

THE RIGHTS-INTERPRETATION OF DESERT

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A Rights Conception of Justice

To say that someone has a right to safety, liberty, property, etc., according to Reid, "has precisely the same meaning as to say that justice requires that he should be permitted to enjoy them, or that it is unjust to violate them. For injustice is the violation of [a] right, and justice is, to yield to every man what is his right."¹ He is affirming that

(1) Violating a right always involves committing an injustice

and

(2) Committing an injustice always involves violating a right.²

I think Reid is correct in affirming both propositions, but each has its critics. Thus, Hare denies (1), saying that someone who orders me at gunpoint to leave a public right of way violates my right but doesn't act unjustly.³ Now, that justice and injustice are matters of deferring to or violating rights seems so clear to me that it is hard to know how to defend it, for anything we appeal to is likely to be more dubious than what we wish to defend. Perhaps that is why philosophers often simply state the connection without bothering to argue for it. I will offer just three observations. First, justice is naturally thought of as the special virtue of judges and legislators, and it is natural to think their special task to be the securing of people's rights. Second, our languages of rights and of justice have a common origin in that the Latin word 'jus' is both an ancestor in political and legal discourse of our term 'right' and also the source of the term 'justice.' Third, traditionally and uncontroversially, justice and injustice involve securing or denying to a per-

¹Thomas Reid, *Essays on the Active Powers of the Human Mind* (Cambridge: M.I.T. Press, 1969), p. 416.

²Throughout this essay, except where otherwise indicated, whenever I talk of rights I mean what philosophers call claim-rights.

³R.M. Hare, *Moral Thinking* (Oxford: Oxford University Press, 1981), p. 148.

son what is her due, but what is someone's due seems to be that to which she is entitled and therefore has a right.⁴

However, this last remark is rejected by some who deny (2). David Miller claims that there are three conflicting "interpretation of," "principles of," and "values" under the concept of, justice; three independent factors consideration of which can yield differing judgments about what course of action would be just.⁵ These three "values" are rights, needs, and deserts and they yield, as interpretations of the general principle of justice that each person must be accorded her due, the principles "To each according to her rights," "To each according to her needs" and "To each according to her deserts." Miller's point is that one can commit an injustice against another by neglecting her needs or denying her her deserts even though one infringes none of her rights, *pace* Reid.

Since I take Reid's side, I wish to defend the view that appeals to needs and deserts bear on justice only insofar as they constitute appeals to rights. It is easy to see what a Reidian should say about need-claims. That I need something, that I cannot have much of life without it, establishes the presumption that it would violate my rights to deprive me of it (or even to leave me unable to get it). So I agree with Flew that "needs give rise to claims of justice only where and insofar as they generate rights."⁶

Deserving is a different matter. Deserving something doesn't ground or provide a reason for my having a right to it. Rather, I think, a desert-claim is a rights-statement. As its etymology indicates, what one deserved was originally what one was owed, had coming, from or on account of (*de*) having served well (*servir*).⁷ This strongly suggests that deserving something, at least, deserving something good, is having a right to it on account of having been good in some way. Such an account has strong intuitive appeal but would today be rejected by most moral philosophers, I think. Feinberg is most responsible for this rejection. His strongest argument is from a counter-example: someone can deserve to win a prize for a contest, e.g., a foot-race, a beauty pageant, a high-jump competition, without having any

⁴Cp. P.R. Foot, "Euthanasia," *Philosophy and Public Affairs* 6 (1977): 97.

⁵David Miller, *Social Justice* (Oxford: Oxford University Press, 1976), pp. 24-31, 151-53.

⁶A.G.N. Flew, "Equality or Justice?" in *Midwest Studies in Philosophy*, vol. 3, ed. P. French *et al.* (Minneapolis: University of Minnesota Press, 1978), p. 182. Miller attacks Lucas for espousing a similar position but his criticism focuses on Lucas' derivation of all rights from prior agreements. Since I have not endorsed that view of rights his criticism leaves my position untouched. See Miller, p. 123f.

