

The Complete Idea of Justice

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Most writers have agreed with the platonic conception that justice is giving a person his due.¹ There is far less agreement about what is due a person and how it is determined, but it is understood that the idea of desert is somehow central. So far as justice is concerned, a person is due no less and no more than he deserves. Thus, one path toward an understanding of justice is to inquire about desert, and, if desert is not treated simply as a synonym for justice, it furnishes a test of results reached in other ways.² Justice as desert is contrasted with the idea of entitlement, with which it is said commonly to be confused.³ Entitlements are the product of rules, which may, but need not, reflect desert and, therefore, justice. So, although one could not without irony speak of a person's "unjust deserts," it is often appropriate to speak of a person's unjust entitlements.⁴

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¹ *E.g.*, D. MILLER, *SOCIAL JUSTICE* 20 (1976) ("[T]he most valuable general definition of justice is that which brings out its distributive character most plainly: justice is *sum cuique*, to each his due."); Frankena, *The Concept of Social Justice*, in *SOCIAL JUSTICE* at 1, 3 (R. Brandt ed. 1962) ("As is stated in an ancient formula, a society is just if it renders to its various members what is due them."). Plato discusses the nature of justice principally in the *Republic*. See especially PLATO, *REPUBLIC*, bk. IV, lines 433-34, where the idea of justice as each person doing that for which he is suited is stated.

² J. HOSPERS, *HUMAN CONDUCT* 433 (1961) ("Justice is getting what one deserves; what could be simpler?"); J. FEINBERG, *Justice and Personal Desert*, in *DOING AND DESERVING* 55, 55 (1970) (Until the "peculiar perplexities" of the question of what it is to deserve something are resolved, "a full understanding of the nature of justice is impossible, for surely the concepts of justice and desert are closely connected.").

³ See, *e.g.*, D. MILLER, *supra* note 1, at 25-26 (observing that "it is fairly clear that justice as the protection of rights [or entitlements] and justice as desert are conflicting values"), 91 (noting the confusion between desert and entitlement). To the same effect, see J. FEINBERG, *supra* note 2, at 57-58, 80, 85-87.

⁴ The ideas that I have identified here as desert and entitlement have been variously labeled. They are sometimes both labeled as desert, although of different kinds. *E.g.*, B. BARRY, *POLITICAL ARGUMENT* 106-15 (1965); Kleinig, *The Concept of Desert*, 8 *AM. PHIL. Q.* 71, 73-76 (1971). The idea of equality often occupies the place given here to entitlement. See *infra* notes 53-54 and accompanying text. Because, as I argue in this article, desert and entitlement are united in the complete idea of justice, the distinction is likely to be noted only in circumstances in which the two manifestly conflict. Where they both appear to be satisfied, either term may serve for the other, and all three terms, desert, entitlement, and

I shall argue here that the relationship of desert and entitlement is much more complex than this simple outline suggests, and that it discloses a fundamental antinomy in the concept of justice itself. The idea of entitlement is as central to a full conception of justice as is the idea of desert. Not only are they united in the complete idea of justice; considered separately, they are reciprocal. Unqualified desert presumes that the conditions of entitlement have been satisfied as well. Unqualified entitlement satisfies the conditions of desert. Nevertheless, desert and entitlement are opposed; it is impossible for the same circumstances to satisfy fully the conditions of both.

This relationship of conjoint dependence and opposition is prominently displayed in the realm of civil justice, where, I shall argue, liberty is associated with desert and equality with entitlement. Every principle of liberty presumes the validity of a reciprocal principle of equality, to which another principle of equality is opposed. Abstractly, without reliance on the conventional understandings of a community, there is no reason to prefer one principle of liberty or equality to another. The effort to describe such principles as objective, independently valid principles of a just social order necessarily fails, because it is a reflection of the more general union of desert and entitlement in the idea of justice.

The incompatibility between desert and entitlement is overcome by the assumption of a normative natural order, in which persons are naturally situated as they deserve. That assumption is the core of the classical and medieval theories of natural law and gives it its distinct significance. Far from making natural law unacceptable, such an assumption is necessary not only for the complete idea of justice but also for an account of moral freedom, without which the idea of a person as morally responsible cannot be sustained.⁵ Desert and entitlement alike identify the individual

justice, may be used more or less interchangeably, according to the aspect of the situation that is deemed significant. In a previous article, I used the terms "desert" and "entitlement" somewhat differently and less precisely than I use them here. See Weinreb, *Law as Order*, 91 HARV. L. REV. 909, 957 & n.138 (1978). Important distinctions within the categories of desert and entitlement have been noted elsewhere. *E.g.*, J. FEINBERG, *supra* note 2, at 71-72. They do not bear on the present argument.

⁵ Michael Sandel has observed:

Only a world unguided by a purposive order leaves principles of justice open to human construction and conceptions of the good to individual choice. In this the depth of opposition between deontological liberalism and teleological world views most fully appears.

Where neither nature nor cosmos supplies a meaningful order to be grasped or apprehended, it falls to human subjects to constitute meaning on their own.

as a responsible being—in short as a person—but in different ways. Only if both are satisfied is it possible to give a person his due, because only in that case is a person fully realized separately from the conditions of his existence. Natural law reflects that aspect of our experience. Positive law reflects the separateness of what is and what ought to be, which is another, equally ineluctable, aspect of our experience. The antinomy is complete and final.

I. JUSTICE AS ENTITLEMENT

The simplest manifestation of the idea of justice is found in the connection most people make unreflectively between justice and law.⁶ The connection is explicit and immediately apparent, even in ordinary, incidental details like the names we give to institutions and agents of the law: courts of justice, justices of the peace, or, more simply, Justice, as we call members of the Supreme Court. Unlike other basic values, which subsist independently of law and furnish a standard against which it is tested, in some special way law seems to bring justice into being; the very product and activity of law, one wants to say, is justice. And although we may oppose a law strongly on other grounds of principle or policy, an unjust law troubles us differently; if the injustice is large and clear, we may question whether it is correct to use the term “law” at all.

The source of this connection is easily traced. A central aspect of the idea of justice is the application of a determinate rule to a case to which the rule applies. When this aspect of justice comes into play, provided that the rule is as stated and without reservations and that it applies to the particular case, it is necessary and sufficient for justice to be done that the rule be applied, whatever its specific content. Stated thus generally, this aspect of justice sounds like a description of law itself. For what is a legal order but a body of rules assumed to be valid, covering every variety of

M. SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* 175 (1982).

Sandel argues, as I do here, that a strictly deontological approach to justice is inadequate to sustain a full conception of a person. His solution is not to make the assumption of natural law. Rather, working in the other direction, he argues that the idea of a person has to be enriched with the (contingent) phenomena that make us the persons we are; so doing, we discover in our actual commonality, uncertain and incomplete as it is, the normative basis that nature does not provide. The demands of justice, he suggests, exist side by side with this other ground of interpersonal relations, which he calls community. *Id.* at 179-83. Although his solution and mine are plainly different, insofar as community provides an objective, “supra-personal” standard of moral judgment (even if it is not unchangeable), the two solutions converge.

⁶ See H. SIDGWICK, *THE METHODS OF ETHICS* 265 (7th ed. 1907).

human affairs, and what is legal process but the application of rules?⁷

We refer to this aspect of justice and use it uncontroversially all the time. It is displayed prominently in law, but is not limited to it. In the *Iliad*, when the Achaeans celebrate the funeral of Patroclus, Achilles announces that he will give prizes to the competitors in a chariot race.⁸ The prize for the runner-up is a mare. Antilochus finishes in second place. Eumelus, the best charioteer in the race, finishes last (because the gods are meddling, as usual, and Athena breaks the yoke holding his horses). Seeing what has happened to Eumelus and feeling "a pang of pity," Achilles suggests that the first prize go to Diomedes, who has finished first, but,

"The best man is the last to bring his team in.

Come, we'll award him second prize, in fairness."⁹

Antilochus protests angrily. If Achilles wants to recognize the merit of Eumelus, let him do so from his store of wealth. Let him bestow on Eumelus anything he wants, of greater value than the mare if he chooses. But the prize for second place is his. Everyone must agree with Antilochus that he is entitled to the prize, and that it would be unjust to give it to anyone else.¹⁰ Achilles's announcement before the race determined how the prizes were to be awarded. According to its terms, Antilochus should receive the second prize. That is enough to settle the matter.

Not every rule implicates considerations of justice, however; nor is every failure to apply a rule an injustice. Justice is not merely consistency. All sorts of acknowledged rules raise no question of morality, or justice, at all. Although an office rule provides that internal office memoranda be typed on blue paper and memoranda for outside the office on yellow paper, a secretary in a hurry commits no injustice if she scribbles a memorandum on white pa-

⁷ Rules that concern the legal process itself are sometimes said to contain requirements of justice, so that a failure to follow them is an independent denial of justice. Lawyers and legal scholars particularly may think in this way about procedural requirements, like a fair opportunity for interested parties to be heard, an unbiased judge, etc., which, in the United States, are called "procedural due process." Such requirements are means of ensuring the principal demand of justice that rules be correctly applied. They do not have an additional independent status of their own. Of course, if they are themselves embodied in rules, a failure to apply those rules constitutes a denial of justice.

⁸ HOMER, *THE ILIAD*, bk. 23, lines 262-70, at 543-44 (R. Fitzgerald trans. 1974). For the whole story of the race, see *id.* lines 262-616, at 543-54.

⁹ *Id.* lines 534-40, at 552.

¹⁰ Except that, as it turns out, Antilochus cheated in the race. But, turn again, his acknowledgment that he cheated leads Menelaus, who had finished third, to concede the mare to him. *Id.* lines 566-613, at 553-54.

per (even though it may not get to its destination promptly). On the other hand, justice is not simply morality. Moral principles dictate acts of benevolence, like giving to charity, or simply right conduct, like telling the truth. We are all more or less liable to honor such principles in thought or word and sometimes not to honor them in deed; but justice does not exhaust the demands of morality, and a moral shortfall is not invariably an injustice. Indeed, if one contrasts the strict application of a rule with a merciful or generous act, justice may seem to be the least that morality requires rather than the most, as Portia tried to convince Shylock.¹¹

We do not delimit the range of justice either if we simply join the requirements of consistency and morality in the application of a specific rule rather than a general moral principle. A person who regularly stops his car on rainy days to give persons waiting for the bus a lift does not behave unjustly if one day his mind is on other things and he fails to stop. The persons waiting at the bus may suffer from the rain, but they have not suffered an injustice when the car goes past.¹² And, although consequences for others are relevant, the fact that the correct application of a rule or the failure to apply it has significant consequences does not itself raise considerations of justice. All sorts of actions guided by a rule, whether a distinctly moral rule or one involving no moral consideration, benefit or harm the interests of others without being just or unjust. A seller of office supplies may benefit from the rule about color-coded memoranda, but he cannot protest of injustice if the rule is ignored. Nor do the people at the bus stop begin to have a claim of injustice if the regular bus fails to come on schedule, the rain changes to sleet, and the wind comes up. So far as application of a rule is concerned, one person may have a valid claim based on justice while another person who suffers far greater loss has no such claim.

Missing from the cases in which the application of a rule does not involve considerations of justice is what we have in mind when we speak of an entitlement. Asked why it would be unjust to deny Antilochus his prize if Eumelus is the better charioteer, the simplest answer is that, having come in second, Antilochus is entitled

¹¹ W. SHAKESPEARE, *THE MERCHANT OF VENICE*, act 4, scene 1.

¹² If the driver has stopped often for the same persons who are waiting this time and has induced them to rely on him for a lift, justice may begin to be involved; in that case, we should say that they have acquired an entitlement. Even then, it would be unkind but not unjust to pick up those persons and leave others, whom the driver has never picked up and who know nothing about his practice, standing there dripping.

to it. We are likely, however, to be able to recognize instances of entitlement more easily than to explain what entitlement is. If it is not a matter of consistency, or morality, or the extent of the consequences, or of all three together, why does it have the special significance that justice invokes? Clearly it is not enough to say that a person has an entitlement if it would be unjust not to apply a rule in his case, since we are seeking to clarify the idea of justice by reference to entitlement.

The usual explanation is that a person has an entitlement if he has a right to whatever is in question. The significance that we attach to entitlements, then, is that they "belong" to the entitled person, and, if denied, the person is deprived of what is "rightfully" his. The reference to a right distinguishes entitlements from expected or hoped-for benefits, but, unelaborated, it does little more. The right in question cannot mean only that someone else has a corresponding duty. One may have moral duties a failure to perform which is not an injustice. Evidently only rights (and corresponding duties) of a particular kind give rise to entitlements. If we sidestep the issues by specifying that an entitlement-creating right includes anything that a person is due, we have once again traveled in a circle back to the idea of justice itself.

Casting about for a meaningful connection between entitlements and rights, one may say that entitlements are not only illustrated by reference to law but designated by it. An entitlement is a legal right, nothing more. Although this statement reflects the main part of the common understanding, it is itself puzzling. For the limitation of entitlements to legal rights seems to add nothing except that an entitlement be enforceable. There is in principle no reason why the content of a law may not be embodied in an unenforceable rule. But if enforceability is a requirement of justice, the worst arguments of Callicles seem to be realized, and there is nothing finally to distinguish justice (as opposed to morality) from force.¹³ That may lead to the conclusion that entitlement is not a matter of justice at all but strictly a matter of law, whether or not an entitlement is just being a separate matter. It is precisely the point of an entitlement, however, that it concludes the question of justice. Antiochus claims that it would be unjust to deny him the second prize *because* he is entitled to it, not that he is entitled *and* it would be just to give him it.

Emphasizing the idea of a right as the core of entitlement calls

¹³ See PLATO, GORGIAS, lines 483-84.

attention to an obstinate asymmetry in the notion of entitlement itself. Although it is readily comprehensible and commonplace to complain of injustice if one is denied a benefit to which he is entitled, it would be peculiar in the extreme to assert that someone who incurs a penalty according to a rule is done an injustice if the rule is not applied.¹⁴ One may treat that as a linguistic quirk and insist that "analytically" entitlement extends to penalties as well as benefits. Or one may urge that the element of a right that is part of the notion of entitlement is not strictly attached to the element of justice but only reflects our additional interest in identifying a claimant; if there is no claimant or the potential claimant forswears his claim, the element of justice is not eliminated abstractly but our concern for it lapses. So, one may conclude, although justice requires the application of a rule equally whether it prescribes a benefit or a harm, in the latter case the person who has incurred the penalty is presumed to forswear his claim.¹⁵

The asymmetry, however, lies deeper than that. For it is only when a punitive rule is not applied that the ordinary reference to justice (or injustice) is inapt. If a penalty is imposed according to a rule, the imposition is explained by reference to the rule. And if the question is pressed further, it will be asserted that it was just to impose the penalty *because* the rule so provided. There is no need for an elaborate theory of an offender's "entitlement" or claim to be punished; it simply is just to impose the penalty as the rule requires. Such theories, furthermore, do not overcome the common sense of the matter that the person himself would gladly do without the penalty. Whether one seeks artificially to incorporate penalties within the notion of entitlement or to separate entitlement as justice from entitlement as a right, the full significance of application of a rule remains undisclosed.

