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CONTROL, DESERT AND THE DIFFERENCE BETWEEN DISTRIBUTIVE AND RETRIBUTIVE JUSTICE

ABSTRACT. Why is it that we think today so very differently about distributive and retributive justice? Why is the notion of desert so neglected in our thinking about distributive justice, while it remains fundamental in almost every account of retributive justice? I wish to take up this relatively neglected issue, and put forth two proposals of my own, based upon the way control functions in the two spheres.

Why is it that we think today so very differently about distributive and retributive justice? Why is the notion of desert so neglected in our thinking about distributive justice, while it remains fundamental in almost every account of retributive justice? There is an unusual and disturbing quietude concerning this issue among moral philosophers. I wish to take up this relatively neglected issue, and put forth two proposals of my own. The issue is manifestly important: unless we find some good reason to distinguish between distributive and retributive justice, we need to revise our thinking radically, either abandoning desert in retributive justice or making it paramount in distributive justice.

John Rawls famously put forth the contrast (Rawls, 1971, sec. 17; 48), but nearly all commentators, although they differ in their interpretation of Rawls' position on desert, agree that he is not successful in defending the asymmetry. Samuel Scheffler is the philosopher that has written most about this issue (Scheffler, 1992, 2002). In the first paper he analyses the moral and political price that liberal egalitarianism has paid for its neglect of desert. In the second Scheffler offers a defense of the asymmetry between the role of desert in distributive and

retributive justice, based upon the “holism” and “individualism”, respectively, in these two spheres. The primary issue seems to be that “people’s productive contributions are mutually dependent in the sense that each person’s capacity to contribute depends on the contributions of others” (Scheffler, 2002, p. 191). Likewise, the economic value of people’s talents will be socially determined, and assigning benefits to some will have economic implications for others. While I think that Scheffler has captured important factors underlying the asymmetry, I do not think that the explanation he gives suffices. In my opinion Jeffrey Moriarty has recently demonstrated that to a large degree we *could* estimate people’s individual desert in the distributive sphere and reward them for it and, in fact, that many social practices already do so (Moriarty, 2003, pp. 526–533). This means that we remain with the question whether the asymmetry can be justified. Moriarty himself finds all attempts to defend the asymmetry unconvincing: “We have not seen, at this point, any argument that justifies the asymmetry” (Moriarty, 2003, p. 533).

I wish to take up the challenge, and offer a defense of the asymmetry. I believe that there is room for greater concern about considerations of desert within distributive justice than exists at present, but I also believe that we are morally justified in not assigning the same role to desert in distributive justice as it rightly has in retributive justice. The difference between the distributive and retributive spheres is neither groundless nor mysterious.

Before I present my reasons for these beliefs, I want to review in broad terms some underlying factors. Some of these have been put forth as justifying the asymmetry, and this needs to be evaluated, and some will contribute to my own explanation of the asymmetry. The first underlying factor is commonplace: in retributive justice, we are concerned with blame and punishment. Whether through morally branding or condemning a person, or through incarcerating him or her, we directly *harm* people. Hence we must give a strong account of why society is permitted to harm a person. The only morally defensible account is that the person deserves to be harmed, or,

to be more exact, while the institution of punishment may have good consequences or be otherwise desirable, a necessary condition for implementing it is that those who are punished have reached the point of no longer deserving the baseline of immunity from punishment, or even positively deserve punishment, in the light of their free actions (cf. Hart, 1970, p. 22). I shall not enter into the details of how this can come about, and will assume that sometimes people can deserve blame and punishment for their actions.

In the distributive sphere matters are different. Economic activity itself – unlike blaming or incarceration – is not inherently harmful. People engage in it by providing goods and services that others desire, in return for acquiring economic resources for themselves. Since economic activity occurs primarily within a framework of voluntary transactions, we are already much less concerned with the strict order of desert than we are with retributive justice. It might be countered that I have not made the proper contrast, that what should concern us in the distributive sphere is state *regulation* of economic activity. However, it is important to emphasize that most activity in the economic sphere consists of the complex voluntary transactions of individuals. Even when the state, in allocating resources, may need to be concerned with desert, its activity understandably generates less moral concern than when it inflicts direct harm. Only in extreme cases of tyrannical economic interference through coercion or overwhelming corruption would the concern with (the absence of) desert as such approach that which appears when, say, the innocent are “framed” and then punished.

