

What Does Desert Cost?

Evaluating Moriarty's rationale for the asymmetry of desert

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Desert at work. The feast of St. Nicholas, Jan Havicksz. Steen, 1665-1668.

1. Introduction

Many paintings of Jan Steen have a message. This depiction of a Dutch St. Nicholas celebration is no exception. Already since the thirteenth century, legend has it that the name-giver of the feast delivers a present in the shoe of Dutch children some time in December. St. Nicholas must have made an exception to his standard delivery method for the girl at the center of the painting. She can scarcely carry the presents she has received: a doll and a bucket full of candy. Her crying brother just behind her has been less fortunate: his shoe only contains a rod,¹ which one of his sisters is holding up while laughing at him. Jan Steen's message seems simple enough: those who are good become deserving of rewards, those who are bad become deserving of punishment. Or is it? It appears there is a twist to the story. Look at the grandmother at the back. She winks the crying boy, while seeming to reach for something behind the curtain. Is she taking out a present to cheer him up?

The scene in the painting is just one illustration of the central role of desert in our everyday lives. Many of us have the intuition, ingrained from a very early age onwards, that it is a good thing if people get what they deserve and a bad thing if they do not. We are – in the words of Shelly Kagan – “friends of desert” (2012, p. 3). This centrality of desert in our thinking would seem to make it a good candidate for a principle of distribution of social benefits, social burdens, and punishment: to each according to what they deserve. Aristotle certainly seemed to favor something of the sort when he remarked that “all men agree that what is just in distribution must be according to desert in some sense” (quoted in Olsaretti, 2003, p. 3). Similarly, John Stuart Mill wrote that “it is universally considered just that each person should obtain that (whether good or evil) which he deserves” (1863/1998, p. 98).

Many contemporary political philosophers think rather differently. They appear to be a bit like the winking grandmother in the back of the painting, resisting the operation of desert as a principle of *distributive justice* – a principle that decides how social benefits and burdens are distributed. As Scheffler puts it (1992, p. 301): “none of the most prominent contemporary versions of philosophical liberalism assign a significant role to desert at the level of fundamental principle”.² It appears only luck egalitarian theories are an exception.³ The absence of desert in prominent theories of distributive justice is puzzling. How is it possible that a notion that is so ingrained in our thinking about what is just in distribution plays a rather limited role in philosophical reflection on that topic?

Matters get even more puzzling when one takes a look at contemporary theories of *retributive justice* – theories about the distribution of punishment. In such theories, desert frequently plays a central role.⁴ It seems that our intuitions about desert are reflected much more in discussions of retributive justice than in discussions of distributive justice. This has been called *the asymmetry of desert* thesis.⁵ Moriarty (2003, p. 512) has claimed that we would expect similar principles of justice to operate in both spheres of justice, because separating them is to some extent “artificial”.⁶ A justification of the asymmetry would show why the arguments for assigning desert a certain role in one realm of justice do not apply to the other realm. In case no such justification can be found, a re-evaluation of the role of desert in distributive and retributive justice may be required, so that desert is assigned a similar role in both. So far, Scheffler (2000), Smilansky (2006), and Moriarty (2013) have put forth justifications of the asymmetry.

Moriarty’s (2013) account is the only one that remains uncontested.⁷ However, in this paper I argue that it is unconvincing. To make my case, I will first flesh out the conception of desert that is at stake in the asymmetry of desert literature (section 2) and discuss Moriarty’s rationale for the asymmetry in greater detail (section 3). In section 4.1–4.3, I will argue that the cost asymmetry on which Moriarty bases his rationale⁸ is not as large as he suggests: rewarding retributive desert is more expensive⁹ and rewarding distributive desert less expensive. Additionally, I will claim in

section 4.4 that for Moriarty’s rationale to be successful, he needs to specify when systems of desert-based distribution and retribution are fair enough. Currently, he does not do so. These two claims together lead to the conclusion (section 5) that Moriarty’s rationale for the asymmetry fails.

