

# Justice As Desert

Louis Pojman\*

*Justice is a constant and perpetual will to give every man his due. The principles of law are these: to live virtuously, not to harm others, to give his due to everyone. Jurisprudence is the knowledge of divine and human things, the science of the just and the unjust.*

*Law is the art of goodness and justice. By virtue of this [lawyers] may be called priests, for we cherish justice and profess knowledge of goodness and equity, separating right from wrong and legal from the illegal. (Ulpian in the Digest of the Roman book of law Corpus Juris. ca 200 AD)*

## 1. Introduction

There is an ancient tradition, found in both the mainstream of Western philosophy and religion as well as Eastern thought (viz. the doctrine of *karma*), that justice consists in giving people what they deserve - often rendered as giving each person his or her due. In our day desert, while still recognized by the ordinary person, has been undermined or completely dismissed by the leading political and social philosophers of our time, including John Rawls, Ronald Dworkin, Thomas Nagel, Brian Barry, Robert Goodin, J J C Smart, John Schaar, Kai Nielsen, T M Scanlon, Robert Young, Michael Young, Iris Young, Derek Parfit, and Richard Wasserstrom<sup>1</sup> -who - reject or undermine the classical idea of justice as rewarding desert or merit as inegalitarian and based on false consciousness. It is inegalitarian in that meritocracy is inherently hierarchical, holding that some people are better than others. It is based on false consciousness, since the view of human nature these philosophers accept tends to be skeptical of deep moral responsibility. Recall Smart's famous retort, "The notion of the responsibility [for an outcome] is a piece of metaphysical

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\* D Phil (Oxon), Professor of Philosophy, US Military Academy, West Point.

<sup>1</sup> J Rawls, *A Theory of Justice*, Harvard University Press, 1971; R Dworkin, 'Why Bakke Has No Case' *The New York Review of Books*, Nov 10 1977; T Nagel, *Mortal Questions*, Cambridge University Press 1979; B Barry, *Political Argument*, Routledge & Kegan Paul 1965; R Goodin states that it is morally repugnant to make distinction between deserving and undeserving people when allocating scarce resources, 'Negating Positive Desert Claims' *Political Theory* vol 13, no 4 (1985); J Schaar, 'Equality of Opportunity, and Beyond' in J R Pennock & J Chapman (eds), *Equality: Nomos IX*, Atherton Press 1967; R Wasserstrom, 'Racism and Sexism' in *Today's Moral Problems*, Macmillan 1985; K Nielsen states he has "reservations about the whole category of desert" and holds that "Everyone should be treated equally as persons and, in spite of what will often be rather different moral conduct, everyone should be viewed as having equal moral worth." *Equality and Liberty: A Defense of Radical Egalitarianism*, Rowman and Littlefield 1985 at 56, 53; D Miller argues that each person must be treated with equal respect and is entitled to self-respect irrespective of desert, 'Democracy and Social Justice' (1977) *British Journal of Political Science* 8; I Young, *Justice and the Politics of Difference*, Princeton University Press 1990; and M Young, *The Rise of Meritocracy: 1870-2033*, Penguin Books 1958.

nonsense”.<sup>2</sup> John Kleinig has remarked, “The notion of desert seems to be consigned to the philosophical scrap heap”,<sup>3</sup> and Brian Barry writes,

In examining the concept of desert we are examining a concept which is already in decline and may eventually disappear. ‘Desert’ flourishes in a liberal society where people are regarded as rational independent atoms held together in a society by a ‘social contract’ from which all must benefit. Each person’s worth (desert) can be precisely ascertained - it is his net marginal product and under certain postulated conditions (which it is conveniently assumed the existing economy approximates) market prices give each factor of production its net marginal product. Life is an obstacle race with no special provision for the law but if one competitor trips up another, the state takes cognizance of this fact; thus compensation is given only when there is negligence on one side but not on the other.<sup>4</sup>

Barry seems to be criticizing the notion of distributing according to desert from a socialist or communitarian perspective, viewing desert as an atomistic holdover from a Capitalist perspective.

Rawls's theory of “justice as fairness”, perhaps the most influential in its rejection of desert as a basis of distribution, attacks desert as a fundamentally incoherent notion:

It seems to be one of the fixed points of our considered judgments that no one deserves his place in the distribution of native endowments, any more than one deserves one's initial starting place in society. The assertion that a man deserves the superior character that enables him to make the effort to cultivate his abilities is equally problematic; for his character depends in large part upon fortunate family and social circumstances for which he can claim no credit.<sup>5</sup>

Even the willingness to make an *effort*, to try, and so to be deserving in the ordinary sense is itself dependent in practice upon happy family and social circumstances.<sup>6</sup>

Our talents and abilities are products of the Natural Lottery (heredity, family, and environment). We don't deserve our talents, including the talent to be moral or make an

<sup>2</sup> J J C Smart, ‘An Outline of a System of Utilitarian Ethics’ in J J C Smart & B Williams, *Utilitarianism: For and Against*, Cambridge University Press 1973 at 54. T M Scanlon, *What Do We Owe Each Other*, Harvard University Press 1999 at 274ff rejects desert because he believes only a libertarian notion of free-will and responsibility, which he rejects, could provide an adequate basis for it. D Parfit seems to hold a similar view. See his dialogue in A Pylee (ed), *Key Philosophers in Conversation*, Routledge 1999 at 74ff..

<sup>3</sup> J Kleinig, *Punishment and Desert*, Martinus Nijhoff 1973.

<sup>4</sup> B Barry, *Political Argument*, Routledge & Kegan Paul London 1965 at 112f.

<sup>5</sup> J Rawls, *supra* n 1 at 104.

<sup>6</sup> Rawls and company have made against meritocracy and the ramifications of their attack are far reaching. For example, since I do not deserve my two good eyes and two good kidneys, the social engineers may take one of each from me to give to persons needing an eye or a kidney - even if their organs became damaged through their own voluntary actions. Since no one deserves anything, we do not deserve pay for our labours or praise for a job well done or first prize in a race we win. The notion of moral responsibility vanishes in a system of levelling. So does the notion of *self-respect*, deemed the basic primary good, for if we are simply products of the Natural Lottery, how can the self deserve anything at all, including respect?

effort to learn and work. So, the argument proceeds, we don't deserve what our talents produce. Moral and intellectual excellence and superior ability to perform important tasks are from a moral point of view arbitrary and must not be used as bases for differential distribution of primary goods, including economic goods, social status, or respect. The notion of natural or *pre-institutional* desert evaporates. Justice as the tendency towards equal distribution of primary goods replaces the classical notion of justice as giving each person his or her due (*sum cuique tribuere*).<sup>7</sup> The criterion of desert is replaced largely by that of rights and entitlements, the language of the Law Court. As Dworkin puts it, *rights are trump cards* which beat everything else. Even though philosophers like Rawls and Dworkin would disassociate themselves from some of the aberrations of rights rhetoric, their work has lent support to the proliferation of entitlement talk so that in our time whenever an interest group desires special recognition it claims a right: civil rights, women's rights, prisoners' rights, children's rights, gay rights, the rights of the handicapped, animal rights, the rights of nature, the rights to paid holidays, to medical coverage. Some parents have even claimed the right to retire from parenting small children.<sup>8</sup> Rights, for the contemporary liberal, such as Rawls, are conventional institutional constructions or programs which flow out of the principles chosen by rational agents in the original position.<sup>9</sup> What is remarkable about Rawls' program is that for the first time in the history of philosophy the Sophist's idea of relative convention (*nomos*) triumphs over natural law (*physis*) and has become the dominant political philosophy of our age. The genius of Rawls is to make Protagoras and Callicles and Glaucon respectable over Socrates, Plato, and Aristotle - no mean feat! Other political philosophers, belonging to the Post-Rawlsian Liberalism, have similar strategies, all agreeing that rights must replace natural desert, yielding institutionally created desert. The Liberal ideal, which has largely replaced merit in the minds of many persons, holds that not the individual but the society at large owns individual talents. Essentially, preinstitutional desert is an incoherent concept.<sup>10</sup>

Egalitarians, such as Kai Nielsen, Tom Nagel and Robert Goodin have replaced the notion of desert with that of need, reflecting Marx's dictum, "From each according to his ability, to each according to his need." Tom Nagel offers the illustration of the family which has the

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<sup>7</sup> Some egalitarians may argue that giving people equal resources or welfare is giving them their due - what they deserve. These sort of egalitarians may assume a basic equal and positive value in all people, but it is hard to find a sound non-religious argument for this view. I have argued against this position in L Pojman, 'On Equal Human Worth: A Critique of Contemporary Egalitarianism' in L Pojman & R Westmoreland (eds), *Equality*, Oxford University Press 1996 and 'Equality; A Plethora of Theories' in *Journal of Philosophical Research* vol 24 1999.