⁷*Concise Oxford Dictionary*, s.v. 'deserve' See also Joel Feinberg, "The Nature and Value of Rights," in Feinberg, *Rights, Justice, and the Bounds of Liberty* (Princeton: Princeton University Press, 1980), p. 145.

right to the prize. Thus, though he concedes that "That a subject deserves *X* entails that he ought to get *X* in the *pro tanto* sense of 'ought,' but not in the 'all things considered' or 'on balance' sense," he claims that for a person to deserve something is for it be "fitting" that he receive it, and further claims that:

'Deserve,' 'fitting,' and 'appropriate,' on the one hand, and 'right,' 'entitlement,' and 'rule,' on the other, are terms from altogether different parts of our ethical vocabularies; they are related in such a way that there is no paradox in saying of a person that he deserves (it would be fitting for him to have) certain modes of treatment which, nevertheless, he cannot claim as his due.⁸

This talk of "different parts of our ethical vocabulary" is quite vague and we are right to be skeptical of efforts to set 'fittingness' apart as an evaluative concept radically separate from the concepts of rightness, goodness, and what ought to be. Recently the idea that our moral language is divided up into diverse parts has been urged in support of the doctrine that a philosophical theory of the moral concepts that maps out their logical relations is impossible and moral disputes couched in current moral terminology are irresolvable.⁹ So, much may be at stake in deciding whether desert is a basis for a justice-claim logically independent of any appeal to rights. Do Feinberg's contest-examples drive us to this conclusion? In this essay I wish to present and articulate an account of standard desert-claims which has the philosophical advantages of (a) avoiding reference to the obscure notion of fittingness, and (b) construing every desert-claim as a statement about rights, thus showing how desert can be accommodated within a rights-conception of justice.

Desert-Statements as Rights-Statements: A Counter-Example

Feinberg's counter-example can be strengthened if we allow that whoever deserves to win the prize therefore deserves the prize, i.e., deserves to be awarded it.¹⁰ After all, as he admits, "the aim of the competition is to sep-

⁸Feinberg, "Justice and Personal Desert," in Feinberg, *Doing and Deserving* (Princeton: Princeton University Press, 1970), p. 86.

⁹Alasdair MacIntyre, *After Virtue* (Notre Dame: Notre Dame University Press, 1981), esp. chaps. 1, 5, 6, 17.

¹⁰Feinberg is unclear about this. He seems to think both that only the actual winner of the contest deserves its prize and also that the most skilled deserves to win both the contest and its prize. ("Desert," p. 64) But, plainly, it is absurd to affirm that *S* deserves to win a prize while denying that she deserves to be awarded it and, plainly, deserving a prize is just deserving to be awarded it. So Feinberg is committed to the view that both the actual

arate the best from the others," i.e., the fastest, the most beautiful, the one who can jump the highest. It is the person who can run the fastest who deserves to win the foot-race and who also therefore deserves to win and be awarded the prize that is given in recognition of that speed. Now, this strengthens Feinberg's position because it allows that if Alice, who is the fastest runner, fails to breast the tape because of bad luck of some form (a freak accident, being tripped by another runner, etc.), nonetheless she is the one who really deserves (to be awarded) the prize, although she doesn't thereby have any right to (be awarded) the prize, because only Betty (who actually finished first) has a right to (be awarded) it. Since, therefore,

(3) (On account of her speed,) Alice deserves the race's prize

and

(4) Alice has no right to the prize

are both true, we seem forced to deny:

(5) Deserving something good is the same thing as having a right to it on account of one's excellence

and

(6) Desert can be analyzed and understood in terms of rights

This makes a powerful case against (5) and (6), but I think further reflection on the example enables us to refine these theses in such a way as to hold on to the substance of both of them. Since Alice is the one who, because of her superior foot-speed, deserves to win the race and be awarded its prize, we can, following Feinberg, infer that, other things being equal, she ought to win the race and prize, or, phrasing it better, the race ought to be won by her and the prize ought to be awarded to her. Talking this 'ought' to indicate that there would be something at fault, something wrong, if Alice should fail to win, the question arises, 'In what does the fault lie if the one who deserves to win doesn't win, if the race and prize don't go to the one they ought?' We cannot always find fault with the runner or the way she has run; perhaps she has done so much that, were everything else as it ought to be, she would win. But not everything else is as it ought to be, for if the race isn't won by the one it ought to be won by, then there is some flaw *in it*. (It is better to say that the race ought to have been won by Alice rather than to say that Alice ought to have won the race-whether Alice wins is important in evaluating *the*

winner and the most skilled deserve to be awarded the same prize, a conclusion he seems to want to avoid.

