic reasons. 'If followed through consistently', he says, 'the [fine-grained account] . . . would sabotage the whole notion of desert rather than . . . refine its moral quality'.[16] Consider next the claim that desert requires responsible agency. While many accept it,[17] recently several supposed counter-examples to it have been put forward. Geoffrey Cupit says that 'free and rational beings deserve to be treated as such – and

[13] Another anti-desert argument may be described as 'epistemological'. After we determine what part of a person's achievement is due to her free choices, then we must determine the *treatment* that person deserves, e.g. a pat on the back, an ice cream sundae, or $1 million. For reasons of space, I leave this problem aside.

[14] Arneson, 'Egalitarianism', p. 332.

[15] David Miller, 'Deserving Jobs', *Philosophical Quarterly* 42 (1992), p. 163.

[16] Miller, *Principles*, p. 146.

[17] Supporters include, in addition to Sidgwick, *Methods*; Rawls, *Theory*; Arneson 'Egalitarianism'; Miller, 'Deserving Jobs' and *Principles*; James Rachels, 'What People Deserve', *Justice and Economic Discrimination*, ed. J. Arthur and W. H. Shaw (Englewood Cliffs, 1978); and Wojciech Sadurski, *Giving Desert its Due: Social Justice and Legal Theory* (Dordrecht, 1985).

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their being deserving of such treatment is in no way undermined by any lack of responsibility for being free and rational'.[18] Fred Feldman gives the case of parents whose child becomes ill and dies. He says the parents deserve sympathy for their loss, even if no one is responsible for their child's death.[19]

The challenge to the second assumption presents less of a problem to the epistemological argument than the challenge to the first. Those who claim that desert does not require responsibility do not claim that desert *never* requires responsibility, just that *sometimes* it does not. All agree, for example, that a necessary condition of a criminal's deserving punishment is that he is responsible for his wrongful act, and that a necessary condition of a hero's deserving a reward is that she is responsible for her heroic deed. Thus, if the first assumption is false in the way Cupit and Feldman believe, all that follows is that the epistemological argument applies only to *some* cases of desert. By contrast, if Miller is right, the argument misses its target entirely. If the proper account of desert is coarse-grained, then separating free choices from natural and social factors is unnecessary, even when desert requires responsibility.

Determining whether the epistemological argument's assumptions about desert are in fact correct would take us far afield. I will not attempt it. For the sake of argument, I will assume they are. But note, even if they are incorrect, the argument is worth examining. For a version of it applies to choice-sensitive types of egalitarianism. G. A. Cohen speaks for many egalitarians when he says 'genuine choice excuses otherwise unacceptable inequalities'.[20] A complete choice-sensitive egalitarian theory, then, will contain a method of differentiating outcomes that are the product of people's choices from outcomes that are the product of natural and social factors. Thus, whether or not it is useful to desert-theorists, what I have to say about the epistemological argument will be useful to many egalitarians.

III. DOES PRACTICABILITY MATTER?

Before going further, it is worth asking whether the charge of impracticability is something desert-theorists should be trying to avoid. Michael Slote thinks justice requires giving people what they deserve. But he also thinks determining what people deserve is difficult – so

[18] Cupit, *Justice*, p. 86.

[19] Fred Feldman, 'Desert: Reconsideration of Some Received Wisdom', *Mind* 104 (1995), p. 69.

[20] Cohen, 'Currency', p. 931. See also Larry Temkin, *Inequality* (New York, 1993); and Kasper Lippert-Rasmussen, 'Egalitarianism, Option Luck, and Responsibility', *Ethics* 111 (2001).

