**Legitimate Expectations in Theory, Practice, and Punishment**

**Abstract**

This paper is concerned with how we ought to think about legitimate expectations in the non-ideal, ‘real’, world. In one (dominant) strand of contemporary theories of justice, justice requires not that each gets what she deserves, but that each gets that to which she is entitled in accordance with what Rawls calls ‘the public rules that specify the scheme of cooperation’. However, that is true only if those public rules are part of a fully just scheme and it is plausibly the case that no such scheme obtains in the real world. Given that, and given the centrality of legitimate expectations to theories of justice, it is vital to think about the status of such expectations in non-ideal circumstances. Having explained the sense in which legitimate expectations have come to play a role often previously associated with desert, a brief argument in favour of an ‘expectations’ view of punishment is considered to show that the system to public rules that generates expectations must itself be (in some sense) just. This argument is illustrated by appeal to just punishment and the relevance of thinking about punishment and not merely distributive justice is defended. In the absence of justice, one possibility would be simply to declare that there are no *legitimate* expectations and so theories of justice provide no guidance as to who should get what in non-ideal conditions. However, this would be to render such theories more-or-less useless in practice. Through discussion of a series of vignettes, the paper offers an account of how we might think about the demands such expectations place on the systems that give rise to them even in cases where the system is unjust.

**Keywords**

Legitimate expectations; desert; punishment; Rawls.

Within a broadly Rawlsian tradition concerning distributive justice, legitimate expectations - as understood within this tradition - play three extraordinarily important roles. First, they are meant to provide what Martin O’Neill (2014, p. 428) calls ‘a replacement or successor notion to the idea of desert’; second, to give a determinate answer as to who gets what; and third, they are meant to do this in a way that heads off (Nozickean type) objections to pattern theories of justice. That is, they are meant to dissolve the tension that David Miller captures as follows:

on the one hand it is a matter of justice to respect people’s rights under existing law or moral rules, or more generally to fulfil the legitimate expectations they have acquired as a result of past practice, social conventions, and so forth; on the other hand, justice often gives us reason to change laws, practices and conventions quite radically, thereby creating new entitlements and expectations. (Miller 2017)

I argue below that in the non-ideal circumstances in which we live, they cannot do the second and third of those things, and given their importance, that matters.

Section 1 describes the place of legitimate expectations in contemporary theories of justice and explains the sense in which they fill a void created by these theories’ rejection of any foundational role for desert. In section 2, a brief argument in favour of an ‘expectations’ view of punishment is considered to show that the system to public rules that generates expectations must itself be just. In the absence of justice, one possibility would be simply to declare that there are no *legitimate* expectations and so theories of justice provide no guidance as to who should get what in non-ideal conditions. However, this would be to render such theories more-or-less useless in practice. Section 3 therefore offers a number of vignettes designed to illustrate questions of justice in non-ideal circumstances. Section 4 considers these vignettes and Section 5 offers one way of thinking about them. Section 6 concludes.

**1. Legitimate Expectations and Desert**

Writing in 1992 with reference primarily to Rawls and Nozick, Samuel Scheffler noted that ‘none of the most prominent contemporary versions of philosophical liberalism assigns a significant role to desert at the level of fundamental principle.’ (Scheffler 2001a, p. 14) Earlier, in his 1986 Tanner Lectures, T. M. Scanlon had associated his ‘Value of Choice Theory’ with what he described as ‘a general philosophical strategy which is common to Hart’s analysis of punishment and Rawls’s theory of distributive justice’. In accounting for our intuitions about the significance of choice, Scanlon acknowledged that we could appeal ‘to a preinstitutional notion of desert’. However, he goes on,

The strategy I am describing makes a point of avoiding any such appeal. The only notions of desert which it recognizes are internal to institutions and dependent upon a prior notion of justice: if institutions are just then people deserve the rewards and punishments which those institutions assign them. In the justification of institutions, the notion of desert is replaced by an independent notion of justice; in the justification of specific actions and outcomes it is replaced by the idea of legitimate (institutionally defined) expectations. (Scanlon 1986, p. 76)

The reasons why ‘desert has not played a significant role in any major [contemporary] moral theory’ (Gert 1989, p. 426) differ in each case. In the argument below, I do not consider these reasons and simply follow the writers above in thinking that desert has no fundamental role in accounts of justice and that ‘legitimate expectations’ function as described above: as ‘a replacement or successor notion to the idea of desert.’ (O’Neill 2014, p. 428)