2. What is desert?

There is some agreement amongst philosophers about what the concept¹⁰ of desert is, but much disagreement about how the concept should be fleshed out (McLeod, 2004; Olsaretti, 2004). Let’s start with the agreement. Desert is generally conceived of as a three-place relation among a subject (S), object (O) and desert base (D). An example would be: Rosemary (S) deserves to win the Rotterdam weightlifting contest (O), because she has the strongest muscles of all contestants (D). Also, it is typically assumed that the base of desert claims must be something about the subject, such as an attribute of hers or an act she performed (Feinberg, 1970).¹¹ Most of us would, for instance, strongly disagree if someone claimed that Rosemary deserves to win the Rotterdam weightlifting contest because her father has stronger muscles than all contestants. Finally, desert claims have normative or moral force (Olsaretti, 2004, p. 15). To claim that someone deserves something is to say that it is a morally good thing if she would get what she deserves.¹²

2.1. The conception of desert in the asymmetry debate

Philosophers seem to stop agreeing with each other on the topic of desert from this point onwards. There is much discussion on what *can* and *should be* the subjects, objects and especially bases of desert claims (see McLeod, 2004). Such dissent is mostly absent from the asymmetry of desert literature.¹³ All contributors assume that the *subjects* of desert claims are human beings. They take *objects* to be punishment in the retributive sphere, and social benefits and burdens in the distributive sphere – although some¹⁴ narrow down the latter to income and wealth. The *base* of desert, however, is often left unspecified. A possible desert base in the retributive sphere could be wrongdoing, while possible bases of distributive desert include effort and achievement.¹⁵

All contributors to the debate specify that they talk about prejusticial desert. To see what that means, it is helpful to distinguish prejusticial desert from institutional and preinstitutional desert. According to an institutional theory of desert, desert claims are based on the rules and purposes of the institutions of society (McLeod, 2004; Olsaretti, 2004, p. 17; Scheffler, 2000). To borrow an example from Rawls (1999): the team that scored the most goals while abiding by the rules of soccer deserves to win the game. This is a relatively simple conception to use in practice. To know what a person deserves, it suffices to apply the rules. However, simplicity may come at a cost here, as rules and institutions of society are not always just. We all know the feeling that the winning soccer team actually deserved to lose.

By basing desert on a principle of justice, preinstitutional desert allows for a discrepancy between desert and the rules and purposes of society's institutions. This conception of desert would make it possible to say: the rules of soccer are unjust, because they allow more able teams to lose matches. Note that preinstitutional desert is "parasitic" on another principle of justice – such as the principle that more able teams should get prizes (Olsaretti, 2004, p. 15). It derives its normative force from that other principle. Prejusticial desert, on the other hand, is grounded in itself. What people deserve is not a function of the rules and purposes of institutions, nor of another principle of justice. To ask what is just amounts to asking what is deserved.

2.2. The asymmetry of desert

With this conception of desert in mind, it is time to move on to the asymmetry itself. Although Moriarty (2003) coined the term *asymmetry of desert*, Scheffler (2000) was the first to write about it. He argues that Rawls (1999) assigns desert a different role in the distributive and retributive spheres of justice. Rawls insists that desert only has a derivative role to play in distributive justice,¹⁶ but he simultaneously argues that it should play a more pronounced role in retributive justice. One can see the opposition by comparing the following two passages from *A theory of justice* (1999).

In the first, Rawls considers the possibility of rewarding desert in the distributive realm:

[I]t is incorrect that individuals with greater natural endowments and the superior character that has made their development possible have a right to a cooperative scheme that enables them to obtain even further benefits in ways that do not contribute to the advantages of others. We do not deserve our place in the distribution of native endowments, any more than we deserve our initial starting place in society. That we deserve the superior character that enables us to make the effort to cultivate our abilities is also problematic; for such character depends in good part upon fortunate family and social circumstances in early life for which we can claim no credit. (p. 89)

In the second, he writes about rewarding desert in the retributive realm:

A propensity to commit such [criminal acts] is a mark of bad character, and in a just society legal punishments will only fall upon those who display these faults. (p. 277)

The question these passages raise is this: how can Rawls simultaneously claim that individuals do not deserve the fruits of their character and endowments when it comes to the distribution of primary social goods, but should be punished for their bad character? He does not provide an answer to this question. Rawls is one of the few philosophers in whose work the asymmetry¹⁷ can be found, which can be explained by the fact that he is one of few philosophers who wrote about both distributive and retributive justice. However, Moriarty (2003) and Smilanksy (2006) note that the asymmetry is quite a general phenomenon in contemporary theories of retributive and distributive justice. Desert frequently plays a fundamental role in the former, but not in the latter. This means that even if one does not agree with Scheffler's (2000) reading of Rawls, the asymmetry is worthy of attention.