race, not in evaluating Alice, measuring how it is against how it ought to be.) The point of the race is to identify the person with the greatest foot-speed and the purpose of awarding the prize is to confer public recognition and acknowledgement of that speed. As in judging implements, so with judging contests it is purpose that grounds 'ought'-statements. The race fails in its purpose, is a bad indicator of foot-speed, does not do (measure and identify) what it ought to do, if it is not won by the fastest runner. (I take a deliberately simplified view that ignores other legitimate factors such as stamina.)

We can easily imagine an improved race and situation in which everything is as it should be. In virtue of the superior speed Alice has in the actual race and retains in the imagined improved one (from which the various forms of bad luck are removed) she wins this improved race and thereby acquires the right to be awarded its prize. Now, I think, we can see that what we mean in asserting (3) when she didn't finish first is roughly:

- (7) She is so fast, i.e., so excellent a runner that she would, *prima facie*, have a right to receive the prize if the race had gone as it ought

Because the race was flawed, went wrong in such a way that it didn't go to the one to whom it ought, Alice didn't acquire and doesn't have any right to the prize in the actual situation. Thus Feinberg's contest example shows that (5) as it stands is unacceptable. But interpreting (3) as (7) allows desert to be understood in terms of rights, though not always rights one has in one's actual, imperfect circumstances. Hence, (3) and (4) need not in conjunction drive us to reject (6). Of course, there is still some tension between (3) and (5), since in the situation imagined Alice deserves the prize without having a right to it. But this can be removed by interpreting (5) broadly enough to allow that deserving a good may be the same as having a right to it under certain improved conditions (provided that the right is grounded in the deserving party's excellence).

But now what are we to say of (8)?

- (8) Alice deserved to win the race

Plainly, it would be stretching things considerably to maintain that (8) is a claim that she had a right to win. Who would have the duty of providing her with victory? And by what means — throwing the contest? (8) is best understood as a claim about what the race ought to be like, not a claim about Alice's rights in the actual or any other situation. Must we, therefore, abandon (5) and (6) after all?

Standard and Non-Standard Desert-Claims

Rather than discarding (5) and (6) in the face of (8), I think we should save their substance by saying they need hold only for standard, 'full-fledged' desert-claims. Of course, this won't get us far unless it can be shown that (8) is somehow deviant. I think it is and think (3) is as well, though they are deviant in interestingly different ways. *Pace* Feinberg, (3) is not the claim that someone is so fast that it would be "fitting" for the judges to give her the prize after the actual race.¹¹ Since she lost, that wouldn't be at all fitting or appropriate. Rather, it is the claim that someone is so fast that, were the race to go as it ought, she would (*prima facie*) have a right to be awarded it (barring some special external factors). So we shouldn't say what Feinberg suggests: that when Alice deserves (to be granted) the prize, giving it to her has "a much weaker kind of... propriety [i.e., fittingness]" than it has when she has a right to the prize. Even in such a case as this it is the same *kind* of moral demand ("propriety"); it just exerts its pull in a different possible situation.¹² What makes (3) a deviant desert-claim in the contest example is precisely this contingency of the moral judgment (that, *prima facie*, she has a right) on other things, especially the race, going as they ought. Such contingency is missing from more standard and ordinary desert-claims such as 'Alice sang so well that she deserves that gratitude.' In those cases she deserves and is presumably entitled to these just as things stand in the actual situation.

I think (8) also is deviant and in a way is enlightening. First, notice how odd is any such talk of deserving to do, or to achieve, or to accomplish something. Both Feinberg and Miller discuss variants of (8) but neither seems to notice how it differs from all their other examples of things deserved: deserving "rewards, honors, prizes, offices, income, praise, recognition," grades, punishment, reparation, deserving to be held liable or responsible, deserving to be praised or blamed or thanked or resented.¹³ That what is deserved should normally find its natural expression in the passive voice, as in all these standard cases, is easily accounted for once deserving something desirable is analyzed in terms of acquiring, on account of some personal excellence, rights to be accorded it. (I discuss deserving undesirable things in the next section.) So (8), I concede, is not a rights-claim; but neither, I claim, is it a normal desert-statement—even its form is unusual. We can see, however, how the focal concept of desert manifested in standard

¹¹Feinberg, "The Nature and Value of Rights," *loc. cit.* Also see Miller, p. 83.