The paper is rather concerned with how we ought to think about legitimate expectations in the non-ideal, ‘real’, world. That is, given the assumption above, justice requires not that each gets what she deserves, but that each gets that to which she is entitled in accordance with what Rawls calls ‘the public rules that specify the scheme of cooperation.’ (Rawls 2001, p. 72) However, that is true only if those public rules are part of a fully just scheme and it is plausibly the case that no such scheme obtains in the real world. Given that, and given the centrality of legitimate expectations to theories of justice, it is vital to think about the status of such expectations in non-ideal circumstances.[[1]](#footnote-1) Thus, the paper is concerned with legitimate expectations in a specific, Rawlsian, sense (although not with Rawls exegesis). Put differently, the paper asks what follows in certain contexts *given* that legitimate expectations are meant to plug the gap left in desert’s absence.

To understand how legitimate expectations might function as a replacement for desert consider the following very simple example. In explaining why the job of a brain surgeon attracts a significant salary, an advocate of pre-institutional desert might claim that brain surgeons have natural talents that they have chosen to develop through hard work and that these things deserve to be rewarded (and thus, other things equal, just institutions will reward them). In the face of the same phenomenon, an advocate of legitimate expectations might claim that we have independent reasons to establish institutions that give incentives to those who have talents and are capable of hard work (for example, institutions that offer comparatively high salaries to brain surgeons). *Having* established those institutions, it is *then* just to meet the expectations of those who have responded by doing what is necessary to be entitled to the incentives on offer.[[2]](#footnote-2)

Put more formally, the account of legitimate expectations advanced by Rawls in §48 of *A Theory of Justice* (holds,

that as persons and groups take part in just arrangements, they acquire claims on one another defined by the publicly recognized rules. 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. Rawls 1999, pp. 273ff)

Rawls makes clear that what the persons in question ‘are entitled to is not proportional to nor dependent upon their intrinsic worth’. For this reason, ‘the principles of justice that regulate the basic structure and specify the duties and obligations of individuals do not mention moral desert, and there is no tendency for distributive shares to correspond to it.’ (Rawls 1999, p. 273) As Rawls puts it elsewhere, ‘there is no criterion of a legitimate expectation, or of an entitlement, apart from the public rules that specify the scheme of cooperation. Legitimate expectations and entitlements are always (in justice as fairness) based on these rules.’ (Rawls 2001, p. 72)

I have (perhaps) laboured this point as the English language is unhelpful here. It allows us to say that in both cases above the brain surgeon ‘deserves’ her salary. However, this causes a great deal of confusion and so in what follows the term desert (insofar as it is discussed) will be reserved for pre-institutional claims and the term ‘entitlement’ will be used for claims that arise as a result of institutionally defined expectations.[[3]](#footnote-3)

Although Scheffler, unlike Scanlon, was discussing only theories of distributive justice (and not theories of punishment), Rawls’s move from desert to entitlements was mirrored in what was perhaps the most influential account of punishment published during the revival of retributivism in the 1970s. According to this theory, pioneered by Andrew von Hirsch, punishment should be proportionate to the culpability of the offender. (von Hirsch 1976) More specifically, ordinal proportionality requires punishments to be graded in terms of their severity and that those who are convicted of crimes of equal seriousness should receive punishments of comparable severity. As I have argued at length elsewhere, this is not a desert theory, but an entitlement one. (Matravers 2017, 2018) What a given offender is entitled to receive is determined by the scale of punishments. The question of cardinal proportionality (the anchoring points of any sentencing scale) could in principle be answered by appeal to desert, but for reasons analogous to those that saw desert retreat from the distributive sphere, that was not the argument.

In short, legitimate expectations in the sense discussed here, are meant to determine the answer to the fundamental question of justice: who rightly gets what. Rather than justice consisting in giving each what she deserves, it consists in giving each that to which she is entitled as determined by the ‘public rules that specify the scheme of cooperation’.

