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A COMPATIBILIST THEORY OF JUSTICE AND DESERT

BY

MATTHEW JOHN CUTLER

Political Science and Justice Studies, BA
University of New Hampshire, 2007

THESIS

Submitted to the University of New Hampshire

in Partial Fulfillment of

the Requirements for the Degree of

Master of Arts

in

Justice Studies

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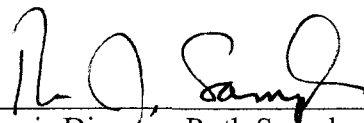
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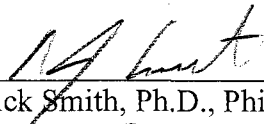
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Matthew Cutler

This thesis has been examined and approved.



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TABLE OF CONTENTS

ACKNOWLEDGEMENTS.....	v
ABSTRACT.....	vi
INTRODUCTION.....	1
I. DESERT BASES.....	9
The Value of Effort.....	9
Productivity and Contribution.....	12
Need.....	16
Merit and Virtue.....	18
Deserved Punishment.....	22
II. RECONCILING DETERMINISM AND FREE ACTION.....	25
Free Action and Desert.....	26
Determinism and the Rejection of Desert.....	31
A Reconciliation of Determinism and Free Action.....	33
III. TOWARDS A PRINCIPLE OF OPPORTUNITIES.....	40
The Asymmetry of Retribution and Distribution.....	41
A Principle Grounded in Empirical Truths.....	44
BIBLIOGRAPHY.....	49

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ABSTRACT
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Matthew John Cutler

University of New Hampshire, September, 2009

This thesis argues against the asymmetry of desert observed across theories of distribution and retribution. While distributive theories have downplayed the significance of desert, retributive theories have outwardly embraced the role of desert in punishment. At the heart of this imbalance rests an unresolved tension between determinism and freedom. In the interest of bringing symmetry to theories of justice, this thesis reconciles determinism and freedom as two compatible notions of human actions and traits.

Additionally, this thesis argues for an increase in opportunities afforded to the least advantaged in order to balance punishments and benefits. This position stems from an acknowledgment of the empirical realities of crime and punishment in capitalist societies. Foremost among the empirical concerns of this thesis is the reality that criminality in capitalist societies is highly concentrated among those residing on the lowest rungs of the socioeconomic hierarchy. The compatibility of determinism and freedom and the rejection of the asymmetry of desert are utilized in making a case for the desert of opportunity as a priority of just societies.

INTRODUCTION

Theorists argue over what individuals deserve in virtue of a variety of factors, but they generally agree that the structure of desert takes the form; A deserves B in virtue of C (Moriarty 519). In addition, theorists generally agree that desert is a natural property as opposed to an institutional one (Moriarty 519). By a natural versus institutional property, it is meant that the concept of desert is a universal norm that functions the same in every culture rather than a relative social norm that may function differently from culture to culture due to varying interpretations of what is just. According to the naturalist perspective, people are understood to be deserving of things across political and cultural boundaries, thus desert is universally applied. If someone gets something they deserve, people generally agree that this is a just outcome; if that person does not receive what they deserve, this is generally held as unjust. The challenge to this notion of naturalism is the institutional argument which places more emphasis on the social structure of deserts and their bases. For example, John Rawls argues that even though someone may get what they deserve, this is only regarded as just by those who are socially situated on the side that would adhere to that conclusion. The assumption that someone deserves something, as well as the conclusion that their receiving it is just, is a socially constructed property that can vary across cultures. I adopt neither the naturalist nor institutional perspective, as

I find it necessary to embrace the conclusions drawn by both perspectives in arguing for a symmetrical system of justice. The central argument contained herein is that socially and economically disadvantaged people deserve a fair system of opportunities in the distributive sense on the basis of need and the traditional moral retributive arguments in favor of punishment must be qualified by such a moral distributive argument for desert if they are to be justifiable. My intention is not to reaffirm retribution in this paper, but I do encourage future theorists to decide whether or not retribution will be necessary to maintain as an institution of justice in light of the movement towards restorative justice.

Included in my thesis will be an inspection of the asymmetry of desert across distributive and retributive theories of justice. Contemporary discussion of desert has just begun to address this issue and this asymmetry has yet to be justified or defeated. Therefore, my research will attempt to pick up where the most recent and relevant work has left off. In his article, *Against the Asymmetry of Desert*, Jeffrey Moriarty suggested that further researchers who doubt that the asymmetry can be justified pursue the task of deciding who is wrong: distributive theorists who reject desert, or retributive theorists who embrace it (Moriarty 533). Distributive theorists generally reject personal desert because of its alleged impracticability in determining the distribution of benefits. This means that it is impossible to determine what part of a person's desert base (a basis for claiming to be deserving of an outcome) is attributable to her own, uninhibited free will and what part is traceable to some outside influence or support. Retributive theory, on the other hand, has been quick to determine that people deserve punishment for their wrongful acts and has given little consideration to the part of the individual's action that can be attributable to her social and economic circumstance.

Additional notions of justice relevant to this discussion do exist, namely restorative and utilitarian justice. Restorative justice seeks to rehabilitate criminal offenders and return them to society. A restorative perspective would agree that an offender deserves some degree of punishment, but it would posit that this punishment should in part be constructively geared toward returning that offender back to the society as a law-abiding individual. In this sense, a restorative perspective would argue that the criminal deserves the chance to live lawfully amongst the rest of those people who have refrained from engaging in criminal behavior. The utilitarian perspective, however, would only accept an outcome if it meant that its occurrence would produce the greatest good. The maximization of social welfare or utility does not require an evaluation of personal deserts. Utilitarian concerns can be considered neutral or indifferent to the concept of desert, but the notion of social utility is apparent in my thesis. Just as punishment can be said to fulfill utilitarian concerns of public safety or deterrence, the distribution of opportunities should fulfill the utilitarian concern of social welfare. Utility is unconcerned with moral desert, however, which leads me away from adopting a utilitarian argument for distribution. I will challenge the traditional retributive and distributive frameworks, but it is my intention to expand desert of benefits within a retributivist framework. Opportunity is among the benefits that can be deserved, yet it has been ignored. Restorative justice may find my arguments concerning the desert of opportunity useful. Establishing the desert of opportunity will bring a balance to retributive claims and it is a step that I see as necessary to providing for a just and symmetrical social order. Therefore, the desert of opportunity will be at the center of my argument.

Theorists have approached desert in an a priori fashion. Much of what is written is based upon moralistic and normative assumptions about the human experience and theories typically build upon the foundations of previous theories without much consideration of the present social reality. In my thesis I hope to break from the foundation that has been built up from common theories of desert. Since it seems counterproductive to completely detach the individual from his or her social circumstance, the more sensible route to symmetry of desert between theories of justice would be through the social structure itself. This is not meant to be a general theory applicable to every institution and/or culture, but the value it contains is to be considered universally applicable to at least all capitalist democracies.

Much of the literature on desert presumes an individuality of human behavior which may not fully explain the entire spectrum of behaviors and actions that individuals partake in. The human experience is undeniably a social one filled with day-to-day interactions and conflict between individuals. Disciplines concerned with the human experience should not actively separate individuals from the social structures that they compose. This is the fundamental flaw I have found with much of the philosophical literature on the role of desert in justice. The existing literature justifies desert in virtue of some individual characteristic or action. Individuals deserve benefits or punishments in virtue of hard work, merit, virtue, or wrongful acts, but individuals are not fully responsible for any of them. Without reference to individuals' social circumstances we have no means for understanding how perseverance or malevolence develops. Individuals are not always criminal or always meritorious (Black 15). Individuals exist within social structures which determine their social positioning and often their choices in life. Our

actions are directly determined by the social structure we reside within. This conclusion need not diminish desert in theories of justice, however, because our sense of what people should have is central to our understanding of what is just or fair. It is also reasonable to conclude that individuals assume a certain degree of responsibility for their actions due to a concept of the free will of a person, an idea which we will return to in chapter two. We must determine a rational position from which individuals can legitimately deserve their reward or punishment. Individuals have different sets of opportunities based upon the social structures they exist within. Therefore, the goal of my thesis will be to show that individuals deserve a social structure that will foster opportunities for good outcomes, and that a society built upon this foundation can justify punishments.