<sup>8</sup> A couple in Montclair, New Jersey (Warren and Patricia Simpson) have recently declared that they're not very good at child rearing and don't much like it, so they're exercising their right to retire from it. "Between the crying and the fighting and asking for toys, it was getting to be very discouraging," Mrs Simpson said. "We're both still young, and we have a lot of other interests." They've put their three small children up for adoption, and after seven years of parenting, they "are moving on." *New York Times Op-Ed* "Retirement Fever" by Michael Rubiner in early February 1996. This may be an extreme example of the abuse of the philosophy of entitlements, but is indicative of a trend.

<sup>9</sup> An older tradition, found in Locke and more recently in Vlastos and Finnis, holds to the concept of natural rights, which are preinstitutional and resemble a kind of desert claim. In these cases desert and rights seem to converge. I am not opposing this tradition in my paper, only the thesis that all rights are institutional.

<sup>10</sup> See G Sher, *Desert*, Princeton University Press 1987 for a defence against some of these charges. My work has been profoundly influenced by this seminal work. But much remains to be done on behalf of meritocracy, which, as my introduction indicates, has taken a serious beating in our time.

choice of moving to the city where the handicapped child will receive important therapy or to a suburban neighborhood where the eldest son and the rest of the family are likely to prosper, but where the handicapped child will not get the treatment he needs. Nagel argues that the morally right act is to move to the city for the sake of the handicapped child, thus promoting equality rather than overall flourishing. Robert Goodin illustrates the principle of overriding desert for need. Suppose two men have been in an automobile accident and have the same serious injury, but one is guilty of gross recklessness which caused the accident, while the other is an innocent victim. Who should get priority treatment in the emergency room? Goodin asserts that even if everyone has clear knowledge of the facts, it would be morally outrageous to give preferential treatment to the innocent victim. The right to equal treatment and to having one's needs met trumps desert.<sup>11</sup>

While some Affirmative Action programs are based on compensatory desert, most are to a large extent based on one of these three anti-meritocratic moves - either on the denial of the coherence of merit altogether (replacing the idea with a more therapeutic ideal of enabling everyone to be autonomous), the justified overriding of merit because of considerations of need, compensation, or utility, or the denial that we can really know who deserves what.

## Equality

The main rival to justice as desert is egalitarianism. Egalitarians typically promote the coercive redistribution of goods from the well off to the worse off. They hold to what Derek Parfit has labeled the *Priority of the Worse Off* principle: whenever feasible, transfer goods from the better off to the worse off, even if it reduces overall utility.<sup>12</sup> Many egalitarians view equality as an intrinsic good, good for its own sake as well as an instrumental good. Egalitarians typically base their policies on the thesis that human beings are all of equal and positive moral worth. We have equal rights to life prospects, resources, happiness or welfare. Elsewhere I have argued that no secular argument for equal human worth succeeds.<sup>13</sup> The one way we have equal rights involves the right of equal protection of the law, including the right not to be exploited. Given any criterion for such worth, be it reason, freedom, conscientiousness, or the ability to deliberate, people have differential amounts of this quality. I have also argued that attempts to work out threshold states is arbitrary and does not give us anything like the normative force that egalitarians need to justify their policies. Where a case for human equality can be made, viz, within rich metaphysical traditions such as religions, equality is only seen as a starting point, not an overriding principle by which to govern society. The best moral arguments reduce to equal opportunity, but these are off-set by considerations of freedom. The *free enterprise system* of economics with its practice of free exchange based on supply and demand and the *family*, with its practice of giving special benefits to its children (eg, I don't aim at causing it to be the case that my neighbor's children are as capable as mine. I educate and train mine to be

<sup>11</sup> R Goodin, *supra* n 1 at 575-598. Some critics have objected that I am just as much an egalitarian as these liberals, since I assume that resources should be distributed according to a common standard. But this objection conflates equality with impartiality. To say that we should be judged by the same laws or criterion, says nothing about what we should get - only that we should receive benefits or burdens mandated by the fulfilling or breaking of the standard everyone should be. You and Ted Bundy the murderer are judged by the same rule of "Thou shalt not murder", but since you are innocent and Bundy guilty, you ought to receive different treatment.

<sup>12</sup> D Parfit, unpublished manuscript: 'On Giving Priority to the Worse-Off' 1989.

<sup>13</sup> *Supra* n 8.

superior), are both inegalitarian institutions. They are not desert-based either, but are based on the values of freedom and welfare (allowing these institutions to flourish promotes overall utility). In this paper I will not deal with the importance of freedom or assume that a case for egalitarianism is doomed. Quite the reverse. I will assume that a *prima facie* case can be made for some redistribution of resources from the well-off to the worse off. What I will argue in these cases is that *desert* must also enter into redistribution schemes and that what we object to in inequalities is not their inequality but their undeservingness. In general, desert trumps equality.

### Merit and Desert

Before I go on, I must define my concepts and distinguish *desert* from *merit*. Although both are appraisal terms and ordinary language uses them in multifaceted and overlapping ways, sometimes, even as synonyms, they have central meanings.<sup>14</sup> Merit is a broader concept, the genus of which desert is the species. Merit, corresponding to the Greek word *axia*, is any feature or quality that is the basis for distributing positive (or in the case of demerit, negative) attribution, such as praise, rewards, prizes (or penalties and punishments) and grades.<sup>15</sup> We find the concept in Homer's writings, as argued for by A W H Adkins:

The Homeric king does not gain his position on the grounds of strength and fighting ability. He belongs to a royal house, and inherits wealth, derived from the favored treatment given to his ancestors, which provides full armor, a chariot, and leisure. Thus equipped, he and his fellow agathoi [nobles], who are similarly endowed, form the most efficient force for attack and defence which Homeric society possesses. Should they be successful, their followers have every reason to commend them as agathoi and their way of life as arete [virtuous]; should they fail, their followers have every reason to regard this failure, voluntary or not, as aischron [shameful]. A failure...in the Homeric world must result either in slavery or annihilation. Success is so imperative that only results have any value; intentions are unimportant.<sup>16</sup>

It signifies an appraising attitude (positive or negative), like gratitude, praise, approval and admiration.<sup>17</sup> What Rawls says about desert really applies to non-deserved merit, which we do not earn, but is a gift of the Natural Lottery. Non-deserved merit can be features which the Natural Lottery have distributed, such as your basic intelligence, personality type, skin color, good looks, smiling eyes, good upbringing, and genetic endowments. The most beautiful dog in the canine beauty contest merits the first prize, the tallest person in the city merits the prize for being the tallest person in the city, and a black actor merits the part of playing Othello over equally good white actors, because race is a relevant characteristic for

<sup>14</sup> See J R Lucas, *Responsibility*, Oxford University Press 1993 for a useful, though overly simplified, version of the standard view. See F Feldman, 'Desert: Reconsideration of Some Received Wisdom' Jan 1995 *Mind* vol 104.

<sup>15</sup> See G Sher, *supra* n 10 at 53.

<sup>16</sup> A W H Adkins, *Merit and Responsibility: A Study of Greek Values*, 1960 at 35.