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difficult, he says, that 'it may be a good idea to deemphasize justice in attempting to set up or govern a good society'.[21] Lest this be construed as a weakness in his view that justice requires giving people what they deserve, he adds:

> [T]he fact that it is difficult to make use of the notion of justice as I have defined it [in terms of desert] would count against the *accuracy* of my definition only if we had antecedent reason to think that the dictates of justice are bound to be, or likely to be, capable of practical implementation. And in fact I think we have antecedent reason to believe the contrary.[22]

More important than Slote's argument for this conclusion is the distinction that underlies it. He distinguishes between principles of justice and principles according to which society should be governed. The former need not be practicable – if anything, they should be impracticable. The latter must be practicable. According to this distinction, the epistemological argument both is and is not a threat to desert-based distributive systems. It is not in the sense that practicability considerations do not threaten desert's status as a requirement of justice. It is in the sense that they threaten desert's status as a principle according to which society should be governed.

Should the desert-theorist appeal to Slote's distinction as reason to ignore the epistemological argument? I suggest not. First, the victory she gains is pyrrhic. A theorist who thinks justice requires giving people what they deserve will want *actual* people to get the *actual* treatment they deserve. She will want the principles of justice she endorses to be the principles according to which society is governed. To achieve this goal, she must confront the epistemological argument. Second, there is reason to think Slote is wrong about the correlation between impracticability and truth in a theory of justice. Ethics, as it is commonly understood, is the study of how we ought to live. But if, as it is usually thought, ought implies can, then cannot implies ought-not. So, if we cannot requite desert, then we ought not to. In other words, if we cannot requite desert, then desert should be rejected as a criterion of justice.

IV. IMPRACTICABILITY AND THE VALUE OF JUSTICE

We have said that desert-theorists should avoid rather than embrace the claim that rewarding desert is impracticable. In the remainder of this article I will show how this can be done. The desert-theorist need not, it should be noted, refute any *arguments* to the conclusion

[21] Michael Slote, 'Desert, Consent, and Justice', *Philosophy and Public Affairs* 2 (1973), p. 337.
[22] Ibid., p. 337. Emphasis in original.

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that rewarding desert is impracticable. Sidgwick, Rawls and Arneson merely *assert*, after reflection on the nature of desert, that rewarding it is impracticable. But one can see why they assert this. Thus it is not unreasonable to expect the desert-theorist to provide proactively an account of desert measurement.[23]

Let us begin by clarifying the terms of the debate. What does it mean to say that rewarding desert is 'impracticable'? It does *not* mean theoretically or logically impossible. The claim that determining what people deserve involves a contradiction is surely false. Beyond this, two interpretations are possible. We might follow Sidgwick and take 'impracticable' to mean *impossible in practice*.[24] On this interpretation, determining what people deserve is like sending a human being to Mars. We understand, in a general way, what this requires (i.e. it is like sending a human being to the moon, except farther), but do not know exactly how to do it. Or we might follow Arneson and take 'impracticable' to mean *very difficult or costly*.[25] This implies that we could, if we wanted, determine what people deserve, but that doing so would be *too* difficult or costly. It might require sacrificing more important projects, such as national defence and environmental protection.

Next consider what it means to say that a theory of justice must be practicable. The idea seems to be that we must be able to implement it. But while we might all (*pace* Slote) agree to this, it is too vague to do much work. The important question is not *whether* the theory can be implemented, but *how much it costs* to implement, and whether we should absorb those costs. Put this way, our question is a familiar one, namely, how much more important is justice than efficiency?[26] Here a range of views is possible. At one end is the view that justice is no more important than efficiency, so that the slightest increase in efficiency is enough reason to fail to do justice. At the other is the view that justice is far more important than efficiency, so that even huge increases in efficiency are not enough reason to fail to do justice.

Already we can see some room for doubt about the epistemological argument. If rewarding desert is impossible in practice, and justice is only slightly more important than efficiency, then it succeeds. But if

[23] This section was much improved by the comments of an anonymous *Utilitas* referee.

[24] Sidgwick, *Methods*, p. 285.

[25] Arneson, 'Egalitarianism', p. 350.

[26] The distinction between considerations of justice and considerations of efficiency can be blurred. For example, some utilitarian defenders of the free market claim that it maximizes utility. But this may be just another way of saying that the free market has the fewest overall costs. I will not pursue this matter here. For our purposes, an intuitive distinction between justice and efficiency will do.