In the first chapter of my thesis I will unpack the various accounts of desert that focus on the individual. These will include deserts for both meritorious and reprehensible actions. The assumptions of these theories will be scrutinized and this will provide the framework for the following chapters. Prior literature has determined desert claims to exist in various canons or categories (Rescher 609, Sher 20-21). Nicholas Rescher has provided a useful set of canons for distributive deserts which include needs, social and economic utility, merit, and effort. Upon concluding that each canon is insufficient alone as a criterion of distributive justice, Rescher combines the noteworthy attributes of each into a new “canon of claims,” (Rescher 609). The canon of claims embodies a principle of symmetry across criteria of distribution. As I discuss the various forms of individual desert bases and claims, I will utilize the philosophy of Rescher’s canon of claims to argue that punishment and benefit exist together within a universe of claims to justice, and the balance of this universe depends upon the strength of opportunity in society.

Claims to punish disproportionately befall those residing in lower socioeconomic circumstances and it is my intention to show that said individuals have unfulfilled claims to greater opportunities leading to meritorious ends. I do not suggest that claims to punish are invalid, but I do aim to show that disproportionate criminality and punishment among certain sections of the population must be addressed with logical solutions.

Personal desert is comprised of a complex network of bases and claims and requires a robust theoretical discourse. George Sher's contributions to this discourse are of particular significance because he has provided an intricate examination of the possible bases and claims for desert in terms of diligence, merit, virtue, diachronic fairness, punishment, and free action. He has also successfully refuted the traditional distributive theory, popularized by John Rawls, which holds that because people do not deserve their natural or inherited endowments, people cannot deserve the advantages that they create (Sher 23). Sher accomplished a counterargument to the Rawlsian position by displaying the importance of diligence and deliberation to bases and claims of desert. Sher's counterargument contends that people can liberate themselves to some degree from their inherited circumstances by investing their efforts into something they wish to achieve. Sustained efforts confer a value upon individual actions which they would otherwise lack. This suggests a degree of free action of which I am comfortable embracing in my thesis, but I intend to highlight some facets of determinism which perpetuate the need for symmetrical justice. For instance, a person born to social and economic disadvantage has limited opportunities to foster deliberate and diligent effort for any one productive cause, let alone the multiplicity of productive activities that are required of those residing in higher socioeconomic statuses.

Since my argument calls forth a broader understanding of the requirements of a just society, the second chapter will examine the prospects for a reconciliation of freedom and determinism. Freedom will be understood as freedom of the will under a Frankfurtian conception of the person (Frankfurt, 125-134). Determinism is the idea that humans are necessarily determined in their characteristics and abilities by both natural and social circumstances for which they cannot claim responsibility. These two notions of human behavior have been considered irreconcilable in theories of desert due to the fundamental disagreement between them, namely that humans are/are not deserving of the consequences of their actions. I evaluate the claims from both perspectives and come to a reasonable middle ground from which to develop my own hybrid theory of justice and desert.

Once determinism and freedom have been reconciled, I will propose a theory of fair opportunities grounded in the empirical truths of modern capitalist societies. In the third chapter I will address the asymmetry of desert between retribution and distribution and embrace the Marxian challenge to traditional retributive and social contract theories of justice. I will not cast aside the assumptions about human rationality of the more traditional theories, but I hope to build upon them with a progressive motive to acknowledge empirically validated social realities of the modern world. Upon conclusion, my thesis will defend the idea of a just society built upon a principle of opportunities. This principle is somewhat similar to the Rawlsian difference principle insofar as it seeks to establish acceptable conditions for the least advantaged. The difference principle holds that, “social and economic inequalities are to be arranged so that they are both (a) to the greatest expected benefit of the least advantaged and (b) attached to offices and positions

open to all under conditions of fair equality of opportunity,” (Rawls, A Theory, 72).

Unlike the difference principle, the principle of opportunities posits that opportunities are distributive benefits which are deserved by the least advantaged members of society.

Additionally, I am skeptical of the difference principle’s acceptance of social and economic inequalities given that the “greatest expected benefit” may be insufficient for providing actual conditions of equality of opportunity. This status quo rationale will reinforce the asymmetry of desert, but in a capitalist framework this seems unjustifiable. I will reject the asymmetry in chapter three, but first I must examine the individual desert bases and the claims to them.

CHAPTER I

DESERT BASES

A great variety of claims are made about what individuals deserve. These claims are often based upon characteristics about the individual. The characteristics can be linked to the actions the individual takes or to the actions taken against the individual. Further still, deserved consequences can arise from no actions at all, but simply mere needs or qualifications of individuals. This chapter will examine the scope of individual desert claims and their bases as they function in contemporary capitalist democratic societies. I will frame the argument against asymmetry of desert between retribution and distribution in such societies later in this thesis, but first I must establish a comprehensive account of desert bases.

The Value of Effort

The efforts of an individual can be regarded as a basis for personal desert of some expected consequence. Individuals provide effort to achieve an outcome and often expect

the consequence of that outcome to be beneficial in some manner. Effort may be one of the easiest desert bases to defend because of the value it confers upon the individual's labor. George Sher constructed a case for diligent, sustained effort which expresses some of the unique characteristics of this desert base. First of all, diligent effort places a value upon a goal that it would otherwise lack (Sher, 1987). For instance, two students may hold the same goal of receiving a high mark on a test, but one may invest the requisite effort by studying long hours while the other procrastinates and only studies for several minutes right before the test is administered. The student who studied longer is often thought to be more deserving than his peer of a high mark on the test because his effort studying conferred value upon his goal. This value of sustained effort gives the individual's aspiration legitimacy and respectability. Before the individual begins work, she places a goal in mind and expects to accomplish it. Her having a goal and an expectation of accomplishment, however, is not sufficient for deserving the consequences of that goal. She must put forth effort in order to achieve her goal, and in doing so her work confers a value upon her desert claim. The extent of her accomplishment may not even be relevant to a discussion of what she deserved thereafter. Of course, her entitlement to the goal's consequence may be impacted by her completion of the task, but a discussion of entitlements will be left for later on.

We often agree that an individual can deserve something in virtue of some characteristic of themselves, and effort is perhaps the most compelling characteristic of oneself. Sher argues that the diligent ought to succeed because "their sustained efforts are substantial investments of themselves—the ultimate source of value—in the outcomes they seek," (Sher, 1987). I agree with this thesis, but I think it may be useful to discuss

what precedes diligence in the actions of individuals. This kind of character is often manifested within particular circumstances containing the appropriate advantages and opportunities. The question of desert merits discussion of determinism and free action, a discussion that will occur in the pages to come, but here I must comment that what is often overlooked is that diligence is preceded by opportunity. This kind of opportunity refers to certain kinds of social capital which not everyone has access to, i.e. family and community values centered on education and civic participation. In his defense of the effort-confers-value thesis, Sher argues that individuals who have not worked hard because of incapacitation or lack of opportunity are regarded as unfortunate rather than deserving (Sher, 1987). On the contrary, I assert that although those lacking opportunity are unfortunate, they can also be considered deserving of opportunity insofar as their society has not delivered the circumstances conducive to equal opportunity (such as inadequate and unsound infrastructure and institutions in dilapidated neighborhoods containing extreme concentrated disadvantage).