¹⁴ Someone else may complain of injustice in such a case. The substance of the complaint, if it were elaborated, would refer to someone, perhaps a victim of the act to which the penalty responds, who is "entitled" to have it imposed. Alternatively, the substance of the complaint might be not that the rule was not applied in this case but that it had been applied in other cases that are not relevantly dissimilar. Hegel, emphasizing that punishment responds to the aspect of wrongdoing, said that "punishment is regarded as containing the criminal's right and hence by being punished he is honoured as a rational being." G. HEGEL, *PHILOSOPHY OF RIGHT* 71 (T. Knox trans. 1942).

¹⁵ It is tempting, if only in the interest of symmetry and conceptual tidiness, to hold that a convicted criminal has a perfect legal right to his punishment, whether he wants it or not, in quite the same sense as that in which a person who qualifies for an advertised reward has a right to it, whether he wants it or not. Perhaps the difference is simply this: a renounced right ceases, sooner or later, to be a right, and the criminal's "right" to be punished is well-nigh certain to be renounced.

J. FEINBERG, *supra* note 2, at 72-73; see also D. RAPHAEL, *MORAL JUDGMENT* 67-68 (1955).

All that holds together the cases of application of a rule in which justice is involved and distinguishes them from other cases in which it is not is our attention to someone other than the person(s) applying the rule, not as an object to whom things happen (beneficially or harmfully) but as a subject or actor who makes things happen.¹⁶ Entitlements are different from mere benefits because they are—so far as human arrangements are concerned—within the power of the person entitled. One may be entitled to a benefit that he has done nothing to earn and of which he is not even aware, like the surprised legatee in a stranger's will. Even so, so far as the entitlement itself is concerned, his status as an acting subject is recognized, so that it is relevant to ask not only "Is he pleased?" but also "Does he claim it?"

Our attention is focused similarly in cases when a rule calls for the imposition of a penalty. If we refer to an imposition as a penalty or punishment rather than simply a harm, we recognize the penalized person as an actor, so far as the conduct for which he incurred the penalty is concerned. Although we may justify an imposition in other ways as well, it cannot be described as a penalty if we deny that the person penalized did anything. So, we distinguish a fine from a tax and a sentence from conscription, although in some circumstances the latter may be far more onerous than the former. This recognition of the person as an actor is the core of the suggestion that a person may be "entitled" to a penalty, which is otherwise misleading. On the other hand, if a penalty required by a rule is not imposed (not because of anything that the person himself has done to make the ordinary rule not apply in his case), he is simply the recipient of a benefit, the object of an action justified on grounds independent of his own agency. Justice, accordingly, is not in question so far as he is concerned.

The significance of this shift of focus from the person(s) ap-

¹⁶ The following statement of Vlastos is closely related: "An action is *just* if, and only if, it is prescribed exclusively by regard for the rights of all whom it affects substantially. . . . Whenever the question of regard, or disregard, for substantially affected rights does not arise, the question of justice, or injustice, does not arise." Vlastos, *Justice and Equality*, in *SOCIAL JUSTICE*, *supra* note 1, at 30, 53-54. Vlastos calls this conception "equalitarian justice," *id.* at 55, but he evidently intends it as an explication of the idea of justice generally. The reference to rights seems to equate justice with entitlement, which is the result of making equality the primary concern. See *infra* notes 53-54 and accompanying text. Elsewhere in his article, Vlastos allows the justice of distributions according to merit. He argues both that such distributions have a utilitarian justification because they further equalitarian values and that they further the value of liberty. Vlastos, *supra*, at 63-69. The arguments are strained because of the emphasis on entitlement/equality and the secondary status given to desert/liberty. See *infra* notes 59-66 and accompanying text.

plying a rule to the person(s) to whom the rule applies is perceptible in some puzzling cases that we do not ordinarily regard as raising considerations of justice. The application of, or failure to apply, a moral principle is not generally thought to be a matter of justice specifically, although the principle presumably functions as a rule of conduct for other like cases. A lie, for example, may violate the rule that one ought to tell the truth, but we should describe it as wrong rather than as unjust. If our attention should shift from the person telling the lie to the person to whom it is told, and if our concern were no longer the act of the former but the availability of the truth to the latter, it would begin to be natural and appropriate to call the lie an injustice. The ambiguity that persists arises from a sense that the teller necessarily remains the actor in control, so that our attention cannot shift entirely to the recipient as actor. If the former were removed entirely from consideration and the rule in question simply provided that the latter be given certain information, the shift would be complete and justice would be in issue. Similarly, acts are praised as displaying generosity even though they follow a consistent pattern, like annual contributions to a particular charity. If the pattern should become highly routine and well-established, we might begin to think of the recipient as having a claim to the benefaction akin to justice, although if pressed we should acknowledge that the benefactor could end the pattern without behaving unjustly. If the benefactor ceased altogether to be noticed and the pattern of benefactions operated, as it were, independently (or, in a typical situation, by operation of law), it would be natural and appropriate to think of the recipient as having the benefit within his power and entitled justly to receive it.¹⁷

Although our attention to the person to or for whom a rule is

¹⁷ Although ordinary usage does not conform to a fixed pattern, it suggests some other examples. If the application of a rule arises in a limited context that is set aside from life generally, like a game or a contest, we are less likely to refer to justice or injustice, terms that seem too weighty for the occasion. The calls of a referee who tilts toward the home team—"home cooking," as it is called—will be hooted as unfair by supporters of the visitors' team, but probably not as unjust. That imprecise distinction may reflect the fact that the team members are identified in their limited roles as players, not fully and unqualifiedly as actors. If the significance of the rule's application went beyond the performance of the game itself, affecting, for example, the award of a trophy, its further consequences would more easily be characterized as just or unjust.

Fairness is also the more natural concept when we are sure that some rule applies, without being sure what the precise rule is. The more definite the rule, the easier it is to refer to justice, not because the focus of our concern is necessarily in doubt when the rule is uncertain, but because the uncertainty casts doubt on the entitlement altogether.

applied rather than to the person applying it, more particularly to the former as a responsible actor, locates the concern of justice as entitlement, it does not provide a neat, formal category. There is no reason why we should expect that it would; the aspects of a situation that concern us are various, and our characterizations reflect our ambivalence and uncertainty. Nevertheless, it has powerful explanatory value. Entitlements are so easily identified with legal rights not because the latter are backed up with force but because they settle the question of agency clearly and confirm the present or past agency of the person who is entitled. Any rule that has or is deemed to have this effect, whether or not it is enforceable, gives rise to the same claim of justice. Not only rules fixing entitlements are taken into account but also rules imposing penalties. One understands, furthermore, why the injustice of a frustrated entitlement is resented so much more keenly than a disappointed expectation of a benefit, even if the latter is more substantial. The refusal to honor an acknowledged entitlement is a specific denial of the person's status as a responsible actor; it treats him as a mere object.

There is, however, a large and important puzzle about this aspect of justice, which the preceding discussion makes more prominent. Although entitlement requires that we think of the person to whom a rule is applied as the subject of the rule and himself an actor, the requirement is necessarily fulfilled without regard to anything about him as a distinct individual beyond that which satisfies the conditions for application of the rule. As we have seen, a person who is entitled to some benefit does not have to prove, in addition, that he has earned it, or needs it, or worked hard for it, or will use it effectively, or anything else. It is enough that he is entitled. Someone who has incurred a penalty does not affect the justice of imposing it by proving that he usually behaves better, or that he will behave better thereafter, or that its imposition will disturb all his well-laid plans. It is enough that the penalty is prescribed. Furthermore, although the claim of justice arises from a rule, once it has been determined that the rule is applicable, the underlying reasons for the rule and their relevance to the particular case are of no importance. From one point of view, an entitlement or punishment directs our attention to the person to whom it attaches; from another point of view, it prevents us from noticing him concretely at all.

If we think of justice specifically as entitlement (including hereafter punishment as well), the connection between law and justice is displayed all the more forcefully. From that point of

view, to say that the law aspires to do justice is precise. The central case of justice as entitlement describes law at its best: a known rule, unequivocally applicable, applied when it counts. One might also conclude, however, that the connection is vacuous. A system of law *must* in some degree be a system of justice, because unless rules are applied with regularity and consistency we cannot talk about law at all. The justice to which law aspires, which had appeared to give it purpose and direction, turns out to be entirely internal, a reflection of the nature of law itself and not its object at all. One can see more plainly the attraction of legal positivism.

Legal Positivist: *Do you agree that this is the rule?*

Smith: *Yes, it is certainly the rule.*

LP: *And you agree that the rule applies to this case?*

S: *Yes.*

LP: *And you agree also that according to the rule Green is entitled to the award?*

S: *There is no question about it.*

LP: *Then as we were saying earlier, it would be unjust not to give the award to Green, wouldn't it?*

S: *Well . . . yes, I suppose so.*

LP: *And the just result, applying the rule, is that Green have the award?*

S: *I don't see how it can be otherwise.*

LP: *To generalize, then, about what we mean by entitlement, justice consists of applying the rules as they apply.*

S: *So it seems.*

LP: *You do not recommend, I suppose, that we act unjustly?*

S: *No.*

- LP: Then we are in complete agreement. (And you may have noticed, incidentally, although I do not press the point, that we have reached a normative conclusion from a consideration only of the facts—what the rule is and whether it applies.)*
- S: Let's back up a bit. I agree that the rule is what you say it is. But it is not a good rule at all and it ought to be changed. If the rule were what it should be, Brown would have the award.*
- LP: I think so too. Isn't it too bad!*
- S: Doesn't that count for anything?*
- LP: It counts for a good deal, but not in this discussion. A rule is a rule, after all.*
- S: Yes.*
- LP: You are not suggesting, are you, that when there is a rule and it is applicable, it is just not to apply it because we believe that there ought to be a different rule?*
- S: No, I don't think so.*
- LP: For we did agree that justice is the application of a rule to a case to which it applies. And if it were otherwise, an entitlement would not be worth much at all, would it?*
- S: I suppose not.*
- LP: Well, then, there we are.*
- S: I am not quite there, I am afraid. For if agreeing that something is a rule has that consequence, then I think I don't agree that the rule entitles Green to the award.*
- LP: Make up your mind. Does the rule entitle Green to the award or doesn't it?*

S: *Well, yes, it does. That is the rule, but it oughtn't be the rule.*

LP: *There is no disagreement between us about that. It seems to me that, like it or not, you are saying either that justice doesn't matter or that it is not unjust for someone to refuse to give someone an award to which he clearly is entitled, because you believe that the rule ought to be something else. And neither of those latter propositions strikes me as one many people would accept. I know Green won't.*

When the positivist asserts that "the law is the law" or that "what the law is is one thing, whether it is a good law is another," he does not rely only on the facts of compliance and enforcement, and so forth. The significance of what he asserts depends also on the aspect of justice to which we refer as entitlement.¹⁸ It is not enough to insist in reply that the law is bad, or even dreadful, and ought to be changed. To meet the positivist's argument fully, one has to respond directly to the consideration of justice.

II. JUSTICE AS DESERT

The conception of justice that may be opposed to an entitlement is one that we commonly speak of as desert. Someone may resist application of a rule, without questioning that it is the rule and that the conditions for its application are met. He may assert that its application would be unjust and, if asked to explain further, is likely to say that the person affected by the rule does not deserve whatever are the consequences of its application, beneficial or harmful. The operation of the rule may be wholly instrumental to objectives of those who formulated it and are responsible for its application and may not depend on the action of anyone else, in which case no entitlement will be involved. Or there may be an entitlement, which the claim about desert opposes. We readily

¹⁸ Although the positivist purports to describe what the law is without attaching any necessary normative significance to it, it is only because it does have normative significance that it is so important to distinguish what the law is from what it once was, or might be, or even what it ought to be. There is also, of course, the element of enforcement. But most positivists do not want to make that the distinguishing feature of law. Nor does enforcement alone explain our *correct* sense that law not only obliges but obligates us—although, for reasons discussed below, it may not obligate us conclusively.

think of a person's desert as what ought to happen to him. That is usually what we intend, but the two are not quite the same, for a statement about what ought to happen is explained by a reference to desert and does not merely repeat it. One may also admit that a person deserves something and assert that nevertheless it ought not happen, on some ground that is thought to be overriding in that instance.

Although a statement about what a person deserves is complete by itself, it invites a request for explanation. If the request is made, the response, "I don't know why, he just does," is unintelligible. Whereas an explanation of an entitlement is likely to refer first to a rule and then to the circumstances that make it applicable, a typical explanation of desert begins with some fact about the person's past, up to and including the present. Not any anterior event will do; the event must be attributable to him in a certain way, as something for which he is responsible.¹⁹ Insofar as the description of an event explains a person's desert, it will refer to him as an actor in it, not merely as someone whom it affected. That is true even if we attribute desert to all the members of a group. In one way or another, each person must individually be identified as an actor in the event that explains the group's common desert.

There is also an enlarged sense of desert, attributed not because of something that the person has done but because of who, or what, he is. This sense is used more commonly now in connection with human beings generally to assert what all persons, as human beings, individually deserve. So used, it is invariably something thought of as good, albeit not a reward. But it has also been used in connection with limited groups of human beings, as, for example, Aristotle and others, generation after generation, used it

¹⁹ Sometimes we make a statement about desert that appears not to have an explanation of this kind. For example, if John goes to bat and strikes out, I may say that he "deserves another chance," without knowing anything more about him than that he has struck out. Another turn at bat, although something he wants, is hardly a reward for having struck out the first time. The point being made, however, is a negative one: that, despite the general rule, John does *not* deserve to be out, because, for example, an airplane flew overhead when he made the third strike. The statement denies John's responsibility in the relevant manner and therefore denies that he deserves the usual consequence.

We may also say that a person deserves to be thanked for something for which he is not responsible: "That enemy soldier who sneezed deserves our thanks. Otherwise we should never have known that the enemy was almost upon us." Such usage is an extension of the standard case, indicated by its ironic overtone. The sneezing soldier would not get far were he to claim a medal, unless we thought it as well to give a hostage to fortune, as sometimes we do.

to distinguish masters from slaves.²⁰ At the limit, it might pertain to a single human being, and in at least one instance, the idea of original sin, it has been used to assert that something not good is deserved by all persons, as human beings. The explanation of desert when it is used in this enlarged sense also refers to persons as responsible actors, but their responsibility is general and not tied to a particular event. If some are said to be deserving in ways that others are not, like masters and slaves, it is because only the former are thought of as responsible persons in the relevant respect. Because the association of desert with responsibility in such cases is general, it may be less explicit and less easily discerned than in the standard case of individual desert arising from a specific anterior event. It will be helpful initially to confine the discussion to the latter class of cases, keeping in mind that our conclusions must embrace desert in the more general sense as well.

Although we are immediately aware of the connection between responsibility and desert and use it without difficulty, the nature of the connection is not at once so apparent. Desert, we may say, fixes the locus of responsibility for an anterior event. Having said that Rufus deserves to be punished for starting the fire, we do not deny the contribution of any number of other factors: there would have been no fire if the basement had been under water, or the rags had not been flammable, or someone else had closed the door in time. We affirm that, for the purpose under consideration, our attention is fixed on Rufus. Were someone to disagree that he deserves to be punished, we should expect either an explanation that he deserves something else—perhaps the fire was a good thing and he deserves a reward—or, if he does not deserve anything in connection with the fire, an explanation directing our attention elsewhere: to another person, perhaps, or to circumstances for which no person is responsible.