¹²What I say here could be phrased more technically in the model-theoretical jargon of deontically perfect alternative possible worlds.

¹³The quoted list is from Miller, p. 88. The other items are mentioned in Feinberg, "Desert", *passim*.

claims of personal desert generates the deviant cases. Standardly, when a person *P* deserves to receive some benefit *B* from some agent *A*, *P* has a right to get *B* from *A* and therefore *A* would treat *P* unjustly, would wrong *P* and fail to treat her as he ought, if *A* fails to grant *B* to *P*.¹⁴ Contrast this with a typical non-standard desert-claim, a non-personal desert-claim such as

(9) This legislative proposal deserves to be passed

Notice that (9) doesn't imply that in failing to pass it, the voters treat the proposal unjustly, violate its rights, or wrong it. But (9) does imply that in failing to pass it they don't do what they ought to do, for (9) is the claim that the proposal is so good that they ought to pass it. In this respect it resembles other non-standard and non-personal desert-claims, such as 'Niagara Falls deserves its popularity among tourists,' the claim that those falls are so rewarding for tourists that they ought to go see them. Standard desert-claims are rights-statements and thus imply moral 'ought'-statements. In contrast, non-standard desert-claims are themselves 'ought'-statements and sometimes merely prudential ones. Thus, standard desert-claims always raise questions of justice, but non-standard ones need not.

Often in deviant desert-claims it is not the subject of the claim—e.g., the bill, the falls—that are the primary beneficiaries, but someone or something else (the voters, the tourists); nonetheless, the desert-subjects do derive a kind of secondary 'benefit' in that they are dignified and lent prestige insofar as they get what they deserve. Thus, being passed would be a tribute to the bill's utility or justice and being widely seen would be a tribute to the falls' beauty. This is because being passed, being seen, etc. all indicate a favorable estimation by the judges, voters and tourists.¹⁵ Similarly, we say the prize, for instance, is given in recognition of the runner's speed. Recognition can be considered a *doxastic* attitude: to recognize that Alice is the fastest is (roughly) to come to believe that she is, and to do something in recognition of her superior speed is to make a public manifestation of this conviction. More commonly, though, people deserve things as tokens of *affective* attitudes others have (or should have or may have) toward them. What people deserve to get from others is fundamentally certain attitudes, especially admiration, gratitude, blame, indignation, etc. Any form of treatment is deserved only insofar as it emerges from the deserved attitude either naturally

¹⁴All these normative judgments about rights, wrong-doing, injustice, etc. should be understood as claims about what is the case *prima facie*.

¹⁵Sterba makes this point at James Sterba, "Justice and the Concept of Desert," *The Personalist* 57 (1976): 189.

or conventionally.¹⁶ Feeling gratitude, for example, naturally calls for acts of gratitude. Custom may call for a more particular type of action (e.g., a cash reward). This explains why conventions can sometimes figure in one's desert. If, for instance, in appreciation of the service done it, it has been decided that the nation will award a certain medal to anyone who has served it outstandingly, then someone who has done such service as to deserve the nation's appreciation deserves that medal. Likewise, where it is customary to give people a cash reward as a token of one's gratitude for their doing certain kinds of favors, we might take failure to give any such reward as an indication that the person who benefited from the favors lacked the due gratitude; in such a circumstance we would likely say that the one who did the favor not only deserved gratitude but deserved the reward as well. Expressing one's gratitude in some act of kindness is an entirely natural human response; if *A* didn't feel *any* inclination to do something for *B* even when *A* was in a position to help *B*, *A* couldn't properly be said to be grateful to *B*. However, expressing gratitude in this rather than that manner is a matter of personal choice and inclination and, I think, *A* is not guilty of denying *B* what *B* deserved if *A* chooses to express her attitude in a non-customary form, say, by sincerely offering to help *A* when necessary rather than by giving money. Institutions and customs thus can, but need not, figure in what one deserves.¹⁷ Miller says a person who rescues another solely in hopes of receiving a reward deserves the reward for what he has done regardless of his ignoble motives. Yet it seems to me that this depends on whether a reward was promised and what its basis is. Plainly, such a rescuer doesn't deserve any reward that is to be given as a token of gratitude for the rescuer's kindness, for the one rescued neither would nor should feel gratitude for what was manifestly not an act of kindness. Since the rescuer deserved no gratitude, she deserves no token of gratitude.¹⁸