A second underlying factor, seemingly obvious, is far from trivial. Within distributive justice matters are *comparative*. In retributive justice the issue of comparison to others is far less central. No one may deserve to go to prison, or most people might, but the deserts of one person are typically not related to those of others (unless they are accomplices, or they bear collective responsibility). People do not desire to get their negative deserts in retributive justice, and when one person is imprisoned, it is not typically at the expense of another. In distributive justice,

by contrast, the very problem of distribution arises only because more than one person is involved, and there are not enough of the desirable goods or services to be distributed. Hence in distributive justice it rarely makes sense to speak about what an individual person deserves, except when that deserving is compared to what others deserve. Desert is thus inherently robust and independent of other considerations in retributive justice, but in distributive justice desert tends to be affected by other concerns: for instance, where the resources to be distributed originated, whether those resources can be increased in certain ways so that what people “deserve” may be enhanced, and how giving someone what he or she deserves will affect the desert of others.

A third underlying factor is that a greater *plurality of values* beyond desert enters distributive justice. In the distribution of resources considerations of entitlement, of rights, of equality, and of needs, are commonly believed to rightfully play an important role alongside considerations of desert (see, for example, Miller, 2001). The normative field within distributive justice is very crowded, and there is little agreement among adherents of these diverse elements. No such diversity or parallel force of these diverse elements exists within retributive justice. When the question of who is to be punished arises (as distinct from general questions about how a legal system is to be constructed), there is considerable agreement about the overwhelming salience of desert, which indeed has *veto power* on punishment. This in itself merely re-describes the perplexity we are concerned with. The question remains, and is merely moved one step backward. *Why* is desert so weak within distributive justice, when its strength is compared to the combined force of the other values with which distributive justice is concerned? Beyond the facts already noted, that in retributive justice we directly aim to harm individuals, and that in distributive justice concern with desert is comparative and invites further concerns, what explains the weakness of desert in distributive justice? More specifically, what is it *about desert* in distributive justice that so severely limits the overwhelming force it exhibits within retributive justice? The pluralism of

values is important, but it is not enough merely to see the force of the competing distributive values. We must explain the weakness of desert itself.

The fourth underlying factor is less commonly noted. The retributive sphere is inherently concerned with justice, with punishing those who transgress the law (this simplifies). This concern in turn plays other social roles: it creates a sphere of personal security, and enables peaceful social intercourse. However, those goals of a justice system need not lie in great tension with the central goal of justice: if justice is done it thereby achieves these goals.¹ In the distributive sphere matters are far more elusive. The goal of the distributive sphere is not justice but economic prosperity. Although this goal often requires *retributive* justice (the enforcement of contracts, for instance), distributive justice bears no close relationship with this basic goal. There is no reason to think that the benefits of enlarging the GDP, increasing productivity, the flourishing of trade, a declining absenteeism among workers, and so forth, require distributive justice, however that notion is understood, but it is easy to understand why most schemes concerned with justice in the distributive sphere will not follow the exact path of the single-minded pursuit of such strictly confined economic goals.

In other words, in the economic sphere the main concern is with economic prosperity, with enlarging the cake (as this is often put) rather than with the exact way in which the cake is sliced. And since these economic concerns are so very different from the concerns with justice, and typically go in other directions, societies must choose. So long as there is an economic payoff, Western societies usually tolerate some inequality, even when it is considered to be undeserved or otherwise unjust. Such a choice between seemingly incompatible demands is not as a rule required in the retributive sphere: achieving what is commonly thought of as justice, and attaining the salient social goals, are largely coextensive. Not only is desert considered to be minor within distributive justice as compared to the other values (as we saw before), but also the very concern with justice in the distributive sphere is weak.

Someone might counter that this striking difference in “practicality” goes only so far in explaining the gap between the weak role of desert in distributive justice and its central role in retributive justice. For unless we have a deeper explanation, we would expect to find in the distributive sphere something very different than we do find: we would expect to find an understanding of distributive justice in terms of desert (as we understand it in retributive justice), coupled with strong exasperation at the stark gap between (desert-based) justice and unjust social practices. However, neither in common opinion, nor within contemporary philosophy, do we find this.