The responsibility fixed by desert, moreover, is not mere causal agency, a link in a chain of causes. Although describing something as the cause of an event also singles it out from other contributing factors, desert attaches only to independent, self-determined responsibility, of the kind that in appropriate circumstances may correctly prompt a moral judgment. Someone might admit that Rufus started the fire but deny that he deserves to be punished, because “after all, he is only a child,” or because “it was all he could do to prevent an explosion,” or, more vaguely, because

²⁰ ARISTOTLE, *POLITICS*, bk. 1, lines 1254a-1255b.

"he couldn't help it." Whether punishment or reward is in question, his desert might be questioned because "he didn't mean to start the fire" or simply because "it was an accident." Such responses do not question Rufus's causal agency, but they direct our attention to some additional fact about him or the situation that negates his responsibility of the kind required for desert.

Although desert is readily and most naturally associated with moral responsibility, there are other situations in which we speak of a person as deserving without reference to a distinctly moral judgment. So, for example, we applaud the acrobat for his somersaults and give the best clarinetist a place in the orchestra (denying the same acknowledgment to others whose achievements are less) without thinking about the moral qualities that were required to develop their respective talents or thinking about their moral characters at all. (It may be that they neglected some moral duties in order to develop their talents.) While a person may, without being undeserving, not deserve a particular acknowledgment, we may also, less often, think of a person who fails to achieve a standard as undeserving in a stronger sense, almost but not quite the same as deserving a penalty. Withholding applause from the acrobat who repeatedly stumbles or, more familiarly, withholding a tip from a waiter who brings the wrong orders, late, to the table may have the aspect of an affirmative act. Even so, we may think of the acrobat or waiter as inept without thinking him immoral.

Situations of this kind are many and various; there is no reason to reduce the nuances and ambiguities of our responses to a few clear types. In all of them, however, like the cases in which a moral judgment is involved, the attribution of desert indicates that we regard the conduct in question as having had an independent origin within the actor himself. The beautiful voice of the mechanical Olympia elicits praise for her creator, Dr. Spalanzani, not for Olympia herself (except, of course, for poor, deluded Hoffman).²¹ If we learned that the waiter had been drugged, we might still withhold the tip because—whatever the explanation—the service was awful and no tip was deserved; but the waiter might have our sympathy, and the failure to tip could not be regarded as a penalty for him at all.

A description of what a person deserves may be specific. More often, and almost always when distinctly moral responsibility is in-

²¹ J. OFFENBACH, *LES CONTES D'HOFFMANN*, act 2. In Hoffmann's story, from which the opera is derived, the admirer is Nathanael. See E. HOFFMANN, *The Sandman* (L. Kent & E. Knight trans.), in *TALES* 277 (V. Lange ed. 1982).

volved, it is general: praise or blame, a reward or penalty, without further specification. But specific or general, it is always identified as something good or bad.²² It would be peculiar in the extreme to say of someone that, having acted this way and that, he "deserves a great deal," without indicating whether he deserves well or ill. When we refer to someone as a "deserving person" without more, we do not mean that he has a tendency to deserve more frequently than most people; the usual understanding is that he deserves well. Thus, although in form a statement about someone's desert resembles a simple statement of fact, like the observation that he has green eyes or has walked ten miles, it depends on premises that are not exclusively factual. One premise (or set of premises) is factual and describes his anterior conduct. The other is a normative judgment about the conduct; it expresses a view about how he ought to have behaved. The conclusion is significantly different from the premises, neither of which refers to desert at all. Nevertheless, it follows directly and seems to be contained by, or to contain them.

Visitor Abroad

(meeting his

friend): You seem in a bad way.

Foreign Friend: Yes. I am upset. I have just learned that a clerk in my office has done something quite dreadful.

VA: Isn't that too bad!

FF: It was really quite immoral behavior. I hope he gets what he deserves.

VA: Oh? Does he also deserve something?

FF: Well, I don't know what exactly he deserves, but he certainly deserves something.

VA: What a pity! And just when he has done something dreadful. Why does he deserve something?

FF: Because of what he did. There was simply no excuse.

VA: And the rule is clear?

²² There are, perhaps, rare exceptions when we know precisely what a person deserves without being certain how he will receive it. One might say something like, "If he did that to someone else, let it happen to him and see how he likes it," without knowing whether he will like it or not. Ordinarily, the assumption is that he will not.

FF: Which rule?

VA: The one he violated.

FF: There is no precise rule. What he did wasn't a crime or anything like that. It was simply immoral.

VA: Then, how do you conclude that he deserves something?

FF: But that's just it. He deserves something because he did such an immoral thing.

VA: Do you mean that in this country persons who behave badly deserve just like that, even though there is no rule fixing a penalty?

FF: Of course. Just as someone who behaves unusually well deserves to be praised or even rewarded for his conduct.

VA: Without any provision in advance?

FF: Certainly.

VA: How curious! It must be unsettling to deserve all the time without any fixed rules.

There is something radically wrong with the conversation because we do not believe that the visitor can understand his friend's initial statement, as he appears to do, and dissent from the conclusion about desert.

Just as one of the legs on which a conclusion about desert stands is descriptive and the other normative, desert itself seems to be poised irresolutely between prediction and prescription. Although it is tied closely to an anterior event, it is not a prediction about what will happen as a consequence. We know that people often do not get what they deserve. Nor is it a prescription about what ought to happen. A conclusion about desert is often the basis for such a prescription, but, as we noticed above, one can, without inconsistency, assert the former and deny the latter.

In an effort to throw a leash over the idea of desert, one might suggest that it is no more than a curiously expressed reinforcement of the underlying moral (or, more generally, normative) judgment, as if to say that "What Rufus did was very bad and he deserves to

be punished," meant, "What Rufus did was very bad. I am certain about that and challenge you to disagree." But the leash does not quite fit. For although they are tightly linked, the ineradicable difference between the judgment and the statement about desert remains. Desert seems to be concerned not with the validity of a moral principle as such or the judgment that depends on it, nor with anyone's opinion about the latter, but with something like its effect or efficacy, as if it had an elusive grasp on reality.

That may remind us of Greek tragedy and the Greek and Christian conceptions of the universe. If we seek help there, we shall say not that desert stands between prediction and prescription, but that it constitutes a bridge between them. In the omniscient view, the actual is according to desert. To assert what is deserved is to assert what, in the fullness of time, will become actual. That reminder, however, hardly clarifies. It suggests that the whole idea of desert is a conceptual anachronism, an historical relic that failed to get swept out with the other debris of superseded cosmologies. But we seem really to need the idea. Nothing else replaces it, nor can its place be eliminated. Without reference to desert, one of the fundamental ways in which we organize our experience would be lost.²³

Our firmest anchor for the idea of desert is that it fixes moral responsibility. We may learn something more if we approach justice as desert from that direction.

III. MORAL RESPONSIBILITY

The central puzzle about moral responsibility is usually formulated in terms of competing claims of free will and determinism. As Isaiah Berlin has succinctly put it, "in a causally determined system, the notions of free choice and moral responsibility, in their usual senses, vanish, or at least lack application, and the notion of action would have to be reconsidered."²⁴ Moral responsibility re-

²³ See *infra* text following note 37.

²⁴ I. BERLIN, *FOUR ESSAYS ON LIBERTY* xxiv (1969). A.J. Ayer also makes the point briefly and clearly:

When I am said to have done something of my own free will it is implied that I could have acted otherwise; and it is only when it is believed that I could have acted otherwise that I am held to be morally responsible for what I have done. For a man is not thought to be morally responsible for an action that it was not in his power to avoid. But if human behavior is entirely governed by causal laws, it is not clear how any action that is done could ever have been avoided. It may be said of the agent that he would have acted otherwise if the causes of his action had been different, but they being what they were, it seems to follow that he was bound to act as he did. Now it is

quires the capacity to direct one's conduct oneself.²⁵ But a bare capacity to choose one's actions is not enough. Although moral responsibility has to do with the quality of a person's actions, not their consequences, morally significant freedom requires that actions have perceptible consequences.

In order for a person's unconstrained decision to count in the way that gives rise to moral responsibility, the decision must be made in a stable natural context. Without that, he would be like someone who wakes up in a room where there is a board of buttons

commonly assumed both that men are capable of acting freely, in the sense that is required to make them morally responsible, and that human behavior is entirely governed by causal laws: and it is the apparent conflict between these two assumptions that gives rise to the philosophical problem of the freedom of the will.

A.J. AYER, *Freedom and Necessity*, in *PHILOSOPHICAL ESSAYS* 271, 271 (1954). Ayer finds a solution to the problem by arguing that a causal explanation establishes nothing except an invariable concomitance between the cause and the effect; such concomitance in the case of human conduct, he says, does not establish that the person who engages in the conduct is not acting freely. One may be said to act freely if he would have acted otherwise *if he had chosen to do so* (and if there is no special interference with his choice, like a mental aberration or compulsion by another person). *Id.* at 281-82. That solution, in one form or another, is not uncommon, e.g., J. HOSPERS, *supra* note 2, at 502-07; but if the causal law holds or *some* causal principle is available, it seems that he could not have chosen to act otherwise.

The problem of free will and determinism has been stated and restated countless times. Two excellent recent discussions are B. MATES, *SKEPTICAL ESSAYS* 58-98 (1981), and J. LUCAS, *THE FREEDOM OF THE WILL* (1970). Sidgwick's brief discussion is also good. H. SIDGWICK, *supra* note 6, at 61-72. He formulates the problem thus:

Is the self to which I refer my deliberate volitions a self of strictly determinate moral qualities, a definite character partly inherited, partly formed by my past actions and feelings, and by physical influences that it may have unconsciously received; so that my voluntary action, for good or for evil, is at any moment completely caused by the determinate qualities of this character, together with my circumstances, or the external influences acting on me at the moment—including under this latter term my present bodily conditions?—or is there always a possibility of my choosing to act in the manner that I now judge to be reasonable and right, whatever my previous actions and experiences may have been?

Id. at 61-62.

²⁵ See, e.g., P. VAN INWAGEN, *AN ESSAY ON FREE WILL* 161-89 (1983). There are refinements and complexities of that brief generalization that can be disregarded here. For example, does moral responsibility attach if one believes *mistakenly* that he is directing his conduct himself? Does the puppet who is insensible of his strings merit praise or blame for his conduct on stage? Perhaps so, if he consciously considers and chooses to conduct himself as he does. That was the stoic solution to the problem of free will. See Long, *Freedom and Determinism in the Stoic Theory of Human Action*, in *PROBLEMS IN STOICISM* 173 (A. Long ed. 1971). The praise or blame attaches, however, because the puppet has *chosen* freely. If the choice also were determined, if there were no possibility that the puppet would choose otherwise and wage an invisible struggle against the strings that control his movements, then praise and blame are out of the picture whether or not he thinks so. That, of course, is just our own situation according to the complete determinist. Perhaps we can distinguish ourselves from the puppet on the basis that in our case there is no one offstage watching the puppet and puppetmaster both. Still, it would be odd if *our own* description of our situation were to be altered by the imperceptible presence of an observer.

to push and no indication of which button does what. He pushes a button at random, and outside the window a building blows up. He pushes another button and lilacs bloom on the flagpole. But when he pushes the second button again, the flagpole vanishes, leaving only the lilacs blooming in midair. Hard as he tries to discover a pattern, he cannot. He has a certain kind of freedom; it is up to him alone to decide which buttons to push, or whether to push any. But it is freedom in a funhouse, a nightmare in which nothing that one does can be depended on.²⁶ Having stumbled on a benign situation outside the window, he resolves not to push any more buttons; but then the situation begins to change whether he pushes them or not.²⁷

In such a world, one could not even conclude safely that he will "do the right thing," whatever the consequences.²⁸ For if he gives a dollar to a beggar, it blows up in the beggar's hand, and when he steps back to let an elderly person board the bus, the bus vanishes and the person falls into the gutter. It has been pointed out often that a wholly "free" will, altogether undetermined by a person's past, contradicts moral responsibility because decisions would not then be that person's in the relevant sense.²⁹ A wholly

²⁶ Gilbert's depiction in the Lord Chancellor's Nightmare Song from *Iolanthe* is in point—and in rhyme.

²⁷ If pushing the buttons lost *all* connection with events outside the window, then it is hard to imagine how our concepts of freedom and moral responsibility could arise for him at all unless his actions had predictable consequences within his isolated chamber or he had acquired the concepts before he entered it. Likewise, the concept of an action would be reduced to his own bodily movements and sensations. Within that reduced range, there would be room for a severely restricted idea of freedom. He might, at any rate, distinguish between an ache in his finger from pushing too many buttons and a sore throat that just happened.

²⁸ The idea of "consequences" of an action would, of course, be problematic along with the idea of an action itself. On what basis could one assert that a random occurrence was the consequence of something that one had done? If one did make such an assertion, where could one stop?

²⁹ *E.g.*, A.J. AYER, *supra* note 24, at 275:

[I]f it is a matter of pure chance that a man should act in one way rather than another, he may be free but he can hardly be responsible. And indeed when a man's actions seem to us quite unpredictable, when, as we say, there is no knowing what he will do, we do not look upon him as a moral agent. We look upon him rather as a lunatic. . . .

. . . Either it is an accident that I choose to act as I do or it is not. If it is an accident, then it is merely a matter of chance that I did not choose otherwise; and if it is merely a matter of chance that I did not choose otherwise, it is surely irrational to hold me morally responsible for choosing as I did. But if it is not an accident that I choose to do one thing rather than another, then presumably there is some causal explanation of my choice: and in that case we are led back to determinism.

See J. LUCAS, *supra* note 24, at 56-61; Campbell, *Is 'Freewill' a Pseudo-Problem?*, 60 MIND 441, 459-62 (1951).

indeterminate universe in which to exercise one's will also contradicts moral responsibility because there would be nothing for which a person's "decision" made him responsible at all. The direction of one's conduct, on which moral responsibility depends, requires both freedom to choose one's actions and a sufficiently stable, causally determinate background order to make one's choices count. Desert, then, arising from moral responsibility, also requires both.

Desert, however, takes us beyond the idea of a stable causal order to the idea of a normative order in which people are roughly situated as they deserve and get roughly what they deserve. Just as individual freedom to choose would not hold in a world without causal order, because choice would be meaningless, so our judgments about individual desert would be empty in a world devoid of natural justice. At stake are not merely the occasional bursts of good or bad fortune that we label explicitly as "luck," but the whole constitution of our individual selves, the talents, attributes of character, and all the other qualities that make each of us the person he is and not another, as well as all the circumstances of our individual lives. The large and small conclusions about desert that implicitly or explicitly accompany moral judgment would be as grains of sand on a beach if a person's entire situation independent of any action that would support a moral judgment were altogether indifferent to desert. Individual desert arising from the exercise of moral freedom requires a normatively ordered background, lest the desert that one earns be swamped by undeserved conditions and circumstances. Even one's desert, insofar as it is a reflection of one's individual character, seems to depend on how one is constituted. Short of us all being identical, which also would eliminate considerations of desert, either the differences among us must not matter or they must be due and satisfy the conditions of justice.