<sup>17</sup> See D Miller, *Social Justice*, Oxford University Press 1976 for a good discussion of appraising attitudes and their relationship to desert claims. The relevant section is reprinted in L Pojman & O McLeod (eds), *What Do We Deserve?*, Oxford University Press 1999 at 93-100. We may note that while admiration may have as its object any value, praise (and blame) are only appropriate to desert claims.

that part, even though he did nothing to deserve his blackness. In these situations beauty, tallness and blackness become meritorious traits, whereas ugliness, shortness and whiteness are demerits. The formula for merit is:

**S merits M in virtue of some characteristic (or quality) Q which S has**

where S is the subject, M is the thing which S ought to receive, and Q is the merit base, the good (or bad) quality possessed by S.

Desert, on the other hand, is typically or paradigmatically connected with action, since it rests on what we voluntarily do or produce. It is typically connected with intention or effort. As George Sher writes:

Of all the bases of desert, perhaps the most familiar and compelling is diligent, sustained effort. Whatever else we think, most of us agree that persons deserve things for sheer hard work. We believe that conscientious students deserve to get good grades, that athletes who practice regularly deserve to do well, and that businessmen who work long hours deserve to make money. Moreover, we warm to the success of immigrants and underprivileged who have overcome obstacles of displacement and poverty. Such persons, we feel, richly deserve any success they may obtain.<sup>18</sup>

I deserve to win the race because I have trained harder than anyone else. You deserve praise for your kind act because it was a product of a morally good will. The man or woman who works hard at a socially useful job deserves more in terms of salary than the person who loafs or works half-heartedly. The Good Samaritan deserved gratitude and benefit for helping the helpless, wounded Jew, which deserved to be reciprocated preinstitutionally, but he would have deserved praise even if his efforts failed. On the other hand, your native intelligence, reflected in a high IQ, may be merited but not deserved, since you were born with it and didn't do anything to deserve it; a prize for being the youngest person in the room is merited but not deserved, since there's nothing the person did to deserve it; and receiving an A on a test over material you effortlessly mastered, was something you merited more than you deserved. Similarly, a black actor's claim on the part of playing Othello has merit although the actor did nothing to deserve his skin color.

A Taxonomy of Appraisal Terms

<i>Desert ( Effort-Will- Responsibility)</i>		<i>Merit (Any positive or negative quality)</i>		
<b>Moral</b>	<b>Non-Moral</b>	<b>Rewards</b>	<b>Prizes</b>	<b>Compensation</b>
Kantian Good Will	Effort made towards	Grades		
Altruism	a worthy goal	Contribution		

Both positive desert and positive merit imply the fittingness of positive rewards or praise, but one has more to do with the internal motivation, control and intention and the other with the external success.

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<sup>18</sup> G Sher, *supra* n 10 at 53.

Some philosophers doubt that the merit/desert distinction is very strong.<sup>19</sup> But consider: Suppose in times gone by a race of humans were born with wings and light bodies, so they could fly. Such people had great social utility, for they could fly over mountains or enemy lines with important goods or information. When there was need of a secure messenger, they would typically get picked over more earth-bound mortals. The flyers obtained higher salaries than walkers and enjoyed great fame and social prestige - much like star athletes do today.

The flyers didn't deserve their wings, but they certainly merited the employment and honors they were given. They were the best candidates for flying to distant places - and reaching them safely and securely. Were there no need of distant communication, their wings would have had only aesthetic value. The need for a means of communicating over long distances created the institutional value of rewarding winged people.

Contrast this with the person who does everything he can to live a virtuous life, to practice benevolence and contribute to the social good. This person deserves praise and honour in a way the flyer may not (let us suppose that the flyer flies almost effortlessly). One merits goods, whereas the second person deserves them. Although I cannot develop the thought here, one must be a metaphysical libertarian or (perhaps) a compatibilist to hold to rewarding desert, but even a determinist can honor merit - indeed, he may be determined to do so.

Joel Feinberg calls such meritorious qualities as intelligence, native athletic ability, good upbringing "the bases of desert," meaning that while we may not deserve these traits, they can generate desert claims. That is, while you may not deserve your superior intelligence or tendency to work hard, you do deserve the high grade on your essay which is a product of your intelligence and effort.

The formula for desert is:

**S deserves D in virtue of doing (or intending or attempting to do) A**

where S is a subject, D is the property, thing, or treatment deserved, and A is the act, the desert base for D.<sup>20</sup>

I suggest that we can further divide desert into moral and nonmoral desert. Moral desert corresponds to the Kantian good will, the intention to do one's duty or go beyond what duty requires. The moral person deserves happiness in proportion to the degree of his good will. Nonmoral desert has to do with effort in morally acceptable activities. We admire Lance Fleming for overcoming his cancer in winning the 1999 *Tour de France*. In some sense, he deserved to win. Of two people of equal ability, the one who trains more diligently and exerts himself more (non-morally) deserves to win in the competition, even if by bad luck

<sup>19</sup> Kleinig, in an *Elvesier Encyclopaedia* entry on *desert*, writes that if there's anything to it, it's soft.

<sup>20</sup> This is not a full characterization, since temporal indexical need to be included. The reader can easily apply these. I leave them out in order to keep the discussion focused on the essential differences. Robert Audi suggest that virtuous character is also a desert base. In so far as our effort creates our character, this is true, but our character may also have a heredity and environmental base, in which case it is more moral merit than desert.

(eg, he accidentally trips), the less deserving actually wins. I qualify nonmoral desert with the phrase “morally acceptable activities,” since we would not say that the thief who trains hard to burgle deserves to be successful or the maniac who becomes skilled in assassination deserves to succeed in assassinating the President.<sup>21</sup> Wittgenstein gives an example in another connection which nicely illustrates the difference. Suppose, while playing a game of tennis, someone reprimands me, “You ought to work harder to play a better game.” I might reply, “I don’t want to - it’s not that important,” without receiving serious censure. But if, on failing to do my moral duty, someone said to me, “You ought to work harder to be a conscientious person,” and I replied, “I don’t want to - it’s not that important,” I would rightly deserve censure.<sup>22</sup>

I said that desert was *typically* or *paradigmatically* connected with what we do or intend to do, but a secondary *negative* use concerns what happens to us. We say that the innocent infant or child didn't deserve to get cancer and that the woman killed by a stray bullet deserved to have been spared. In these cases we posit a base line of innocence and reason that the innocent deserves an opportunity to develop, which in this case is thwarted by natural catastrophe. The infant is innocent *tout court* and the woman is innocent with regard to the behavior of the bullet. Fred Feldman mentions the case of the figure skater who is intentionally maimed by a thug, hired by her opponent, so that her opponent can win the competition. Surely, the injured skater deserves compensation, though she is not responsible for what she deserves. I would say that she would deserve (or merit) some compensation even if it were a disease that caused her to be unable to compete. Do the blind, the deaf, and the physically and mentally handicapped merit or deserve compensation for their handicaps? If so, why? In some sense, since they are innocent of ill-doing that might require punishment, they do merit special compensation to bring them up to a baseline of well-being, but, beyond certain minimal benefits, society may not have the resources to give them what would bring them up to the average. Perhaps our notion of a God and a heaven has to do with our sense that nature is unfair and our sense that the discrepancy between what we deserve and what we actually get in his life should be rectified. God is seen as the great judge and Compensator, who will bring it about that the virtuous and vicious get exactly what they deserve. All will be made right in a future existence. The notion of karma, which holds that there is a casual relationship between your actions in this life and your character and circumstances in the next, plays a similar role.

Let us designate such instances *compensatory desert*, or *compensatory merit*, signifying that people should ideally be compensated for evils which were in no way their fault, evils which were either brute bad luck or brought on by other agents' behavior.

The formula for *compensatory desert* is:

**S deserves C from Y in virtue of Y's doing X to S**

where C is the compensation due to S on account of some harm ( X) that has happened, is happening or will likely happen to S.<sup>23</sup> If I drive my pick-up truck over your left arm, I

<sup>21</sup> Or perhaps the industrious criminal does (non-morally) deserve success, but his kind of desert is overridden by the fact that the victims deserve or have a moral right not to be burgled or killed.

<sup>22</sup> L Wittgenstein, ‘Lecture on Ethics’ *Philosophical Review* (1944).