3. Moriarty's consequentialist rationale: an asymmetry to defend the asymmetry

Moriarty is one of the most active contributors to the asymmetry of desert literature. Although he previously confessed to having serious doubts about whether the asymmetry can be justified (2003, p. 533), he has come up with a consequentialist rationale for it in a recent (2013) paper. The rationale is based on a difference in the costs of rewarding desert in the two spheres of justice. It is consequentialist, because Moriarty assumes that a practical consideration – the cost of rewarding desert – can outweigh the importance of giving people what they justly deserve. I think one could summarize his argument as follows:

- M1. A case can be made for requiring desert as a matter of justice,
- M2. Requiring desert in the distributive sphere would be very costly,
- M3. Requiring desert in the retributive sphere is not as costly,
- M4. Cost considerations can outweigh the importance of giving people what they justly deserve,
- M5. Therefore, an asymmetry in the costs of requiring desert between the two spheres of justice could provide a (partial) rationale for the asymmetry of desert.

To make his case, Moriarty refers to a paper by Arneson (2007) that argues that a free market does not reward people according to any plausible conception of distributive desert. He then claims that in order to implement desert-based distribution, a planned economy would be required. However, history has shown that planned economies are terribly inefficient. Requiring desert in the distributive sphere would therefore be expensive. This cost argument does not apply in the retributive sphere because much fewer people break criminal law than make productive contributions.

The upshot is that requiring desert is more costly in the distributive sphere than in the retributive sphere. Such cost considerations can be a reason to refrain from allocating all social benefits and burdens

according to desert. Cost considerations do not *justify* the asymmetry, however, as they do not undermine the case for requiring desert that Moriarty assumes (M1). Therefore, one should still try to reward distributive desert whenever this can be done at a reasonable cost. This seems quite possible for the distribution of a substantial number of goods: think of scholarships, welfare benefits, transplant organs, and work visas. What remains is a *residual asymmetry*: the whole of people's just share of punishment would be awarded according to desert, whereas only part of social benefits and burdens would be distributed in accordance with desert.

4. Bringing some symmetry to Moriarty's cost asymmetry

It is my contention that the cost asymmetry that Moriarty postulates does not succeed at vindicating the asymmetry of desert. To establish this claim, I will defend the following argument:

- B1. Distributing punishment according to what people deserve is more expensive than Moriarty suggests,
- B2. Distributing social benefits and burdens according to what people deserve is less expensive than he suggests,
- B3. Estimating the cost of rewarding desert requires the specification of a fairness threshold,
- B4. Moriarty does not specify such a threshold,
- B5. Therefore, Moriarty's rationale for the asymmetry of desert fails.

4.1. The cost of rewarding retributive desert

Moriarty (2013) does not ponder how well the criminal justice system is doing at rewarding desert. This is remarkable given that he (i) does ask this question for the market, (ii) answers that it is doing badly, and (iii) then argues that an inefficient planned economy would need to be implemented to properly reward distributive desert. Could a similar story be told for retributive desert?

To arrive at a tentative answer to this question, let's try to assess how well the criminal justice system in the United States is doing at rewarding desert. I restrict my attention to the United States here, because that is the country Moriarty focuses on. Now, to make the assessment, we need to know what it means to punish people according to their desert. In essence, it seems to entail giving people (S) punishment (O) grounded on a desert base (B). Moriarty does not specify what he takes the base for retributive desert to be. Suppose that it were 'wrongdoing by breaking criminal law'.¹⁸ Furthermore, assume for now that all the punishments for violations of criminal law in the United States are in fact in accordance with desert: no innocent people are arrested and convicted, and the punishments that guilty people get are perfectly in accordance with the law.