The opportunity to be able to put forth persistent and sustained effort is not universally shared by all individuals in their objectives. In capitalist societies, opportunity is touted as the foundation of the economic system, but the social realities of such contemporary societies reveal truths inconsistent with this naive assessment. For instance, an education may be more difficult for some to obtain than others, yet it is often necessary to have in order to enter into the middle class job market. Public schools lack funding to provide adequate, let alone quality, educational experiences, and most working-class and poor people are attending these institutions for their primary education. A child of a working-class family may desire to put forth persistent and

sustained effort to succeed in school, but the school itself lacks the resources to meet the needs of the inspired student. Here we see that the unequal distribution of opportunity can have an impact on effort, thus affecting deserved outcomes that would have been created by the effort claim that Sher defends. The student cannot reasonably be expected to exert effort into endeavors that she has limited or no access to because her secondary educators were unable to provide them (such as college preparatory courses, advanced curriculums, adequate counseling, etc). My contention here concerning opportunity will be the cornerstone of my thesis, so I will return to this more than once. Access to the kinds of advantages discussed above may not be necessary for individuals to exert effort, but this does not undermine the desert of opportunity which the principle seeks to establish. It is true that disadvantaged individuals may exert effort towards the kinds of successes described above. However, the relationship between the differential advantages that advantaged enjoy and the disproportionate criminality by the least advantaged suggests that legitimate effort-making abilities are linked to sufficient opportunities.

Productivity and Contribution

The value of effort can establish a basis for deserving something, but it does not account for those desert bases that may not arise from any amount of sustained effort at all. One may deserve to be acknowledged for his contribution or productivity even though he did not invest as much effort as others may have. Productivity and contribution

are desert bases that do not require diligent effort to maintain their normative force. Theories of desert in favor of contribution generally contend that individuals deserve rewards based upon their contributions. Relativity is not necessary to contribution as a desert base -for instance, one may be thought to be deserving of recognition for contribution to a charity and no consideration may be given to the relative amount of that contribution as compared to other contributors. Some donators may contribute more than others, and thus be thought of as more deserving of praise, but desert based in contribution does not require measures of relativity to establish normative force.

Desert based in productivity, on the other hand, quite specifically relies on relativity to maintain its normative force. The amount one produces is measured relative to a set standard or the production rates of others. In the philosophical discourse on desert, productivity is often associated with market economies, a feature of capitalist societies, and thus it directly pertains to this discussion of asymmetry between desert in distribution and retribution in contemporary capitalist democracies. Owen McLeod provided a useful account of market valuation of contribution that states that “the wage one deserves for providing a service is equal to the free market value of that service,” (McLeod, 273). McLeod finds numerous problems with this contention, chief among those being that market value will not always adequately reflect the array of skills, qualifications, and efforts that one puts into a service. Additionally, the market value may not reflect the genuine value of an object. For instance, fuel efficient vehicles, such as modest compacts, were once less appreciated because they lacked the frills of luxury sedans and sport-utility vehicles, thus their market value was lower due to the lack of demand for them. The modest compact cars of the past were more genuinely valuable

than luxury vehicles because of their diminished impact on the environment and their promotion of the sustainability of oil-based energies, but the market can be indifferent to such genuine value at certain times. This market value contention requires markets to be ideal or perfectly free markets, but markets have yet to accomplish this tremendous improbability. A theory of desert rooted in laissez-faire economics ignores such social realities as income inequities by gender and race.

In addition to the inequities tied to social stratification, markets are also problematic due to the manipulations and restrictions by third parties. Productivity, in this sense, may be rendered irrelevant due to changing market forces. For example, a larger, wealthier manufacturer may be able to produce certain goods at a faster and cheaper rate than smaller businesses, thus rendering obsolete the productivity of those on the floor of the smaller manufacturing plants. Those workers in the smaller businesses had a claim to desert based upon productivity, but now their productivity is incomparable to that of the larger manufacturer who can employ not simply more individuals for less money, but can also afford machinery to skip several steps in the process involving manual labor. Nothing has changed with the smaller manufacturer, and yet now he would be considered less deserving on the productivity account. This may be an acceptable conclusion for free market theorists, but desert theorists must recognize the limitations of claims based solely in market value. Therefore, we need a broader conception of what people deserve based not simply in effort or productivity. In advance of effort and productivity, we need to consider the equality of opportunity in society.

Contribution can be assessed both relatively and individually for determining the appropriation of deserved consequences. For instance, two graduate students could be

tasked with dividing up the labor of administering surveys for a qualitative research project. They are given three weeks to have results ready for analysis. One student distributes the surveys to the target subjects diligently and receives responses within a few days. The other student procrastinates, not receiving any responses until days before the deadline and is forced to submit only a portion of the amount she administered. One could reasonably argue that the student who contributed more value to the analysis phase deserves a better evaluation from the professor in charge. The product in question has no relative value to be determined by outside players, nor does the professor leading the project have any competitors to contend with. From the perspective of the two students involved, their respective contributions are the most compelling conduits through which their claims to be deserving of a good evaluation can pass.

Since the opportunity was shared, and all else equal, there seems to be an appropriate basis for one student's claim to desert via contribution. Their relative (dis)advantages may also be taken into consideration. One student may lack the preparation skills or the intelligence quotient to adequately contribute in a manner equal to the other student. The individual claims to desert in this example are not undermined by such questions of relativity because the subjects in question are not immersed in an overtly competitive environment. Though each student hopes to obtain a high grade point average in order to compete in the job market later on, their immediate circumstance is not competitive in a capitalistic sense. If the goal is to balance desert in a capitalist framework, though, how can we apply it to an imperfect market context? The answer is to first provide equal opportunity, the extent to which will be explored later on, and then to examine desert claims in the context of a plurality of bases. It is likely the case that

societies will forever fall short of providing equal opportunities for everyone at all times, so we must operate under the assumption that non-ideal conditions will indefinitely persist. The most promising avenue towards a symmetrical system of justice leads us to the fair distribution of benefits and burdens, which I will address later in the chapter.

Need

Individual contribution and effort has a tendency to overshadow desert based upon circumstance. Need has been recognized as a reasonable qualification for the purposes of distributive justice, but whether necessity can confer desert upon individuals is somewhat less conclusive. Someone may need something, but does that mean that person deserves it? It seems better to say that it is good or appropriate that she has it; but the need does not seem the basis of moral merit. David Miller argues that need is “inappropriate as a basis of desert; being needy cannot make us deserving,” (Miller, 95). The characteristics of need that disqualify it as an appropriate basis of desert are two-fold; everyone has needs, until they are satisfied, and no one wishes to be needy or admires others for being needy (Miller, 95). This argument stems from Miller’s broader discourse on the importance of keeping separate the claims of rights, deserts, and needs (Miller, 95).

Need seems to exist outside of the domain of appropriate claims to desert, but Miller’s argument does not sufficiently explain why this is the case. To afford deserts the elevated status, “highly regarded,” may explain why desire is not sufficient on its own to

establish a basis of desert, but the question of whether need establishes desert still looms. For instance, individuals may desire a mode of treatment or an object, but unless they have fulfilled the relevant requisites or qualifications for having them they do not deserve said treatments or objects. These treatments or objects are highly regarded by those who desire them and are only deserved by those who attain the requisite achievements for having them. If there is a need for treatments or objects, however, there seems to be an alternate source of inherent value in those treatments or objects that would lower the requisites for having them. Consider the basic need for food shared by all people. Miller would argue that because everyone possesses this need, no one has an individual claim to deserve food. However, in a competitive economic environment, people have differential access to sources of income and thus may not be able to obtain adequate meals. Those who are disadvantaged in their abilities to provide themselves and their kin with sufficient sustenance deserve the opportunity to provide for this very basic necessity.

The discussion of value was central to the assertion that effort is a basis of desert. Value seems to pervade the literature on desert, but it does so in a fractured manner. Diligent and sustained effort carries a different sort of value, in regards to deserved benefits, than productivity or meritorious action. Additionally, the persistence of effort or contribution towards mischievous ends would confer disvalue and perhaps even deserved punishment. Need confers an entirely different sort of value even still, yet the literature on desert has not addressed this issue as it has those above.