I think that this counter-argument is strong. I shall now offer two deeper explanations for why desert plays a weaker role in distributive justice than in retributive justice. The first deep feature that distinguishes distributive and retributive justice is the *Possibility of Equal Control*. Society can reasonably expect almost all people almost all of the time to control their actions so as to fully comply with the directive of retributive justice. It might be more difficult or burdensome for some persons to comply than for others, due to internal or circumstantial differences, but almost all of us have the capacity for fully satisfactory control. In other words, almost everyone can practically always obey the law. The system of retributive justice recognizes a host of excusing or mitigating circumstances when practical obedience does not occur, but these are clearly exceptions. The excuse of insanity is only rarely accepted, whether from those persons who have no responsible control over their actions or from those who temporarily lack such control. Comparatively few people are insane, and few of those who are not insane will ever be acknowledged as suffering from temporary insanity. The vast majority of persons who have committed crimes will be deemed to deserve punishment. This is a fact of utmost importance. It means that everyone who simply obeys the law can, ideally, meet the concerns of the retributive sphere. It means also that those who choose not to obey the law deserve to be blamed and punished, because it is assumed that everyone can control his or her behavior and become deserving *in every respect that matters in the retributive sphere*.

In stark contrast, such an assumption is manifestly false in the distributive sphere. The distributive sphere does not demand that some finite goal (such as 100% compliance with the law) be met. Rather, it holds out the seemingly infinite goal of creating larger quantities, qualities and varieties of, for example, desirable objects. The demands of the distributive sphere are met by contributions to our well being (whether light bulbs or computers), that had to be invented and constructed. Such demands differ in kind from retributive justice's demand for mere compliance with a set of laws. Further such inventions, discoveries, products and services are clearly within the goals of the distributive sphere. Moreover, the continuous achievement of the goals of the distributive sphere is inherently inegalitarian. Everyone can be expected to obey the law, but not everyone can be expected to invent new beneficial devices or to have business acumen. Of course many become deserving, in the sense of desert that is based upon economic contribution, through more pedestrian means (nearly everyone can dig ditches), but it is significant that high rewards will often go to people who perform tasks which most others could not do.

To sum up my points about the *Possibility of Equal Control*: in the retributive sphere control can be fully and equally expected of everyone, and the appropriate desert can rightfully be implemented. Such an order of individual self-control and of social response in terms of desert are all that is required in order to meet the goals of the retributive sphere. Concomitantly a large measure of (desert-based) retributive justice is achieved. In the distributive sphere the relevant forms of control that are required for attaining its goals *cannot be expected* of everyone, let alone expected of them either fully or equally. Hence a moral order where each of us has matters under his or her control and can therefore deserve anything we choose, as a result of the exercise of our free will, is possible within the retributive sphere, but it is clearly impossible within the distributive sphere, at least as we know it today.² Desert based upon control is naturally the focus of the retributive sphere, but it cannot be equally so in the distributive sphere.³

The second deep feature that distinguishes the retributive and distributive spheres is the *Importance of Equal Control*. Just as in the one sphere but not in the other we could *assume* that people had complete control over the relevant matters, likewise the two spheres differ in the moral *importance* of control and desert, and particularly of equal control and desert. The second feature to some extent follows from the first. Since not everyone can become similarly deserving in the distributive sphere (this, we recall, being the first point), that fact already reduces the moral weight of desert within this sphere as compared to the retributive sphere. One does not have to be a Kantian to have doubts about putting at the very center of morality matters that many people cannot be good at, however hard they try. Nevertheless, the question of the importance of equal control is clearly not reducible to, nor dependent on, the question of the possibility for equal control.

In the retributive sphere it is of great social importance that everyone comply with the requirement of obeying the law. And for each individual it is morally important that he or she do so. Otherwise, he or she will harm someone or transgress that person's rights. In the distributive sphere matters are very different: it is not socially crucial (at least above a certain minimum) that everyone do as best as he or she can to achieve (more and more) of the distributive sphere's goals. If no one at all got out of bed every morning, that would indeed create serious problems, but a mix of people with varying degrees of economic ambition is in fact better than a single-minded uniformity. It takes all kinds for the economy to function well. In any case, a person's moral standing does not depend in any crucial way on his or her doing all that he or she can do in order to acquire wealth. Even where we can make sense of desert in the distributive sphere, becoming more and more deserving in that sphere is not a necessary moral goal. However, being fully deserving (that is, in no way being deserving of negative desert) *is* morally required in the retributive sphere.