It is worth noting that this is not a ‘pattern’ or ‘allocative’ theory. This is important in heading off one common criticism of Rawls’s, and Rawlsian, thought. The criticism is that a state committed to some ‘pattern’ of distributive shares would forever be interfering in its citizens lives. (Nozick 1974) As Martin O’Neill puts it (quoting Rawls), ‘Respecting legitimate expectations means that governments must avoid the “continual interference with particular individual transactions” that Nozick mistakenly believed justice as fairness would involve.’ (O’Neill 2014, p. 429; quoting Rawls 2001, p. 52 n18)

However, that is not the only reason this is important. The other is that what persons are entitled to is not to be worked out at each moment. Compare this with a crude hedonistic act utilitarian theory. On such an account, the answer to the question, ‘who gets what?’, can in principle be answered by doing the hedonistic calculation and allocating accordingly. A theory based on legitimate expectations cannot do this. The price it pays for stability and predictability is that persons’ expectations once created cannot simply be cancelled in the name of some other distribution. This, as we shall see, makes the problem of expectations created by unjust rules particularly acute.

**2. Legitimate Expectations and Just Rules**

It cannot be enough that we ought to ensure that people receive whatever it is that the public rules specify. It matters whether the public rules are themselves just.[[4]](#footnote-4) To see this, consider the following passage from an early essay on punishment by the Oxford philosopher John Mabbott:

I was myself for some time the disciplinary officer of a college whose rules included a rule compelling attendance at chapel. Many of those who broke this rule broke it on principle. I punished them. I certainly did not want to reform them; I respected their characters and their views. I certainly did not want to drive others into chapel through fear of penalties. Nor did I think there had been a wrong done which merited retribution. I wished I could have believed that I would have done the same myself. My position was clear. They had broken a rule; they knew it and I knew it. Nothing more was needed to make punishment proper. (Mabbott 1939, p. 155)

There is an important sense in which Mabbott’s account of the propriety of his imposing punishment on his colleagues resembles the account of legitimate expectations given above. Mabbot did not think that those who violated this rule ‘deserved’ punishment in any pre-institutional sense; indeed, it is clear from the above that he thought that they did not. Rather, his claim is that the public rules were clear and that those who violated those rules were ‘entitled’ to punishment.

Yet, this cannot be sufficient. Mabbott regards the substance of the particular rule – making attendance at Chapel compulsory – as wrong, which makes his insistence on the propriety of punishing those who break it seem quixotic. More importantly, it cannot be that *any* punishment for *any* offence is justified by its merely being announced in advance *even if* it is properly announced by the legitimate authorities whose role it is and as a result of which agents come to expect the punishment in relation to the offence. (cf.: Brown Forthcoming) Imagine that the college had instituted ‘burning at the stake’ as the declared penalty for missing chapel. It would still be true that those who were unwise enough to miss chapel had broken a rule; they would know that they had done so; Mabbott would know that they had done so; but that would hardly render this punishment proper.

What this highlights, of course, is that the Rawlsian account of legitimate expectations presupposes *just* arrangements. The regulation of the basic structure in accordance with the demands of the two principles is needed to ensure what Rawls calls ‘pure procedural background justice’. It is only where such background justice is in place, that it will be true that

once agents engage in economic cooperation according to the terms of [the] background rules and institutions [of the basic structure] and form their expectations accordingly, then a just distribution of income, wealth, powers, and positions of authority will be whatever distribution results from the full compliance with the institutional requirements of these basic background institutions. (Freeman 2007, p. 126)

Mabbott has no such background account and as we have seen makes it clear that he thinks the rule he enforced was unjust (or at least wrong). That is why more is needed if what he says about the propriety of punishment is to be even remotely plausible.

One option would be to fill the missing space with a prejusticial account of desert (one might say, for example, that no-one deserves punishment for missing chapel). This is Rawls’s position with respect to retributive justice in *A Theory of Justice*, where he distinguishes questions of distributive justice from questions of punishment precisely by identifying the first with legitimate expectations and the latter with the desert appropriate to the violation of natural duties (which would not, of course, include missing chapel) committed by those of ‘bad character’.[[5]](#footnote-5)

Rawls’s distinction has given rise to a mini-literature on the connections (if any) between distributive and retributive justice, but I want to put that to one side.[[6]](#footnote-6) The reason for doing so is that even if distributive and retributive justice are not in the relevant sense analogous, it is, for reasons I have argued elsewhere, not at all plausible that this is because (contemporary justifications of) the latter appeal to prejusticial desert. (Matravers 2011) As Rawls argues (2001, p. 73), ideas of moral desert belong most easily in certain kinds of (particularly religious) comprehensive moral doctrines. This, for him, is a reason why they are inapt in a political conception of justice. For me, it is a reason why they are inapt in any philosophical account written for ‘adults’. That is, ‘for persons who live consciously in a post-anthropomorphic, post-theocentric, post-technocratic world.’ (Gauthier 1988, p. 385)

In the absence of a desert-based story, we might instead reach for a procedural account to flesh out the theory and so provide determinate guidance on, in this case, what those who have missed chapel and entitled to receive. For example, we might ask if the rule was properly enacted by the college authorities.