A visitor to the kingdom of Kmet was taken after his arrival to the Great Square. "Here you will observe our most important practice, central to every aspect of Kmetan life," his escort told him. One after another, Kmetans approached the Great Urn, situated in the center of the Square and shining brilliantly. The Urn pronounced a judgment on each of them in turn. The judgment invariably consisted of the announcement of some award or fine, usually a moderate amount but occasionally a great deal. After being judged, the Kmetan turned to the left where there was a desk.

There the judgment of the Great Urn was recorded, and

the Kmetan received his award or paid his fine. The procession up to the Great Urn and then to the desk was solemn and stately. It was evident that the Kmetans took it most seriously. "Our children are instructed from their earliest days in the path of the Great Urn," the escort observed. "We should regard someone who had no appreciation of the path as crazed, almost not fully human."

"Does everyone come here?" the visitor asked.

"Without exception."

"It is certainly very impressive," said the visitor.

After they had observed for a long while, the escort suggested that they leave. The visitor had noticed that, before approaching the Great Urn, the Kmetans entered an enclosure on the north side of the Square. Nothing could be seen inside the enclosure, but a great many noises were audible, among which the visitor heard voices expressing joy or sorrow in the most extreme terms.

"Might I have a look inside the enclosure?" the visitor asked.

"There is nothing to stop you, but it is of no importance at all. We Kmetans scarcely notice it."

Admitting that he was curious, the visitor entered the enclosure. Inside, there was a disorderly line of persons. One by one, in no particular order and without paying much attention, they approached an urn that was like the Great Urn in all respects except that it was of some dull finish. This urn also pronounced a judgment on each person. The only difference that the visitor could see was that its judgments were usually for much larger awards or fines than the ones outside; often, indeed, they were cataclysmic. Invariably, the person received the award or paid the fine before leaving the enclosure and approaching the Great Urn.

The visitor returned to his escort. "Is there any connection between the judgments of the two urns?" he asked.

"Not really. There is this. Often the judgment pronounced within the enclosure has a significant, one might almost say controlling, effect on the judgment pronounced by the Great Urn later."

"You mean an award within the enclosure makes it more likely that one will be given an award by the Great Urn?"

"Evidently. And the same with fines."

"All in all, judgments within the enclosure are what really count, I suppose."

"We do not think of it that way. The judgments of the Great Urn are what concern us. One might say that most of one's life depends on the judgments within the enclosure, but that is of minor importance."

The visitor inquired for a long time about other differences between the judgments of the two urns that would explain their relative importance to the Kmetans. He was never able to discover any.

Insofar as our judgments about individual desert disregard the background order against which they are made, we resemble the citizens of Kmet. Like what happens within the enclosure, the circumstances that explain how a person got to be the (un)deserving person that he is seem to be "what really counts."

The usual way out is to say, like the Kmetan, "We do not think of it that way." Our attributions of desert, it is argued, simply are more limited than that; they have to do with those actions for which a person is responsible, and do not look beyond the action itself to determine whether the person deserved to be the kind of person he is, in the situation in which he found himself. Robert Nozick, for example, asserts that we can correctly "describe people as entitled to their natural assets even if it's not the case that they can be said to deserve them. . . . Whether or not people's natural assets are arbitrary from a moral point of view, they are entitled to them, and to what flows from them."³⁰ Were we to require that a person's desert be deserved "all the way down," we should render the very idea of desert incoherent, because desert depends on conduct and we should always be able to ask whether the person "deserved" to engage in the conduct in which he engaged.³¹ To put it another way, if every one of a person's qualities had itself to be deserved, the idea of a person as the *subject* of desert would lose meaning.

However, we do not eliminate the problem by agreeing that it is very difficult and deciding not to talk about it. Nozick's reference to an entitlement to an undeserved natural asset, for example, is only a dressed-up version of the Kmetan's dismissal of the problem, not a solution to it. What could such a natural "entitlement" possibly be? On what could it be based? It is easy to overlook the problem in the form in which Nozick presents it, because he draws our attention to talents rather than to moral character. When we

³⁰ R. NOZICK, *ANARCHY, STATE, AND UTOPIA* 225-26 (1974) (footnote omitted).

³¹ The phrase is Nozick's. *Id.* at 225. See M. SANDEL, *supra* note 5, at 83-84.

speak of a person as deserving because of his talent, the normative aspect of his desert is not immediately as evident as it is when moral desert is in question; nor does a judgment that a person is talented necessarily implicate a judgment about his desert, as does a moral judgment. Nevertheless, it is only the normative aspect of the statement that he is deserving that distinguishes it from a description, however laudatory, of his talent. The insistent connection of individual moral responsibility with desert does seem to take us all the way down, even if perforce we usually manage to stop somewhere short of the bottom.³²

If we examine the connection between moral responsibility and desert, we arrive at this dilemma. On one hand, the two seem to be distinct but inseparable aspects of the same idea. As soon as we have stated premises that will support a conclusion about moral responsibility, we have committed ourselves also to a conclusion about desert. Yet, the latter conclusion cannot be maintained unless we suppose, contrary to our actual experience, that we have our individual "just deserts" prior to and independent of the exercise of moral responsibility. The ordinary notion of moral responsibility that we apply without difficulty in every aspect of our lives, whenever we think about human beings as responsible persons, seems to commit us to the altogether unacceptable proposition that "whatever is, is right."³³

The dilemma is not abstract or remote. Once made explicit, it dominates public and private moral issues of every kind. For example, a young man who has been caught mugging someone for the third time is convicted and brought before a court to be sentenced. He (not being a Kmetan) asks leave to speak. He tells the judge that he was born with little natural endowment: physically weak, intellectually limited, unhandsome. He was ill-nurtured; neither of his parents, who were themselves criminals in their youth, took an interest in his welfare. He was not taught a satisfactory trade, nor was moral or lawful behavior much encouraged in his neighborhood. He never asked for any of that and in no sense can he be said to have deserved it. The judge points out that many other

³² [I]t does not seem possible to separate in practice that part of a man's achievement which is due strictly to his free choice from that part which is due to the original gift of nature and to favouring circumstances: so that we must necessarily leave to providence the realisation of what we conceive as the theoretical ideal of Justice, and content ourselves with trying to reward voluntary actions in proportion to the worth of the services intentionally rendered by them.

H. SIDGWICK, *supra* note 6, at 285 (footnote omitted).

³³ A. POPE, *ESSAY ON MAN*, epistle IV, line 394.

persons confronted difficult circumstances and did not become criminals. The young man responds that a lot more of them did than those who were raised more happily. It is, he asserts, irrational and the worst sort of hypocrisy to speak now of his desert, when the whole unfortunate course of his life was undeserved and had a significant, if not controlling, effect on his conduct that is now in question. (A lawyer assigned to assist him adds that insofar as his past did *not* have a controlling effect on his conduct, the young man can hardly be held accountable for it, since heaven only knows what produced it.)

The same argument touches the small incidents that compose the morality of most lives as much as it touches the dramatic examples of moral heroism and failure that call forth explicit pronouncements about desert. Not only does what a person deserves seem trivial in comparison with those aspects of life, including natural endowments, that happen to us without any connection to our desert. Even in that small corner of our lives where moral responsibility is relevant, desert really counts for nothing, since our conduct is so much affected, for better or worse, by its undeserved antecedents.

IV. THE UTILITARIAN RESPONSE

The preceding argument presses us to the conclusion that, unless we can accept the assumption of "natural justice" we must break the connection between moral responsibility and desert in order to preserve the idea of moral responsibility itself. Why should we not, after all, explicitly limit the notion of moral responsibility to the moral principles themselves and the fact that someone did or did not observe them, without any implication about his desert?³⁴ We could still express our views about conduct generally and in specific cases. The young man who has a propensity for mugging, for example, might be told: "It is immoral to take another person's property without right and by force. You ought not to do it. You are not sentenced to prison because you deserve to be punished. We know and care nothing about that. You are sentenced because we want to prevent conduct like yours, and the sentence, we believe, will have that effect."

That approach to moral judgment adopts a strictly utilitarian attitude to matters of desert. Praise and blame, rewards and penal-

³⁴ That presumes, of course, that the idea of morality itself can be sustained without the idea of desert, which I argue below cannot be done.

ties, are appropriate only insofar as they affect future behavior. Desert as a strictly moral phenomenon has no meaning or reference, but we may continue to speak as though it did, because it is an effective way to induce the right behavior. The idea of punishment, for example, moralizes the sentiment of retaliation and reinforces moral principles against the desire for individual advantage. However, should it occur somehow that rewarding Smith for an immoral act will have more beneficial consequences than punishing him, then Smith should be rewarded. And if punishing Jones for Smith's act will have beneficial consequences, then Jones may be punished.³⁵ So far as nonmoral desert is concerned, it is only an efficient and useful way to distribute goods; those who are talented are encouraged to exercise their talents and those who are not are encouraged not to resent their relative deprivation. If there is a puzzle about desert, it concerns only the origin and strength of the sense of desert, which is a psychological matter without philosophical significance.

This reduction of desert to utility, which treats desert not as a self-sufficient end but as a means to another end, has more than a little support in our actual practices. Rarely is there a situation in which we respond according to notions of desert when our response does not plausibly further any other social objective. If another social objective strongly so requires, we pass over contrary considerations of desert silently or with only the merest pretense that justice is served. For example, persons who are pathologically unable to refrain from harmful conduct, the criminally insane and sexual psychopaths, are "committed" to "hospitals" for "treatment"; the labels scarcely obscure the fact that the commitment is a sentence to a prison-like institution without facilities for any serious treatment at all. We noticed above that although desert is a sufficient ground for action, it can be overridden in special circumstances. Pressing public or private interests regularly oblige us to dispense with desert, good or bad, lest too much else be sacrificed. If we treat desert itself as based on utilitarian considerations, it may be argued, we do no more than acknowledge frankly that the "special" cases are not special at all and that the reasoning we apply to them applies generally.

³⁵ There may seem to be an inconsistency in the notion of an *undeserved reward* or an *undeserved punishment*, because the terms "reward" and "punishment" contain an implication of desert. One can, however, consistently assert that someone ought to receive what ordinarily would be a reward or punishment, although he does not deserve it. See H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 4-6 (1968).

Such an argument is typically presented as part of a more general utilitarian ethics. John Stuart Mill, for example, said that principles of justice are those "moral rules, which concern the essentials of human well-being more nearly, and are therefore of more absolute obligation, than any other rules for the guidance of life."³⁶ Justice as desert, then, both in individual cases and in the enlarged sense by which it attaches to all human beings or to a group, falls within that general description. But the reduction of desert in particular to social utility need not be derived from a more general utilitarian theory. Whatever is the basis of one's moral principles generally, desert might be recognized only as a means to their realization. So far as desert alone is concerned, the complexities and perplexities of calculating relative totals of well-being can be avoided.³⁷

For all the utilitarian's calm argument, his analysis of desert does not provide an accurate account of what we mean by it. The utilitarian rests his conclusions on actual consequences. Individual responsibility is relevant insofar as it has a bearing on the outcome for the community generally of one policy or another. Desert, however, focuses our attention differently from the beginning. It depends on a person's responsible relation to his conduct and is insistently individual rather than general. To ask what the consequence will be in order to determine what a person deserves is not a practical or moral error so much as a failure to understand what desert is all about.

The utilitarian understands this abstract difference between utility and desert, but believes that in practice it has no substance. In general, when desert appears to be a strong independent consideration, it is also consistent with sound social policy; the community is likely to be dependent on responsible individual action, which considerations of desert will foster, to carry its policies into effect. When desert and utility appear to diverge, our actual practices show that we do not keep them separate. In the unusual case when justice prevails against social policy, we have, the utilitarian argues, simply made a mistake, which is understandable in view of the rarity of such cases, the difficulty of the issue, and the usual

³⁶ J.S. MILL, *UTILITARIANISM* 88-89 (15th ed. 1907) (1st ed. London 1863).

³⁷ Such an effort requires one to adopt a general ethical theory at the outset, since one has to know what desert is supposed to be useful for. Almost always, or perhaps simply always, the effort is in fact made in the context of a general utilitarian theory, which adopts "general well-being" as the ultimate moral standard. The effort to deal with desert, therefore, does get mixed up with the "felicific calculus" and all its difficulties.

utility of adherence to justice.

Some of the efforts to show how desert and utility coincide are notoriously unconvincing. Too often, the demonstration seems calculated to show the utility of a result that we know to be correct on other grounds. The utilitarian may concede as much, only observing that the issues are large and complex. In the end, he will assert that however weak some of his factual demonstrations may be, desert cannot mean anything but utility because there is nothing else for it to mean. His opponents also finally disregard the demonstrations themselves, strong or weak. They will assert that the reduction of desert to utility is wrong not because of the answer it gives to a question whether punishment of an innocent person, indefinite commitment of the mentally ill, or even forced labor or slavery may not be deserved, but because it allows, indeed requires, us to ask the question at all.³⁸ To ask whether some human lives ought not be destroyed for the sake of the rest or for any reason, without asking independently whether it would be just, is, they assert, wrong. The utilitarian's final response is a challenge: Either accept my analysis of desert as utility or grant that it is without any content whatever. Either way, the outcome is the same.

V. DESERT AND MORAL RESPONSIBILITY

The reduction of desert to utility has great force. Particular arguments to show how desert is useful may stretch our credulity. But that is nothing compared with the suspension of disbelief that is demanded by the notion of natural justice. If individual desert depends on a general background order of desert, then have we really an alternative to the utilitarian account? On the other hand, one may ask also whether we have an alternative to the idea of desert, with all that it implies about natural justice.

We noticed above that the ideas of moral responsibility and desert contain one another. Just as desert depends on moral responsibility, so too moral responsibility leads directly to a conclusion about desert and cannot be sustained without it. The connection can be broken in speech and can be ignored or overridden sometimes in practice. But it cannot be broken conceptually without depriving our moral judgments of their specifically moral quality. A judgment that a person ought or ought not to have behaved as he did that carried no implication about desert would be akin to

³⁸ See Rawls, *Justice as Fairness*, 67 *PHIL. REV.* 164, 188-90 (1958).

an observation that a machine ought to have produced so many widgets per hour. Its full significance would be reflected in a search for causes to make the person do what he ought. So, for example, when the utilitarian judge pronounces sentence against the young man, *all* that counts is what sentence will achieve the desired result in the future. But to treat a person's conduct as fully determined by causes external to himself, whether the causes are natural or deliberately engineered, is to deny him the freedom without which one is not a moral being.

To speak of a category of human beings or of human beings generally as deserving in some respect is to assert that they are responsible in that area of their lives. Women deserve a right to vote as men do because they are as capable as men of electing their governors and are not to be treated merely as civil subjects, morally irresponsible for the laws that they are obliged to obey. All persons deserve an equal opportunity for employment because all are equally capable of exercising a choice, even though they are not equally capable of implementing it; they are not to be treated as machines, not responsible for their employment and set to do whatever tasks it is useful to have done. Slavery is wrong not because it necessarily lacks utility; if the highest morality requires a pyramid for one's god, it may be useful to find slaves to build it. It is wrong because it denies altogether the freedom and moral stature of the slaves, who are deemed fit for whatever function their masters assign them.