This conclusion is related to the fact that continuous vigilance is required in the retributive sphere: one cannot have periods of time in which one disobeys the laws. Economic life

typically is not piecemeal; it is based on accumulating the fruits of different levels and forms of endeavor. Hence, taking time off to rest or do things other than one's main occupation is not necessarily bad or harmful to one's value, even as a positive deserving economic agent. However, the deep factor operating in the distributive sphere is that it is *prima facie morally all right* to do less economically – whether working fewer hours, or less hard, or aiming for lower goals. Some will value a person who by striving is able to buy a new or better car every two years; others will value a person who works less and does not mind keeping his or her older car longer; while many will say that both persons are equivalently morally good because each may choose the way he or she wishes to live. This is not to deny that virtues are often expressed through work, but they may be expressed as well through devoting time to one's family or volunteer work, because there is no mandatory moral concern that requires the sort of economic ambitiousness that would make one highly deserving. What this pluralism signifies is that one's economic performance is not typically something that matters greatly from the moral point of view. Hence considering whether a person deserves much or little (in the sense of desert which is concerned primarily with economic contribution), and applying criteria of desert, both carry no urgency, unlike when punishment is at issue. The reason that the distributive sphere is not imbued with concern for the pairing of deserts to economic performance is that such performance is in large measure optional (if other criteria of desert were used this might change, but I am assuming the common criteria of desert in the economy). Other values (such as needs or equality) can therefore dominate distributive justice. Other concerns not related to justice (such as increasing social wealth) can therefore dominate social practice. These, along with the play of random economic powers or sheer political interests, combine to push desert to the fringes.

Take, for example, the issue of retirement at the age of 60. Typically there is no social reason why a person should be discouraged from retiring, if he or she can afford to do so. On the contrary, if more people were to retire at an early age more

jobs would be open to younger persons. Nor is there any reason why a person retiring at 60 is morally at fault. There is nothing morally better, or morally worse, about retiring at 60 in contrast to retiring at 70. By contrast, if the person “retired” from obeying the law or the dictates of morality at age 60, this at once becomes the concern of the retributive sphere, and the person may become the target of retributive justice. Being less or more ambitious economically, and choosing how much to aim for in the distributive sphere, is morally permissible, but choosing not to obey the law is not.

This stark contrast between the two spheres can also be seen from those marginal situations in which desert *is* highly valued in the distributive sphere. A good example lies in the notion of the “undeserving poor”. This is often abused as a political slogan, and yet surely it represents a viable category. There is normally little if any moral concern about the lives of people who live without earning salaries: if they retire, or their spouse supports them, or they won a lottery, or their savings happened to do well on the stock market. But when people are unable to provide basic resources for themselves and their children, and when they then turn to others for support, matters *become* morally troublesome: society requires an account of why and how this circumstance arose. If this inability to support oneself is not within the person’s control, then most of the rest of us who earn our livings would view it very differently than if the person had freely chosen to live on welfare or through charitable handouts.

A brief consideration of the notion of respect for persons is relevant. Desert is inherently related to respect for persons. A paradigm of injustice occurs when a person is blamed or punished unjustly for a crime that she did not commit. It matters greatly that she is harmed but does not deserve to be. Everyone can deserve or not deserve in the relevant senses, by committing or not committing crimes (recall our first point), and since committing a crime says something morally serious about one (this being our second point), it is of the utmost importance that one receive what one deserves. Respect for persons requires that a strict desert-based order be maintained, and in particular that a person not be punished if she does not deserve to be

punished. (It typically matters more if a person is punished more than she deserves rather than less than she deserves, but the reasons for this are beyond our scope here.) By contrast, since most of the factors making for differences among people in the distributive sphere are not equally within their free control, desert cannot play the central role it plays in the retributive sphere. Nor is it as important in the distributive sphere that people get their deserts: my being somewhat poorer than my neighbor due to morally arbitrary factors beyond our control such as our differing inborn talents, or the changing vagaries of the economy, does not mean that I am not respected as a person. If, however, I were branded a criminal and put in prison when this is something I do not deserve, this would clearly imply less respect for me. Businesses are opened or shut down, and people are thereupon hired or laid off, for economic reasons having nothing to do with the desert of individual employees. This is known to be so, and it does not express respect or disrespect to any individual (which is not to say that it is a trivial matter). Deep concern with desert will emerge in situations of firing when particular infringements of the respect due to persons are at issue (such as when people are fired for sexist or racist reasons).