Such a move accords with the language of *legitimate* expectations. However, although Rawls uses the term *legitimate* rather than, say, ‘well founded’ when referring to expectations, there is no reason to believe that he meant to invoke the separate concept of legitimacy as he uses it, for example, in discussing ‘the liberal principle of legitimacy’ in *Political Liberalism.* (Rawls 2005, p. 137) Rather, what Rawls seems to have in mind is, first, a more minimal reference to the fact that these expectations are derived from institutions; in Rawls’s case, from the institutions of the basic structure and in Mabbot’s from the college. Second, that having given rise to such expectations there is, other things equal, reason for those institutions to satisfy them (in that sense, the recipients have a legitimate claim or ‘entitlement’).

However, although procedural propriety may be important, it is clearly not enough. It would not make any difference to the judgement in the ‘burning at the stake’ example that the rule had the correct procedural pedigree. Thus, if we are to say anything about who is entitled to what, we need more than the mere knowledge of what the rule states and of its pedigree.

Of course, we might say that what it is that we need to know is that the rule and institution to which it belongs are fully just. However, if that is the bar, then the account of justice as giving people that to which they are entitled is rendered impracticable in non-ideal circumstances. No society’s public rules and institutions are fully just, so the issue of the status of the expectations generated by unjust (or, less than fully just) rules is a critical one if we are to obtain any practical guidance from contemporary theories of justice. As Meyer and Sanklecha put it (2014, p. 378), if

an expectation has normative force only if it has been formed against the background of a just basic structure [then] if we now add the highly plausible claim that there has never been a basic structure that has been just, this means that absolutely no expectations have normative force.

How then ought we to think about expectations created by unjust (or, less than fully just) schemes? To address this, the following section offers three pairs of vignettes through which, it will be argued, we can begin to think through the answer to this question.

**3. Six Vignettes**

In what follows it is assumed that the rule in question emanated in the right way from the system (as defined by the system). That is, they all possess the proper pedigree as defined by the system of which they are a part. This is because for something to be an expectation in the relevant sense it must be the result of what the system announces it will reward or punish. Of course, this is not always true in the ordinary way we use the word ‘expectations’. Moreover, in some systems the announcement might be more-or-less explicit. So, someone who loyally serves a tyrant might ‘expect’ to be rewarded by some whim of the tyrant, but that is still a ‘system’ - all be it an arbitrary and unreliable one - as opposed to a mere chance of happenstance. Whilst not all expectations arise from rules - consider the example of a promise to be collected from the airport - I take it that those that do are at the heart of the account of legitimate expectations in contemporary theories of justice.

The first two examples arise out of the South African (1957, Apartheid) government’s Sexual Offences Act. This Act consolidated several sexual offences (although not ‘core’ offences such as rape, which were a matter of Common Law). The most notorious, in §16, was the prohibition of sex between a white person and a person of another race with a maximum penalty of seven years’ imprisonment. Other sections contained prohibitions on, for example, (§12) detaining a woman against her will in a brothel, or for the purpose of sex, with a maximum penalty of five years’ and (§18) using drugs or alcohol ‘to overpower a woman for the purpose of having sex’, again with a maximum penalty of five years’ imprisonment.

Consider, then, the following two cases: First, Ambrose, a black campaigner against apartheid and a white student, Betty, who have consensual sex, but who are discovered, prosecuted, convicted, and sentenced to seven years’ imprisonment. Second, Charles, who is successfully prosecuted for drugging Denise with a ‘date rape’ drug for the purposes of having sex with her and is sentenced to five years’.