Moral responsibility and desert are inseparable because we have only the two ways of ordering our experience, freedom and cause, each of which excludes the other. As soon as one is eliminated, the other occupies the field; we strive for explanation and do not accept a vacuum of order altogether. To eliminate desert as the basis for responding to conduct is explicitly to put the response and the conduct itself within the realm of causation.

The reduction of desert to utility generally adopts as a principle and a program the submission of human action to causal order.³⁹ Desert marks the limits of such an approach. It identifies responsibility explicitly as moral responsibility by placing an act in the realm of freedom. We may say that by admitting cause as a full

³⁹ This may sound strange and inhospitable to someone like John Stuart Mill, who was both a utilitarian and a defender of liberty. Contemporary philosophers, among whom H.L.A. Hart is notable, have taken a like position. One may, however, believe that liberty is valuable because it promotes well-being without believing that the exercise of liberty is an exercise of morally significant freedom. See *infra* text following note 60.

account of our actions (or by treating our actions as if cause fully accounts for them) the denial of desert is a denial of the relevance of freedom. Or we may say that the denial of desert is a denial of the relevance of freedom, which thereby admits cause as a full account.

The link between desert and freedom is fundamental and irreducible. It is as fruitless to ask why desert should be the expression of freedom as it is to ask why causation should be the mode or expression of regularity and stability. We may decide that, so far as we are able, persons will or will not get what they deserve. But so long as we think of them as persons, who act with freedom and moral responsibility, we cannot decide that they will not deserve. They just do.

We do not need to address the question whether a universe containing persons is imaginable without the idea of desert.⁴⁰ It may be, although it lies beyond our capacity to settle the conjecture, that desert is a conceptual anachronism, which rose and should have fallen with the belief that desert is always realized in the fullness of time. So far as we can tell—and it is sufficient for the present purpose—the moral ordering of our experience includes irreducibly and *a priori* the element of desert, which itself is incoherent without the presupposition in some form that all human experience, both that which involves free will and that which is causally ordered independently of human will, is responsive to considerations of desert. We may acknowledge that we do not and cannot know the bases of natural desert. One might have thought that unavoidable ignorance of that kind would defeat the notion altogether. Evidently that is not so.

VI. ENTITLEMENT AND DESERT

We are now able to see how entitlement and desert are united in the complete idea of justice. If an entitlement is also deserved, the claim of justice is at its strongest and ordinary usage allows us to employ the two terms interchangeably, according to which aspect of the claim we want to emphasize. So, since Antiochus came

⁴⁰ Cf. B. BARRY, *supra* note 4, at 109-15. Barry states that desert is "a concept which is already in decline and may eventually disappear," *id.* at 112, and that "a world in which 'desert' had completely disappeared would not necessarily be radically different from one with it," *id.* at 114. It is evident that I agree with neither proposition. Barry's argument suggests that he may have in mind only a shift away from individual desert toward utilitarian considerations as a ground of legal entitlements. He does not draw out the ontological implications of the complete abandonment of desert.

in second in the chariot race because of his own effort (or so it appeared), we may conclude that he not only is entitled to the prize according to the rules but also deserves it;⁴¹ and our conclusion will move easily between the two considerations. If a deserved entitlement is the creation of law, we may take the element of desert for granted and equate application of the law with justice; so doing, we overlook the other sense of justice in which the equation is vacuous, as if the entitlement alone answered the question whether the law ought to be applied. On the other hand, if considerations of desert are clear and compelling and the situation is explicitly within a framework of rules, we may strain the rules to find an entitlement that coincides with desert. That occurs most commonly and visibly in the law, where the significance of entitlement is especially great; even if the separate significance of desert is acknowledged, as often it is not, the result is inevitably cast as an entitlement. So, according to the adage, hard cases make bad law.

Entitlement and desert need not coincide, however. A person may be entitled to something that he does not deserve, like the ne'er-do-well heir, or he may deserve something to which he is not entitled, like the poor relation who cares long and faithfully for the dying testator and is not mentioned in his will. In such a case, we must somehow decide which to prefer. So, in the law, if justice as entitlement prevails, we may dismiss contrary considerations of desert with the observation that the law is settled and clear. So also, in the rare legal cases when it is urged explicitly that desert should prevail over entitlement, the former is likely to be referred to a "higher law," as a sort of small acknowledgment of entitlement after all.⁴²

Differences between entitlement and desert arise because, although both call attention to a person as a responsible actor, the former depends entirely on application of a rule and the latter arises exclusively from moral responsibility. While the rule may be supposed to apply according to desert, circumstances may not work out as we had supposed they would, or the rule may not be designed to apply according to desert at all. Where a community adopts the goal of justice as desert in its public life—and even as a

⁴¹ See *supra* text accompanying notes 8-10.

⁴² Compare *Board of Regents v. Roth*, 408 U.S. 564 (1972) (limiting the protections of procedural due process to entitlements as opposed to claims, however serious and substantial, on altogether nonlegal grounds), with *Goldberg v. Kelly*, 397 U.S. 254 (1970) (an earlier case in which the availability of procedural due process seemed to depend in part on the claimants' need, a matter of nonlegal desert). See generally Michelman, *Formal and Associational Aims in Procedural Due Process*, 18 *Nomos* 126 (1977).

goal, it will be subject to exceptions—in private life, goals other than justice are pursued constantly and without reproach. The claims of love, friendship, family, commitment, as well as the ordinary, unsystematic pursuit of private satisfactions are all admitted as worth-while. An effort to make justice the exclusive consideration would lead to the elimination of such private goals altogether, as in Plato's vision of the ideal community.⁴³

In a society that preserves large areas of life for private arrangements, which are supported by law, voluntary transfers of every kind create entitlements based not on the recipient's desert but simply on the transfer. The claim of the original transferor may have been based on desert, but intervening links in the chain may make that claim remote from a current entitlement; the ne'er-do-well heir may be removed by generations of ne'er-do-well heirs from the deserving ancestor and likely as not does not even know his name. In any case, desert is insistently individual. Whether there are many links in the chain or few, inherited or transferred desert is as meaningless in this context as it is in the context of the inherited guilt of the family of Oedipus. If the appalling doom of Oedipus and his children, said to be the consequence of his father's wrongful act, was undeserved, the meagre entitlement of the child of poor parents likewise has nothing to do with his desert (and may have nothing to do with his parents' desert either).

Even when the substance of an entitlement seems consistent with desert, the former typically has a specificity that the latter lacks. An indefinite entitlement calls for further articulation of the rule on which it depends; rules lend themselves to such articulation and, if the result is accepted, may be said implicitly to have contained it. Desert, on the other hand, is not often put to the test of specificity and even resists it.⁴⁴ Not fixed in advance by a rule, it may take into account an unlimited range of circumstances. The *lex talionis*, eye for an eye and tooth for a tooth, has nothing to recommend it as a measure of desert. It attracts us nonetheless, because its insistence on symmetry between an act and the de-

⁴³ See PLATO, *supra* note 1, bks. 2-8.

⁴⁴ In a case like the chariot race, desert may seem to be specific, because it is coupled with an entitlement or, perhaps, a quasi-entitlement. We know what Antilochus deserves because he deservedly (as it appears) is entitled to the second prize. In competitive situations generally, one may deserve one's rank, which entitled one to a specific award. In non-competitive situations, one may be deserving because of one's talents, but, unless some sort of rule is applicable, there is no basis for saying what one deserves specifically. The excellent waiter may deserve a tip, but not a specific amount, as our resort to a rule of thumb (15%) to overcome our indecision attests.

served response relieves us of the burden of considering every particularity in the circumstances that might have a bearing on the actor's desert.⁴⁵

We are familiar with the idea of an unjust law. That possibility is what has led to the view that justice fully considered is simply desert and that "legal justice," or entitlement, is a partial justice or a formal and somewhat suspect imitation of the real thing. But desert without entitlement is also an inadequate conception of justice. Unless we believe that the conduct giving rise to desert is based on qualities of the deserving person that are properly *his*, that is to say to which he is entitled, we do not speak of desert at all. If we reject an entitlement as inconsistent with desert, we do not thereby affirm justice as desert alone, removed from entitlement altogether; we affirm it as desert according to another entitlement.

At the stroke of midnite, the mysterious beauty fled from the royal palace. On the staircase, one of her glass slippers fell off. The prince, chasing after her, picked up the slipper. Everyone wondered who the woman could have been. The prince wondered most of all. He announced that his messengers would search the kingdom. The woman whose foot fit into the glass slipper would be his bride.

When the messenger arrived at the house where Cinderella lived with her stepmother and her two stepsisters, the older of the stepsisters was there to meet him. She was somewhat double-jointed and had practiced bending her toes back under her foot for weeks. The messenger was dubious. But with her toes tucked back, she got her foot—more or less—into the slipper. "Call me princess," she said.

Looking into her face, the messenger was still dubious. But the stepsister's foot, getting redder by the minute, was

⁴⁵ Kant, who was unwavering in his insistence that precise justice—as desert—be done, tied his argument in intricate knots when he tried to give examples of it. He relied, inevitably, on the "*lex talionis*"; equally inevitably, he was both imaginative and conventional in his renderings of it. See I. KANT, *THE METAPHYSICAL ELEMENTS OF JUSTICE* 100-07 (J. Ladd trans. 1965).

The hopelessness of rendering a precise judgment according to desert regularly confronts judges in criminal cases. The law brings the sentence within a broad range that may encompass years of imprisonment, as a matter of entitlement; within that range, the judge has to decide according to the circumstances of the crime and the criminal. Understandably, judges take comfort in the realization that their sentences also are imprecise and that the actual penalty will be determined afterwards by prison authorities and parole boards (who usually rely on rough rules of thumb).

still in the slipper. "The prince didn't say you could bend your toes back that way," he said.

"He didn't say you couldn't," the stepsister replied. "Call me princess."

Just then, Cinderella's fairy godmother appeared. "Try Cinderella," she said to the messenger. She prodded Cinderella to come out from the chimney. The messenger was more dubious than before. "Everyone gets a chance," the fairy godmother said.

With some effort, the slipper was pried off the stepsister's foot. The fairy godmother dipped her wand. Cinderella slid her foot easily into the slipper, and—another dip of the wand—she was dressed as she had been at the ball. "There," the fairy godmother said, "there is the woman who deserves the prince."

"There she is indeed," the messenger said.

"Nuts to that," the stepsister said. "Why does she deserve the prince more than me?"

("More than I," the fairy godmother murmured.)

"Well," the messenger said, "she is beautiful and kind and gentle and she dances like Fred Astaire, and she has a beautiful wardrobe. Who could deserve a prince more?"

"Anyone could," the stepsister replied. "I see it all. Cinderella's always been a drudge. A snivelling, drippy-nosed, sooty drudge. Never did anything to make something of herself. Why, every time there was a dance, my sister and I asked her to go with us. I offered to lend her my best dress. She always said no. Always sitting there playing with a rotten pumpkin and a couple of verminous little mice. Ugh! Then this fairy god-what's-her-name comes along and, poof—Cinderella's a princess. Never did a thing to deserve it. All these years I've been trying to make something of myself. So what if I'm not terrific. I make the best of what I've got. Why doesn't what's-her-name do her wand number on me? Cinderella doesn't deserve to marry the prince any more than that pumpkin does."

Cinderella smiled gently and walked off on the arm of the messenger.

The stepsister brought a lawsuit in which the prince was named as defendant. Her main claim was that the prince's original announcement should be interpreted to provide that only a person's natural attributes count; and that Cinderella's natural slipper size was 11½. The prince's defense was

that when he made the announcement, all he cared about was that the woman he marry be the woman in the glass slipper with whom he had danced at the ball. Cinderella was that woman, and it was all the same to him how she got to be who she was. Cinderella's fairy godmother was lead counsel for the defense, and the prince won the case.

If our sympathies were not with Cinderella from the start, we should have to say that her stepsister had a strong argument.

From the perspective of complete justice, an unqualified statement that someone is entitled to win an award excludes the possibility that someone else deserves it; for if someone else were deserving, the rule on which the former person's entitlement depends would not be valid. Likewise, an unqualified statement that someone deserves an award excludes the possibility that a valid rule entitles someone else to it; for if there were such a rule, the former person would not deserve it.

Entitlements have the same relation to desert as do natural occurrences, which also may, but need not, conform to desert.⁴⁶ Rules that create entitlements intervene in the natural course of events; they are a substitute for and displace the laws of nature. We are apt not to notice this relation between them, because rules are deliberately adapted toward some objective, while the laws of nature simply describe patterns of natural phenomena. Rules are broken by nonconforming behavior; natural laws are not broken but falsified. With respect to a person's individual desert, it does not matter whether the differential characteristics that make him the person that he is and more or less deserving than other person(s) are based on legal or other entitlements or on the distribution of nature. In either case, they simply come.

The complete idea of justice, in which both entitlement and desert are present, is thus the analogue of natural moral order. We saw in section III above that the idea of desert supposes a background for one's actions that is orderly not only causally but morally as well; a person's individual situation must be roughly as he deserves. That is no less true in the portion of our experience determined not by causal laws of nature but by the positive law (and other rules) of the community. However the background order is composed, individual desert and moral responsibility suppose that

⁴⁶ For some reason, when a natural occurrence conforms very closely to what we think is deserved, we call it "poetic justice." That probably gives the creative power of poetry more than its due, but it may suggest our perplexity about, and perhaps our exasperation with, the whole business.

what happens to a person is—somehow—according to desert and that what a person deserves—somehow—becomes actual.

It is evidently easier for us to suppose that justice is realizable in human affairs than to believe that there is a natural moral order. At least it is easier for us to overlook the fact that justice is not realizable. Perhaps all that it is necessary to say is that we adopt the idea of justice as a standard for ourselves without depending on a model in nature. But the former is unattainable not only because human beings are weak but because the idea itself is antinomic. A natural moral order, in which everyone gets what he deserves, excludes the possibility of significant self-determined action and thereby eliminates the possibility of desert altogether. All being always and everywhere exactly what is just, there could be no possibility of significant human freedom, which would be a disruptive wild card.⁴⁷ In the only terms in which we could describe such an inevitable, perfectly ordered course of nature, cause would displace freedom entirely. Complete justice within a human community would be the same. If positive law—entitlement—perfectly embodied desert, it would authorize only that action that was consistent with desert and would exclude the possibility of a lawful self-determined action. The dying testator would no longer be able to choose his heir; the faithful, industrious relation—who is a bit of a pill nonetheless—would inherit because he is deserving, and the ne'er-do-well whom the testator loves despite it all would reap no more than he had sown. Insofar as the law were effective, the possibility of desert would be eliminated, because the rule of law would determine all our actions.