Hence we conclude that, even beyond the influence of the four underlying factors that we noted, two deep differences related to control exist between the distributive and retributive spheres: the Possibility of Equal Control, and the Importance of Equal Control. These differences in the equal possibility of desert-generating agency, and in the moral importance of desert-generating agency, are what primarily matter. In distributive justice equal desert based on control is neither possible nor morally necessary, while in retributive justice it is both possible and morally necessary.⁴

We can interpret these differences between distributive and retributive justice in two ways. First, in the retributive sphere, justice is related to desert and of great importance. In the distributive sphere, although justice is important, it is not (and perhaps cannot be) primarily about desert. Alternatively, we can try to maintain much of the connection between desert and

justice in the distributive sphere as in the retributive sphere, but then we must see justice as not having central importance in the distributive sphere. The first strategy is the one taken in most of the philosophical literature; the second strategy emerges most frequently in contemporary public opinion. Some combination of the two seems most plausible, but I cannot defend this claim in detail here.

The roles of different normative models are also worth investigating. The possibility and moral importance of equal desert within retributive justice make it sit well within the deontological model. The very different features of agency as well as of other inherent factors in the distributive sphere, make room for broader models, such as contractual bargaining and consequentialist ways of thinking.

The proper role of desert within distributive justice, and the importance of distributive justice as such, are difficult and large topics that I have not attempted to settle here. There is certainly a need for further work on these matters within normative ethics and moral psychology. I do think, however, that close observation shows us that much can be said to explicate the gap between the role of desert in the distributive and the retributive spheres. Philosophers dealing with distributive justice should pay greater attention to questions of desert, and social concern about questions of distributive justice, including those related to desert, needs to increase. Nevertheless, the reasons offered in this paper support my claim that there is no need for the role of desert to be symmetrical in the retributive and in the distributive spheres of life.⁵

NOTES

¹ This is too simple. There may be some tension between effective ways of combating crime, for instance, and considerations of justice. However, the two largely go together. And significantly, when they do not there is a widespread acceptance of the need to sacrifice efficiency for the sake of justice. This is why, for example, the utilitarian acquiescence with the idea of 'punishing' the innocent when useful is a problem for utilitarianism rather than one of its attractions (see, e.g., Smilansky, 1990). There is nothing remotely comparable in the economic sphere, where, for instance, views

about taxation are dominated by considerations about the possible influence of various schemes on economic incentives, and about which level of taxation will lead to an increase in the revenues, rather than about justice.

² If desert in the distributive sphere were only a matter of the amount of effort one invests, perhaps matters could approach the condition of retributive justice, in terms of the more or less equal possibility of acquiring desert. However, only with young children or in marginal circumstances is effort the only, or indeed the main, criterion of desert: consider the way we grade our students or choose our plumbers, for instance.

³ It is possible to “keep desert alive” here by opting for forms of desert (such as that generated by making a contribution) whereby the desert base is not thought to be up to everyone. I recognize the importance of such fundamentally unequal desert, for reasons such as those of opening opportunities for people and allowing them to advance themselves. But this is a very different matter. Notice that it would already constitute a significant desert-related difference between distributive and retributive justice. Moreover, such desert based upon unequal factors that are themselves not deserved would naturally carry less moral weight. For, the operation of such a desert-based economic order would already depend upon factors (such as inborn talents) that work decisively in favor of some people and against others. There is nothing equivalent in the retributive sphere.

⁴ Once again, there is a measure of simplification here. Real-life systems of criminal justice do not quite deliver on the promise of a desert-based order (notice the role of wealth in acquiring better legal counsel, for instance). And in a more fundamental way, due to the complexities of the free will problem, even an optimally just retributive justice system will inevitably involve us in injustice (see Smilansky, 2000). But for present purposes these caveats are minor.

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