The next two arise out of the ways in which English criminal law has dealt with male homosexuality in the Twentieth Century. In 1966, English law prohibited male homosexual acts with a penalty that included imprisonment (the offence was abolished in 1967). In 1995, English law included an ‘age of consent’ of 16 with respect to heterosexual sexual acts and of 18 with respect to (male) homosexual sexual acts (this was changed in 2001).

Again, consider two cases: First, Edward and Freddie have sex in 1966 and are convicted of buggery and imprisoned for two years. In 1995, George, who is 18 and bisexual, has sex with Harriet, 17, and Isaac, 16. He is convicted for the latter and receives two years in prison.

The final two vignettes arise out of tax arrangements. In 2015, James is convicted under English Law of Cheating the Public Revenue (tax evasion). In the same year imagine that following some highly publicised examples of what the then Prime Minister called ‘aggressive tax avoidance’ (describing legal practices of which he disapproved), the government introduces retrospective legislation criminalising some accounting practices such that Kevin, whose actions to avoid paying tax had been legal at the time, is now convicted and sentenced to prison.

**4. Legitimate Expectations in Circumstances of Injustice**

With the exception of Kevin, all of the characters above have done ‘various things’ clearly specified ‘by the existing arrangements’ (although Cheating the Public Revenue is a Common Law offence, imagine James’s offence is particularly egregious and follows discussions with his accountant in which the latter made it clear that what James proposed was criminal); as a matter of their beliefs, they expect to receive the sentences to which they are ‘entitled’; these expectations are derived from institutions; but whether there is even a *prima facie* reason for the institutions to satisfy them is (at least) an open question.

That is to say, the theories of justice we are considering hold that what each person is entitled to is given by the institutions and rules that govern the co-operative practice of which that person is a part. In all of the above cases, the rules are clear and once combined with certain facts mean that each character has a reasonable expectation of what follows from having violated those rules (although Kevin’s case this will only become clear to him after the retrospective legislation is passed). What the vignettes are meant to illustrate, or so I shall argue, is that the ways in which systems can be unjust are many and complicated and that if we want to make progress in thinking about legitimate expectations in the real world, we need to attend to those differences.

It is worth noting that none of the systems of rules in the examples is fully just on any plausible ideal theory of justice. Apartheid South Africa is the most egregiously unjust and Ambrose and Betty present the easiest case in that they suffer under an unjust system and are victims of an unjust rule. It might be thought that James who lives in the UK in 2015 lives in a broadly just society, but it is hard to think of a plausible ideal theory that would underwrite that claim. Neither an egalitarian theory – whether distributive or relational – nor a historical theory (such as Nozick’s) would count the UK as having anything remotely resembling a just distribution of any measure of holdings (however conceptualised).

The question to be addressed in each case is whether the expectations that have been generated are such that there is reason to fulfil them. Answering this question requires us to consider the way in which we should think about the relation of the overall system that generates the expectations and the moral claim those expectations exert.

In the face of expectations generated by unjust (or less than fully just) societies, there seem to be three possibilities:

(1) Expectations that properly arise from less than just institutional schemes provide no good reasons to meet them;

(2) Expectations that properly arise from institutional schemes provide good reasons to meet them, no matter how just or unjust the institutional scheme from which they arise;

(3) Expectations that properly arise from less than fully just institutional schemes must be assessed on their merits, where their merits will be an all things considered judgement about what it is right to do.

Embracing (1) would render the idea of legitimate expectations redundant in real world decisions about what to do. The idea would still do conceptual work in an ideal theory of justice – in that it would explain the claims citizens would have on the products of doing what the system announces it will reward or penalise – but it could not guide us at all when asking whether in this or that country there is a moral case to honour the expectations generated by more-or-less, but never fully, just institutions and rules. However, (2) takes us too far: merely enacting a rule that promises certain consequences does not provide sufficient reason to deliver those consequences. That leaves (3), but (3) is not a matter of saying that more-or-less just regimes generate expectations that we have proportionate more-or-less reasons to meet.[[7]](#footnote-7) Rather, it is a matter of deciding what in each instance ought to be done. In making that decision, the fact that institutions created certain expectations may be important (for all the reasons stressed by the legal account of legitimate expectations), but it may not be (as in the example of Ambrose and Betty above).