On my view, then, for someone to deserve something welcome is for her to acquire, on account of her being good in some way, a right to receive it; it

¹⁶Sometimes we think of an accomplishment as if it were a benefit distributed in recognition of one's excellence. This seems to be what underlies the following example (adopted from Sterba): 'He's researched this so long and so diligently that he's the one who deserved to make the discovery.' Though people are normally hired and promoted for future-regarding reasons, we sometimes think of such appointments as if they were prizes given in recognition of superior qualification or past service as in 'He's the one who deserves the job.' Since this is true only insofar as the job is conceived of as a prize and since the employer needn't so conceive of it, I think this is a deviant desert-claim and grounds no complaint of injustice if the job goes to another. For more on this, see my "A Problem about the Basis of Desert", *Journal of Social Philosophy* 19 (1988): 11-19.

¹⁷Benn and Peters' view that desert always involves rules can be accepted only if such rules are not exclusively man-made rules. Their view is quoted at Miller, p. 90, footnote.

¹⁸Cf. Miller, p. 119.

follows that if people deserve certain favorable attitudes from others, they must have a right to those attitudes, e.g., a right to another's gratitude. This further implies the other must have a duty to be grateful. This will offend philosophers who hold the conjunction of:

(10) One is always subject to blame for not doing one's duty,

(11) One is never subject to blame for what one cannot control,

and

(12) One cannot control one's attitudes.

This is not the place to present a full response by going deeply into the question of whether 'ought' implies 'can'. Let me remark only that, first, there are at least *apparent* counter-examples to (10): the chairman may, for example, have the duty of maintaining order at meetings, but, when he cannot manage it, he doesn't do his duty though he cannot be blamed if he tried his best.¹⁹ Second, even if the apparent counter-examples to (10) can be explained away, (12) is problematical. Though one's feelings are not under one's immediate control—a normal person cannot, for instance, start feeling grateful at will—nonetheless, one can largely determine whether one becomes the kind of person who feels grateful for kindnesses. If you fail to take the necessary measures and wind up in a situation in which you don't feel the gratitude the circumstances demand, your ingratitude is in part your own fault and a proper ground for blame. Thus (12) is ambiguous: if it means we have *no* control over our attitudes, it is false; if it means we can have only *indirect* control over them, it loses its usefulness for the argument against me.

Unwelcome Desert

Thus far, I have discussed deserving various good things: gratitude, rewards, etc. and have held that such desert consists in acquiring a claim-right against another. I wish now to switch from considering such welcome desert to considering unwelcome desert: deserving to be blamed, punched, punished, etc. When, as a result of some service I have done you, I deserve (to receive from you) a sign of gratitude (and the gratitude itself), it comes to be true that your feeling and expressing no gratitude toward me would violate my rights. The purpose of someone's reminding you of what I deserve would be to point out to you that you would wrong me, violate my rights, in

¹⁹On this topic consult A. R. White, *Modal Thinking*, (Ithaca, N.Y.: Cornell University Press, 1975), pp. 147–57.

failing to be grateful. Such a desert-claim would come from my side if you and I were in a moral dispute about your showing me gratitude. In contrast, when, as a result of some disservice I have done you, I deserve to receive from you a sign of resentment, say, a rap in the teeth, it comes to be true that your feeling and expressing such hostility toward me would not violate my rights. Here the assertion that I deserve the blow would normally come from your side, not mine, and its purpose would be to point out in your defense that you would not wrong me by striking me. In unwelcome desert, as in welcome desert, it is some attitude that is fundamental: we are first justified in harboring a certain form of disfavor (e.g., resentment, blame, indignation) toward those who have wronged us or others in various ways and then, on that basis, justified in taking action that expresses that unfavorable attitude. This attitudinal response is a natural one and there is a logical connection between the attitude and the general type of action — that you are resentful of someone entails that you have some inclination to do something to harm her if possible. Imprisonment, fines, blows, execution, etc. can be deserved only insofar as they are expressions of deserved disfavor.²⁰ There are, of course, upper limits to just how much disfavor is deserved for any given case of wrong-doing and corresponding limits on just what sort of harmful action may be taken as expression of such disfavor. I'm afraid I have no philosophical account of how these limits are fixed and won't pursue that question here.