The value underlying the essential treatments and objects that people need is inherent. When we talk about what people deserve, we often mean it is what they ought to have. We think it is a good thing when they receive what they deserve and a bad thing

when they do not. The same logic can follow for needs. Yet needed treatments and objects are argued as undeserved because the needy are not active in some form requisite for an appropriate claim. People deserve objects or treatments in virtue of a variety of actions, such as effort, productivity, or wrongful actions. Need is a trait or a characteristic of individuals and cannot function to establish desert directly. Traits such as preferences or beliefs do not establish desert (Miller, 95). However, the things that people need are of such value that it is necessary to afford people at least the opportunity to have what they need. The same may not be said of people's beliefs or preferences, traits that do not establish desert.

Out of this principle of fairness, we can assume that people deserve opportunity; that they ought to have opportunities and that not having opportunities is a bad thing. We will return to fairness again later on, but it was necessary here to the discussion of need and desert because it isn't examined as often or in such depth as the more recognizable, diminutive aspects of need.

Merit and Virtue

As the discussion proceeds further from actions and closer to traits and characteristics, the claims of desert become increasingly difficult to defend. Merit is a contending desert basis that embodies both the normative force of actions and debatable worth of traits and characteristics. Meritorious actions appeal to our sense of desert

because of their outstanding qualities. Those who act above and beyond the median of expectation are believed to deserve some praise or better treatment. In this sense, excellent performances or acts of heroism are examples of actions that acquire greater value. This value is not uniformly applied to claims of desert, however, because it can exist in two separate realms depending upon the circumstances of the actions. George Sher divides the value of merit into two realms; moral and nonmoral merit (Sher, 109). Those actions which are morally meritorious appeal to our sense of good will and can include gestures of kindness, charitable donations, and acts of heroism to name a few. Nonmoral merit arises from actions such as athletic performances, artistic or musical ensembles, and academic or professional achievements.

Actions are deemed meritorious based on norms and standards, and those actions whose intentions are nonmoral derive the entirety of their normative force from norms and standards. Morally meritorious actions are inherently good and do not rely necessarily on norms and standards to achieve normative force. An act of heroism is not considered to be the standard course of action in any circumstance of extreme danger. For this reason, an act of heroism is applauded as a morally outstanding action. Acts of nonmoral merit, such as exceptional athletic performances, are judged in reference to a standard of athleticism. Here we can attach no moral value because the actions are not in response to an extreme circumstance or immediate threat. Nonetheless, outstanding athletic performances are at least worthy of nonmoral merit. The same applies to most sets of actions that are above standardized or institutionalized expectations. Not all standardized or institutionalized expectations have a nonmoral value. In fact, some institutionalized expectations may be immoral, such as a Nazi soldier's orders to execute

Jewish men, but within that institutional setting the Nazi soldier would probably receive merit for his actions from his supervisors. Our sense of justice would reject the notion that he deserves merit for his actions; in fact most would be outraged at such a suggestion. Simply because an action lacks a moral basis, however, does not mean its merits are not deserving of a rewarding outcome. Nonmoral merit can confer desert of reward.

The prizes that nonmorally meritorious competitors deserve are based in a similar set of expectations or standards. An outstanding athlete may expect to have greater recognition for her accomplishments. Her claim to desert has been argued to be grounded in veracity and fidelity (Sher, 118-119). The same can be said of competitors who are not athletically superior but manage to be victorious through some instance of fortune or advantage. Sher provides the example of a foot race in which the superior runner tears a shoe and this misfortune affords his competitor victory. The losing runner has no complaint against the winner receiving the prize, but people may be inclined to say that the loser really deserved to win (Sher, 118). Regardless of what we believe the loser deserves, we cannot strip the winner of his desert of the prize for actually having won the race. We have two competing claims to desert here, but only one can be sufficient for the reward. The demands of veracity are the justification for rewarding the lesser athlete with the prize for winning the race.

Not all desert-claims based on merit are justified by the demands of veracity. People with great ideas may deserve to be heard, superior political candidates may deserve to be elected, authors of outstanding books may deserve to be recognized, and scientists who discover cures for diseases may deserve honors or awards (Sher, 129).

Sher asserts that such claims of desert are really disguised hypothetical imperatives. That we believe any of the aforementioned are deserving of anything is really our expression of admiration or gratitude. Nothing is owed to the meritorious parties, but we feel that others would “do well to respond to them in certain ways,” (Sher, 130). These non-justificatory deserts are rooted in our tendencies to project our internal values onto the world. This aspect of Sher’s account of merit-based desert is linked to the discussion about desert and institutions carried on by Julian Lamont and Owen McLeod, which I will explore in great detail in Chapter 2.

Earlier I stated that morally meritorious actions are inherently good and they do not require standards to be judged as such. As Sher put it, “There are no virtue contests,” (Sher, 132). People’s talents and abilities do not correlate with their propensities for good will. Those who are virtuous are not competitively so, and often their intentions are not self-evident. A person’s good will is a trait that appeals to greater moral principles. To follow a path of virtue requires a moral compass. This does not mean that all virtuous people always act morally, but it does indicate that in order to act virtuously one must possess at least a certain degree of morality. Since morality is a set of attitudes, dispositions, and beliefs determined by factors largely outside of our control, our tendency to act virtuously is not something we can be said to be fully responsible for. Because of this truism, John Rawls has argued that virtue cannot be a basis for distribution (Sher, 139). Sher’s counterargument contends that those who are virtuous have conferred greater worth upon themselves through their sustained efforts and desires. This argument appeals to the Kantian idea that morality is rooted in reciprocity (Sher, 142).

Deserved Punishment

So far I have discussed the bases of deserved benefits (prizes, awards, compensation, etc.). Deserved punishment arises out of wrongful acts, but wrongdoers are not actively seeking their own punishment as others may seek the benefits from the actions listed above. Moreover, the punishments we administer are normally impermissible acts outside of the context of punishment. Therefore, deserved punishment requires a substantial justification that will not be as easily attained as the justifications for those desert bases discussed above. Classical theorists have discussed punishment in great detail, but their theories fell short of any strong arguments about *deserved* punishment (Sher, 74). The Kantian perspective on punishment holds that the offender perpetrates evil upon himself when he commits crimes against others, thus punishment serves to balance the scales of justice. This is an appeal to rights and justice, but it doesn't answer the inquiry of whether punishment is deserved. Kant's retributive framework has been expanded by contemporary theorists in a few major ways. First, we can justify punishment "by the value it brings" rather than the moral obligation it must maintain (Sher, 71). In this sense, matching punishment to wrongdoing produces value. According to Sher, this value has no defense because it is simply a restatement of what retributive justice "needs to explain," (Sher, 72).

A second approach to retributive desert promotes the ideas that punishment safeguards our rights, that the wrongdoer forfeits his right not to be punished, and punishment is an obligation of the law (Sher, 72). These assertions are rooted in a systemic model of justice that adheres to legal principles. According to those opposed to such a retributive account, the logical rebuttal is that there is no reason to punish those who have broken no laws (Sher, 73). Additionally, the assertion that the wrongdoer forfeits his right not to be punished is rooted in institutionally-based contract theory. Retributive theorists in support of this assertion, however, do not construe it in terms of practical legal institutions, but merely as a pre-institutional moral notion. Therefore, in my attempt to seek a justification for retributive desert I find it necessary to explore contemporary retributive theories that may avoid the inadequacies of past ones.