Even under such unrealistic assumptions, it seems that the U.S. criminal justice system is doing a poor job at giving wrongdoers the punishments they deserve. The Federal Bureau of Investigation (FBI) publishes yearly reports on crime clearance rates for the whole of the United States. In these statistics, a crime is marked as 'cleared' whenever the offender has been arrested or when she/he has been identified but cannot be arrested due to factors outside of the control of the relevant law enforcement agency (FBI, 2014). These are the main clearance rates for violent crimes and property crimes of all U.S. law enforcement agencies in 2013: murder and negligent manslaughter, 64,1%; forcible rape, 40,6%; robbery, 29,4%; aggravated assault, 57,7%; burglary, 13,1%; larceny-theft, 22,4%; and motor vehicle theft, 14,2%.

The clearance rate for all of these offenses is well below 100%. Note that the reported clearance rates include cases in which the known offender cannot be arrested and punished. What is more, it is well established in criminology that crime is underreported by victims and underrecorded by the police (MacDonald, 2002). In other words, a substantial number of the crimes committed are not met with any form of legal punishment. The perpetrator walks free. I think that these statistics are enough to cast serious doubts on the ability of the U.S. criminal justice system to currently punish wrongdoers in accordance with what they legally deserve. Achieving increases in the clearance rate of crimes is likely to come at

considerable costs: more police on the streets, more surveillance, more cases to be tried, more people in prison, and so on.

If such a costly rise in clearance would need to be realized before it can be assumed that wrongdoers are sufficiently punished in accordance with their deserts, it seems that the cost asymmetry on which Moriarty bases his rationale decreases. This implies that a smaller part of the asymmetry of desert can be rationalized by cost considerations.

4.2. The cost of rewarding distributive desert

The cost asymmetry decreases further if one considers that desert-based distribution may be less expensive than Moriarty claims. He argues that the (free) market does not reward people according to any reasonable conception of individual desert. The only way in which one could reward distributive desert is by implementing a planned economy. As history has shown time and again, however, planned economies are inefficient, which makes rewarding distributive desert an expensive option. What Moriarty seems to ignore here though, is that a number of proposals have been put forth for combining the efficiency of the market with rewarding distributive desert. One example is the 'belasting op bekwaamheid' (talent tax) proposed by the Dutch Nobel prize-winning¹⁹ economist Jan Tinbergen (1970). His idea is to have people pay a fixed amount of tax each year that increases with their capacity to earn. Such a system approaches a desert-based system of distribution by making people's incomes less dependent on factors outside their control, such as genes and upbringing.

Plug, Van Praag and Hartog (1998) work out Tinbergen's suggestion.²⁰ They claim (p. 186) that capacity to earn can be approximated by (i) physical health, (ii) cognitive intelligence, (iii) social and emotional intelligence, and (iv) gender (men live shorter than women and do not bear children). In countries with mandatory education, such information could initially be acquired at schools and updated when required. Everyone would pay a fixed amount (lump sum) of tax, regardless of how many hours he or she works. The height of the tax increases with capacity to earn. A system of income taxation based on capacity to earn is likely to be more efficient than the current tax system in the United States. There,

the marginal tax rate²¹ increases with income – which creates a disincentive to work harder (p. 207). Also, a talent tax would significantly reduce the costs of assessing each year how much income tax people need to pay. People's capacity to earn is unlikely to unpredictably change significantly over time.

Talent-based taxation comes with worries too. People may have a strong incentive to understate their capacity to earn. However, tax administrators could reduce this incentive by making higher education admission and job selection for the government (as they already are to some extent) dependent upon factors as (ii) cognitive intelligence, and (iii) social and emotional intelligence. Additionally, one may worry that people's privacy is infringed upon too much if the government tests people for their capacity to earn. I would retort that the current tax system in the United States also infringes upon people's privacy quite a bit. When parents apply for financial help (Temporary Assistance for Needy Families) in the state of Georgia, for instance, they need report whether their children (i) have satisfactory attendance at school, (ii) have been immunized, (iii) have experienced domestic violence, (iv) suffer from physical or mental incapacities, and so on (Georgia Department of Human Services, 2015).

The upshot is that if a talent tax could ensure distribution in accordance with desert, it appears that it is less costly to reward distributive desert than Moriarty claims. Hence, the cost asymmetry on which he bases his rationale would decrease further.