Talking simply of deserving forms of disfavor and of normal, perhaps institutional, forms of expression of that disfavor can, however, be misleading. Though my mistreatment of you normally will in fact lessen your good will and fellow-feeling toward me,²¹ and also lessen morally any claim-right I have to your goodwill, it does not of itself justify you in willing me harm for its own sake. Such willing would be simply spite and vengeance and is morally unacceptable. As Aquinas writes:²²

We must consider the mind of the one retaliating. For if his intention is directed ultimately to the evil of the person against whom he retaliates and rests there, then his vengeance is altogether unlawful: because to

²⁰In punishing we express not only our outrage but also (implicitly) our belief that the evil-doer's conduct justifies our outrage. Thus we express a doxastic as well as an affective attitude. Cf. Feinberg, "Expressive Function of Punishment," in *Doing and Deserving*, pp. 95–118.

²¹On this see P.F. Strawson, "Freedom and Resentment," in Strawson, *Freedom and Resentment and Other Essays* (London: Methuen, 1974), p. 21.

²²*S. T.* II-II, q. 108, art. 1. I have (somewhat freely) rendered *vindicans* as "the one retaliating" and *principaliter* as "ultimately" where the English Dominicans' translation which I use has "the avenger" and "chiefly".

take pleasure in another's evil belongs to hatred, which is contrary to the charity whereby we are bound to love all men.

What we are getting at when we say that someone deserves a rap in the teeth or a long prison term is that she has acted so wrongly that such treatment wouldn't violate her rights *if done for the right reasons*. Hurting her just for the sake of hurting her is not the right kind of reason but hurting her to teach her a lesson—to demonstrate in an unforgettable way just how objectionable we find her behavior— may be acceptable, no violation of the rather vitiated rights to our goodwill and concern she retains.

That the evil-doer's rights to our goodwill are weakened by her evildoing explains both why it is permissible to treat her in ways in which we have no right (liberty) to treat others and also why some extremes of punishment and ill-will are, because undeserved, unjust. Most of us think that significant intentional injury cannot be justified when undeserved. In terms of my account, this is the claim that so injuring a person always violates her rights unless her rights have already been vitiated by her own misconduct.

We should, incidentally, note that there are deviant cases of unfavorable desert. When we say, for example, 'That bill deserves to be defeated' we seem to mean it is so poor that defeating it wouldn't be bad (not imprudent for us). This example resembles standard desert-claims in that first an unfavorable attitude (say, scorn) is deserved and then a form of conduct (voting against it) is deserved as an expression of the attitude. In a standard desert-claim such as 'He deserves to be punished' we mean that he has been so bad that punishing him wouldn't be morally bad (not unjust to him). In the standard case the issue is always whether what we do to the desert-subject violates her rights; in non-standard cases it frequently is simply whether what we do to the desert-subject will injure our own interests. Such non-standard desert-claims need not raise any question of justice.

Summary and Implications

The first distinction we must make, then, is between standard, normal desert-claims and merely deviant ones. Since the latter needn't involve any serious questions of justice and the former can always be understood in terms of rights acquired or vitiated by one's goodness or badness, desert needn't be separated from entitlement as a different kind of justice-consideration, Miller and Feinberg notwithstanding. However, though every standard desert-claim is a rights-claim,

(13) *S* deserves to be *V*-ed

can be used to make two very different kinds of claims about the connection between *S*'s rights and *V*-ing *S*. This introduces our second distinction — that between positive desert (deserving something desirable) on the one hand and negative desert (deserving something undesirable) on the other. On my view, it is wrong to think that *S*'s deserving something desirable differs from *S*'s deserving something undesirable only in that *S* stands in the same relationship but to a different kind of thing. On the contrary, when being *V*-ed is a desirable fate, (13) means that *S* has been so good in some way that, if properly intended, we would (*prima facie*) violate her rights by not *V*-ing her. When, however, being *V*-ed is an undesirable fate, (13) means that *S* has been so bad in some way that our *V*-ing her, if done from the right motive, wouldn't violate her rights.