Herbert Morris' retributive argument is perhaps the most compelling of the modern era. Morris' argument exists in two parts, with the second providing the most appropriate conclusion for the purpose of establishing retributive desert. First, Morris points out that "any society that wishes to forego punishment, but also wishes to control behavior, will be pressed to regard undesirable acts as forms of pathology," (Sher, 75). This means that the alternative to punishment is therapy and the perpetrator is viewed as a patient in need of treatment instead of a blameworthy criminal in need of punishment. Morris takes issue with the therapeutic system because he believes it degrades humans to the "status of animals or things," (Sher, 75). The initial, anti-Hegelian conclusion drawn by Morris is problematic for the purposes of balancing retributive and distributive justice because it takes the position of classical retributivism that punishment upholds human dignity. The most punitive measures taken by states against their criminal citizens are

purely backward-looking in principle. Since the goal is to balance retributive and distributive deserts, we must move beyond both *backward- and- forward looking principles*.

The second part of Morris' retributive argument looks beyond both backward- and forward-looking principles by appealing to a sense of equilibrium. This aspect of the Morris' approach is essentially what provides the foundation for a balance of retributive and distributive deserts. Morris contends that punishment is just because it "distributes benefits and burdens fairly," (Sher, 76). This distribution of benefits and burdens is achieved through punishment by removing the advantages that criminals enjoy which most others have refrained from. Grounded in fairness, retributivism seems more acceptable to our contemporary sense of justice. However, distributive theory must adopt the same foundational equilibrium or else the scales of justice, in the Kantian sense, will incline more to one side than the other (Sher, 70). In the following chapters, I will examine the possibilities of establishing the equilibrium of distributive desert. My thesis will assert that punishment can be justified when the fair distribution of benefits and burdens has been achieved in the distributive sense of justice.

CHAPTER II

RECONCILING DETERMINISM AND FREE ACTION

At the heart of the discussion about desert, a debate has persisted which has separated retributive and distributive theorists due to their seemingly irreconcilable difference of opinion. Central to this debate is the question of whether individuals act freely and autonomously or according to their inherited or socially determined traits and abilities. In respect to desert, retributive theorists generally hold the position that individuals are autonomous in nature and they should be held responsible for the consequences of their actions. Conversely, distributive theorists argue that individuals are shaped by their inherited and/or social and economic circumstances, and cannot claim to deserve anything outright.

For the purposes of this thesis, we will consider the retributive perspective to be free action theory and the distributive perspective to be determinist theory. Between these two opposing factions, a theoretical middle-ground has developed which embraces the arguments from both perspectives. Perhaps it is possible to discern what parts of an individual's actions are self-determined and what parts are socially determined. The prospects for a resolution to this conflict are meager due to the intricacies of the problem,

but the moral significance of desert in theories of justice demands a thorough inspection of the possibilities. Moreover, I must adopt a sound conception of the relationship between determinism and free action if I am to establish equilibrium between retributive and distributive deserts in society. Compatibilism, the assertion that free will and determinism do both exist and are in fact compatible, will be the foundation for my proposal in the third chapter. First, I will examine the arguments from both the compatibilists, such as Harry Frankfurt, and the incompatibilists, such as John Rawls, and will conclude that Frankfurtian compatibilism holds the consistent and compelling argument which I will adopt for the foundation of my thesis.

Free Action and Desert

Freedom of action is the ability to do what one wants to do. All living things, when unrestricted, can demonstrate the ability to do what they want. A rabbit can sprint in any direction in a field that it may want to. A man can go for a walk down the street to take a break from life's chores. The difference between the man and the rabbit, as explained by Harry Frankfurt in his *Freedom of the Will and the Concept of a Person*, is first-and second-order desires (Frankfurt, 125). First-order desires can consist of the straightforward and usually necessary desires to eat, sleep, and be comfortable. All animals possess these and are often free to act on them when possible. Humans differ

from all other animals, however, in that they can *choose to not* fulfill first-order desires. Other animals generally act on their first-order desires without any deeper inquiry. Humans can weigh the costs and benefits of certain first-order desires and may adopt second-order desires based on the options presented by the first-order. For instance, a student may desire to go to the beach, but she might also desire to get some work done on a research paper. A second-order desire is formed from the first two options and the student may decide against going to the beach in order to finish the research paper on time. However, people may have second-order desires without wanting to act on them.

If the student has the second-order desire to finish the paper on time, she must make this desire her will and commit to the necessary action. This is called the second-order volition (Frankfurt, 125). Freedom of the will is essential to the formation of second-order volitions. Free will is the ability to be free to want what one wants regardless of whether one may actually be free to have what one wants. Even when deprived of the freedom of action, people can maintain the freedom of will. People can be free to *want* what they want even when they are not free to *do* what they want. If our will is taken away, does that undermine moral responsibility for our actions? According to Frankfurt, a person may be morally responsible for having done something even though his will was not free at the time he did it (Frankfurt, 133). Moral responsibility requires commitment to action. Determinism is not inconsistent with this requirement. It can be the case that forces outside of a person's control will lead to the freedom or restriction of their actions or wills, but this does not undermine the moral responsibility that each person holds for their actions. It does entail, however, that others may be morally responsible for their actions as well.

A useful example to illustrate this point, which Frankfurt himself employs in his literature, is that of two drug addicts; one willing and the other unwilling. The first is said to be acting of free will. The willing drug addict's will is not free, however, because his addiction maintains a desire within him to take the drug "whether or not he wants this desire to constitute his will," (Frankfurt, 134). His moral responsibility for taking the drug does not entail that he "was in a position to have whatever will he wanted," (Frankfurt, 133). What Frankfurt means is that our moral responsibility for our actions remains intact regardless of the freedom of our will. The willing drug addict in Frankfurt's example has chosen to keep his desire for the drug effective by choosing the second-order desire of taking the drug (as opposed to the second-order desire of abstaining), thus he remains morally responsible for taking the drug even though his free will has been compromised by his addiction. The unwilling drug addict, on the other hand, has conflicting first-order desires. He desires the drug yet also wants to discontinue his use simultaneously. He may be inclined to believe he is not morally responsible for taking the drug because his addiction is so powerful that it overcomes his own will. According to Frankfurt, the unwilling addict "identifies himself, however, through the formation of a second-order volition, with one rather than the other of his conflicting first-order desires," (Frankfurt, 130). Therefore, though he had wanted to do otherwise, he was moved to take the drug and should be considered responsible for doing so. Concerns about the degree of his freedom and free will are irrelevant to the discussion of his moral responsibility.

Frankfurt makes a strong case for the separation of moral responsibility, free action, and free will. Fundamental to his discourse is the assertion that individuals can be

morally responsible for their actions regardless of the freedom of their will. It seems necessary, for the purposes of balancing retributive and distributive deserts, to afford individuals as many options as possible for the formation of second-order volitions that produce benefits rather than punishments. This means that all persons should have a wide range of first-order desires to choose from in order to satisfy the Frankfurtian conception of a free will.

If a person only has the first-order desires of a criminal, it may very well be the case that he lacks the freedom to have the will that he wants. For instance, a poor individual may not have the institutional access to gain resources sufficient to feed his family. He is constrained in his ability to have the will that he may want because of the financial difficulties he faces. In a desperate attempt to obtain quick cash, he commits armed robbery at a local gas station and is sent to prison. Though he is morally responsible for his actions because he made armed robbery his will, his will was not free because his responsibility to feed his family was urgent and his available options for income were extremely limited. He may have wanted the will to have a legal income, but he could not have the will that he wanted because he was under the pressure to feed his family and without any legal means to do so. His formation of a second-order volition to commit armed robbery consisted of two competing first-order desires; the urgent desire to feed his family and the pressing desire to avoid prison. Though he chose the former out of desperation and impulsivity, he identified himself with that action and withdrew from the latter. He acted freely, but as Frankfurt notes, “it is a mistake to believe that someone acts freely only when he is free to do whatever he wants or that acts of his own free will only if his will is free,” (Frankfurt, 133). According to our Frankfurtian conception of the

person, the armed robber in our example was not free. Again, this does not excuse him of his actions, for which he remains morally responsible, but it does encourage the question of whether he should have been able to have the will that he wanted. The distribution of wages, awards, and prizes all seem to hinge upon the availability of opportunity, but opportunity is conceived of by desert theorists as something that can be deserved by those who satisfy the conditions of any of the bases mentioned in the first chapter which also afford wages, awards, and prizes. My assertion is that opportunity is deserved in advance of the fruits gained through sustained labor, meritorious action, production, and contribution. Since I acknowledge a partial significance of free will on behalf of criminals, however, I cannot deny that they deserve the punishments that they receive. Not all deserved outcomes are necessarily just, and not all just outcomes are necessarily deserved. Therefore, a punishment may be deserved of a criminal but this does not diminish his claim to justice in the distributive sense based upon need.

