

**JUSTICE
AS
FITNESS**

Thesis submitted in accordance with the requirements
of the University of Liverpool for the degree of
Doctor in Philosophy by Geoffrey Cupit.

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Abstract

Justice as Fitness

Geoffrey Cupit

In 'Justice as Fitness' I have argued that a unifying and coherent account of the concept of justice can be given. Injustice, I have suggested, is to be understood in terms of the notion of treating someone unfittingly, that is, by treating them as if they were less, or lower, than they are. This account of justice suggests that desert is central to justice; to treat someone as less than they are is to treat them in a manner in which they deserve not to be treated. It is intended that this account of the concept of justice be consistent with (many of) the various conceptions of justice, that is, with the various conceptions of what is and is not just, and that these various conceptions be illuminated by being viewed as interpretations of the 'justice as fitness' concept of justice.

In the course of defending this view, rule-relative and non-rule-relative justice are compared and contrasted, an attempt is made to place the concept of justice in relation to such concepts as authority, merit and worthiness, degradation and value, and the view that justice is always a matter of desert is defended against the charge that considerations, irreducible to desert without conceptual impropriety, are relevant. The problematic character of people being said to deserve compensation and treatment in accordance with their contribution are explored. Accounts of the obligation to keep a promise, and of political obligation, are offered. It is argued that there is reason to believe that reasons for action are incommensurable.

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Preface

I have tried in this thesis to develop a unified and coherent account of the concept of justice. To be at all persuasive such an account must be as comprehensive as possible. Although I have certainly not done more than sketch the broad outline of this account, I have nevertheless largely had to forgo discussion of the views of others. It is, I believe, better to avoid the insult of an inevitably superficial discussion of significant works. My failure to discuss the views of others should not, however, be thought to imply that I have not learnt a great deal from those who written on justice. I should like to take this opportunity to acknowledge my debt to four works which have particularly stimulated my thoughts. My interest in justice began, as an undergraduate, with study of John Rawls' *A Theory of Justice*. Subsequently, I wrestled with Robert Nozick's *Anarchy, State and Utopia*. In trying to develop my own ideas I have returned again and again to David Miller's *Social Justice*. Readers familiar with *Social Justice* will be aware of the extent to which this book has 'set the agenda' of my discussion. I began to consider the concept of desert with the intention of showing the unsatisfactory nature of this concept, and with a view to recommending that it be abandoned, at least as far as theoretical discussion is concerned. As the reader will discover, matters did not work out quite as I intended. Like others I have found Joel Feinberg's article, '*Justice and Personal Desert*' enormously helpful.

My interest in political philosophy was aroused when, in my final year as an undergraduate, I chanced to take a course on political ideas taught jointly by Russell Keat and Geoff Smith. This course was, far and away, the highpoint of my education; I was thrilled. I am indebted to them for having provoked a decade of thought about the problems there raised. And, I am sure, there are many years of ruminating ahead.

I am very grateful for the help and encouragement I have received over the years from my successive supervisors, Terrell Carver and Peter Morriss. Both have done much more for me than supervise. I have learnt a great deal in conversation with former teachers and colleagues; I should particularly like to express my thanks to Keith Graham, Janet Hutchings, Russell Keat, David Milligan and Tariq Modood.

I have tried out some of the ideas in this thesis - and rather more since abandoned - in papers read at meetings in the Philosophy Departments of the Universities of Bristol, Hong Kong and Lancaster, and I should like to express my thanks to all those people who attended and tried to show me the error of my ways.

I have tried the patience of many friends over the last few years, subjecting them to my latest wild ideas at all hours of the day and night. I must express not only my thanks, but also my apologies to these good people; especially B.J. Gran. Dr. K.

Singer satisfied an unanticipated need at a critical time.

I should like to acknowledge financial support from the late Social Science Research Council in the form of a post-graduate award which enabled me to undertake this research. I should also like to thank the University of Bristol and the University of East Asia for allowing me time to continue this work whilst in their employment.

The tedious task of preparing the present typescript was undertaken with astonishing good humour by Maggie Ho, Anna Lam and Tracy Yuen. It is, I think, a magnificent achievement.

Susie Fung organized and prepared the clear and elegant typescript which I originally submitted from my extremely inelegant and unclear offerings in the little time I left to her. I am deeply indebted to her; without her labours late into the night I could not have submitted the work in time. I should like to dedicate this work to her, and to my mother and father who made many sacrifices to enable me to study, and who first taught me how we should act.

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Chapter 1. The Concept of Justice

In this first chapter I begin by trying to explain what, in general terms, I will try to achieve in this thesis. I then go on to indicate the central idea of Justice as Fitness, to give some indication of the issues to be raised and the methods to be used and, finally, to explain how I propose to set about my task.