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rewarding desert is only very difficult or costly, and justice is much more important than efficiency, then it fails.

This room for doubt would collapse, of course, if it were clear that the views most favourable to the epistemological argument are true. This is not clear. In fact, we have reason to believe the views *least* favourable to it are true. In the following section, I will argue that determining what people deserve is not impossible but only difficult and costly. In the remainder of this section, I will argue that justice is important enough to absorb the costs.

For my argument to succeed, a further assumption is needed: that rewarding fine-grained desert is a requirement of distributive justice. Space considerations prevent a defence of this assumption. But it is reasonable. And it is likely that endorsers of the epistemological argument – my target – also make it. If they believed rewarding fine-grained desert was not required by distributive justice, they would have said so. Arguments based on a practice's inefficiency are weaker than those based on its injustice. It is possible, of course, that rewarding fine-grained desert is not required by distributive justice. In that case my argument would be otiose.

I have said that justice is much more important than efficiency. There is no way, however, to quantify precisely the importance of these values. Instead, as evidence that justice is in fact much more important than efficiency, I will appeal to the widely held, though sometimes implicit, conviction that it is.

Choice-sensitive versions of egalitarianism provide one illustration. As we have said, they face an epistemological problem of their own, viz. identifying which outcomes are the product of people's 'genuine' choices. Egalitarians describe this task as 'extremely' and 'awesomely' difficult, but are undeterred.[27] This suggests that they think significant costs should be absorbed for the sake of justice. Democratic elections provide another. The infrastructure needed to run them costs millions of dollars, and candidates can spend millions more on advertising. Yet few would say we should do away with elections (or advertisements) because they are expensive. Since, we believe, justice requires democratic elections, we are willing to bear the expense.

The best illustration comes from retributive justice. Most large, developed nations spend billions of dollars every year on their criminal justice systems. The United States is a glaring example. Most of its states spend more money each year on criminal justice than on education. Doubtless there are many reasons – good and bad – that explain our willingness to spend enormous sums of money on criminal

[27] See, respectively, Cohen, 'Currency', p. 931; and Temkin, *Inequality*, p. 18.

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justice. On the one hand, we want to prevent crime and deter potential offenders. On the other, powerful corporations have a significant monetary interest in the construction of new prisons. But I suggest one reason we are (rightly) willing to spend enormous sums of money on punishment is that we think it is important that justice be served. We want to punish the guilty and to avoid punishing the innocent. And, when a crime has occurred, we want the offender's punishment to 'fit' his crime. To achieve these goals, we invest heavily in our criminal courts. And the primary purpose of criminal trials, unlike the broader purpose of a system of criminal justice, is the assessment of guilt.

This example is especially telling against the epistemological argument. Our beliefs about limiting punishment to the guilty and fitting punishments to crimes are motivated by considerations of desert. We believe that desert is a necessary condition for punishment and that punishment should be proportionate to desert. Thus, in spending enormous sums of money on criminal trials to assess guilt, we are spending enormous sums of money on the measurement of desert. Moreover, measuring the extent of a person's desert of punishment requires addressing difficult epistemological questions about excusing and mitigating circumstances. It is apparent, then, that we make no exception to our lavish spending on justice when it requires giving people what they deserve. But if we are willing to absorb huge costs in efficiency in the name of justice and desert in the context of retributive justice, then we should be willing to absorb huge costs in their name in the context of distributive justice, as well.[28]

Some might object on the grounds that other explanations of our beliefs about punishment are possible. The real problem with punishing the innocent, it might be said, is that it violates their rights against unwanted interference (which rights the guilty have forfeited through their wrongful acts), not that they are given treatment they do not deserve.[29] Deterrence may explain our belief that those who commit more serious crimes should be given harsher punishment better

[28] I am (still) assuming that rewarding desert is a requirement of distributive justice, but not *because* rewarding desert is a requirement of retributive justice. It is possible, as Scheffler argues in 'Justice and Desert', that there is an asymmetry between distributive and retributive justice with respect to the role of desert. My point here is just that we are willing to spend lavishly on justice, even if, as the case of retributive justice suggests, it requires rewarding desert. For criticisms of Scheffler's argument, see Thomas Hurka, 'Desert: Individualistic and Holistic', *Desert and Justice*, ed. S. Olsaretti (Oxford, 2003); and my 'Against the Asymmetry of Desert', *Noûs* 37 (2003).