The freedom of the will, as conceived by Frankfurt, shows us that humans have the ability to identify second-order desires and make them their volitions. This ability to enjoy a freedom of the will requires the availability of many second-order desires for the formation of second-order volitions. Opportunity is integral in establishing and maintaining freedom of the will. Within the Frankfurtian conception, opportunity is the vehicle for second-order volitions to become the will of the individual.

Determinism and the Rejection of Desert

The principal philosopher of determinist theory, John Rawls, denies the relevance of desert to distributive theory. His famous contention is as follows:

“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. The notion of desert seems not to apply to these cases.” (Rawls, 159).

Rawls’ attack on desert is based upon the assumption that individuals cannot claim complete responsibility for their actions and character traits because they are, in effect, caused by inherited and social circumstances. People are in part a product of their lineages and social circumstances, but Rawls’ contention is that we cannot affirmatively separate people from those influential factors enough to discern whether or not they are *deserving* of the benefits they achieve or are rewarded with.

An important counterargument to Rawls’ rejection of desert is Sher’s value theses about effort and virtue. Effort and virtue confer value onto an individual action which can

be recognized independently of inheritance or social circumstance. As outlined in the previous chapter, Sher contends that individuals “may acquire desert by working hard, acting wrongly, behaving virtuously, performing heroic acts, and so on,” (Sher, 36). These desert bases are not rooted in competition, whereas the Rawlsian rejection of desert considers only those attributes relevant to competition. The underpinning point of the Rawlsian argument is that no one can deserve anything that is acquired through the differential advantages for which they can claim no responsibility.

There seems to be a disconnection between those naturally endowed or inherited advantages and the advantages created by sustained effort and virtuousness. Though I cannot say for certain how Rawls would answer, I do believe his response would hold that individuals cannot be said to be fully responsible for the better character that enables them to engage in diligent effort or virtuous actions. Frankfurt’s conception of human free will offers a reason to be suspicious of Rawls’ assertions about the “better character” of individuals. People are capable of choosing between competing alternatives, or first-order desires, and often make second-order desires based upon the alternatives at their disposal. The ability to create second-order desires for ourselves and then convert those into our second-order volitions demonstrates that we have a certain amount of discretion in our actions. Unfortunately, it may be too difficult a task to separate the part of our actions and traits that is a natural or social construct and the part that is of our own will (Moriarty, 524). Nevertheless, there is sufficient reason to believe that humans have a degree of control in forming their desires and converting them to volitions, thus partially constructing their will. As Frankfurt notes, freedom of the will can only be achieved

when we are able to want what we want *and* do what we want. Therefore, the amount of opportunity we have at our disposal will provide the greatest measure of our free will.

Rawls' perspective on retributive justice affords a greater degree of responsibility to individuals for their actions. This inconsistency in his argument has been highlighted by several previous authors. Since it is my specific intention to reject the asymmetry of desert between distributive and retributive justice, however, the inconsistency provides a useful theoretical representation of the unjustified asymmetry. I will delay my argument against the asymmetry until the following chapter. Beforehand, it is necessary to reconcile the differences between determinism and freedom to find a common ground for the acceptable rejection of asymmetry and proposal of a new path forward.

A Reconciliation of Determinism and Freedom

As I stated above, there is sufficient reason to believe that humans are capable of separating themselves from their social and inherited circumstances. A few of the least advantaged have worked to overcome the hurdles that prevent the majority from succeeding, such as tuition expenses, racial and ethnic discrimination, and poor quality infrastructure. This statement, however, is not meant to detract from the often blatantly obvious impacts that social and inherited circumstances have upon individuals in their actions and traits. Our task must be to establish how we are to understand individual actions and traits as partially molded by inheritances and social positions and partially by free will.

A useful example to begin with is that of college admissions. Prospective students are judged often on a diverse set of criteria for their admission into colleges and universities. Since the end of formal segregation in the United States, colleges and universities have become more sensitive to the concerns of underprivileged minority communities. In the process of evaluating students for potential admission into their programs, colleges and universities will consider the ethnic background of the students applying. These institutions attempt to diversify their student bodies by accepting more minority students each year. Here it may seem we have an example of individual desert based solely upon social and inherited circumstances. The minority students are viewed as deserving of special consideration for the purpose of alleviating the societal ills created a generation ago and to create more diverse communities of students on campuses. However, we may also consider the socially-determined statuses of minority students to render entitlement to special considerations rather than desert of them. Entitlement may serve as a more appropriate political conception for the purposes of distributive justice than moral desert. This is a fixed point of clarification on the concept of desert in distributive justice in Rawls' *Justice as Fairness: A Restatement*, where Rawls improves upon his previous work, *A Theory of Justice*. We will return to entitlement soon, but for now I will explain the significance of this example in greater detail.

Affirmative action policies in college admissions provide a practical example of a benefits-and-burdens account as applied to distributive justice (Sher, 82). Sher's benefits-and-burdens account is rooted in a principle of diachronic fairness, which states that "with respect to each class of commensurable benefits and burdens, each person's total of those benefits and burdens should, over time, be roughly equal to that of each other

person,” (Sher, 92). Desert theorists have been much more comfortable applying this principle to retributive justice because it is easier to arrive at a conclusion about what extra benefits criminals take advantage of and what burdens they circumvent to have those advantages. It is not so simple to discern what burdens people have disproportionately experienced relative to others in the past and what benefits they deserve in the future as a result of such alleged past injustices.

Colleges and universities do not take a simplistic approach to the admission of students. Though their concerns of diversifying their student body do enter into their decision-making process, admissions offices have the primary goal seeking out the exceptional students with personal achievements and successes present in their applications. Therefore, each student admitted is considered to be entitled to their admission based on their prior meritorious actions. This example provides a unique intersection of determinism and free action in individual desert, where both the determinist and free will features of individual traits are considered. The institutions themselves may not have a mentality to award candidates admission based upon their “deserving” it, but we are inclined to believe that meritorious actions are deserving of recognition. Though meritorious students do deserve admission to college, all prospective students deserve the fair treatment. This model seems appropriate to our discussion because we are seeking a way to reconcile determinism and freedom in order to reject the asymmetry of desert across retributive and distributive theories of justice. It uniquely entails a benefits-and-burdens approach to distributive justice with specific attention paid to the principle of diachronic fairness.

Prospective students from an ethnic minority are not absolved of the basic requirements of the application process, which means that they must, on their own merits, provide sufficient evidence of their willingness to succeed academically. After having displayed such criteria, said applicants are then given special consideration based on their ethnicity if the deciding institutions are in fact sensitive to the demands of a diverse student body. The students are no less deserving of their admission than their counterparts from the racial majority due to this special consideration because they display requisite characteristics, achievements, and traits, but are perhaps more deserving due to the principle of diachronic fairness. Again, the institutions may not necessarily consider the candidates “deserving,” but their methods of achieving diverse student bodies implies a principle of diachronic fairness akin to that of Sher’s conception. It would seem upon my simple, nevertheless valid, understanding of this process that there exists a benefits-and-burdens account in distributive justice that applies the principle of diachronic fairness. Through this rough example, a reconciliation of determinism and freedom seems much more attainable for the purposes of distributive justice. Desert emerges as not simply a sufficient but perhaps even necessary concern of distributive justice when aligned with concerns of fairness.

