

Liberalism, Desert and Responsibility

A Response to Samuel Scheffler¹

In recent years, a number of critics of liberalism have focused on its supposed dependence on a voluntaristic and impoverished conception of the self and its inability in consequence to recognise and do justice to those moral phenomena – ideas regarding allegiance, desert and responsibility in particular – that are connected to the situatedness of embodied selves. Samuel Scheffler’s strategy in *Boundaries and Allegiances* is to acknowledge the force behind the intuitions that motivate such critics without abandoning the basic framework of liberalism. Although Scheffler takes the Rawlsian theory as his guideline, inasmuch as it represents the most powerful and best articulated form of modern liberalism, his purpose is constructive, not exegetical: the interpretations he gives are aimed principally at providing a defensible version of liberal theory, not necessarily at following Rawls’s own conception of it. Of the family of questions that Scheffler addresses, one stands out in interest and importance in my view, namely, the place of desert in liberal theory, and it is on this that I shall concentrate in the remarks that follow.

Desert is obviously a central issue for Scheffler, since he devotes two major essays to it in his book. Moreover, it is an issue on which his ideas have been in flux: the position that he takes in Chapter 10 (“Justice and Desert in Liberal Theory”) is sharply at variance with what is presented in Chapter 1 (“Responsibility, Reactive Attitudes, and Liberalism in Philosophy and Politics”). Where the two conflict I shall (like Scheffler himself) treat the later essay as authoritative. In what follows I too will seek to give an account of desert along broadly Rawlsian lines without being overly concerned whether that account corresponds

¹ References by page number alone are to S. Scheffler, *Boundaries and Allegiances: Problems of Justice and Responsibility in Liberal Thought* (Oxford: Oxford U.P., 2001);

strictly to the position taken by Rawls himself. The principal weight of my argument will be conceptual: the difficulties for the Rawlsian approach Scheffler raises can best be met, in my view, if it is possible to show that they rest on confusions regarding the concept of desert. Finally, I hope to follow Scheffler in the open-mindedness with which he approaches the issue; my aim here is not polemical but to contribute to the discussion that he has initiated – even if that is by revealing my own misunderstanding of it.

I

In “Reactive Attitudes and Liberalism” Scheffler differentiates two forms of desert. The one corresponds to intuitions about desert that are commonly held in the political community. Scheffler often refers to this form simply as “desert”, without qualification, although he also describes it as “individual” (p.14), “personal” (p.190) “pre-institutional” (pp.18,24,26), “pre-justicial” (p.193), “robust” (p.20), “desert as a basic moral concept” (p.16), “desert at the level of fundamental principle” (p.16) and “desert as traditionally understood” (p.168). The other form of desert is desert taken as the outcome of the expectations generated by a set of publicly accepted rules: institutional desert. Now, according to Scheffler, “it is a striking fact that, according to the dominant philosophical defenses of liberalism that are current today, desert has no role to play in the fundamental normative principles that apply to the basic social, political and economic institutions of society” (p.16). Inasmuch as desert figures within Rawlsian liberalism, for example, this is desert of the second form, “purely institutional” (p.17). But there is a difficulty arising from the restriction of desert to institutional desert which has been pointed out by such critics of Rawls as Michael Sandel (and which is endorsed in this essay by Scheffler himself). Whether or not an institutional view of desert is defensible in relation to questions of distributive justice, the rejection of pre-

references to *A Theory of Justice* are to J. Rawls, *A Theory of Justice* (Oxford: Oxford U.P.,

institutional notions of desert appears quite implausible in relation to retributive justice: “Offhand, it would seem that if the punishment of a murderer or a rapist, say, serves to express the community’s outrage and indignation, it does so by answering to the thought that the perpetrator *deserves* a severe penalty, where this does not mean merely that he has reason to expect one.” (p.24) The implausibility of the institutional view of desert with respect to retributive justice thus casts doubt on the exclusion of non-institutional desert from distributive justice.

By the time of “Justice and Desert in Liberal Theory”, however, Scheffler’s position has changed radically in two ways. First, he now distinguishes between an institutional account of desert (one that makes desert depend on the expectations generated by actual institutions) and a justicial conception of desert (one that makes desert depend on the expectations generated by *just* institutions.) The justicial conception of desert meets the objection that institutional conceptions of desert are essentially uncritical, without committing itself to the existence of desert as a basic moral concept. This strikes me as a sensible and helpful modification (which corresponds to the point that Rawls himself makes at p.314 of *A Theory of Justice*) and I shall have no more to say about it.