<sup>23</sup> See F Feldman, *supra* n 14 at 63-77 for an excellent essay on this type of desert.



should compensate you for the damage. As far as the logic of compensation is concerned, there is a difference between an agent harming S and nature harming him. In cases where the person is harmed by nature, society may not owe him anything. On the other hand, the notion of providing everyone in society with the possibility of a minimally good life may generate an institutional right to be compensated for nature's harm. In this case society treats nature as a quasi-agent and seeks to off-set its "actions."

The question may be raised, is compensatory desert really a type of desert or just another kind of merit? Perhaps it could be either. If we think of the person as a moral agent who is doing his best to live a moral life, then the harm is bringing his welfare quotient down from where it should be. In this case he deserves not to be so harmed. However, if the person is a child, innocent, but not yet a moral agent, it is bringing him under what innocence merits. Similarly, animals do not merit being slaughtered so that we can enjoy the taste of meat. On other hand, if the person is immoral and contracts a dread disease, he may be getting "poetic justice," harm or punishment which he really deserves but which is not being administered via a human authorized agency.

Types of merit include grades, contribution or reward, and prizes. We give students grades on the basis of merit, on how well they have performed on tests, essays and class discussion, not on how hard they have tried. The student who tries hardest may actually fail the course. We reward people for their productivity and their contribution to society whether or not they deserve their talents. General MacArthur merits our respect even if he did nothing to deserve his fantastic military skill. The skilled surgeon who effortlessly performs a life saving operation merits our gratitude and some reward. The insane homicidal maniac merits being removed from society, even though he is not responsible for his acts. Marx, referring to St. Paul in the New Testament, said that in pre-utopian society, he who does not work, should not eat, food being a form of just desert. He went on to say that the rule should be "from each according to his ability, to each according to his contribution," signifying productivity as the merit-based wage differential. When I was in Capitol Reef National Park last summer, I heard the following story about Dewey Gifford (1901-1996?), a cattleman who worked in the area for over 60 years. One day Dewey asked the cattle owner for a horse in order to make his work easier. The owner took the request and did a cost-benefit assessment. He came back to Dewey with the proposal that he could provide a horse but that it could get only a bare minimum of food, so it would be constantly hungry. Dewey turned down the offer, saying "If my horse does an honest day's work, he deserves an honest day's pay." Substitute "merit" for "desert" and my point is made - even a horse who works out of coercion merits a reward or proper remuneration for his contribution or services.

Desert, then, is closely connected to effort and intention, whereas merit signifies positive qualities that call forth positive response. While God, knowing our inner motivations, rewards purely on the basis of desert, we fallible beings, being far less certain as to how to measure effort and intention, tend to reward merit, the actual contribution or positive results produced. You and I may both get the same *merit* pay bonus for producing 100 more widgets than the average worker, but I may deserve them more than you do, since your superior native ability enabled you to produce them effortlessly whereas I had to strain every ounce of strength to get the same result.

An interesting example of the conflict between desert and merit occurred during the

Olympic Games in Atlanta, Georgia (August 3, 1996). Carl Lewis, one of the leading United States athletes, having won his ninth gold medal in the long jump, requested that he be added to the United States men's 400 metre relay team. He argued that, because of his superior ability, he merited it. Many athletes and fans agreed with him and requested that the coach substitute Lewis for one of the other runners. Some of the other spectators and runners, including those who feared being displaced by Lewis, were outraged at his audacity. They argued that Lewis shouldn't be put on the team because he didn't deserve to be on it in spite of his great talent, for he turned down the opportunity to enter the try-outs for the team. Those who made the team played by the rules, won their places in fair competition, and could legitimately expect to run. Here is a case where merit and desert seem to conflict, and where desert, it seems to me, wins out over merit. It wins out because we have a legitimate institution (the process of competing for a position on a team) in which those who play by the rules deserve to be rewarded with the positions which they fairly won.<sup>24</sup>

Finally, we may distinguish desert and merit from *entitlement*, positive rights. Even though I am a lazy bum who is undeserving of any wealth, I am entitled to the inheritance that my rich uncle bequeaths to me. For Rawls all desert claims reduce to entitlements and justified entitlements are those obtaining in a society governed by the principles of justice-as-fairness.

The awarding of prizes illustrates an institution where merit, desert and entitlement intermingle. We bestow prizes on the basis of how well a person performs in a socially constructed competitive activity. Only one team wins the National Football Championship or The World Series and thereby is entitled to the prize. All the others are losers, even though they may be more deserving (their total effort was greater) or more meritorious (their combined talent was greater). Only the runner who crosses the finish line first merits first prize even though the loser may have worked harder, and so be more deserving. Feinberg distinguishes between desert worthiness and desert qualification. The victor meets the qualification for the prize, even though another competitor is actually better, more worthy.

In a contest of skill in which the winner can be determined by exact measurement, such as a high-jumping contest, there can be no question of who deserves the prize (qualification). It is deserved by the contestant who has demonstrably satisfied the conditions of victory, in this case by jumping in the prescribed way the highest distance off the ground. There might still be controversy, however, over who deserved to win. To be sure, the victor deserved the prize, but who deserved to be the victor? Perhaps the man who truly deserved to win did not in fact win because he pulled up lame, or tore his shoe, or suffered some other unforeseeable stroke of bad luck. In a contest of skill the man who deserves to win is the man who is most skilled, but because of luck he is not in every case the man who does win.<sup>25</sup>

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<sup>24</sup> One may even say that they have a *right* to the spot. In this case the language of rights and desert seem to coalesce. The controversy over Lewis's participation was exacerbated by the fact that Canada unexpectedly beat the United States for a gold medal. Could Lewis's participation have prevented that? Should it have mattered?

<sup>25</sup> J Feinberg, 'Justice and Personal Desert' in Pojman and McLeod, *supra* n 17 at 74.

I think it would be better to say that the winner may not be the most meritorious, judged by the criterion of actual ability, but that he, nevertheless, is entitled to the prize. For contests, whether they be athletic events or competitive exams for fellowships, are socially constructed and intended to measure merit, but capable only of picking out the person who actually excels on the given occasion. If I excel on the competitive exam, I merit the reward, even if I am not as talented as another competitor. Perhaps we should say that fellowship exams and contests are generally meant to measure and give prizes for merit, but the prizes they offer are actually entitlements, socially devised rights.

There are other normative concepts (eg, need) which need to be assessed in relation to desert and its relatives. All of these concepts entail presumptive normative force. To paraphrase W D Ross, whom I follow in much of the spirit of my analysis, desert or merit claims create *prima facie* obligations on others to enable the subject to receive the things deserved or merited or to which the subject is entitled.

Although most of what I shall say in this essay applies broadly to both desert and merit, which greatly overlap, I will primarily be concerned with central uses of merit, those having to do with moral excellence and excellence connected with performing a task or job. My thesis, which may be called “Justice as Merit” (though “Justice as Desert” sets it in the classic tradition), is that such considerations provide strong *prima facie* grounds for distributing benefits and burdens, including coveted positions and occupations. In other words, I offer in broad outline a defense of meritocracy. In section II, I will outline my main arguments for the meritocratic thesis that desert claims constitute a strong *prima facie* ground for the distribution of appropriate goods. In section III, I will argue that desert trumps equality.

## 2. A Defense of Meritocracy

Why should we value desert and merit? Why should we reward and punish people according to their desert and merit? Why not reward them according to their needs? or according to a utilitarian calculus? or according to their entitlements, which flow from institutional arrangements and expectations? Let me first outline a deontological justification of desert/merit, and then offer a utilitarian justification and explanation of justice as desert.