Though determinism cannot successfully rule out desert as a criterion of distributive justice, it does signal an important feature of human behavior that needs to be considered foremost by retributive theory which embraces desert under the moral notion of free will. Humans are uniquely shaped by their social environments and family inheritances. Opportunities that exist for some may not exist for others in any practical, attainable sense. Wealthy children attain cultural capital through the experiences they can

afford to have. For instance, wealthy children often have access to hierarchically elevated institutions, such as private schools activities, and organizations, which are simply not available to less fortunate children (Lareau, 1-6). A child cultivated in the upper-middle class will enter adulthood equipped with the social tools necessary for productive interactions in a professional setting. These tools include proper communication skills, knowledge of institutions and how they function, and a general sense of entitlement to the fruits of upper-middle class life. Poor children are not so privy to such knowledge because of their constrained lives. Financial hurdles are set too high for many parents to overcome, which leads to restricted choices later in poor children's lives. For these children, their low status is determined by their lack of resources and cultural capital, and this status becomes reinforced if they choose criminal paths to financial gains.

There are exist admirable cases of impoverished people rising above their circumstances and legally succeeding. As it is to be understood, people's actions and traits are only partially determined by their social circumstances and inheritances. The examples of those who stray from the norm are a testament to the Frankfurtian conception of free will as discussed earlier on. The vast majority of cases, however, lead many to believe that we cannot be deserving of anything in the distributive sense because we are so often the product of our inheritances and circumstances.

Rawls states that, "no one deserves his place in the distribution of natural assets any more than one deserves his initial starting place in society," (Rawls, 162). As noted in the discussion of Sher's thesis earlier, moral desert may be afforded to those who put forth conscientious effort, a precept that is perhaps underappreciated by Rawls. The Rawlsian response, however, argues that even "the effort a person is willing to make is

influenced by his natural abilities and skills and the alternatives open to him,” (Rawls, 162). This argument is quite valid and it leaves us in a peculiar moral position somewhere between determinism and freedom which is perhaps too difficult to pinpoint. We must acknowledge the fundamental importance of equality of opportunity to a theory of a just society. As Rawls states, “in a well-ordered society we usually do deserve... things, when desert is understood as entitlement earned under fair conditions,” (Rawls, 78). Desert of distributive shares, according to Rawls, may exist at some point later our lives, but only if it is morally arbitrary and considered as entitlement. For instance, an executive at a large company may be entitled to his position, but his position is not awarded to him by an appeal to moral desert since his abilities are a product of social and inherited circumstances for which he can claim no credit. Rawls does not reject desert outright. His goal is to establish a practicable political conception of justice. Conceiving of desert as entitlement allows him to do so.

This conclusion seems unsatisfactory. Opportunity precedes other distributive shares and carries a moral value that helps to distinguish just and unjust societies. It originates the entitlements people claim in a well-ordered society which Rawls has argued for. Even he acknowledges that desert is understood as entitlement “earned under fair conditions,” which would imply his advocacy for equal opportunities. Without opportunities to make effort, be productive, gain merit, or act virtuously, people cannot claim to be entitled to or deserving of many things in the distributive sense of justice. In the following chapter, I will argue that a principle of fairness built upon equal opportunities for all citizens is essential to a just society. It is my intention to show that people deserve sufficient opportunities, and if they are afforded such opportunities the

systems of distributive and retributive justice will be balanced. In a utopian sense, though impracticable as it may be, a just society built upon this principle would have no need for penal law because the citizens would take advantage of the fair opportunities for distributive shares that would be available to them. It is not my intention to argue for a utopian society, but simply a more just one. Therefore, the closer we come to fair and equal opportunity in society, the more just our society will be. Punishments can be legitimated to all citizens based upon the high availability of opportunities for distributive shares in such a society.

This conception of society relies upon the assumption that the realms of distributive and retributive justice are interconnected by a higher normative order. I view retributive and distributive justice as having a shared stake in the overall fairness of a society. This is based upon the empirical realities of a modern capitalist society. It is here that I depart from previous theories of justice. Determinism and freedom are reconcilable because both contain a degree of normative force that cannot be denied completely. Each of these two notions of human actions and characteristics has a degree a validity as well as its proven limitations. For instance, the Frankfurtian conception of a human being appeals to our individual sense of freedom and free will, whereas the Rawlsian perspective appeals to our understanding that humans are in fact heavily influenced by factors outside of their own control. The reconciliation of determinism and freedom is only the first step in establishing equilibrium of retributive and distributive justice.

CHAPTER III

TOWARDS A PRINCIPLE OF OPPORTUNITIES

Having established the major bases of desert and provided a reasonable reconciliation of determinism and freedom, I can now propose a way to balance retribution and distribution in society. As I have argued throughout this thesis, opportunity is a fundamentally important precursor to any claims to distributive desert bases (such as desert based in effort, productivity, or merit). The opportunity to act with productive effort towards a meritorious goal must be afforded to all people in order to counter the claims to deserved punishment. Active and productive members of society are usually those with greater opportunities. Criminals, especially violent ones, most often exist in socially and economically inferior positions in society. Therefore, attention must be paid to the sufficient distribution of opportunities to those who exist lowest on the socioeconomic hierarchy. A strong theory of justice must be rooted in social reality. Much of the previous work on desert has ignored social realities surrounding the issue. Theorists often make statements about the role of desert in justice without much consideration of the grave inequalities and inequities that exist in society. My intention here is to establish a theory of desert and justice that acknowledges social realities and

proposes a balance of retribution and distribution in society under a distinct principle of fairness. Opportunity is simply the vehicle for this proposal to operate within.

The Asymmetry of Retribution and Distribution

As it was noted at the end of the preceding chapter, retribution and distribution have a shared stake in the overall justice of society. I prefer to consider distributive deserts to be as morally enforceable as retributive deserts are, but there must be a basis for all deserts in order for them to carry normative force. This is essentially the point of consideration that divides my principle of justice from that of past distributive theorist, John Rawls. Rawls supports an imbalance of retribution and distribution in society because he does not view the two notions of justice as converse or even related. Moreover, he rejects moral desert in favor of entitlement for the purposes of distributive justice whilst embracing moral desert for the purposes of retribution. These conclusions about Rawlsian political philosophy are born out of specific, yet somewhat elusive statements made by Rawls in *A Theory of Justice*.

“It is true that in a reasonably well-ordered society those who are punished for violating just laws have normally done something wrong. This is because the purpose of criminal law is to uphold basic natural duties, those which forbid us to injure persons in their life and limb, or to deprive them of their liberty and property, and punishments are to serve this end. They are not simply a scheme of taxes and burdens designed to put a price on certain forms of conduct and in this way to guide men’s conduct for mutual advantage. It would be far better if the acts prescribed

by penal statutes were never done. Thus a propensity to commit such acts is a mark of bad character, and in a just society legal punishments will only fall upon those who display these faults,” (Rawls, 163).

“It is clear that the distribution of economic and social advantages is entirely different. These arrangements are not the converse, so to speak, of the criminal law, so just as the one punishes certain offenses, the other rewards moral worth... To think of distributive and retributive justice as converses of one another is completely misleading and suggests a different justification for distributive shares than the one they in fact have,” (Rawls, 163-164).