**5. Justice and Politics: Legitimacy, Systems, and Rules**

If we are to embrace (3) and evaluate each claim on its merits, where might we start? One possibility, suggested by the vignettes is to think of some issues – those of basic rights or fundamental freedoms – as properly insulated from politics (often in a constitutional bill of rights) and thus as generating entitlements that other features of the system cannot override. To borrow again from Rawls (without making any claim to be a ‘reading’ of Rawls), we might think of these issues only being triggered only with respect to: (a) fundamental principles that specify the general structure of government and the political process: the powers of the legislature, executive and the judiciary; the scope of majority rule; and (b) equal basic rights and liberties of citizenship that legislative bodies are to respect: such as the right to vote and to participate in politics, liberty of conscience, freedom of thought and association, as well as the protections of the rule of law (Rawls 2005, p. 227); and (c) with respect to social and economic matters, a ‘social minimum’ (an adequate standard of living to enable citizens to develop their moral powers and to participate in the political life of their communities). (Rawls 2005, p. 166) Matters that fall outside these three areas are ‘merely political’ and subject to legislative decisions that implicate questions of legitimacy.

If we combine these thoughts we get a rough vision of a constitutional democratic regime in which the underlying theory of justice dictates the shape of the political structures and the limits of legislative purview. A structure of the right shape might then generate expectations within its appropriate domain irrespective of the overall justice of the regime of which it is a part. Does this then provide the framework with which to understand the examples above?

Apartheid South Africa meets neither of the conditions of justice (b) and (c) described above. Moreover, the rule applied to Ambrose and Betty is unjust; it is a violation of their rights to sexual freedom or, more generally, to live their lives in accordance with their (comprehensive) conceptions of the good. Thus, it is, or ought to be, beyond the scope of ordinary politics. If the argument is that expectations generated by rules that violate basic rights or fundamental freedoms have no weight, then there is a case that the expectations generated in relation to their conduct are null and void and, whilst Ambrose and Betty might confidently expect to be punished, other things equal their expectations generate no moral reasons on the part of the state to meet them. There may be residual reasons to be considered in an all things considered judgement about what to do - for example, reasons to do with the consistency, stability, and/or the rule of law - but the mere fact that Ambrose’s and Betty’s behaviour relates in a certain way to ‘public rules’ and ‘existing arrangements’ and thus gives rise to expectations is not a reason to meet those expectations.

The same is, of course, not true of the particular rule that is applied to Charles. There is no right to, or constitutional provision that protects, drugging someone in order to have sex with them irrespective of whether Charles thinks, or does not think, of this conduct as part of his conception of the good. Legislation in this area is entirely appropriate and its form is a matter of politics.[[8]](#footnote-8) Does it follow that Charles’s expectation of punishment is legitimate and the institutions of the state ought to meet it?

If we continue to assume that the legislature acted properly by its own lights - that is, the rule criminalising drugging someone for the purposes of having sex with them has the correct pedigree - then Charles’s actions connect in the right way with the institutions and the rules to generate expectations that there are, other things equal, reasons to meet. Note, these institutions are neither just nor legitimate (in the full sense of that term). Does this matter?

The background system of injustice does not seem to be problematic with respect to Charles’s conduct. Nonetheless, there is at least one reason to think that whether Charles is black or white makes a difference even within the narrow confines of ‘expectations created by institutions’ in play here. If Charles is black, he has had no say in the institutions that govern him or their policies. This is a powerful consideration in deciding whether there is an all things considered case for the Apartheid state meeting Charles’s expectations.

That is, Denise and others like Denise deserve protection and Charles is rightly to be censured for his conduct, but there is something inappropriate for the Apartheid state to deliver that censure. It lacks what Antony Duff has called the ‘standing’ to call Charles to account.[[9]](#footnote-9) Charles is answerable to someone – most obviously to Denise – but it not at all clear that he is answerable to the South African state. Perhaps the security of others provides a reason to punish Charles, but weighing the reasons for and against doing so is not simply a matter of deciding whether or not the expectations arose from just institutions.

It is worth noting, as an aside, that the same applies to issues of distributive justice. Imagine Charles’s brother, Christopher (who, like Charles, is black) who is disabled in a conflict with the police at an anti-Apartheid demonstration. As a result, Christopher is entitled to disability welfare payments. He has an expectation that he will receive these each week. Of course, given the alternatives - in particular, Christopher starving - there are surely overwhelming reasons to meet this expectation, but it remains the case that there is something inappropriate - even, obscene - in the racist Government providing a handout to Christopher and those like him.