[29] For example, W. D. Ross, in *The Right and the Good* (Oxford, 1930), says the state 'ought, in its effort to maintain the rights of innocent persons, to take what steps are necessary to prevent violations of these rights; and the offender, by violating the life or liberty or property of another, has lost his own right to have his life, liberty, or property respected' (pp. 60–1).

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than desert. This objection raises questions about the conceptual foundations of the criminal justice system which cannot be fully answered here. But two things can be said against it. First, the position it advances is a minority one. As Michael Moore (somewhat tendentiously) says, 'any plausible theory of punishment gives some prominent role to the desert of offenders'.[30] Second, even if the objection succeeds, it does not impugn my general claim that we are willing to devote enormous resources to the pursuit of justice. If justice requires rewarding desert, we should try hard to reward it.

A more general objection might be advanced. The fact that we *do* spend lavishly on justice, it might be said, does not prove that we *should*. The assumption about the relative values of justice and efficiency embedded in contemporary political theory and practice might be mistaken. This possibility cannot be ruled out. But we should think carefully before accepting it. Even if we do, we should not necessarily conclude that *no* money should be spent on rewarding desert. We should conclude, instead, that we should spend a small(er) amount of money on rewarding desert.

I have given reason to believe at this point that justice is much more important than efficiency, so that, even if rewarding desert is very difficult or costly, we should absorb the costs. I will next argue that rewarding desert is in fact *only* difficult and costly, not impossible. Note, however, that we have reason to believe it is not impossible already. For measuring desert is precisely what most think we are doing – and, we suppose, with a reasonable degree of success – in the context of retributive justice. Nevertheless, producing a precise method for measuring desert would strengthen our case against the epistemological argument. In the next section I will adapt John Roemer's pragmatic theory of responsibility for this purpose.[31]

V. A PRAGMATIC THEORY OF DESERT MEASUREMENT

To recall, the epistemological argument says that, to determine what a person deserves, we must separate that part of her achievement which is due to her free choices from that part which is due to natural and social factors. Now we cannot literally 'yank apart' a person's achievement and evaluate its distinct parts, as we might physically

[30] Michael Moore, *Placing Blame: A General Theory of the Criminal Law* (Oxford, 1997), p. 191.

[31] I draw on John Roemer, *Equality of Opportunity* (Cambridge, Mass., 1998); and his 'A Pragmatic Theory of Responsibility for the Egalitarian Planner', *Philosophy and Public Affairs* 22 (1993). Jonathan Wolff, in 'The Dilemma of Desert', *Desert and Justice*, ed. S. Olsaretti (Oxford, 2003), has also pointed out that Roemer's theory can be used by desert-theorists. He is not too hopeful, however, that it can ultimately be made to work. My discussion in Section VI may answer some of Wolff's concerns.

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disassemble a car and evaluate its distinct parts. Human achievements do not lend themselves to this kind of examination. Nor is it useful to try to imagine what a person would have achieved if she were not affected by any natural and social factors. She would have achieved nothing. In the same way, a car without a transmission would not have performed worse; rather, it would not have performed at all.