From these statements we can make two valid inferences; 1) Rawls sees criminal action as a display of one’s inferior moral character, thus retribution is a morally justified response to such actions and, 2) Rawls is not willing to view distribution as the converse of retribution because the distribution of economic and social advantages should not be considered rewards on the basis of moral worth such as retribution is punishment on the basis of moral desert. Rawls delivers an apparent inconsistency in his argument here which has been recognized by previous authors, namely Michael Sandel. Sandel inquires, “Since under the veil of ignorance, none can know whether he shall have the misfortune to be born into the unfavorable social and family circumstances that lead to a life of crime, why would the parties not adopt a kind of difference principle for punishments as well as distributive shares, and agree, in effect, to regard the distribution of natural and social liabilities as a common burden?” (Sandel, 183). Rawls opposes moral desert in distributive justice because, as he claims, none can be deserving of the fortunate natural and social circumstances he is born into. In agreement with Sandel I

must ask, would this not carry over to moral desert in retributive justice as well, where none can be deserving of the *unfortunate* natural and social circumstances he is born into? This inquiry presupposes the idea that criminality is a derivative of socioeconomic disadvantage. It is here that ground my principle of justice in social reality.

In a just society, retribution would be the converse of distribution. If fair opportunities were to be afforded to a sufficient degree, moral desert in punishment would be legitimated to all members of such a fair society. As is currently the case in capitalist democracies, there is a disproportionate share of economic opportunities held by those in higher socioeconomic positions. Access to social and economic institutions, which foster the knowledge, skills, and abilities to obtain legal economic incomes, are limited to an opulent minority of the populations of capitalist democracies. This is not to say that those of lower socioeconomic positions are completely blockaded from accessing such institutions, but the means to do so are greatly reduced by the lack of opportunities afforded to them. For instance, a person raised in a circumstance of socioeconomic disadvantage is unlikely to attend reputable institutions of higher education due to a number of factors. The price of attending such institutions is far beyond the meager means of someone such as this. To obtain scholarships and grants would entail a fair degree of knowledge and abilities which are unlikely fostered in environments of socioeconomic disadvantage. Furthermore, the acquisition of a meritorious transcript and a resume of involvement in activities revered by the upper-class are frustrated causes for those of socioeconomic disadvantage. For instance, parents of children living in disadvantaged are likely over-burdened by low-paying jobs with long working hours,

thus reducing the time they have to spend tutoring their children and transporting them to various extracurricular activities.

If sufficient opportunities were afforded, such as those which elude our socioeconomically disadvantaged example above, reasonable expectations of members of a just society would be met and punishments would be grounded in moral desert for those who choose not to take hold of the sufficient opportunities supplied. To think of distribution and retribution as converses, therefore, should not be misleading. Rawls' rejection of the moral basis of distributive shares seems unreasonable, for if we are to reject their moral basis for the reasons he does we would have to reject the moral basis of retribution as well. That conclusion seems altogether impracticable and even nonsensical. Therefore, we must accept a moral basis for the distribution of economic and social advantages and look toward a theory of justice that balances retributive and distributive deserts.

A Principle Grounded in Empirical Truths

My argument carries the intention of acknowledging the empirical realities of capitalistic societies. Prior theories of justice and desert have largely presumed a certain view of man and society that is empirically false. J.G. Murphy pointed to this discrepancy found in much of the literature in his piece entitled, *Marxism and Retribution*. Murphy argues that the Marxian challenge to traditional Kantian and Hegelian views of man and society is in fact valid and should direct our attention to the empirical realities of crime

and punishment. The traditional Kantian and Hegelian views rely on a “rationality” of man. According to their views, the criminal has willed her own punishment upon herself and has a right to be punished under a penal code that she would have chosen for herself in the original position of choice (Murphy, 55). This traditional retributivist outlook has heavily influenced the work of modern contractual thinkers such as John Rawls. The idea of a social contract is a “model of rational choice” under which people would treat each other as they would have reasonably expected to be treated from an original position of choice (Murphy, 55-56). Under a theory such as this, we presume the rationality of modern institutions of justice and punishment. The Marxian challenge to this theory finds that this theory “does not have application in concrete fact the actual social world in which we live,” (Murphy, 57).

My contention is that the Marxian challenge is essentially correct, but there exists no solution to the problem posed because it is immensely difficult to establish a theory which respects a certain degree of freedom of human rationality whilst acknowledging the economic and often irrational nature of criminality. The solution resides in the establishment of fair opportunities, but not from a morally arbitrary standpoint. The socially and economically disadvantaged people of capitalist societies deserve opportunities on the basis of need and under a principle of diachronic fairness. Once the established institutions of government have secured a reasonable degree of fairness of opportunities, of which the majority of the socially and economically deprived can choose to take advantage, then the institutions of justice *may* carry out punishments (emphasis added because, under such a system, penal laws may not even be necessary) with a presumption of rationality which retributive social contract theory is based upon.

When I refer to a principle of diachronic fairness, I borrow from Sher's construction of DF3, which states that, "for every good *G*, every person *M*, and every period of time *P*, if *M* has less (or more) of *G* than he should during *P*, then *M* should have correspondingly more (or less) of *G* or some related good he otherwise should during some later period *P*," (Sher, 94). This principle of diachronic fairness seems appropriate for our conception of fair opportunities in a retributive state. For if a capitalist society can accept this principle, such a society can presume that its members would be in a rational position of choice because the distributive concerns of the disadvantaged would be adequately addressed.

In order to illuminate the central point of my argument here, I will develop a hypothetical example of a typical criminal in a modern capitalist setting. Consider the life of an impoverished African-American male raised in a structurally and socially disadvantaged urban area. From an early age, opportunities for upward economic and social mobility are sparse. His single mother works two jobs to pay rent, bills, and put food on the table. Taking the time to transport her child to various social extracurricular activities is simply out of the question. Therefore, the boy develops in a setting close to home around children in a similar position of disadvantage. The setting is filled with violence, drugs, and other temptations which his active participation in would prevent him from climbing the socioeconomic hierarchy later in life. He eventually finds himself immersed in a drug-infested, violent criminal network of underprivileged youth who identify with his situation and carry similar feelings of isolation, alienation, and repression. During a drug raid on their commune, our deviated youth is apprehended and charged with possession and intent to sell narcotics and possession of an unregistered

handgun. He faces a minimum 15 years in prison under the harsh penal codes surrounding his offenses.

Though for the moment it is simply my own hypothetical construction, this example is not unheard of and is based entirely in empirical truths of our modern capitalist societies. The key points to take away from it are that criminals are often alienated from the mainstream and their motives are the product of a capitalist economy that fiercely encourages the acquisition of material goods. My example is not meant to excuse offenders of such crimes, but it intended to highlight the specific flaw found in traditional social contract and retributive theory. Humans are not entirely rational in such an economic setting. Under a Frankfurtian conception of a person, however, we can view humans as capable of choosing second-order volitions from a pool of first-order desires. The goal then is to afford people reasonable opportunities for prosperity in a capitalist society. This principle of fairness can correspond to DF3, with opportunity understood as the good *G*. Of course, this would presume that those who enjoy more opportunity at some point would have to enjoy less at some later point. This may seem problematic, but once opportunity has been afforded to a person the prospects of their need developing later on will diminish.

My proposal of a principle of fairness grounded in empirical truths has the capacity to alleviate the asymmetry found between retributive and distributive deserts as well. Recall that the problem of asymmetry lies within the fact that retributive theory generally accepts moral desert, whereas distributive theory commonly rejects it. Here I have constructed a principle which accepts moral desert for the purposes of distributive justice. Embodied within the principle is the understanding of empirical facts, which have

shown us that without this foundational understanding of moral desert based upon reasonable needs we will witness a criminal class of the least advantaged emerge. Under a principle of fair opportunities, retribution and distribution will balance and the moral deserts prescribed by retribution will be buttressed by the moral deserts recognized in distribution. A concern that I cannot address here but will have to be considered by future writers is the state of retributive institutions. From the conclusions I have drawn here, one could assume the best possible retributive institution would have to adopt a restorative approach to punishment. The role of an emerging restorative system of justice should be discussed by future theorists in order to determine an appropriate balance of punitive and restorative functions.

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