Does the approach of discriminating between fundamental questions of rights and other matters help with the other examples? Edward and Freddie are convicted under an unjust rule that is, in the terms described above, unconstitutional (that is, it goes beyond what ought to be left to ‘politics’ because it involves basic rights). Again, there may be reasons of stability, the rule of law, consistency, and so on, for the state to punish them, but these reasons do not stem from the entitlements of Edward and Freddie.

George’s position is much less clear. Setting the age of consent is, within some boundaries, a political matter and different democratic regimes will (and have) set it differently. Whether having different ages for different sexual activities is profoundly discriminatory and so triggers constitutional concerns is not clear and may depend on the rationale offered for the differences. That male homosexuality is disgusting and unnatural is not a permissible reason, but other arguments might be offered that do not appeal to substantive judgements about male homosexuality itself (whether any such arguments hold water is a different matter as is whether they might be used in bad faith by those who do object to male homosexuality in itself). George’s conduct, then, just in virtue of its relation to the announced rules, might generate a *prima facie* reason for the state to recognise and fulfil his ‘entitlement’; that is, to punish him.

The positions of James and Kevin might seem the most straightforward. In James’s case, tax would seem a quintessentially political matter so James’s tax evasion renders him liable to punishment. In Kevin’s, retrospective legislation undermines the whole basis of legitimate expectations. At the time of acting, Kevin does not do what the system has announced it will punish and so his actions cannot ground a legitimate claim that he be punished for his actions.

Yet, even here the issues are not so clear cut. On the one hand, as noted above the UK is an unjust society. For example, its tax system maintains and exacerbates gross inequalities that differentially affect the life chances and life expectancy of its citizens, and through tax funded schemes, the Government supports and sells expertise and arms to countries such as Saudi Arabia whose internal arrangements allow discrimination against women, the beheading of adolescent offenders, and externally, the gross human rights violations currently occurring in Yemen. That is, it is at least arguable that the substantive tax regime in place in the UK is as implicated in matters of fundamental justice as was the law criminalising buggery in 1966. That these policies are not justified by reference to, for example, the greater significance of the lives of the rich in comparison to those of the poor does not entirely blunt the objection (just as appealing to public health in support of a differential age of consent for male homosexual sex does not do so). James’s conduct in evading tax, then, connects in the right way with a procedurally proper rule prohibiting tax evasion and threatening consequences (that is, creating expectations) for those who commit it, but whether that is sufficient to warrant meeting those expectations just on that basis is unclear.

On the other hand, even if one thinks that all things considered James’s expectation of punishment ought to be met, Kevin seems in the clear. However, it is interesting to note that when David Cameron (and others in his Government) condemned ‘aggressive tax avoidance’, there were those who argued for retrospective legislation for those companies whose legal actions had resulted in their paying very little tax despite very large earnings. The basis of the argument was that in particularly egregious cases, it ought to have been clear to the companies that their behaviour was immoral (consider, by analogy, the position of someone who does not realise that murder is prohibited, or who does but has spotted a gap in the law of murder that he is looking to exploit). Thus, depending on the nature of Kevin’s actions, an argument could be mounted that he ought to have realised that it was wrong and expected that there would be consequences even in the absence of an institutional rule specifying the prohibition of the conduct with attendant consequences. To carry through that argument, however, would require an account of the background theory of non-institutionalised wrongs as an implicit system of rules. This is possible – not all legitimate expectations arise from institutional or codified rules – but unlikely in any account dealing with public rules and state power.

**6. Legitimate Expectations in Theory and Practice**

The point of this paper is *not* to resolve what ought to be done in each of the six cases above. To do that, far more would have to be said about each case and even then it is likely that reasonable people might disagree about both how to approach the decisions and the outcomes. Rather, the point is to say something about the place of legitimate expectations in guiding our actions once we drop the assumption of an ideal world.

In theory, legitimate expectations are created by institutions and give reasons for those institutions to satisfy the expectations that they have created. However, as the quotation from Rawls at the beginning of the paper makes clear, on the Rawlsian story such expectations arise only in respect of ‘a just scheme’. In the real world, no scheme is fully just, and so in practice we must hold that such expectations have no normative force; that they retain their full normative force; or that they establish claims that must be assessed on their own merits using the resources available from moral and political theory. Given the centrality of legitimate expectations in contemporary theories of justice, I have argued that the first position would render these theories inert in the real world; the second is implausible; and so we are left with the third.