4.3. The inefficiency of planned economies

There is one more point that is worth mentioning here. Moriarty claims that history has shown that planned economies are inefficient and lead to a low standard of living. By implication, a planned economy that rewards distributive desert will lead to a low standard of living as well. I disagree with this inference, because it seems that planned economies that aimed to reward individual desert have not really been tried yet. The lion-share of the planned economies of at least recent economic history consists of the economies that made up the Union of Socialist Soviet Republics

(USSR). These economies were notorious for the lack of individual incentives to work harder (Murrell, 1991).

What factory managers were paid depended on whether they met production targets. Such targets were frequently defined just in terms of quantity, which meant that managers had no incentive to (i) produce more than the target, and (ii) produce goods of higher quality. Such an incentive problem might be less prevalent in planned economies that aim at rewarding individual desert. After all, such a system could provide people with an incentive to become more deserving, whereas such incentives were largely absent in the USSR economies. The upshot of this is, again, that rewarding distributive desert might not be as expensive as Moriarty claims it to be, even if it would require implementing a planned economy.

4.4. A fairness threshold

Moriarty might respond to my argument by claiming (i) that the U.S. criminal justice system is actually doing sufficiently well in giving people the punishments they deserve, and that (ii) in proposals like that of Tinbergen, people's distributive desert is not rewarded in a precise enough manner. This brings me to a problem that underlies Moriarty's rationale for the asymmetry. To be able to assess to what extent it is successful, one needs to be clear on when a desert-based system of distribution and retribution is fair enough. It appears that the lower one sets the fairness threshold for rewarding desert, the cheaper it will become to implement desert-based systems of distribution and retribution.

Wolff (2013) claims precisely this when he argues that for any such system, there is a tradeoff between feasibility and fairness. 'Feasibility' refers to the idea that the information required for requiring an individual's desert can be approximated at reasonable costs. The lower these costs are, the more feasible a system for requiring desert is. 'Fairness' considerations typically pull in the opposite direction. They refer to the extent in which a measure of desert really captures an individual's desert. The cheaper one's measure of desert is, the less likely this is to be the case. To see this more clearly, it is helpful to think of requiring distributive desert in accordance with effort.

If we were to aim at rewarding effort *corrected for* differences in genetic endowment and upbringing, we would naturally need to gather information about these two factors. Approximating this information by education level would be quite cheap, but might be unfair. After all, the education level that people obtain is likely to be determined both by their effort-making ability, but also the ability-corrected effort they exerted. We only aim to correct for the former, but not the latter. A fairer measure would be to establish people's effort-making ability by submitting them to a full day of testing. Doing so for the whole population of a country, however, would be expensive. This, in a nutshell, is the tradeoff between the feasibility and fairness of rewarding desert.

The success of Moriarty's rationale for the asymmetry of desert stands or falls with what tradeoff between fairness and feasibility he deems acceptable. I have claimed that little would be left of his rationale if he would deem desert-rewarding systems as the talent tax fair enough, and the current criminal justice system in the United States unfair. Whether Moriarty would do so, is guesswork: he does not explicitly consider the tradeoff. Therefore, I claim that (B5) his rationale for the asymmetry of desert fails.

5. Conclusion

The asymmetry of desert is a fascinating puzzle. It can be solved either by providing a justification for the asymmetry, or by assigning desert a similar role in distributive and retributive justice. This paper critically evaluated Moriarty's consequentialist rationale for the asymmetry. He claims that an asymmetry in the costs of rewarding desert between the distributive and retributive sphere can (partially) vindicate the asymmetry of desert. I claimed that (B1) rewarding desert in the retributive sphere might be more expensive than Moriarty seems to think. At the same time, (B2) rewarding desert in the distributive sphere may not be as expensive as he suggests. Combining these two claims, it turns out that the cost asymmetry that underlies Moriarty's consequentialist rationale is not as large as he makes it out to be. In addition, I argued that the success of Moriarty's defense of the asymmetry hinges on the (B3) specification of a fairness threshold

for desert-based systems of distribution and retribution. As Moriarty does (B4) not specify such a threshold, it appears that (B5) his rationale fails.