On the other hand, every departure from a situation perfectly according to desert, whether it is natural or provided by law, undermines our judgments about desert based on the exercise of freedom. The problem is most visible in extreme cases—someone born with a substantial natural handicap or with unusual talents, or born into an impoverished environment or an unusually well-endowed one. But it infects every case in which people are situated differently. According to the general assumption that the universe is orderly, individual desert in each case will vary precisely as

⁴⁷ Compare the epicurean doctrine that the universe is governed strictly according to causal laws that determine atomic motion, but that this motion is occasionally interrupted by a "swerve," or absolutely undetermined motion, of some atoms. This arbitrary indeterminism accounted for free will as well as the beginning of the causal chain. See A. LONG, *HELLENISTIC PHILOSOPHY* 37-38, 56-61 (1974).

much as it is undermined.⁴⁸

VII. LIBERTY AND EQUALITY

If we confine our attention to that portion of our lives within the ambit of positive law, in which entitlements displace natural occurrences, the conclusions of the previous section can be taken a step further. The ideas of liberty and equality are prominent as organizing principles in contemporary political philosophy. In John Rawls's influential work, for example, the two basic principles of justice, which determine "the basic structure of society," are specific principles of liberty and equality.⁴⁹ Other writers as well, implicitly or explicitly, have suggested that a description of the con-

⁴⁸ John Rawls's theory of justice obscures the antinomy. His starting point is a conception of free and equal moral persons. It is that conception that dictates disregard (ignorance) of individual circumstances in the original position; persons are represented as not "affected by social fortune and natural accident." Rawls, *Kantian Constructivism in Moral Theory*, 77 J. PHIL. 515, 523 (1980). See also *id.* at 529. The fundamental principles of justice are those principles that persons free and equal in that sense would adopt to deal with all the differences of nature and fortune that make one person more or less able than another, the critical consideration being that none of the differences is itself a matter of justice, i.e., deserved. The general formula is to provide conditions of social order that maximize the realization of individual interests, always on the basis that the more able have no special claim because of their (undeserved) ability; if they are allowed extra rewards according to distributional principles that Rawls specifies, it is because that will contribute to the maximum realization of the interests of the whole group. Since every consideration of individual desert is rejected as a basis for the fundamental principles of justice, the outcome has strong utilitarian aspects, which Rawls, however, qualifies in many respects.

Rawls's "Kantian" conception of the person may appear untroubling because it employs the familiar ideas of freedom and equality, the full significance of which in this context may not be apparent. Rawls intends that as "free," we are self-determining and morally responsible, and as "equal," our differential characteristics are not normatively significant. Those are the two propositions that, I have argued, cannot be rendered consistent with one another except by the idea of normative natural order. As a consequence, Rawls's resolution of the concrete conflicts of interest that arise among persons with all their actual differences are *ad hoc*; they have no basis in justice at all. Why is it, for example, that an unequal distribution must be to the advantage of the least favored; or, on the other hand, why should there be any inequalities of distribution, at least without unanimous consent? See J. RAWLS, *A THEORY OF JUSTICE* 303 (1971). Rawls describes incisively the solutions that would be reached by persons having the general outlook of thoughtful "liberals" in this country. The solutions depend, however, on the conventional understanding of such persons. Rawls perhaps does not intend more than that. See Rawls, *supra*, at 517, 572. See generally M. SANDEL, *supra* note 5, at 66-103.

⁴⁹ See J. RAWLS, *supra* note 48, at 54 (1971). The two principles are:

First: each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others.

Second: social and economic inequalities are to be arranged so that they are both (a) reasonably expected to be to everyone's advantage, and (b) attached to positions and offices open to all.

Id. at 60.

tent of liberty or equality, or both, provides the grounding for a just social order.⁵⁰ To a large extent, current work in political philosophy has consisted of an effort to elaborate that content specifically and concretely.

Every exercise of liberty potentially interferes with the liberty of someone else, however, and, unless one relies on conventional understandings, there is nothing in the nature of liberty itself that tells us which to choose. It may seem obvious—but why is it?—that my liberty to put my fist in another person's face is subordinate to his liberty not to be punched. The choice and the basis for making a choice is far less clear if, for example, we have to decide whether the liberty to smoke on an airplane outweighs the restraint on the liberty of someone who wants to fly without being surrounded by the fumes. If all have liberty to smoke, none has liberty to fly without breathing smoke-filled air; if all have liberty to fly in clean air, none has liberty to smoke. Which liberty should prevail? The most likely test in a democratic society is actual preferences: Which of the opposed liberties would most people, after careful reflection, prefer? On that basis, the principle of liberty is only a principle of majority rule. That may often be the correct result, but considerations of liberty do not establish it. Some of the particular liberties especially valued in the United States are expressly protected against the will of the majority. In the same way, every other ground for choosing one liberty over another depends on assumptions not provided by the idea of liberty itself.⁵¹

⁵⁰ See, R. NOZICK, *supra* note 30 (primarily liberty); M. WALZER, *SPHERES OF JUSTICE* (1983) (primarily equality).

⁵¹ Even the choice of liberty to assault someone else or liberty not to be assaulted oneself is not as self-evident as it seems. If all have liberty to walk down the street without being assaulted, none has liberty to assault another person; if all have equal liberty to assault another person, none has liberty to walk down the street without being assaulted. Liberty seems manifestly greater in the first case than in the second, because so much of what one does depends on where one can safely go, and liberty simply to assault someone else does not seem like much at all. If one generalizes, however, "assault" may refer to any physical aggression to get what one wants, not such a small matter for those who are strong enough to be successful aggressors. (Suppose the "aggression" were a matter of wealth rather than physical strength.) Of course, only the stronger will have the capacity to exercise that liberty, while all, or almost all, have the capacity to walk down the street. But liberty to do something does not guarantee that one has the capacity to do it. Every liberty benefits those who are capable of exercising it and want to do so more than it does those who are not capable or not interested. Cf. Hart, *Rawls on Liberty and Its Priority*, 40 U. Chi. L. Rev. 534 (1973) (discussing Rawls's principle of the priority of liberty). Rawls responds to Hart's criticisms in Rawls, *The Basic Liberties and Their Priority*, in 3 *THE TANNER LECTURES ON HUMAN VALUES* (S. McMurrin ed. 1982).

The best-known formulation of a general principle of liberty, John Stuart Mill's assertion that one ought to be at liberty to engage in self-regarding conduct,⁵² is notoriously unsatisfactory. Not only is it unclear what conduct—if indeed any—it plainly covers but it is doubtful on its own terms.⁵³ A more limited version of the same principle, that the enforcement of morality as such is a viola-

⁵² Mill's "very simple principle" is

that the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant.

J.S. MILL, *ON LIBERTY* 13 (Liberal Arts Press ed. 1956) (1st ed. London 1859). Mill himself qualified the principle by excepting from its application children and people in "those backward states of society in which the race itself may be considered as in its nonage." *Id.* at 13-14.

⁵³ The blunt response of James Fitzjames Stephen, Mill's contemporary, was that there is no significant self-regarding conduct while a community is intact.

[T]he intimate sympathy and innumerable bonds of all kinds by which men are united, and the differences of character and opinions by which they are distinguished, produce and must for ever produce continual struggles between them The good man and the bad man, the men whose goodness and badness are of different patterns, are really opposed to each other. There is a real, essential, eternal conflict between them.

J.F. STEPHEN, *LIBERTY, EQUALITY, FRATERNITY* 148 (1967). If the explicit moral struggle that Stephen described has receded somewhat from public life, nevertheless the distinction between self- and other-regarding conduct is difficult to maintain in a community that recognizes, much more so than did Victorian England, myriad interactions among persons and affirmative obligations of support, not only of one person by another but of all persons, up to some level, by the community.

[What is involved is] the negative principle that no one should be coerced for his own good alone; but no one would gravely argue that this ought to be applied to the case of children, or of idiots, or insane persons. But if so, can we know *a priori* that it ought to be applied to all sane adults? Since the above-mentioned exceptions are commonly justified on the ground that children, etc., will manifestly be better off if they are forced to do and abstain as others think best for them; and it is, at least, not intuitively certain that the same argument does not apply to the majority of mankind in the present state of their intellectual progress. Indeed, it is often conceded by the advocates of this principle that it does not hold even in respect of adults in a low state of civilisation. But if so, what criterion can be given for its application, except that it must be applied whenever human beings are sufficiently intelligent to provide for themselves better than others would provide for them? And thus the principle would present itself not as absolute, but merely a subordinate application of the wider principle of aiming at the general happiness or well-being of mankind."

H. SIDGWICK, *supra* note 6, at 275.

Mill himself quietly gave the show away when he observed: "If either a public officer or anyone else saw a person attempting to cross a bridge which had been ascertained to be unsafe, and there were no time to warn him of his danger, they might seize him and turn him back, without any real infringement of his liberty; for liberty consists in doing what one desires, and he does not desire to fall into the river." J.S. MILL, *supra* note 52, at 117. That case shades into all sorts of other cases in which, it may be said, the person "does not desire" to do what he is about to do. It all depends on how one identifies the person through all the temporary and permanent changes that occur during a lifetime.

tion of liberty, may look unassailable only because it has no concrete applications and, in any event, is far too limited to provide a significant content for liberty in the modern world; it also depends on conventional understandings of what counts as an injury.⁵⁴ We are adrift in a sea of so-called "negative" and "positive" liberties, but which are negative and which positive depends on where one starts; that characterization is either indefinite or inconclusive.⁵⁵ For all their protests to the contrary, the libertarian's assured definition of liberty assumes a knowledge of human nature and a natural order as certain and metaphysical as anything in Greek tragedy.⁵⁶ The rest of us struggle uncomfortably with our preferences and the opposed preferences of others.

⁵⁴ For a defense of the view that the enforcement of morality is always to be condemned as a violation of liberty, see H.L.A. HART, *LAW, LIBERTY, AND MORALITY* (1963). Hart's examples are cases of private sexual conduct, which readily elicit the agreement of many, perhaps most, liberal persons. He argues generally that the distress to others arising from knowledge of how someone exercises his liberty cannot justify its restriction because if that is enough, then anything may be enough. *Id.* at 46-47. The right to liberty by itself would protect only conduct that no one cared about. Hart assumes that the value of liberty is great enough to outweigh any amount of distress so caused. But that is far from clear. It is not difficult to imagine circumstances in which, consequentially at any rate, the distress to others might count for more than the benefit to the actor: Must the community allow a latter-day Sade to conduct his experiments in a house in the middle of town, provided no one is there involuntarily and he takes care that the walls are soundproof and the shades drawn?

The issue in the end is not enforcement but the moral principles themselves. Rejecting any authoritative dogma that declares particular sexual conduct to be immoral (or "unnatural") and rejecting the claim of concrete injury, those who object to the enforcement of morality reduce the opposing moral claim to the conventional judgment that the conduct is immoral. By itself, however, convention is simply what others think one ought to do. No more is needed to rule out enforcement than recognition of the actor as self-determining, that is as a person, without which the question of liberty does not arise at all. The objection to the enforcement of morality is so strong because once it is run to ground, all that opposes liberty is a phantom, the assertion of a morality that proves to have no content except the denial of liberty of others.

⁵⁵ For the distinction between negative and positive liberty, see Isaiah Berlin's famous essay, *Two Concepts of Liberty*, in I. BERLIN, *supra* note 24, at 118, 121-34. The distinction is questioned in MacCallum, *Negative and Positive Freedom*, 76 *PHIL. REV.* 312 (1967), and Feinberg, *The Idea of a Free Man*, in *EDUCATIONAL JUDGMENTS* 143, 143-47 (J. Doyle ed. 1973), reprinted in J. FEINBERG, *RIGHTS, JUSTICE, AND THE BOUNDS OF LIBERTY* 3, 3-7 (1980).

⁵⁶ For example:

Many of the institutions of society which are indispensable conditions for the successful pursuit of our conscious aims are in fact the result of customs, habits or practices which have been neither invented nor are observed with any such purpose in view. We live in a society in which we can successfully orientate ourselves, and in which our actions have a good chance of achieving their aims, not only because our fellows are governed by known aims or known connections between means and ends, but because they are also confined by rules whose purpose or origin we often do not know and of whose very existence we are often not aware.

F. HAYEK, *LAW, LEGISLATION, AND LIBERTY* 11 (1973). The invisible hand is the hand of God.

Likewise, every human characteristic and aspect of the human condition is abstractly a candidate for some sort of equality, and every equality heightens the significance of differential characteristics that remain. Equality of opportunity, the most generally approved principle of equality, does not lead to equality among individual persons at all; on the contrary, it suppresses some differential characteristics and heightens the differential impact of others.⁵⁷ So we are pressed toward the idea of identity, which eliminates altogether the differential characteristics that distinguish us as individuals.⁵⁸

Not only are abstract liberty and abstract equality by themselves in internal conflict. They are in conflict with one another. Significant liberty allows a person to distinguish himself and become different, for better or worse, from other persons who use their liberty differently. Equality in some respect eliminates difference and, with it, the liberty to become different in that respect. Thus, every liberty not only potentially restricts another liberty, but, from another perspective, denies equality. Every equality not only heightens the impact of another inequality, but also denies some possibility of liberty.

Liberty and equality are not meaningless ideas nor do they lack significant, reasonably determinate content in our political and social life. On the contrary, there are many areas of life in which they have specific content that is largely uncontroversial and other areas in which their content is openly contested and which provide testing grounds for their meaning in the future. It would be bizarre for someone to protest that basing admission to college on academic potential is a denial of equality because it favors persons with greater academic aptitude, or that giving every person one and only one vote is a denial of liberty because persons have no opportunity to increase their political power by voting early and often. In this country at this time, the frontiers of liberty and equality are elsewhere. From a broader perspective, however, it is evident that the frontiers are as much determined by our legal and

⁵⁷[T]he equal-opportunity principle really is not very helpful to many men. Under its regime, a man with, say, an Intelligence Quotient of ninety, is given equal opportunity to go as far as his native ability will take him. That is to say, it lets him go as far as he could have gone without the aid of the doctrine—to the bottom rung of the social ladder—while it simultaneously stimulates him to want to go farther.

Schaar, *Equality of Opportunity, and Beyond*, 9 NOMOS 228, 234 (1967).

⁵⁸ For an argument that the idea of equality in moral and political discussion "is an empty form having no substantive content of its own," see Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537, 596 (1982) (footnote omitted).

other conventions as they are determinative of them. If our expectations are undermined by a shift in public policy, like the introduction of affirmative action into competitions previously based on more or less understood conceptions of differential merit, the meanings of liberty and equality become open and unsettled and by themselves furnish no resolution of the contesting interests.

The conflict between liberty and equality as principles for the organization of a just society is neither more nor less than the opposition between desert and entitlement in the complete idea of justice.⁵⁹ That conclusion in itself is not surprising. Within that portion of our existence that has been wrested from nature and is within human control, liberty defines the area that positive law preserves for freedom. It is normal for us to regard a person's exercise of liberty as a basis for judgment about his desert. On the other hand, except in unusual circumstances when the validity of the law itself is called into question, an act in compliance with the law is not a basis for a judgment about desert, since we do not regard the act as an exercise of liberty, even if the same act would be a basis for judgment in the absence of the law.⁶⁰

Once one has in mind the connection between liberty and desert, the inadequacy of the utilitarian defense of liberty becomes plain. Ignoring desert and considering only liberty's beneficial consequences, the utilitarian regards liberty as if it were no more than the elimination of one kind of restraint on conduct so that another more conducive to our well-being can take its place. Liberty is like removing the stake to which a plant has been tied or releasing an

⁵⁹ This parallel accounts for the frequent assertion that equality has a peculiarly intimate association with justice, an association that is nevertheless disturbed by the conflicting demand that a person receive what is uniquely his due and not simply whatever anyone else has received. See, for example, Hospers's asserted "attempt to handle every problem concerning justice under one or the other of two main headings: equality and desert." J. HOSPERS, *supra* note 2, at 417. See also D. RAPHAEL, *supra* note 15, at 65-67. In that context, equality refers not to some particular kind of equal treatment (e.g., one person, one vote), but to a background order within which all inequalities are according to desert and, therefore, just. See generally Vlastos, *supra* note 16.