More importantly, Scheffler now rejects the idea that arguments regarding the role of desert in retributive justice can be applied to the case of distributive justice. He now holds what I shall refer to as the Asymmetry Thesis, namely, that distributive justice and retributive justice are not to be thought of as complementary mirror images of one another (the one distributing goods, the other “bads”, as it were). Hence different forms of desert may be relevant in each case. He writes that, in the case of distributive justice, Liberal Theory (the basically Rawlsian approach that he is here defending) “does indeed reverse the traditional order of dependence between the concepts of justice and desert, just as a purely institutional

theory does”, while it “accepts the traditional order of dependence in the context of retributive justice.” (p.186) Moreover, Scheffler now acknowledges that Rawls himself holds the Asymmetry Thesis. Thus he believes that Rawls too may avoid the embarrassment that the denial of (pre-justicial) desert in the case of distributive justice must lead to the (counter-intuitive) denial of desert in the retributive case. Nevertheless Scheffler believes that there is a potential inconsistency in Rawls, inasmuch as what is apparently Rawls’s crucial argument for the rejection of desert – “the general principle that a desert claim cannot be valid unless the underlying desert basis is itself deserved” (p.189) – has just as much force in the retributive case as it does in the distributive one. Rawls, Scheffler writes, “may perhaps have yielded to the temptation to offer an argument that was too strong for his own purposes.” (p.195) Scheffler must therefore look for an argument for rejecting pre-justicial desert in the case of distributive justice which – unlike the excessively sweeping force of the claim that desert bases must themselves be deserved – will leave the idea of desert untouched in the retributive case. Thus he argues that “whereas desert is individualistic, distributive justice is holistic” (p.190), from which it follows that a “robust” concept of desert is appropriate in the former case while a justicial one is appropriate in the latter. This claim is crucial for Scheffler in his argument for the Asymmetry Thesis. As he writes in the conclusion to his essay, “the interesting question is not whether a valid desert claim must have a desert basis that is itself deserved, but whether the case for distributive holism is compelling.” (p.195)

Like Scheffler, I too believe that the Asymmetry Thesis should be defended. But I am not persuaded by Scheffler’s account of the difference between distributive and retributive justice as a contrast between holistic and individualistic desert bases. I shall argue that nevertheless, when the nature of the asymmetry between distributive and the retributive justice is properly appreciated, it is possible to see that Rawls’s argument regarding the moral arbitrariness of undeserved desert bases can be accepted (although I do not want to commit

myself here without further argument to the claim that it *should* be accepted) without damage to the notion that (at least some of) those who break the law can be said to deserve punishment.

II

To open my argument, I should like to draw attention first to how broadly the term “desert” is used. We certainly do use the term “desert” purely institutionally (e.g. “The holder of the ticket with the winning number deserves the prize”) and justicially (e.g. “The team deserved to win – and would have done but for the referee’s mistake”). We also use it in a moral and pre-institutional/justicial sense (e.g. “His loyalty deserves gratitude”). But there are many other contexts in which we also speak about desert. For instance, we say things like “every child deserves an education” or “those with more serious illnesses deserve priority in the allocation of hospital treatment”. Indeed, there is some temptation to think that *whenever* we judge that there is a morally obligatory way of treating an agent, then we say that that agent *deserves* to be treated that way (an employee deserves to be treated with respect, a spouse deserves fidelity, etc.).

But this broad use of the term, one might say, is only a fact about everyday usage: desert in this sense is not *really* desert – it is only honorifically desert, a kind of desert by convenience. This, however, is, I think, to underestimate the importance of the point being made here. Scheffler takes it for granted that the domain of desert divides into two: institutional (later post-justicial) desert and individual desert. Of course, if the second kind of desert is simply *defined* as non-institutional desert then the bifurcation follows necessarily. However, it is in my view very important to recognise that there are several kinds of non-institutional conception of desert. Those who believe in desert as a “basic moral concept” presumably believe that there are certain qualities of character (or features of action) the mere

possession (exercise) of which creates a claim of desert, irrespective of needs that are thereby met, fundamental features of moral personhood that are thereby defended or desirable ends that are served. Let us call such a view the idea of desert as merit. While it makes sense, perhaps, to divide desert between institutional/justicial and pre-institutional/justicial, it is wrong to assume that there is bifurcation between institutional/justicial desert and desert as merit.