Roemer has provided what is effectively a way to isolate free choice from natural and social factors: by comparison. For example, we can evaluate a car part – say, a transmission – by comparing the performance of the same car first with one transmission, then with others. Or we can compare the performances of several cars that are otherwise identical but have different transmissions. The difference in performance among these cars will be due to their different transmissions. Roemer's analogous idea is to assess a person's desert of a thing or treatment by comparing her performance in the desert-creating activity to the performances of others who are affected by the same set of natural and social factors. The difference in performance among these individuals will be due to their different choices. The better (or worse) the person does compared to her peers, the more (or less) deserving she is.[32]

Suppose, for example, we want to identify who deserves admission to college (the 'thing or treatment'). For simplicity, suppose there is only one desert-base for admission: achievement in high school (the 'desert-creating activity'). The first step is to identify, using the latest empirical research, the natural and social factors that help or hinder student achievement.[33] Although this process will be contentious and complete agreement will never be reached, at some point a decision must be made. Suppose we decide, on the basis of the best available evidence, that the relevant categories of natural and social factors are (1) teacher quality, (2) classroom size, (3) native cognitive ability and (4) perceived parental expectations.[34] Next we divide students into types. A 'type' is a group of students all of whom are equally well (or badly) off in terms of factors (1)–(4).[35] Thus, one type might have poor teachers, large classrooms, high IQs and low perceived parental expectations. Another type might have excellent teachers,

[32] Roemer intended his theory not for the desert-theorist but for the 'egalitarian planner', who wants to achieve 'real' equality of opportunity. But, he says, 'an equal-opportunity view is . . . a desert-based view' (Roemer, *Equality of Opportunity*, p. 15).

[33] The literature on the determinants of academic achievement is immense. Under the heading 'academic achievement', ERIC, the online database for quantitative research in education, lists 48,882 entries as of March 2004.

[34] The uncertainty about what factors produce advantages for some over others will lead to doubts about the accuracy of this proposal. I address those doubts in Section VI.

[35] Roemer, 'Pragmatic Theory', p. 152.

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small classrooms, high IQs and high perceived parental expectations. And so on. According to this proposal, students' deserts can be assessed by comparing their achievements to those of members of their own types.

Let us suppose we have a way of combining a student's overall high school achievement into a single number. Suppose P's score is 80 and Q's score is 85. If P and Q are students of the same type, then to assess their deserts of college admission we simply compare these numbers. In this case we will conclude that Q is more deserving than P. For we will attribute the superiority of Q's score to (a) free choice(s) she made (e.g. to study hard, to sacrifice social activities) that P did not. We will not attribute it to (a) natural or social advantage(s) Q had over P; these influences, by hypothesis, have been factored out. If P and Q are students of different types, an additional comparison is needed. First we compare their scores to the scores of members of their own types to obtain their percentile ranks. Then we compare those ranks. Suppose P's score of 80 puts her in the 70th percentile for her type, while Q's score of 85 puts her in the 60th percentile for her type. We will conclude that, because P compares more favourably to members of her type than Q does to members of her type, P is more deserving than Q. Although Q's score is, in absolute terms, better than P's, there is a respect in which P's score is better than Q's. And it is reasonable to attribute the respect in which P's score is better than Q's to (a) free choice(s) that P made and Q did not, as opposed to (a) natural or social advantage(s) P had over Q.

The main elements of the pragmatic theory of desert measurement are now before us. We have considered its application in just one context, but it can easily be adapted for use in other contexts. To do so, we must identify the deserved treatment (e.g. a pay raise), its desert-base (e.g. making a contribution to one's company) and the natural and social factors that help or hinder acquisition of it (e.g. native cognitive ability, family background). The required comparisons are the same.

VI. OBJECTIONS AND REPLIES

No doubt many objections will be raised to this proposal. As a way of filling in some of the missing details and bolstering its plausibility, I will now consider what seem to me to be the four most important ones.[36]

The first says that the pragmatic theory misunderstands the nature of desert. Desert is an individualistic notion: What P deserves depends only on what P does. But the pragmatic theory makes what P deserves

[36] The main ideas for the theory of desert measurement come from Roemer. The defence of it against objections is my own.