That, in practice, legitimate expectations alone might not help us much in deciding what to do in particular cases, is not a criticism of the concept, but a recognition that political philosophy and theories of justice operate at one level and granular decisions about what to do at another. In displacing prejusticial desert, legitimate expectations provide a means of talking about who should get what, and why, that does not depend on ‘morally (or metaphysically) controversial, or unknowable, or impracticable, standards of individual virtue or worth.’ (O’Neill 2014, p. 430) That is important and applies as much to those concerned with blame and penalties as it does to our theories and practices of praise and reward. However, recognising the value of the idea of legitimate expectations ought not to blind us to the real difficulties that there are in using an ideal theory of justice to answer the fundamental question of justice: who gets what?

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1. The application of Rawls’s thoughts on legitimate expectations to non-ideal circumstances is the main theme of Allen Buchanan’s influential paper (Buchanan 1975) although whether any such application is properly attributed to Rawls is disputed by Alexander Brown (forthcoming). [↑](#footnote-ref-1)
2. The underlying normative idea here (roughly, that the state should do what it has led citizens to believe it will do) is shared with the legal notion of legitimate expectations. This holds that if a public body has given cause to an individual to believe that she has some right or claim, then ‘it is not merely legitimate for him or her to expect something; the law will give the expectation some form of protection in judicial review’ (Endicott 2015, p. 293). However, the paper is not concerned with this narrower sense of legitimate expectations. [↑](#footnote-ref-2)
3. Note, this usage applies below even when the discussion is of blame and punishment rather than praise and reward. An anonymous reviewer objected to this as ‘there is something odd about focusing on the “legitimate expectations” of someone liable to punishment. This is because talk of “expectation” at least pragmatically implicates some desire for what is being expected. But generally people don’t desire to be punished.’ I am, of course, happy to concede that the reviewer is right about the usual implication, but if the distinction between ‘desert’ and ‘entitlement’ is genuine, then we need a word for ‘entitlement’ when it comes to blame, punishment, and so on. In the absence of an alternative, all I can do is specify the meaning as here. (cf. Matravers 2018, 26n) [↑](#footnote-ref-3)
4. As we shall see later, this formulation encompasses both an injustice in the particular rule or expectation and the injustice of the background system of institutions. (on which, see Meyer and Sanklecha 2011) [↑](#footnote-ref-4)
5. ‘No doubt some may still contend that distributive shares should match moral worth at least to the extent that this is feasible. They may believe that unless those who are better off have superior moral character, their having greater advantages is an affront to our sense of justice. Now this opinion may arise from thinking of distributive justice as somehow the opposite of retributive justice. It is true that in a reasonably well-ordered society those who are punished for violating just laws have normally done something wrong. This is because the purpose of the criminal law is to uphold basic natural duties, those which forbid us to injure other persons in their life and limb, or to deprive them of their liberty and property, and punishments are to serve this end. They are not simply a scheme of taxes and burdens designed to put a price on certain forms of conduct and in this way to guide men’s conduct for mutual advantage. It would be far better if the acts proscribed by penal statutes were never done. Thus a propensity to commit such acts is a mark of bad character, and in a just society legal punishments will only fall upon those who display these faults.’ (Rawls 1999, pp. 276-77) [↑](#footnote-ref-5)
6. See, for example, Scheffler 2001a, 2001b. [↑](#footnote-ref-6)
7. Meyer and Sanklecha (2014, p. 378) write of a possible system in which legitimate expectations ‘could be modified to make space for degrees of justice’. On this view, if there are degrees of justice, then it would be in principle possible to say that for an expectation to be legitimate, the background institutions, etc., need to be just to some degree. Once that condition is met, then the expectation would be legitimate, and there would be reason to meet it (not a proportionate more-or-less reason). However, this is advanced merely as a theoretical possibility (it is not a view they discuss). [↑](#footnote-ref-7)
8. There is an interesting question as to whether justice requires legislation to prohibit such conduct, but that is beyond the scope of this paper. [↑](#footnote-ref-8)
9. Duff 2003, 2010; for a partial endorsement and partial criticism of Duff’s position, see Matravers 2006. [↑](#footnote-ref-9)