Consider the claim that every child deserves an education. This is certainly not a claim that depends on institutions for its justification. It is a claim that is – if anything is – individualistic, since it holds irrespective of the level of resources or other claimants. (Although it might not be justifiable to satisfy the child’s claim to an education in certain circumstances, the need and the desert would remain nevertheless.) But it is not a claim about the possession by the child of meritorious qualities. The “desert basis” that justifies the claim that a child deserves an education is for most of us quite simple: the child needs an education if it is to flourish and that flourishing is intrinsically valuable. It is flatly irrelevant whether the child who deserves an education deserves those characteristics that make it true that she so deserves – the basis for the claim that a child deserves education is simply the fact that she has those characteristics (as it happens that all children do). Likewise a suffering patient deserves treatment because she is ill – and it is irrelevant whether she deserves to be ill or not. Rawls’s argument to the effect that desert claims cannot be valid unless the underlying desert basis is itself deserved (if it is accepted) has force against the idea of desert as merit but it does not apply to all non-institutional conceptions of desert. Now, as I said above, it could be objected, perhaps, that what we have here are cases which are not “really” desert. What founds the child’s claims, as with those of the patient, is not desert but *need*; desert here is not a “basic moral concept”. But that is precisely my point. I shall argue later that the conception behind judgements of desert in the retributive case (when approached from a

broadly Rawlsian standpoint) is neither institutional/justicial nor does it draw on the idea of desert as a basic moral concept. This possibility is excluded by the bisection of the terrain that Scheffler adopts.

Since Scheffler argues on the assumption that the only alternative to institutional/justicial desert is desert as merit, his defence of the Asymmetry Thesis requires him to find an argument which will block the claim of desert as merit in the distributive case while allowing it in the retributive one. This he does with the claim that distributive justice is holistic while retributive justice is individualistic. In “Rawls and Utilitarianism” Scheffler explains his view as follows:

... desert as traditionally understood is *individualistic* rather than holistic. No assessment of the overall benefits and burdens in society or of the institutions that produced that distribution is normally required in order to decide whether a particular individual deserves a certain benefit. Instead, it is a constraint on the justice of distribution and institutions that they should give each individual what that individual independently deserves in virtue of the relevant facts about him or her. (p.168)

In the case of distributive justice, however, this independence of wider social considerations does not hold. Since “the life prospects of individuals are so densely and variously interrelated, especially through their shared participation in social institutions and practices, that virtually any allocation of resources to one person has morally relevant implications for other people ... it is impossible to assess the justice of an assignment of benefits to any single individual without taking into account the larger distributive context of that assignment.” (pp. 166-67) I cannot address here the many interesting issues raised by this account of the holistic character of distributive justice (towards which I am in many ways sympathetic) but will confine myself to the question: is retributive justice in the relevant sense individualistic?

Needs-based desert claims of the sort discussed earlier certainly seem to meet the individualistic standard. They are true in virtue of facts about the individual in isolation and remain even if facts about other individuals (for instance, their superior claims on scarce resources) make it wrong to meet those needs. But is the same true about retribution? It seems to me obvious that the judge who sentences the criminal (and the law-maker who sets guidelines on sentencing) takes into account the effect of that sentence on third parties (and, indeed, fourth, fifth and further parties). In sentencing a drug-dealer, for example, the judge takes into account the fact that the dealer's client is likely to become addicted to the drug, commit crimes of violence to pay for addiction, and so on. In assessing whether or not the drug-dealer deserves a particular punishment, an "assessment of the overall benefits and burdens in society" is very much required, in my view.

Now there is a reply to this. Certainly, one might say, judges and law-makers *do* look at social consequences but this is a matter of prudence on their part, not desert. On this view, what people deserve is set simply by the quality of the character or motivation that lies behind their actions. The suggestion is that retributive desert should be detached from consequences entirely: that to follow desert is to return bad for bad in an appropriate measure. Let us call this *radical retributivism*. Radical retributivism is certainly a consistent position, in my view, but it is strongly revisionist and, to most people, I think, counter-intuitive. Let me mention three obvious problems. First, the radical retributivist must claim that it is good to punish even if there are no good consequences to be had from doing so: *fiat justitia ruat coelum!* Second, it must be possible to judge how much punishment is appropriate to any particular crime without reference to consequences – it seems that the radical retributivist is pushed towards some form of the *lex talionis* if his or her position is not to become indeterminate. Beyond that, the force – if there is any – of Rawls's scepticism about undeserved desert bases is clearly applicable to radical retributivism.