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depend on what other people (of his type) do.[37] This objection confuses metaphysics with epistemology. The pragmatic theory does not claim that deviation from a mean is constitutive of desert, only that it is a good measure of desert. The sense in which, according to it, desert 'depends on' what other people do is epistemic, not metaphysical. And it does not follow from the fact that deviation from a mean is a bad metaphysics of desert that it is a bad epistemology of desert.

The second objection accepts the legitimacy of assessing desert by interpersonal comparisons, but says that the pragmatic theory is inaccurate even on its own terms. The theory says that, if P and Q are students of the same type and P's score is higher than Q's, then the respect in which P's score is higher than Q's is due to a free choice P made and Q did not, and thus P is more deserving than Q. This conclusion, according to the objection, is unwarranted. P's higher score might be due to some undetected help or hindrance (e.g. an influential role model) or a lucky break.

This objection must be taken seriously. Given the state of our empirical knowledge of the causal determinants of human behaviour and the randomness of lucky breaks, we can never be sure that the respect in which P's score is higher than Q's is due to P's free choice. Hence we will sometimes incorrectly judge that P is more deserving than Q. But this objection is not decisive. Three points can be made against it. First, our ignorance about the natural and social factors that help or hinder high school achievement (or any other desert-base) must not be exaggerated. We know, for example, that classroom size is inversely proportionate to scholastic achievement, and that students who are taught in small classrooms during the first few years of their education have a permanent advantage over those who are not.[38]

Second, while we may not be able to discount for all natural and social factors on achievement, the pragmatic theory enables us to discount for some, and this improves our ability to determine what people deserve. Suppose P and Q are competing for admission to college. And suppose P is better off than Q in every respect. P has better teachers, is taught in smaller classrooms, has a higher IQ and has more supportive parents. Let us stipulate that, because of these advantages, P's score will be higher than Q's, but if P and Q were equally advantaged, Q's score would be higher than P's. According to the fine-grained conception of desert we have accepted, Q is more deserving than P. But notice: Q's score is as likely to be, when all of the advantages are corrected for,

[37] Norman Daniels, 'Democratic Equality: Rawls's Complex Egalitarianism', *The Cambridge Companion to Rawls*, ed. S. Freeman (New York, 2003), p. 254.

[38] Jeremy D. Finn, Susan B. Gerber, Charles M. Achilles, and Jayne Boyd-Zaharias, 'The Enduring Effects of Small Classes', *Teachers College Record* 103 (2001).

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slightly higher than P's as it is to be *much* higher than P's.[39] If it is only slightly higher, then we might have to correct for all of the advantages to see that Q is more deserving than P. But if it is much higher, then correcting for only a few of P's advantages will yield the (correct) result that Q is more deserving than P. In this way, the more factors we correct for, the more likely we are to identify the person who is most deserving.

Some may remain troubled by the fact that the pragmatic theory of desert measurement cannot guarantee the accuracy of its results. They should not be, for – and this is my third point against the above objection – failures of justice are inevitable no matter what distributive theory one endorses. Theorists should not be deterred by this fact. The proper response is not to abandon one's ideals, but to devise ways of getting as close to them as possible. This is what the pragmatic theory does. Although it does not ensure total accuracy, it ensures greater accuracy. Since a more just distribution is better than a less just one, this is better than ignoring desert altogether.

The third objection to the pragmatic theory questions not the accuracy, but the nature and specificity, of the desert-judgements it makes. The judgements it makes are comparative. It tells us that P is more or less deserving than Q. This might be considered problematic for two reasons. First, desert is generally thought to have a non-comparative or absolute component.[40] Second, and relatedly, without knowledge of this absolute component, we face a problem analogous to the anchoring problem in criminal theory.[41] That is, we might know that P deserves a larger share of social benefits than Q, and that Q deserves a larger share of social benefits than R, but we might not know exactly what amount of social benefits P, Q and R each deserve.