### Justice as Merit as a Deontological Principle in Human History

It is interesting to observe how deeply the notion of justice as desert or merit is embedded in human history. It seems a pre-reflective, basic idea of primordial or Ur-justice. One finds it grounded in every known culture and religion. The ancient Greek poet Simonides defined justice as “rendering each person his due”.<sup>26</sup> Ancient Roman law, as indicated by the quotation from the Roman jurist Ulpian at the beginning of this paper, similarly defined justice as giving people what they merited, their due. The eminent sociologist George Caspar Homans observed, “Men are alike in holding the notion of proportionality between investment and profit that lies at the heart of distributive justice” and “Fair exchange, or

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<sup>26</sup> Quoted in Plato's *Republic* at 331. Although Socrates argues against Polemarchus's interpretation of this view, he holds a version of it himself.

distributive justice in the relations among men, is realized when the profit, or reward less cost, of each man is directly proportional to his investment".<sup>27</sup>

The idea is explicit in the Hindu and Buddhist idea of karma, where in succeeding reincarnations each person is rewarded in exact proportion to his or her desert. In Islam the Koran is filled with similar passages. One of the least known is the dictum, "A ruler who appoints any man to an office, when there is in his dominion another man better qualified for it, sins against God and against the State."

In the Judeo-Christian Scriptures we read that a lawlike principle rules the universe so that "whatsoever a person sows, that shall he also reap".<sup>28</sup> The message of the Hebrew Bible is that the mills of God grind slowly but surely. The righteous will prosper and the wicked will be punished in proportion to their wickedness. We read that punishment should consist in equivalent actions, "life for life, eye for eye, tooth for tooth, hand for hand, foot for foot, burn for burn, wound for wound, stripe for stripe" (Exodus 21:23). In the Book of Psalms we read that the righteous person "is like a tree planted by streams of water that yields its fruit in its season, and its leaf does not wither. In all that he does, he prospers." The wicked are doomed, "like chaff which the wind drives away" (Psalms 1).

In the New Testament we read that "he who sows sparingly will also reap sparingly, and he who sows bountifully will also reap bountifully" (II Cor. 9:6).<sup>29</sup>

<sup>27</sup> G C Homans, *Social Behavior: Its Elementary Forms*, RKP 1961 at 246 & 264.

<sup>28</sup> Galatians 6:7.

<sup>29</sup> In the Gospel of Matthew Jesus tells the Parable of the Talents in which a Master, about to depart on a journey, gives five talents to one servant, two to another and one to a third, and instructs them to improve on these endowments. Upon the master's return, they are called to give an account of their stewardship and are rewarded and punished in proportion to what they have done with the talents. The master rewarded the two servants who doubled their talents and punished the man who hid his in the ground (Matt. 25: 14-30). The central ideas are (1) The Stewardship Thesis: Our talents are not simply a product of the Natural Lottery, but of a Divine Bestowal. We didn't earn them, nor do we own them. They are gifts, sacred trusts, but we are responsible for using them in the service of God and humanity; (2) The Inegalitarian Thesis: We do not have equal endowments. Some people are more gifted than others. Some are Aristotles, Michelangelos, Mozarts, Newtons, Einsteins and Michael Jordans, whose abilities cause them to stand out as mountains amidst the mole hills of the rest of us less talented. Furthermore, we do not end up with equal results. Those who work harder generally receive more. Equal justice does not entail equal outcomes. It would be morally outrageous if all the servants, the industrious and the slothful, ended up with the same benefits. Instead, each reaps exactly as he has sowed. What is wrong is *undeserved* inequalities (and equalities); (3) The Desert Thesis: Desert is the basis for rewards and punishment. We are responsible for what we do with our talents, and each person will be rewarded on how well he uses his talents. To whom much is given, much will be required. You can take no credit for your initial talents, but you can take some credit for what you do with your talents, the resulting merit; (4) Desert is a Function of the Good Will. There have been two competing types of merit: *contribution* and *effort*. The contribution is what the actual result of one's endeavor is, but the effort consists in how hard one worked to develop one's talents and contribute to society. The three servants each had different initial abilities (in units of 5, 2, and 1) but very different resulting merits - contribution merit of 10, 4, and 1. We do not know exactly what the efforts involved were, though we do know that the third servant made no effort at all at improving his lot. He had no merit at all, which made him worthless in the sight of his master. Presumably the other two may have made equivalent efforts, reflecting the fact that they both doubled their original endowments.

The Parable doesn't actually tell us which criterion of merit is the proper basis for reward. Results don't tell the whole story. One could imagine the 5-talent servant investing his money but having bad luck and the one talented servant finding a talent along the road and so doubling his output. This is only a parable and should not be expected to yield a definitive distribution scheme, but the overall

Further, in the Jewish/Christian tradition this meritocratic principle is reflected in the doctrine of heaven and hell (and purgatory). The good will be rewarded according to their good works and the evil will be punished in hell - which they have chosen by their actions. Leibniz characterized this practice as an expression of the **principle of the fitness of things**:

Thus it is that the pains of the damned continue, even when they no longer serve to turn them away from evil, and that likewise the rewards of the blessed continue, even when they no longer serve for strengthening them in good. One may say nevertheless that the damned ever bring upon themselves new pains through new sins, and that the blessed ever bring upon themselves new joys by new progress in goodness: for both are founded on the **principle of the fitness of things**, which has seen to it that affairs were so ordered that the evil action must bring upon itself chastisement.<sup>30</sup>

It might seem that eternal hell is excessive punishment for human evil and eternal bliss excessive reward, but the basic idea of moral fittingness seems to make sense.

We observe this fittingness in the Lockean notion of property rights. In fact, Desert and Natural Rights, as opposed to institutional rights, are closely related to each other. Desert is typically based on what we have done (or what has been done to us), whereas basic or natural rights signify claims we make. I have a natural right to life (or not to be killed), but we would not say that I deserve not to be killed (though we might say I didn't deserve to be killed when someone murders me or the State executes me by mistake). The Lockean notion of property rights seems to be closer to a desert claim than a standard entitlement. I have a natural right to my own body (which I own but do not deserve - nor do I not deserve it), but I extend my property right to natural objects by mixing my labour with it. By tilling

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thrust of the Old and New Testaments inclines towards identifying *effort* as the decisive criterion of merit, what I have called the paradigm notion of desert. As Saint Paul put it, "If readiness is there, it is acceptable according to what a man has, not according to what he has not" (II Cor. 8:12) - a sentiment similar to Kant's later thesis that the good will is the only intrinsically good thing, "a jewel that shines in its own light."

As you may have noticed, the parable of the talents omits the doctrine of *Grace*. According to Saint Paul, we are not saved by works, but by grace through faith (Eph. 2:8-9). None of us wants to receive *only* what we deserve - otherwise we would all be found wanting. Forgiveness from God, procured in part on the basis of our repentance, our intention to reform, gives us more than we deserve. We are assured that God will not give us less good than we deserve. Nevertheless, there is still the initial act of commitment and the subsequent acts of obedience to God which become the basis of meritocratic judgment. Even in heaven the blessed will bear the differential rewards of their actions, for at Judgment Day they will be tried according to whether they built with "gold, silver, precious stones, wood, hay, or stubble - each man's work will become manifest; for the Day will disclose it, because it will be revealed by fire, and the fire will test what sort of work each one has done. If the work which any man has built on the foundation survives, he will receive a reward. If any man's work is burned up, he will suffer loss, though he himself will be saved, but only as through fire" (I Cor. 3:13-15)

<sup>30</sup> Leibniz, *Theodicy* (trans. E M Huggard) 1698. For an excellent discussion of the concept of fittingness, see G Cupit, *Justice as Fittingness*, Clarendon Press 1996. *The Oxford English Dictionary* defines fittingness as "appropriateness, becoming, suitable". It is partly a functional notion, as when we get suitable corrective lenses or the right medicine. It is partly moral, as when we speak, *following Aristotle*, of doing the right thing in the right way, at the right time, or as expressed by the Mikado, in Act II of Gilbert and Sullivan's opera "The Mikado", of letting "the punishment fits the crime." It also has an aesthetic aspect, as when we say a certain shade of purple is not appropriate for this picture.

the soil, planting crops, cutting down a tree and making a chair, I come to own the land, the fallen tree, the chair. I have added value to the external object, so it is fitting that I be allowed by others to use it as I see fit, ie, to own it. This process resembles a desert claim more than a typical natural right claim.