I have not tried to *prove* my view of desert. Rather, as intuition and most dictionaries attest, it is common sense to understand desert in terms of entitlement. What I have tried to do here is turn back some supposed counter-examples, to point out advantages gained by excluding clearly deviant desert claims from our analysis, to show how such deviant claims are related to and derived from standard desert-claims, and thus to show that desert poses no insuperable difficulties for Reid's thesis (also, I think, supported by common sense) that every question of justice is a question of rights.

My concern in this essay has been solely with matters of conceptual clarification, meaning and logical connection. It is not surprising, however, that such clarification has important implications for certain substantive normative controversies. Philosophers have, I think, been misled precisely by misunderstanding the complexity of desert and the very different things we can mean by sentences in the form of (13). I will point out just two kinds of error.²³

Focussing too narrowly on deserving as it concerns conferring such bad things as punishments, philosophers leap to the false generalization:

- (14) It is wrong for us to confer *X* on someone when she doesn't deserve *X*.

Thus they are led to condemn laws permitting inherited wealth, for example, where good things, not bad, are conferred. Focussing too narrowly on deserving such welcome things as rewards, philosophers leap to the false generalization:

²³I discuss these normative issues more fully in my "Two Concepts of Desert," *Law and Philosophy* 5 (1986): 219–235. For a response, see H.S. Hestevold, "On the Moral Status of Punishment", *Law and Philosophy* 6 (1987): 249–257. My rebuttal is in my "Deserved Punishment", *Law and Philosophy* 8 (1989): 263–277.

(15) It is wrong for us not to confer *X* on someone when she deserves *X*.

Thus they are led to condemn judicial clemency, where something bad, not good, is deserved. Attending to the different meaning and function of positive and negative desert-claims leads us to more limited and less counter-intuitive generalizations:

(16) Conferring *X* on someone who doesn't deserve *X* is unjust when *X* is something unwelcome, but not usually when it is something welcome

and

(17) Not conferring *X* on someone who deserves *X* is unjust when *X* is something welcome, but not usually when it is something unwelcome.

A Meta-Philosophical Lesson

At the beginning of this essay I agreed with Reid that acting unjustly, denying another her due, is nothing other than violating someone's rights. I have tried to show how deserving can be fit into such an account of justice and injustice. We cannot identify acting justly with giving people what they deserve, for we can both give them undeserved benefits and withhold from them deserved harms without injustice.²⁴ On the other hand, there is no reason to say of an account of justice solely in terms of rights what MacIntyre says, that "being based exclusively on entitlements [it] can allow no place for desert."²⁵

Taking concern for rights to be the focus of justice, and desert-claims to be but a special species of rights-talk, may help us better to integrate the thought of some classical thinkers into our current controversies over justice. Some philosophers have recently maintained that Aristotle, Spencer and others conceived of justice solely in terms of desert and have further maintained that this conception makes it difficult for us moderns who conceive of it in terms of rights to assimilate and understand their doctrines.²⁶

²⁴*Pace* Hospers: "Justice is getting what one deserves; what could be simpler?" Quoted at Feinberg, "Desert," p. 56, footnote.

²⁵MacIntyre, p. 232.

²⁶On Aristotle, see MacIntyre, chaps. 12, 13, 17; on Spencer, see Miller, chaps. 1, 6.

It seems to me a thinker doesn't have to use the word 'rights' or some semantic equivalent before we can properly say he or she was talking about desert. But what is important is that we cannot ascribe to him or her the concept of deserving something unless we can ascribe the thought of rights being acquired and vitiated on account of excellence and defect. Since that is what deserving *is*, it is hard to see how we could know a thinker was thinking of deserving unless we could determine that he or she was thinking of that. If, as is commonly held, thinking of rights is just thinking of duties and requirements in a certain way, there need be no great difficulty in ascribing such thought even to ancient writers. Thus, lines of communication are established and the dispute between these classical thinkers and ourselves may come down to the question of whether deserving is the only way in which rights can be acquired or weakened. On this we may in the end diverge from some classical thinkers on justice. But at least when we part ways we shall know that we are all traversing the same country.

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