The first concern can be answered quickly. Although the pragmatic theory of desert measurement does not make judgements of absolute desert, it does not deny that people have absolute deserts. Analogously, those who endorse 'unanchored' penalty scales need not deny that there is a definite number of years in prison P, Q and R each deserve. They

[39] An advantage can be 'corrected for' in two ways. We can give Q the advantage P has, or we can make it one of the 'factors' in the pragmatic theory of desert measurement. It may be impossible or undesirable to correct for some advantages (e.g. native cognitive ability, perceived parental expectations) in the first way.

[40] Compare Shelly Kagan, 'Equality and Desert', *What Do We Deserve?: A Reader on Justice and Desert*, ed. L. P. Pojman and O. McLeod (New York, 1999). Kagan's 'comparative' desert involves treatments as well as desert-levels. It says that treatment should be proportionate to desert among the deserving, so that, e.g., two people who are equally absolutely deserving should receive the same treatment. When the pragmatic theory says that P is more deserving than Q, it means, in Kagan's terms, that P is more absolutely (or non-comparatively) deserving than Q.

[41] For a discussion of this problem, see Andrew von Hirsch, *Censure and Sanction* (New York, 1993).

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just may not know what those numbers are. The second problem, not surprisingly, has no easy solution. But there is reason to think it is not as urgent in the context of distributive justice as it is in the context of retributive justice. For while the supply of punishment is not unlimited, it is not scarce. As a result, the penalty scale can be anchored in many places. The supply of social benefits, however, is scarce.[42] Provided that we do not want to let any go to waste, there are fewer places to anchor the benefit scale. In the case of social benefits, then, the crucial question will be who is more or most deserving of them, not whether someone deserves them absolutely.

The fourth objection to the pragmatic theory questions its moral (not economic) costs. Norman Daniels says that 'responsibility tests' are 'intrusive and demeaning . . . [and] violate concerns about liberty and privacy'.[43] To assess students' deserts of college admission, for example, we must obtain information about their native cognitive abilities and perceived parental expectations. Acquiring this information might be degrading for both students and parents. It would be better to give up on desert, this objection says, than to make these sacrifices.

Daniels's concerns are significant but inconclusive. As with the economic costs of giving people what they deserve, the relevant question is not *whether* rewarding desert has moral costs, but *how high* those costs are, and whether we should absorb them. There is reason to think we should. Many state-sponsored laws and activities – e.g. restrictions on the sale and registration of hand guns, boats and automobiles, audits by the Internal Revenue Service and criminal trials – are intrusive and demeaning, and require enormous sacrifices in liberty and privacy. But we tolerate, and often demand, them to achieve what we take to be morally more important goals: safer public spaces, the payment of a fair share of taxes and the infliction of punishment on (only) the guilty. Daniels does nothing to show that giving people what they deserve is a morally less important goal. In fact, given what we said above, we have reason to believe the opposite. Thus it is arguable that we should tolerate similar, or greater, sacrifices in liberty and privacy to ensure that people get what they deserve.

My case against the epistemological argument is complete. In section IV, I noted that many are convinced that justice is much more important than efficiency. In section V, I sketched a way of determining what people deserve and, in this section, defended it against several objections. If, as we have assumed, justice requires rewarding desert,

[42] Scheffler also makes this point. Unlike the problem of distributive justice, he says, 'the problem of retributive justice does not concern the allocation of advantages at all, and it is not a problem posed by conditions of scarcity' ('Justice and Desert', p. 986).

[43] Daniels, 'Democratic Equality', p. 254.

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determining what people deserve would have to be very inefficient before it would justify rejecting desert as a distributive criterion. I argued that it is not. We should not, therefore, abandon desert because of concerns about efficiency.

VII. CONCLUSION

The epistemological argument is under-appreciated but potent. In this article I clarified its structure and assumptions, and gave reason to believe it fails. Still, much more should be said about it. I left worries about the view of desert on which it relies unresolved. In addition, while the pragmatic theory of desert measurement is, I argued, fundamentally sound, its details must be filled in and policy recommendations must be developed. These, however, are tasks for another article.[44]

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