Karl Marx seems to hold a theory of desert based on labour derived from Locke's theory via Adam Smith. His Labour Theory of Value holds that the carpenter who creates the chair, investing ten hours of labour into the process, creates ten units of value, and so deserves all ten units of remuneration. If the carpenter works for an entrepreneur, the entrepreneur can deduct for the tools, investment and minimal profit, but must not **steal** what is the carpenter's lot. The carpenter deserves the value of his product minus the overhead. Marx, of course, believed that the means of production ought to be made into common property, but, at least in his *Critique of the Gotha Program*, he attacks Lasallian socialists' uncritical notion of ownership in which "the instruments of labour are common property and the proceeds of labour belong undiminished with equal right to all members of society." Marx rhetorically asks, "To those who do not work as well? What remains then of the undiminished proceeds of labour?" Only to those members of society who work? What remains then of the 'equal right'? Of all members of society?"<sup>31</sup> The first phase of the communist society will adhere to the labour theory of value. The worker will receive in accordance with his production, "with an equal performance of labour, and hence an equal share in the social consumption fund, one will in fact receive more than another, one will be richer than another, and so on." Only in the "higher phase of communist society, after the enslaving subordination of the individual to the division, and therewith also the antithesis between mental and physical labour, has vanished," in the more abundant society, will society "inscribe on its banners: from each according to his ability, to each according to his need." Until that time the formula for justice must be from each according to his ability, to each according to his contribution.

So Locke and Marx both hold to a theory of natural property rights that is desert based. Marx is more a meritocrat than Rawls, Nielsen or most contemporary liberals.

As these citations from the history of religion and philosophy indicate, desert has normative force, connected to obligation and duties. If I promise to pay you back my debt, I ought to do so and you deserve that I pay you back. We say that rational, but not hopelessly senile, people "deserve to be told the truth" about their terminal illness, the guilty deserve to be punished according to the severity of their crime, hard work deserves reward, as does social contribution - especially undergoing hardship or danger.

I think we get another hint of this *fittingness* or symmetry in the practice of gratitude. We normally and spontaneously feel grateful for services rendered. Someone treats us to dinner, gives us a present, teaches us a skill, rescues us from a potential disaster or simply gives us directions. We normally feel spontaneous gratitude to our benefactor. We want to reciprocate and benefit the bestower of blessing. On the other hand, if someone intentionally and cruelly hurts us, deceives us, betrays our trust, we automatically feel resentment. We want to reciprocate and harm that person. Henry Sidgwick argued that these

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<sup>31</sup> K Marx, 'Critique of the Gotha Program' in D McLennan (ed), *Karl Marx: Selected Writings*, Oxford University Press 1977 at 566f.

basic emotions were in fact the grounds for our notion of desert: punishment was resentment universalized and rewards - a sort of positive punishment - gratitude universalized.<sup>32</sup> Whether such a reduction of desert to resentment and gratitude completely explains our notion of desert may be questioned, but I for one do feel a universalized sense of resentful outrage when I hear of criminals raping and murdering, and I feel something analogous to gratitude - call it "vicarious gratitude" - when I hear of works of charity, such as those of Mother Teresa. These reactive feelings may well be the natural origins of our sense of justice. These reactive sentiments have a normative core: those whom I resent "ought" to suffer and those towards whom I feel gratitude "ought" to prosper. Of course, my sentiments-judgments are not infallible and may not even be valid. But if we can link them with the nature of morality itself, with promoting or detracting from human flourishing, we can moralize the reactive attitudes.

W D Ross offers a thought experiment to support this position. After identifying two intrinsically good things (1) pleasure and (2) virtue, Ross asks us to consider a third:

If we compare two imaginary states of the universe, alike in the total amounts of virtue and vice and of pleasure and pain present in the two, but in one of which the virtuous were all happy and the vicious miserable, while in the other the virtuous were miserable and the vicious happy, very few people would hesitate to say that the first was a much better state of the universe than the second. It would seem then that, besides virtue and pleasure, we must recognize, as a third independent good, the apportionment of pleasure and pain to the virtuous and the vicious respectively. And it is on the recognition of this as a separate good that the recognition of the duty of justice, in distinction from fidelity to promise on the one hand and from beneficence on the other, rests.<sup>33</sup>

Surely Ross is correct. It is intuitively obvious that the appropriate distribution of happiness and unhappiness should be according to virtue and vice. This sort of thought experiment seems to be what underlies the universal commitment to meritocracy mentioned above. It seems to be exactly the intuition that motivated Kant's principle of equality, a sort of symmetry between input and output in any endeavor. This finds expression in the *Groundwork for the Metaphysics of Morals* where Kant writes that conscientiousness or the good will, being the single desert base, is the only moral basis for happiness:

An impartial spectator can never feel approval in contemplating the uninterrupted prosperity of a being graced by no touch of a pure and good will, and that consequently a good will seems to constitute the indispensable condition of our very worthiness to be happy.<sup>34</sup>

In Part III, I will outline what a system of Justice as Desert would come to. But first, let us note the utilitarian justification for justice as desert.

### *Utility and Merit*

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<sup>32</sup> H Sidgwick, *The Methods of Ethics*, Hackett Publishing Co Indianapolis Book III, Ch 5.

<sup>33</sup> W R Ross, *The Right and the Good*, Oxford University Press 1930 at 138.

<sup>34</sup> I Kant, *Groundwork of the Metaphysic of Morals*, trans. H J Paton Hutchinson University Library 1948 at 59.

The answer to these puzzling questions leads us to the deepest regions of human experience. No doubt one can give a partial explanation of our belief in the propriety of rewarding and punishing people according to the nature of their acts by utilitarian considerations. Rewarding good works encourages further good works and punishment deters bad actions. By recognizing and rewarding merit, we promote efficiency and welfare. We want the very best surgeons to perform vital surgery, the very best judges to decide hard legal cases, the very best business persons to lead corporations in which we have investments, the very best engineers to design our bridges, nuclear power plants, airplanes and automobiles. Even the most ardent advocate of affirmative action on university campuses refrains from advocating that positions on the football, basketball or track team be based on any other criterion than merit. Where utilitarian grounds are strong, merit-based operations generally go unquestioned. Generally, a society that has a commitment to rewarding those who contribute to its well-being and punishing those who purposefully undermine it will survive and prosper better than a society that lacks these practices. But, of course, as we noted above in discussing Nagel, if we are driven simply by utilitarian considerations, we may have reason to override merit.<sup>35</sup>

We can give an evolutionary account of the need for giving people what they deserve in terms of group selection and survival. Millions of years ago a pattern of behaviour selecting for reciprocity, which is the underlying basis of desert, would have been chosen. Reciprocity is the principle that stipulates that you should return like behavior for like, a "tit-for-tat-rule." It creates an expectation that whatever I do unto others will be done to me. Among our Pleistocene ancestors behavior that was socially useful would have been positively reinforced, and behavior that was socially harmful, negatively reinforced - ie, social sanctions would have been used against it. Groups that promoted reciprocity would be more adaptive than groups that didn't. For example, suppose that in group A, members repay one good deed with another. When member A1 helps member A2 gather food, member A2 will at some future time share food or groom member A1. Benefactors will have the confidence that their good deeds will be rewarded. In group B no such reciprocity functions. Either benefits are distributed randomly, equally or by virtue of force and fraud. As such, members have no incentive to help others, since behaviour is not socially reinforced. There is no causal relationship between actions and pay-offs. If I will reap as much good as you, whether I work or not, where is the incentive to work? All things being equal, Group A will have a better chance at surviving and flourishing than group B. Group A members will be more likely to defend each other from attack and to cooperate in endeavors that promote individual and social well being.

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<sup>35</sup> There is a classic objection to utilitarianism which applies here, but utilitarian considerations would also enjoin us to punish the innocent in order to deter crime. Suppose a sheriff has weighty evidence that by framing and hanging a vagrant for a crime he didn't commit, the crime-rate in his town will be greatly reduced and the well-being of the town greatly enhanced. Why not frame and hang the vagrant? The answer is "Because he is innocent. He does not *deserve* to be punished. So it would be unjust to inflict harm on him." Even deeply committed utilitarians tend to shy away from applying punishment on the basis of utility alone (what Rawls calls "telishment"). A necessary condition for just punishment is guilt. The criminal must have done something that deserves harm. That is, a retributive theory of justice underlies the practice of punishment. We believe that not only should only the guilty be punished but, absent mitigating circumstances, all the guilty should be punished, and punished in proportion to the severity of the crime. As Emil Durkheim noted, "There is no society where the rule does not exist that the punishment must be proportioned to the offence."