Following the argument made in sections II-V above, strictly speaking the basis of liberty can only be desert and the basis of equality can only be entitlement. Although the law may entitle one to liberty, the entitlement as such is a guaranteed equality, a restriction on the power or authority of others, to interfere with one's liberty. The full meaning of liberty can be realized only by the exercise of freedom. We may say not that a person deserves to be at liberty but that he can be at liberty only as a deserving person. Equality, on the other hand, is the application of a general rule without more; it pretermits consideration of individual desert.

⁶⁰ Since the law does not compel in the same way that laws of nature do, a person's act in compliance with the law might be a basis for an affirmative judgment if he had strong personal motives to violate the law.

animal from its tether. It will behave differently than it did under restraint, and if the untrained growth of the plant or untethered movement of the animal serves our purposes, the utilitarian case for liberty is fulfilled. The liberty that we prize, however, is more than a change of behavior, however beneficial. It is the community's public recognition of the uniquely human attributes of freedom, moral responsibility, and desert.

To just the same extent, however, a community confronts the conditions of individual desert not as a philosophical problem but as an intensely practical one. Every departure of the law from what is deserved—every separation, that is to say, between entitlement and desert—undermines the connection between liberty and desert without which liberty as the exercise of freedom is impossible. Within the political context, the idea of equality expresses this requirement that entitlement be according to desert or, as we say, just entitlements. Principles of equality in the abstract do not eliminate difference or the liberty on which difference depends. Rather they limit the range of liberty to those differences and their results that are (perceived to be) just.

In the same way and for the same reasons that desert and entitlement tend toward absoluteness, the ideas of liberty and equality carry us toward the formulation of "absolute" principles that are said to be objective and valid without regard to particular circumstances, which principles are united in the ideal of a just community.⁶¹ This tendency of our thought is evident not only in formal discussions, but even more so in political debate about concrete issues. If the social consensus is strong, issues are likely to be contested on grounds of public policy that refer to the needs and choices of the community. The increments of liberty and equality that result from adoption of one proposal or another are understood to be matters of ordinary legal entitlement, which are authoritatively granted or withdrawn by rules of law and which one may like or dislike but which one accepts among the vicissitudes of community life. If consensus is lacking, liberty or equality itself may be asserted "absolutely" as the primary and sufficient ground for a proposal; considerations of public policy are treated

⁶¹ A notable exception to this tendency is Michael Walzer's recent book, *Spheres of Justice*, in which he argues that social justice depends on "complex equality," which takes its meaning in large part from the conventional understandings of the community. M. WALZER, *supra* note 50, at 17 & *passim*. See Ronald Dworkin's critical comments about this aspect of Walzer's book in Dworkin, *To Each His Own* (Book Review), N.Y. Rev. of Books, Apr. 14, 1983, at 4.

as collateral or forgotten altogether. If the absolute principle is challenged in turn, the response is that it is a requirement of justice.⁶²

When the individual interests are large and explicit, public debate may be at more than one level, and arguments shift ambiguously from one level to another. Discussions of affirmative action, for example, are greatly complicated by the difficulty of separating arguments that depend on assumed or demonstrable social consequences from those that do not. Similarly, arguments that widespread homosexuality would have harmful consequences for some generally shared social objectives (whether the arguments have any validity or not) do not meet the argument that private, consensual sexual practices belong fundamentally within the range of liberty and ought to be protected for that reason. Unless the arguments are sorted out and the difference between them understood, those who maintain opposed positions talk past one another and are likely to construe the failure to join issue as an indication of their opponents' obtuseness or bad faith.

Strikingly, introduction of the idea of justice endorses the absoluteness of a principle without affecting its content. Extensions of suffrage, integrated schools, improved public housing, and a minimum wage have all been described as fundamental aspects of liberty or equality, claimed on grounds of political, social, or economic justice alone. At the end of the 1960's, more and more claims were asserted in that fashion absolutely. Far from characterizing a claim further or qualifying it in any way, the reference to justice was intended (and received) precisely as an assertion that it was unnecessary to offer further arguments in its defense. To some observers it seemed that questions of public policy to which there was no certain answer were being presented unreasonably as bare demands that could be resolved only by a test of strength. To others, the claims were evidence that American society was fundamentally unjust.

⁶² The first response may be a reference to an authoritative text, if one is available, like the Constitution. If the meaning of the text is then questioned and the proffered meaning is not accepted on other grounds, unless the discussion breaks off at that point, a reference to justice follows. It is an American peculiarity that all questions of political philosophy are converted into questions of constitutional law. The results, as exercises in textual analysis, are frequently extraordinary. For just one example among many, see *Wesberry v. Sanders*, 376 U.S. 1 (1964), in which Justice Black for the Court declared that the provision in article I, § 2, of the Constitution that Members of the House of Representatives shall be chosen "by the People of the several States" means that as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's." *Id.* at 7-8 (footnotes omitted).

We are never asked to prefer liberty or equality to justice, or the reverse. Opponents of a claim, likewise, never concede the fundamental argument about liberty or equality and deny that the claim is just; nor do they concede that a claim is just but argue that liberty or equality is too important to be sacrificed to justice. Although liberty and equality are reciprocal and opposed, there is no divergence between liberty and justice or between equality and justice. Perceiving the multitude of conflicting claims that parade under the banner of justice, the ease with which the banner is run up and down, and its lack of significance for the content of a claim, one may be inclined to disregard the association of liberty and equality with justice, as a rhetorical flourish. But in the case of serious, substantial claims, at any rate, the association seems too insistent and appropriate to be only that; it is not superficial.

Confronting the variety of claims, we may look hopefully to nature for guidance. The weight of long, well-established practice may give some principles the appearance of being "natural," so that any departure looks like an interference with the natural order. But nature expresses its preferences authoritatively, in its own laws, or not at all. Once we have acquired and recognized a capacity to affect natural circumstances in some way, so that liberty or equality is seriously in issue, a decision whether and how to exercise the capacity is unavoidable. A reference to what is natural may for some purposes distinguish crudely between the complex, sustained interventions characteristic of modern civilization and the simpler, more direct ones of a primitive society. Beyond that, it is simply meaningless to speak of one manner of social organization as more natural than another.⁸³

From the individual perspective as well, it is meaningless to speak of the "natural person" as if that referred to values found in nature itself. Human life as we know it is possible only in community, and we cannot isolate the contribution of nature from the inescapable effects of some form of nurture. Although some endowments may seem more independent of nurture than others, even they derive their value and significance, whether positive or negative, from human convention. A community's modes of individual

⁸³ On the whole, it appears to me that no definition that has ever been offered of the Natural exhibits this notion as really capable of furnishing an independent ethical first principle. And no one maintains that 'natural' like 'beautiful' is a notion that though indefinable is yet clear, being derived from a simple unanalysable impression. Hence I see no way of extracting from it a definite practical criterion of the rightness of actions. H. SIDGWICK, *supra* note 6, at 83. See generally *id.* at 80-83.

and group behavior may seem to its members natural and uncontrived, and it may be difficult to change them. Those are matters of psychological (or sociological) and technological importance, which may have a bearing on that community's choice of policies. Although it may sometimes seem otherwise, they do not supply the absolute principles of liberty and equality that we lack.

We may conclude from the foregoing that the political ideal of a just community, founded on principles that have objective and not merely conventional validity, is not only unattainable in practice but is not susceptible of coherent exposition. Liberty and equality cannot be realized "objectively," because they are contradictory; nor can one exist without the other. Every significant liberty is a departure from the determinate background of desert that is assumed by liberty itself. The community of perfect liberty is Hobbes's state of nature, in which there are no entitlements and each person has what his natural abilities allow him to procure.⁶⁴ But, unless we assume that nature itself is morally orderly, it is liberty without responsibility or freedom (or, as Hobbes perceived, justice⁶⁵), because there can be no desert. A fully determinate background order would eliminate liberty altogether. The community of perfect equality is the society imagined by Plato in the *Republic*, in which each person's role is fully determined according to his nature. Entitlements leaving no room for autonomous action at all; once again desert, and therefore responsibility and freedom, are eliminated.⁶⁶

Yet we can no more do without the ideas of liberty and equality than we can do without the idea of freedom. They are present to us as soon as the collective human capacity to modify the natural order in any of its respects is recognized. They are concomitants of the experience of freedom within a human community. Evidently, we require some idea of "practical justice" to serve for our ordinary lives in place of the unattainable ideal.

Liberty can be described metaphorically as space for one's self, space within which to realize one's self by effective decisions. Given the limitations of human existence, at any time all but a tiny portion of the abstract possibilities of self-determination inev-

⁶⁴ The Right of Nature, which Writers commonly call *Jus Naturale*, is the Liberty each man hath, to use his own power, as he will himselfe, for the preservation of his own Nature; that is to say, of his own Life; and consequently, of doing any thing, which in his own Judgement, and Reason, hee shall conceive to be the aptest means thereunto.

T. HOBBS, *LEVIATHAN* 66 (Everyman ed. 1914) (1st ed. London 1651).

⁶⁵ *Id.* at 66.

⁶⁶ See *supra* text accompanying notes 47-48.

itably are not even perceived as such and remain outside the area of actual interest and concern.⁶⁷ For most Americans near the end of the twentieth century, the possibilities of cultivating snapdragons, keeping a pet tiger, and selling a kidney are in this category. Other possibilities are perceived and wanted, with varying degrees of intensity, but their denial still leaves the self intact, with ample space for realization in other ways. Some possibilities of self-determination, however, may be attached so closely and inescapably to the conception of self that one accepts that their restriction is felt as a diminution of self, whatever countless other possibilities remain. For contemporary Americans, the core of the freedoms of expression and religion protected by the first amendment, freedom of unrestricted domestic travel, and the core of the fifth amendment's privilege against compulsory self-incrimination are among the fundamental liberties of this kind. So also are some aspects of private, personal conduct, including, probably, sexual behavior and the intimacies of nuclear family life. In other societies the list would be different.

Equality ensures that space for one's self is real space, measured not by wishes but by effective action. It is the difference between liberty to fly to the Caribbean by flapping one's arms if one can and the real liberty to have a holiday in the Caribbean that is conferred by a sufficiently high minimum wage. Innumerable differences between ourselves and others pass below, or sometimes above, the level of our concern. They may affect the size or shape of our real space in ways that we care about, while still regarding our comparative disadvantage as one of the multitude of ordinary differences that distinguish one person from another. A disadvantage begins to be perceived as an inequality and becomes intolerable if it renders ineffective a possibility of self-determination that is central to one's conception of self, so that the disadvantage is no longer merely a difference from others but a diminution of one's self.

Most of us obtain a conception of self not by abstract imagination or reflection but from acquaintance and constant interaction with our surroundings. We learn who and what we are and what we

⁶⁷ Compare the observation of Hobbes:

For seeing there is no Common-wealth in the world, wherein there be Rules enough to set down, for the regulating of all the actions, and words of men, (as being a thing impossible;) it followeth necessarily, that in all kinds of actions, by the law praetermitted, men have the Liberty, of doing what their own reasons shall suggest, for the most profitable to themselves.

T. HOBBS, *supra* note 64, at 111.

may become by observing others like ourselves. It is only the Miniver Cheevies who define themselves so grandly that they mourn the ordinary conditions of existence, which are the same for all alike.⁶⁸ Even a harsh, idiosyncratic incapacity, like a physical deformity, may be absorbed and the resulting *impossibility* of self-determination accepted as part of the conception of self, rather than a diminution of self, if it is unreservedly so treated by other people. So also, a person may not be disturbed by a comparison with others if they are generally regarded as so completely unlike himself or are so much more powerful or wealthy or "higher up" that the liberties that they have and he lacks are not part of his conception of self at all. We are diminished far more if we are on the wrong side of differences between ourselves and others more palpably our "equals."

A harmonious community will subscribe to principles of liberty and equality that are congruent and give a coherent shape to its members' conceptions of self. In addition, the principles of liberty and equality will be coherent with the community's customs and habits and correspond generally to the facts of ordinary life. Insofar as those conditions are fulfilled, the members of the community will find that their conceptions of self are generally satisfied, and the community will have achieved a just social order. That does not mean that it will have found perfect justice or that other communities necessarily depart from justice if they adopt different principles and practices. There is no perfect justice nor is there a unique social order that comes closest to it.

The problem of affirmative action for a previously disadvantaged minority has produced the most explicit and persistent concrete conflict about the nature of justice in recent American life. Although the particular shape and scope of the problem is rooted in our history, it is a specification of the abstract contradiction between liberty and equality themselves. It is so intractable because the competing claims have no coherence within the social order generally, and there is no perceptible path toward coherence. If the minority is preferred, we deny the significance of desert for some members of the majority, who lose out although they are individually more deserving according to the understood criteria than some

⁶⁸ Robinson, *Miniver Cheevy*, in *THE OXFORD BOOK OF AMERICAN VERSE* 486-87 (1950). In Camus's play, *Caligula*, the Roman emperor seeks to overcome the conditions of existence. He demands the moon. A. CAMUS, *CALIGULA*, in *CALIGULA SUIVI DE LE MALENTENDU* 11-155 (Gallimard 1958), reprinted in *English in A. CAMUS, THE COLLECTED PLAYS OF ALBERT CAMUS*. (S. Gilbert trans. 1965).

members of the minority who benefit. If the minority is not preferred, we deny the significance of desert so far as some of them are concerned; without affirmative action, no "equality of opportunity" is sufficient, because differential entitlements in the past have made them undeservedly less able to compete. We may turn for a solution to considerations of utility, the future well-being of the community or more immediate social needs, as some courts have done. But a solution on that basis will not relieve the sense of injustice of those whose personal well-being suffers. There is no correct principle of liberty or equality in such a situation; the effects of principles applied in the past, which are now believed to have been wrong, can be undone only by the application of principles that also appear to be wrong. Rather, coherent principles of liberty and equality need to emerge together and to become a part, seriously and substantially, of the community's way of life.⁶⁹

The requirement of coherence of principles that are not themselves absolute helps also to explain other phenomena that are too persistent to be dismissed as irrelevant to the idea of justice. There is typically an explosion of demands for justice in a social setting when things are getting better, not worse. This effect of "rising expectations" is not merely psychological. Large social changes are rarely made in tandem. The inconsistencies and incongruities between principle and practice and between some principles or practices and others that result from such changes are perceived and articulated as injustice, even though previous conditions of greater denial perhaps were not. So also, we perceive injustice in the treatment of someone in our own community without perceiving injustice in the far worse treatment of someone halfway round the world. Abstractly, individual desert does not depend on nationality, but in a world of nation states, we rely on national boundaries to limit the extension of our principles and our practices. An internal incoherence that is perceived as injustice may not be noticed or felt at all in a similar pattern of external facts.

In a sense, therefore, convention does replace nature. Some order there must be. Looking in vain to nature for a standard of justice, able neither to formulate absolute principles to satisfy the ideal of a just community nor to abandon the attempt, we rely finally on the order that we experience, an amalgam of principles and practice.⁷⁰ In so doing, we run the risk that we shall confuse

⁶⁹ For a particularly perceptive discussion of utilitarian considerations and claims of desert with respect to affirmative action, see M. SANDEL, *supra* note 5, at 135-47.