III

I do not know if Scheffler is a radical retributivist – I imagine not – so perhaps he has some further argument for the individualism of retributive justice. If so, I am afraid that I have missed it. What will become plain, though, is that Rawls is not a radical retributivist. So what account can Rawls (or the Rawlsian) give of retributive justice? Rawls, as he himself admits, says “very little about this part of the theory of justice.” (*A Theory of Justice*, p. 575). In Section 48 of *A Theory of Justice* (which Scheffler discusses) there are, however, two passages that could indeed be thought to suggest that Rawls thinks that retributive justice involves what Scheffler calls “desert as traditionally understood” and which I have called “desert as merit” (in this case – since we are dealing with faults – it might be better to say “desert as demerit”). First, he writes that, since “it would be far better if the acts proscribed by penal statutes were never done ... 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*.” (*A Theory of Justice*, p. 315, my emphasis) Secondly, Rawls contrasts distributive justice with retributive in the following terms: “These arrangements are not the converse, so to speak, of the criminal law so that just as the one punishes certain offenses, the other rewards moral worth.” (*A Theory of Justice*, p. 315) Distributive justice, Rawls then goes on to argue, has, in fact, a function other than that of rewarding moral worth – a point of contrast which at least suggests, even if it does not entail, that he believes that it *is* the function of the criminal law to penalise moral fault. If these passages are taken as authoritative then Rawls may indeed be interpreted as thinking of punishment in terms of a “traditional” view of desert as merit or de-merit – and he would lay himself open to the force of his own objections to merit-based accounts of desert.

But there is another passage in which Rawls raises the issue of punishment that appears to go in a very different direction. This comes in Section 38 in which Rawls discusses why even a well-ordered society must be regulated by a framework of law. Such sanctions are justified, he writes, from the principle of liberty:

... the principle of responsibility *is not founded on the idea that punishment is primarily retributive or denunciatory*. Instead it is acknowledged for the sake of liberty itself. Unless citizens are able to know what the law is and are given a fair opportunity to take its directives into account, penal sanctions should not apply to them. This principle is simply the consequence of regarding a legal system as an order of public rules addressed to rational persons in order to regulate their co-operation, and of giving the appropriate weight to liberty. (*A Theory of Justice*, p. 241, my emphasis)

This, I think, potentially throws a quite different light on retributive justice. The point of punishment as Rawls here presents it is not – as the radical retributivist appears to think – that it is good to do bad things to bad persons but to hold people responsible for their actions.

On a naive view, distributive justice and retributive justice are symmetrical: the one distributing “goods”, the other “bads”. Seeing the naivety of this view, it is tempting to argue that retributive justice is a non-distributive institution and that questions of punishment should be detached from questions of distribution for that reason. But the presentation of the contrast between distribution and retribution as a contrast between two different kinds of institution is itself misleading. After all, punishment is the means we use to enforce adherence to one single system of laws. Those laws cover issues that are in part distributive (property, taxation) and in part non-distributive (protection of the person, etc.). The person who violates laws of either kind is subject to retribution. If people are to be treated as ends

then in each case they should be subjected to sanctions only if their actions are such that they can properly be held responsible for them.

Although Rawls is sceptical about the idea of desert as merit/de-merit, he is not sceptical about the fundamental Kantian idea of treating people always as ends rather than as means only and it seems obvious that part of what it is to treat people as ends is to give them responsibility for their actions. This entails treating their choices and values with respect but also – or so it may be plausibly thought – holding them responsible for actions that transgress laws. (Of course, we do not hold agents responsible for all of their actions; but then neither does – or should – the law do so.) The responsible agent may be said to deserve punishment in a non-institutional sense, but not because of some basic punishment-requiring trait that acts as a fundamental desert base. It is responsibility that grounds desert.

In “Reactive Attitudes and Liberalism” Scheffler puts together the notions of desert and responsibility. Thus he remarks in relation to utilitarianism that “no form of utilitarianism treats desert as a basic moral concept. Indeed, utilitarianism as it is most naturally interpreted presents a radical challenge to ordinary notions of responsibility”. (p.16) This equation is mistaken, in my view. While it is true that, if someone is responsible, it entails that they deserve (and not merely in an institutional/justicial sense) to be treated in a certain way, it is certainly not true that responsibility is equivalent to or presupposes desert “as a basic moral concept”.

In the same essay, Scheffler remarks that it is, in his view, ironic that Rawlsian liberalism should be exposed to just the kind of objection – that it leaves no room for the concepts of desert and responsibility – that is commonly raised against utilitarianism, given that the Rawlsian approach is founded on a dissatisfaction with the failure of utilitarianism to give a sufficiently entrenched foundation for the idea that people should be treated as individuals, with basic rights (p.26). My conclusion, to the contrary, is that, once the place of

that Kantian, anti-utilitarian element in Rawls's thought is properly appreciated, then the objections that trouble Scheffler are deprived of their force.

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6 September 2002