Ethologists have documented reciprocity in apes, showing, in particular that our nearest cousins express gratitude and reciprocate. If chimp 1 helps chimp 2 retrieve a bucket of food, chimp 2 is likely to share it with chimp 1 or promote some other benefit for chimp 1 (eg grooming).<sup>36</sup> The formula goes like this:

**If A helps B at time t, B is expected (ought to) to help A at some subsequent time.**

In their ground -breaking work *Unto Others: The Evolution and Psychology of Unselfish Behavior*, Elliott Sober and David Sloan Wilson illustrate this point about desert as the socially beneficial distribution of rewards and punishments. They take the case of the hunter, who spends an enormous time hunting at great risk to himself, but distributes food to all of the group, hunters and non-hunters alike. This seemingly altruistic, group enhancing behavior, it turns out is rewarded by the group. “It turns out that women think that good hunters are sexy and have more children with them, both in and out of marriage. Good hunters also enjoy a high status among men, which leads to additional benefits. Finally, individuals do not share meat the way Mr Rogers and Barney and Dinosaur would, out of the goodness of their heart. Refusing to share is a serious breach of etiquette that provokes punishment. In this way sharing merges with taking”. These new discoveries make you feel better, because the apparently altruistic behavior of sharing meat that would have been difficult to explain now seems to fit comfortably within the framework of individual selection theory.<sup>37</sup>

So, while hunting might, at first sight, appear an example of pure altruism, the rule of reciprocity comes into play, rewarding the hunter for his sacrifice and contribution to the group. Sober and Wilson call activities like hunting, which increase the relative fitness of the hunter, primary behavior, and the rewards and punishment that others confer on the hunters, secondary behavior. “By itself, the primary behavior increases the fitness of the group and decreases the relative fitness of the hunters within the group. But the secondary behaviors off-set the sacrifice and promote altruistic behavior, so that they may be called the amplification of altruism.”

This primitive notion of reciprocity seems to be necessary in a world like ours. One good deed deserves another (and mutatis mutandis with bad deeds). Reciprocity is the basis of desert - good deeds should be rewarded and bad deeds punished. We are grateful for favours rendered and, thereby have an impulse to return the favour; we resent harmful deeds and seek to pay the culprit back in kind (“an eye for an eye, a tooth for a tooth, a life for a life”). Put summarily, positive desert is gratitude universalized and punishment (negative desert) is resentment over harmful deeds universalized.

This is similar to Ross’s interpretation of the correlation of rights and duties:

A right of A against B implies a duty of B to A. What is meant is that A’s having a right to have a certain act done to him by B, which act may be either a

<sup>36</sup> F de Waal, ‘Good Natured: Animal Origins of Human Morality’, lecture delivered at the University of Utah, February 12, 1999.

<sup>37</sup> E Sober & D S Wilson, *Unto Others: The Evolution and Psychology of Unselfish Behavior*, Harvard University Press 1998 at 142-3.

similar act (as where the right of having the truth told to one implies the duty to tell the truth) or a different sort of act (as where the right of obedience implies the duty of governing well).<sup>38</sup>

That is, rights and duties are reciprocal. Your having fulfilled your duty to me, creates a right over against me (or a duty in me) to do an act of similar quality to you. Ross includes our duty to reciprocate a prima facie duty, which has presumptive force, but can be overridden in special circumstances by other moral duties.

### 3. The Logic of Justice as Desert

Justice is done when a person gets what he or she deserves. Moral desert is based on one's moral character, the quality of one's dedication to the moral point of view. This may be likened to the Kantian good will, one's moral conscientiousness. Kant asserted that a person should be happy to the degree of his or her moral goodness. We might represent this by a Feldman Graph.<sup>39</sup> Let there be two axes: a Desert Axis representing the level of one's moral integrity (+), as well as one's immorality (-), and a Well-Being or Happiness Axis representing various levels happiness (+) and unhappiness (-). Let us assign numbers in the standard way, the higher numbers representing the better outcomes and the lower numbers representing the lower outcomes. We then posit the following principle:

P1 Justice obtains when the morally good are happy in proportion to their goodness and when the morally bad are unhappy in proportion their immorality.

Suppose Mother Teresa has a high moral desert score of +10, and it turns out that her well-being is very high, +10. We add the positive numbers and get a combined Justice score of 20 (see the Northeast quadrant). Suppose Ted Bundy, who is reported to have raped and killed over 100 women, has a moral desert score of -10. Suppose he is proportionately unhappy (-10). Adding his combined scores of -10 and -10 in the Southwest quadrant, we get his justice score is +20. He is getting what he deserves and justice is satisfied. But suppose Mother Teresa is not happy. Fortune has frowned upon her and left her depressed and oppressed, so that her happiness score is -10. The combination of her desert score and her happiness score, is transformed to a negative number -20 (Southeast quadrant). Justice has not been done, but rather injustice prevails. Her negative score transforms her positive worth to a negative justice score. Or suppose that Ted Bundy, evil person that he is, somehow is flourishing. He's ecstatically happy, as happy as Mother Teresa should be. His happiness score is +10. Adding together his two scores, recognizing a negative score transforms a positive to a negative increment, we get -20 (Northwest quadrant). Injustice, once again, prevails.

We may add to our principle of justice to account for a negative score transforming positive score to a higher negative one in this way:

P2 Negative desert transforms positive well-being into a negative increment, resulting in a

<sup>38</sup> W D Ross, *supra* n 33 at 48.

<sup>39</sup> The graph was suggested to me by Fred Feldman's Intrinsic Value graphs in his 'Adjusting Utility for Justice: A Consequentialist Reply to the Objections from Justice' *Philosophy and Phenomenological Research* 60:3 Sept 1995, though I have slightly modified it to suit my somewhat different theory. I have been influenced by Feldman's paper.

negative justice score.

P3 Negative well-being transforms positive moral desert into a negative increment, resulting in a negative justice score.

It is worse from the point of view of justice that Mother Teresa is deeply unhappy than that a less morally good person is unhappy or that a bad person is happy. It is more just that a very bad person is unhappy than that a good person or less bad person is unhappy.

The justice graph reaches its ideal marks when the amount of happiness is proportional to the desert score. If a good person is happy, but less happy than he or she deserves to be, justice is diminished. If a bad person is happier than he or she deserves to be, justice is diminished. But if a good person is happier than he or she deserves to be, justice is also diminished. Similarly, if a bad person is unhappier than he or she deserves to be, justice is diminished. But it is better for a good person to be happier than he or she deserves to be than for a bad person to be more unhappy than he or she deserves to be. This intuition, if it is sound, is puzzling. Does it mean that there is a second order principle: P4 Justice is satisfied even when the good prosper more than they deserve? Or should we say that although these over-proportionate results simply indicate that justice is not the only value, grace and charity are also values? If we can make the good happier than they deserve, why not be generous. Perhaps this is an instance of grace or charity.

But it seems worse to make the bad person worse-off than he deserves to be than to make the good person better-off than he deserves to be. Why is this? I think it is because the principle, do no unnecessary harm, is more binding or stronger than the principle, increase happiness whenever possible. Yet it does seem worse that the evil are not punished or made unhappy to the extent of their viciousness than that the good get more than they deserve.