Should political theorists become more or less like the desert-upsetting grandmother in Jan Steen's painting? The disappointing but simultaneously hopeful answer is: I do not know, *yet*. This paper criticized the last defense of the asymmetry of desert that remained uncontested. However, new justifications could be found. In my view, the way forward is further conceptual reflection upon distributive and retributive desert – in the line of recent work by Olsaretti (2004), Kagan (2012), and Walen (2014). So far, the assumption in the asymmetry of desert debate has been that similar conceptions of desert are at stake in both spheres of justice. I highly doubt this assumption. This raises a new question: if there are different conceptions of desert at stake in theories of distributive and retributive justice, to what extent can one still speak of an asymmetry of desert that is in need of justification? This is a question for a different paper.

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Editorial note

Since this essay was written by a member of the editorial board of the Erasmus Student Journal of Philosophy, it was subject to a more extensive review procedure. For more information, see

<http://www.eur.nl/fw/english/esjp/submissions>

Notes

1. Symbolizing an instrument with which bad children would be whipped.
2. The term 'fundamental principle' here refers to a preinstitutional and prejusticial notion of desert. I will explain what such a notion of desert is in the next section.
3. Luck egalitarians such as Cohen and Dworkin argue that unequal distribution only is morally permissible if it is the result of deliberate, calculated gambles by people. Concomitantly, inequalities are impermissible if they are the result of 'brute luck' factors such as genetic endowment and upbringing. Lippert-Rasmussen (2014) provides an overview of the many variants of luck egalitarian theories.
4. See, for instance, Olsaretti (2003), Smilansky (2006), and Walen (2014).
5. See Moriarty (2003, 2013), and Smilansky (2006).
6. See Moriarty (2003) for a more elaborate argument on why the asymmetry of desert is in need of justification. I will not repeat it here, but simply assume that the asymmetry is indeed in need of justification.
7. Scheffler's (2000) justification has been challenged by, amongst others, Moriarty (2003) and Miller (2003). Smilansky's was challenged by Moriarty (2013). Note that Scheffler (2003) published a more refined version of his justification to accommodate some of the criticisms he received. This 'updated' justification has not received critical scrutiny yet.
8. When talking about his *rationale* for the asymmetry of desert, Moriarty (2013) occasionally uses the word 'justification'. I think this is confusing, because he actually argues that the asymmetry could be unjust, but we might leave it intact because it would be costly to eliminate it. Consequently, I will consistently talk about Moriarty's rationale in this paper from now on.
9. Note that Moriarty does not specify what he takes 'expensive' and 'costly' to mean. I took these terms to denote not only monetary costs, but also feasibility concerns.
10. I am here using the word 'concept' as defined by Rawls (1999, p. 5). It refers to the structure of the term 'desert': a three-place relation between subject, object and desert base. A conception of desert would be a concept of desert in which the subject, object and desert base are specified.

11. Desert claims are typically backward-looking (i.e. based on past and/or current attributes or acts), although David Schmitz (2011) has recently published a plea for forward-looking desert.

12. There is disagreement, however, about whether desert claims can or should be able to ground obligations.

13. This is claimed, *inter alia*, by Moriarty (2003, p. 519).

14. Smilansky (2006) does that, for instance.

15. Note, however, that there are many other possibilities. See, for instance, Wolff (2003, pp. 220-221).

16. Note that this interpretation is contested. Scanlon (1986) and Sandel (1982) interpret Rawls as assigning the same role to desert in both the distributive and the retributive sphere.

17. Scheffler (2000) and Moriarty (2003) claim this.

18. Of course, the notion of desert being discussed in the literature on the desert asymmetry is prejusticial, so might not coincide with criminal law at all times. This, among other reasons, is why I call my answer to the question how well the U.S. criminal justice system is doing at rewarding retributive desert 'tentative'. I decided to focus on criminal law here for two reasons. First, it is the best proxy for a prejusticial notion of retributive desert that I can think of *for which data are available*. Second, Moriarty cites statistics of the United States criminal justice system as well, and I am responding to his argument.

19. I am well aware that it is actually the Sveriges Riksbank Prize in Economic Sciences in memory of Alfred Nobel, and that Alfred Nobel did not include this award in his testament. All this is besides the point of the paper.

20. An elaboration on Tinbergen's suggestion was needed; the article in which Tinbergen calls for the talent tax is only three pages long.

21. The tax paid on an additional dollar earned.

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