⁷⁰ Compare the conclusion of Michael Walzer:

the familiar with the necessary; but what other choice have we?

VIII. LAW AND JUSTICE

Neither legal positivism nor natural law accommodates the complete idea of justice. Positivism readily accounts for justice as entitlement. The rules of law that are valid according to its criteria create real entitlements, acknowledged as such within the legal order. It is permanently subject, however, to the objection that a rule of law is wrong, not merely as a matter of policy but fundamentally as a matter of justice, and ought not be observed. Natural law accounts for desert. Its principles are the unlimited moral principles that underlie particular moral judgments and conclusions about individual desert. As it is currently conceived, however, natural law is permanently subject to the objection that it is concerned not with law but with morality. It is one thing to assert what ought to be the law or that the law is bad and ought to be changed, quite another to say what is the law or that because a law is wrong it is not the law.

The testing case for positivism and natural law alike is one in which entitlement and desert are opposed. Focusing on their respective inadequacies, the test of positivism emphasizes the immorality or undeservedness of the entitlement and the test of natural law emphasizes the entitlement's firm acknowledgment in the law. The defender of natural law points to any of the most immoral Nazi laws that imposed catastrophic, undeserved suffering. If those are laws, he asks, what can law have to do with justice? The positivist calls attention to an especially firm entitlement according to a settled rule of law that is nevertheless agreed to be immoral: the fugitive slave law in antebellum America or apartheid laws in South Africa.⁷¹ If those are not laws, what are, and what distin-

Justice is relative to social meanings. Indeed, the relativity of justice follows from the classic non-relative definition, giving each person his due, as much as it does from my own proposal, distributing goods for "internal" reasons. These are formal definitions that require, as I have tried to show, historical completion. We cannot say what is due to this person or that one until we know how these people relate to one another through the things they make and distribute. There cannot be a just society until there is a society; and the adjective *just* doesn't determine, it only modifies, the substantive life of the societies it describes. There are an infinite number of possible lives, shaped by an infinite number of possible cultures, religions, political arrangements, geographical conditions, and so on. A given society is just if its substantive life is lived in a certain way—that is, in a way faithful to the shared understandings of the members.

M. WALZER, *supra* note 50, at 312-13.

⁷¹ The Nazi laws do not provide good test cases because they did not become well settled. The Nazis were in power for less than a dozen years altogether, during half of which

guishes law from morality?

Each is inadequate because it disregards the aspect of justice that the other respects. Legal positivism observes accurately that it is on the basis of actual practice and acknowledgment within the legal system, not moral judgment, that we regard a law as valid and recognize an entitlement under it.⁷² Furthermore, we ordinarily give effect to entitlements and believe that we should do so, even if our individual moral judgment is conflicting. When positivism makes this limited validity of a rule within the legal order a basis for judgment and action, however, it depends on an assumption that the law's validity is unlimited. Although in specific cases the move from limited to unlimited validity may be questioned, as it is in the case of the Nazi law, it cannot be questioned generally without eliminating entitlement as a concept distinct from desert and undermining the whole positivist case. But if the move is ever properly questioned, it is always subject to question. The positivist solution to the problem of immoral law is internally inconsistent, or at least it treats law as a phenomenon other than the one that functions in everyday life. If the positivist solution is correct, it is hard to see why we care what the law is, which is all that the positivist proposes to tell us.⁷³

The practical weakness and danger of legal positivism arises from its inability to find any place within its system for the idea of natural moral order. Insisting that positive law alone is concrete and definitive, and excluding from its purview any other source of order, positivism does not overcome the brute facts of our experience, freedom and desert, that lead us to the idea of a background order of desert. From its own point of view, positivism insists above all on individual moral freedom and responsibility, but it

the nation was in a general state of war. That has enabled defenders of natural law to deny the status of law to Nazi decrees without confronting the problem of entitlement directly. Were we not blinded by the vision of a nation-state, we might on quite neutral grounds conclude that the harshest decrees of the Nazis, which had the least connection with prior German law, were not laws but the exercise of naked force. See Weinreb, *supra* note 4, at 940-41.

⁷² See, for example, the discussion of the "rule of recognition" in H.L.A. HART, *THE CONCEPT OF LAW* 97-107 (1961).

⁷³ Lon Fuller described the positivist as posing a choice between "giving food to a starving man and being mimsy with the borogroves." Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 *HARV. L. REV.* 630, 656 (1958). Kelsen understood this difficulty of positivism precisely. His reaction was to say: It is none of my business *why* you care. The fact is that you do. I do my job if I describe accurately that about which you care. See H. KELSEN, *THE PURE THEORY OF LAW* 105 (M. Knight trans. 1967). Kelsen's solution is analytically sound. Even so, one feels that a description that rejects as irrelevant so large a feature of the subject being studied must be incomplete.

cannot have them without the background order that it insistently rejects.

As a result, since positive law embraces all human relationships within a community, it tends itself to become a cosmology and to invoke the legitimacy of the authority of the state, not simply as a matter of positive law but absolutely. However resolutely legal positivists deny that the state has such authority, the tendency persists, because in the absence of any other cosmology the human mind requires it. We do not create the universe by our theorizing. What is and what ought to be are different questions; no effort of human ratiocination will change that. But in the effort to account for our experience of freedom we are driven to draw the two together.

Justice springs from coherence and order. Without them, there is no justice. But they may also be attributes of a community that is brutally unjust. Human experience suggests that if coherence and order are achieved, persistent injustice will gradually acquire a mantle of rightness. In such a situation, the abstractions of natural law considered by themselves as external to the legal order are not likely to be more of a safeguard than simply principles of morality. If the idea of natural law as a necessary qualification to the sufficiency of positive law is preserved and moral principles are insistently summoned to challenge the law from within, the conversion of an unjust Leviathan into a "mortal god"⁷⁴ may be postponed and, finally, prevented. It may also make us dissatisfied under a rule of law that is on the whole decent and just. But the restless pursuit of perfect justice, even if it is unattainable, does not seem unfortunate.

Natural law is inadequate because it refuses to acknowledge the validity of a law and the entitlements that depend on it despite indicia that ordinarily are sufficient to establish them. There is no error in the stance that subjects laws to moral criticism and disapproves, or even condemns, adherence to an immoral law. The guard of a concentration camp or someone who accepts the benefits of an unjust expropriation may appropriately be assailed for failing from lack of courage or will to oppose application of the law.⁷⁵ That is a specifically individual moral stance, however, which dismisses the importance of applying acknowledged rules, despite one's preference, on whatever ground, for a different rule.

⁷⁴ T. HOBBS, *supra* note 64, at 89.

⁷⁵ One may think of some of the Americans who acquired property in California that had belonged to Japanese-Americans forcibly relocated during World War II.

A failure to perceive the immorality of a law or to oppose it is not often a demonstrable error, as a failure to read a statute correctly or a failure to remember and apply the correct procedure may be. The difference in that respect may not seem large if one chooses the most monstrously immoral law as an example and isolates it from its legal and social context. But the immoralities of the law once it has become established are not often so clear.

The practical weakness and danger of natural law is that it may discourage reliance on the rule of law generally. In a turbulent community, claims based on a higher law or the justice of nature itself may come from many sides. The collective judgment embodied in established law is a brake against the disorder in which, deprived of their previous entitlements, the weakest members of the community fare worst. A society that relies entirely on desert without benefit of entitlement is not likely to be less unjust than one in which entitlements, however imperfect, are preserved. Unless it is embodied in entitlements, desert is individual and can be realized only in the natural order itself. In practical effect, that means that the strongest prevails.

Hobbes, rejecting altogether the idea of natural justice, pointed out as clearly as anyone the consequence of separating positive law from natural law. It is the unlimited authority of the state to determine every aspect of our lives according to the entitlements of positive law. However "incommodious" that may be, he thought, the alternative was the state of nature in which the only law was the law of nature, liberty unconstrained by desert.⁷⁶ Plato, who accepted the idea of natural justice without reservation, pointed out the consequence of identifying positive law too closely with natural law. Perfect justice is embodied in entitlements so complete that individual freedom vanishes in the realization of a just community.⁷⁷ Again, the authority of the state is unlimited. The extremes meet. All that is left to distinguish them is the label, which, as Hobbes reminds us, is also a human device.⁷⁸

IX. FREEDOM AND ORDER

Beyond the jurisprudential debate, the antinomy between desert and entitlement leads finally to the ontological antinomy between freedom and cause. The possibility of freedom seems to de-

⁷⁶ T. HOBBS, *supra* note 64, at 96.

⁷⁷ PLATO, *supra* note 1.

⁷⁸ T. HOBBS, *supra* note 64, at 29-30.

pend on regularity and orderliness of occurrence, which we know only as cause. The dependence holds in the very constitution of the free, acting self, for unless the self comes into being according to some order, it must be only momentary and accidental and conduct would lose the quality of individual action. We should have only a series of discrete acts, not united by their association with a "self," so the notion of action also would have no meaning. And generally, unless events in the world in which we act occur according to causal laws, we should not be able to ascribe effects to our conduct at all, and again the quality of actions would be lost.⁷⁹ But if causal order governs human action, individual desert, which is the expression of freedom, seems to be overthrown. If the self is constituted by causes in an unbroken sequence, how can a person be individually responsible for his actions? And if events occur according to causal laws, then a background order of desert, without which individual desert and freedom are lost, is excluded. One can see why the Greeks insisted on a kind of desert that is not dependent on individual action, so that Oedipus deserved what was altogether beyond his power to avoid or control. If that seems like hopeless confusion about the meaning of freedom and desert, what have we to offer in its place?

Making a way through such obscurities, one may seem to have grasped a solution, if only the last piece could be fit into place. But it is not like that. We do not explain or account for freedom at all. Freedom and cause are primitive, unanalyzable ordering concepts of our experience. We know them directly from our experience. Together, they are the means by which we separate the individual self from its surroundings. If we try to abandon either one for the other, experience itself collapses.⁸⁰

The Greek conception of *moira*⁸¹ and the doctrine of natural law contained in Thomas Aquinas's great Christian synthesis⁸² ac-

⁷⁹ Except, perhaps, in a very limited sense referring to one's own sensations. See *supra* note 27. Those also, however, can be described as events in the world; in any case, they would have to occur according to causal laws.

⁸⁰ It may be a question whether the concept of causation has any meaning without a distinguishing concept of freedom. The Kantian solution is that causation would have no application to things in themselves, unexperienced by a distinct self. So far as it is possible to say anything at all about that, I have generally subscribed to that approach here. But—still following Kant—I do not see how one can say anything without introducing the distinct self that is supposed to be left aside.

⁸¹ Roughly, fate. The concept of normative natural order appears in various forms pervasively in classical Greek.

⁸² T. AQUINAS, *SUMMA THEOLOGIAE*, I, questions 90-97, translated in 1 *SUMMA THEOLOGICA* 993-1025 (Fathers of the English Dominican Province trans. 1947). Especially rele-

knowledged the paradox of human freedom as the central fact of our experience. Inevitably, they accounted for it by metaphysical principles that removed the explanation beyond the limits of human comprehension. Renunciation of that kind of metaphysics and the substitution of empirically verifiable, *effective* modes of explaining the phenomena of our experience have led to the replacement of the Greek and Christian concepts with the concept of justice, not as it had been used earlier but as a limited, specifically normative concept. The terms of the discussion have shifted from ontology to ethics and politics, but we are no closer to a solution. We simply get along as a practical matter, as, after all, our predecessors did also. Neither at the individual level nor at the specifically political level are we able to account satisfactorily for the phenomenon of individual desert. Nor can we dispense with it. Perfect justice is not attainable; it is an irrational ideal.

There should be no mistake about that. If we have relegated *moira* and the Christian God to the domains of myth and religion, we have nothing to put in their place. The area of express tension has shifted, nothing more. We are now able to give satisfactory causal explanations for natural occurrences that once seemed to require (and to permit) explanation in terms of desert. The social sciences have gone on to explain individual conduct by causal laws that do without desert. If it seems like a pleasant myth that the "will of Zeus" was fulfilled by the destruction of Troy,⁸⁸ not long from now it may seem like a myth that individual will rather than the chemical constituents of the body or orderly and predictable psychiatric phenomena accounts for some of our conduct. The method and objective of the social sciences calls for the continuing extension of causal laws to larger areas of human behavior. Nothing in the record so far indicates a limit to their success. We may suppose that there is an indissoluble core of freedom and action that will remain. But the supposition is supported only by the indubitable experience of freedom itself.

Increasing control over nature by the discovery of its laws increases human freedom in one sense. We are freed from subjection to unalterable conditions of existence and can reshape them to approximate more closely a concrete idea of justice. The "accidents" of nature, whether they are unforeseen calamities and strokes of fortune or simply the arbitrary distribution of endowments, can more nearly be corrected. In terms used in this article, entitlement,

vant are questions 93, discussing eternal law, and 94, discussing natural law. *Id.* at 1003-13.

⁸⁸ HOMER, *supra* note 8, bk. 1, line 5, at 11.

determined by human positive law, encroaches on the natural order, and we are able to establish a background order of desert where it had previously to be assumed.

From another point of view, human freedom is not increased. Once we have reduced phenomena to order and learned the causes that make their occurrence determinate, no room is left for desert. We understand that where freedom is absent, there is no desert. It is equally true that if the idea of desert no longer pertained to any of our experience, the idea of freedom would have vanished as well. It is pointless to ask whether that would be a good or a bad thing. The question could not arise.

I see no particular reason to suppose that that transformation will not occur. Just as fate and original sin are no longer part of the explanation of our experience, another transformation might eliminate individual moral responsibility and desert. If that occurs, it will not be because a new theory is announced from some academic or scientific citadel. It will be the product of accumulated facts and a slowly accumulating shift in the fundamental conceptual system by which facts are ordered. I have no idea what such a world would be like. The difficulty of imagining it can be suggested by trying to describe some event involving—as we think—responsible human behavior in wholly causal terms that altogether dispense with human action. A world so described would be an entirely new world.⁸⁴ It seems to me that the worlds of classical Greece and medieval Christianity, as they were experienced, may have been not simply different states of our own but different worlds entirely. If there is such a thing as absolute truth, the best case for it here may be that we are able to enter into the Greek and Christian worlds and find ourselves.

In our own world, freedom and cause coexist inconsistently and with equal necessity. The inconsistency rarely troubles us in practice, and it engages us theoretically more than it disturbs us. The effort to transcend considerations of social utility and to realize justice prevents measurement of what ought to be by what is and preserves an essentially human tension between a static and a dynamic social order. There is continuity between the old cosmologies and our own. The issue now, as then, is meaningful freedom within a morally indifferent universe. Henry Adams observed, "Chaos was the law of nature; Order was the dream of man."⁸⁵ We

⁸⁴ See Strawson, *Freedom and Resentment*, 48 *PROC. BRIT. ACAD.* 187 (1962), reprinted in P. STRAWSON, *FREEDOM AND RESENTMENT* 1 (1974).

⁸⁵ H. ADAMS, *THE EDUCATION OF HENRY ADAMS* 451 (E. Samuels ed. 1974).

neither achieve what we aspire to achieve, nor give over the aspiration. Which is just as well.