Sometimes we hear, and I once believed this myself, that in a perfect universe everyone will get what he or she deserves. But this seems wrong. In a perfect universe the good would get more than they deserve and the evil no less than they deserve. Justice requires proportionality of happiness to desert, but justice is not the only value. Happiness is a good in itself and benevolence would likely spread itself out generously, making the good as happy as possible. It would also endorse grace through repentance. That is, if an evil person repents of his evil, forgiveness is possible, so that though his total life desert score is very low, grace mitigates that score and raises his score significantly. For example, suppose Ted Bundy, who had a desert score of -10 for a number of years, repents and decides to live a virtuous life (with a desert score of +5). Even though Bundy would be expected to provide restitution for his past evil, it need not be the exact amount of his evil. Grace would seem to cancel out some of the debt. But to figure out these numbers would require an omniscient being, a God. For us, we may only take into rough account the tension between justice and mercy.

This point leads to the fundamental objection to this entire schema. We humans simply aren't capable of ascertaining how morally righteous people are, let alone how to determine when they are proportionately happy. It is true that we can't give these categories cardinal numbers, but we can roughly give them ordinal numbers. We can legitimately judge Mother Teresa to be more moral than the average morally good person, say my Aunt Jean or Uncle Sam, and we can judge these to be better people than Adolf Hitler or Ted Bundy or the

spiteful co-worker who maliciously harms his or her fellow workers. And we can make rough determinations about when people are finding overall fulfilment in their work and lives. If my friend Jane is always depressed and haunted with guilt (rational or irrational), I can rate her well-being score negatively and rank it lower than that of Jill, who manifests a zest for life, an ebullient confidence that has social success written all over it. Rough though the scoring may be, we have a pretty good idea of how our acquaintances are doing, both morally and in terms of well-being. The more we know the other person, the more confident we can be about these judgments, though perfect knowledge may elude us.

#### **4. Desert Trumps Equality**

It seems, on reflection, that desert has significant normative force. The morally good should prosper over the wicked, those who labour should prosper over the lazy, and whatsoever a man sows, that shall he reap. When we see someone working 12 hours a day six or seven days a week in order to build a successful business or career, such as many immigrants in the US have done, our sense of justice is satisfied when we see him or her succeed, whereas we feel that justice has not been done when someone who has failed to work hard succeeds over such industrious persons.

Consider a four person society consisting of David, Saul, Isaac and Nabal. David and Saul are two highly talented men; whereas Isaac and Nabal are low talented men. David dedicates himself to becoming a successful businessman (or scientist), sacrifices time and money in attaining his goals; whereas Saul spends his time surfing in the Mediterranean Sea, taking harmful drugs when he is not surfing, ending up a failure. Isaac, although he has limited intelligence and education, works diligently, takes whatever work he can find and does a good job at whatever he does. Nabal, true to his name - fool, has little talent, squanders his time and money, and ends up a failure. It seems obvious to most of us that David, because of his supreme effort, eminently deserves to be more successful than Saul, and Nabal and merits more success than Isaac (though he may not deserve it) and that Isaac deserves to prosper more than Saul or Nabal. Suppose that Isaac, through no fault of his own, is laid off from a job and applies for unemployment benefits. Saul and Nabal also apply. If there is only enough money for one person, we would say that Isaac deserves to receive it over the other two. We might even say that of the three only Isaac deserves the benefits from people's tax dollars. We might choose to help Saul and Nabal, but from a moral point of view that help should be tied to their intention to reform. If no inclination to reform is manifest, no obligation rests on the shoulders of society to provide them with a livelihood. Their demise is tantamount to a self-imposed suicide. We judge Saul more harshly than Nabal because he had more talents with which to improve his lot. We think that David and Isaac are equally deserving of success, though David, due to his superior talents, merits success in a more complex or highly developed enterprise.

Effort, industry, commitment, the good will, conscientiousness, these are the qualities that make up desert; talent, skill, contribution, native ability and intelligence, these are the qualities that make up merit. Society values merit as the bottom line and the desired result of social endeavors, but it recognizes desert as that which casts moral value on the individual, causing him to shine like a jewel in his own light. At the highly hierarchical United States Military Academy where I teach, cadets sometimes complain about what they perceive as the undeserved status and authority of some of those chosen to be regimental commanders and company officers. When I ask them whether they object to the inequality

of authority or the undeserved inequality of authority and status, they invariably answer, it is the undeserved inequality.

We already considered Ross's two worlds with equal utility (A) in which the virtuous prosper and the vicious suffer in close equivalence to their virtue or vice and (B) in which the virtuous suffer and the vicious prosper in equivalence to their virtue and vice, seeing that A was to be preferred to B. Let us now compare two worlds C and D which like A and B are equal in utility. In C, however, the virtuous prosper in accordance with their virtue and the vicious suffer in a manner fitting their viciousness; whereas in D the good and bad alike are equally but mediocally happy. I think we would choose C over the egalitarian D.

Recently Dick Arneson has argued for the intrinsic value of equality. He concedes that desert sometimes trumps equality but holds that equality has some intrinsic value.<sup>40</sup> He asks us to consider two worlds, which we may designate E and F, in which the utility is equal and which have the same number of virtuous and vicious people. In E the resources or happiness are distributed randomly, whereas in F everyone has an equal amount, regardless of virtue. Arneson thinks we would choose F, indicating that equality has some intrinsic force. I don't think that it is clear that we would choose the equal world. What I suspect may incline us to F is the epistemic opacity in knowing how to decide just who is virtuous and who is vicious. When we are uncertain, we may incline towards equal distribution. Perhaps this is what happens in our world. As Barry notes in our quotation at the beginning of this paper, we cannot know for sure just who is virtuous and to what extent people deserve their holdings, so we incline to a rough egalitarianism. Equality, then, becomes a default position.

I'm uncomfortable with this conclusion. Firstly, I think we do have a sufficient grasp of the concepts of desert and merit to apply them to distribution schemes. In general we ought to award coveted positions to the best qualified, wages to those who earn for them, rewards to those who achieve excellence in various institutional endeavors, punishments to those who violate just laws in proportion to their gravity. Welfare schemes should distinguish between the unfortunate, who through no fault of their own, lose out in life, and the drones who choose not to do socially useful work.

In this view of distribution, as Harry Frankfurt has suggested, the craving for equality should be replaced by a notion of *sufficiency*.<sup>41</sup> A society like ours with ample but limited goods should aim at meeting everyone's basic needs, with providing a floor under which no one is allowed to fall except where he is clearly at fault. Frankfurt shows how this policy would take care of Nagel's handicapped child without mandating equal welfare. The reason the family with the handicapped child should move to the city where he can receive basic care is not to bring him up to a place where he has equal life-prospects with his siblings, but where his basic needs are met, so that he can live a good life. The pure egalitarian would opt to bring him up to a place with equal prospects with his more able siblings, but that doesn't seem necessary, especially when it would require severe sacrifices on their part, perhaps bringing everyone to a level below sufficiency. Frankfurt offers the following thought experiment against thoroughgoing equality. Suppose we have 10 people

<sup>40</sup> R Arneson, 'Justice and Responsibility' (paper delivered to the Philosophy Department at New York University Nov 15 1996).

<sup>41</sup> H Frankfurt, 'Equality as a Moral Ideal' in *Ethics* vol 98:1 October 1987.

who each need five units of nourishment in order to survive. We only have 40 units. How should we distribute these? The thoroughgoing egalitarian would enjoin us to give four units to each even though that would result in the death of all. A utilitarian very likely would advise us to draw lots so that eight people would receive the requisite five units and two people die. The meritocrat, agreeing that eight should live and two die, would advise us to use a criterion of desert or merit (including perhaps likelihood of future contributions) in dividing up the resources.

### **Conclusion**

My thesis is that desert matters and trumps equality. I think that, generally, it also trumps utility. We reward people for their work or achievements in order to give them what they deserve or have merited. We punish in order to give criminals what they deserve. If, in the process, we can deter crime as well, so much the better, but the underlying justification of rewards and punishment is desert (or merit). I have not argued that desert is a moral absolute which can never be overridden by other considerations such as utility. In fact I believe that utility can sometimes override merit, but the presumption is always on the side of merit/desert.

I have not sorted out the various ways in which desert and merit compete with each other. That is a task for another occasion. My main goal has been to show that it is plausible to hold that desert is a far more important moral concept than equality, that equality is not a significant moral concept at all, and that it has only instrumental value. Hence desert generally trumps equality.<sup>42</sup>

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