1.1. The Concept and Conceptions of Justice

What is justice? It is this seemingly simple, but beguiling question which I want to try to answer. Since the question is so difficult, it will be as well to begin with some remarks about the question itself and how it is to be understood.

Suppose we disagree as to whether some particular action is or is not unjust. In discussion we may discover that we agree in our basic ideas of which types of action are unjust, but find that we have applied these basic ideas to the particular case in different ways. Let us say that, in such a case, we share a view of what is just and unjust, a conception of justice, but disagree as to how the conception or theory is to be applied to the particular case. However, we may find that our disagreement goes deeper than this, that we do not share a conception of justice, and that our views on what types of action are just and unjust differ, perhaps even in a radical fashion.

Suppose, then, that we agree that we do not share a conception of

justice. We may, nevertheless, be willing to accept that we each have a conception of justice. That is, we may agree that our respective conceptions are conceptions of justice. And if this is so then it would seem that there must be at least some measure of agreement between us about justice; we must, it would seem, share an understanding of what 'justice' means, a concept of justice. (1)

Of course the disagreement may take a different form: one party may be unwilling to accept that the other has a conception of justice at all. It may be denied that the other party has a conception of justice, that is, an adequately clear and coherent set of views; or it may be denied that the other's conception is properly described as a conception of justice. On some occasions these responses are, no doubt, the most appropriate that can be made. But this is not always so: in many discussions of whether an action or policy is just or unjust, disagreement arises as a result of the clash of, what are accepted on all sides as being, differing conceptions of justice. And if this is so it does seem to follow that there is some concept of justice which at least most of use share.

(1) My use of 'concept' and 'conception' of justice follows RAWLS (1972), p5. Full details of works cited are given in the Bibliography.

Our task will be to try to characterize this concept of justice which, I allege, at least most of us share. I shall, therefore, be proposing, and attempting to defend, a view of the basic idea, the central core, of the notion of justice which, I will claim, lies at the heart of our talk of, and our theorizing about, justice. (2)

The task of attempting to elucidate the concept of justice has, of course, been undertaken before. An attempt was made by Sidgwick in Methods of Ethics, and it is worth reminding ourselves of his judicious statement of the problem. (Sidgwick's discussion of justice was part of his programme to determine whether the method which he termed 'intuitionism' was coherent. But Sidgwick's statement of the problem is worthy of note even if we are not concerned with that issue.) Sidgwick begins his chapter on justice with the following:

We have seen that in delineating the outline of duty, as intuitively recognized, we have to attempt to give to common terms a definite and precise meaning. This process of definition always requires some reflection and care, and is sometimes one of considerable difficulty. But there is no case where the difficulty is greater, or the result more disputed, than when we try to define Justice.

(2) In so doing I follow Slote (SLOTE (1972-3), p339):

I think, then, that the concept of justice can be analysed more substantively and less trivially than Rawls and others have supposed, even though I do agree with Rawls that the concept of justice must be something common to different conceptions of justice.

Before making the attempt, it may be as well to remind the reader what it is that we have to do. We have not to inquire into the derivation of the notion of Justice, as we are not now studying the history of our ethical thought, but its actual condition. Nor can we profess to furnish a definition which will correspond to every part of the common usage of the term; for many persons are undoubtedly vague and loose in their application of current moral notions. But it is an assumption of the Intuitionist method that the term 'justice' denotes a quality which it is ultimately desirable to realize in the conduct and social relations of men; and that a definition may be given of this which will be accepted by all competent judges as presenting, in a clear and explicit form, what they have always meant by the term, though perhaps implicitly and vaguely. In seeking such a definition we may, so to speak, clip the ragged edge of common usage, but we must not make excision of any considerable portion. (3)

As Sidgwick says, the project is difficult, and any results we obtain are likely to be at best controversial. It may be wondered, therefore, whether we are wise to embark on such a project at all. Is there any reason to suppose that there is a common core to the different conceptions of justice? Perhaps - it may be suggested - there simply is nothing common to the various uses of 'just' and 'unjust'. (4) If this were so our search would be doomed to failure from the outset. Even if it were conceded that there is a common concept of justice, it may be asked whether there is any reason to suppose that the measure of agreement embodied in that concept will be anything but meagre

(3) SIDGWICK (1981), p264. Footnotes omitted.

(4) The assumption that where there is a general term there is also a common property was, of course, discussed and questioned by Wittgenstein. See, for example, WITTGENSTEIN (1969), pp17-19 and 86-87; and WITTGENSTEIN (1972), Part I, Sections 65-77.

and banal. If this were so then it would seem that, even if we were to be successful in elucidating the concept of justice, we should establish nothing which would help to resolve substantive disputes concerning what is, and what is not, just.

These are not unreasonable fears. Certainly some concepts appear to be 'contested' (5), and there often appears to be no more than a family resemblance between the diverse uses of a term. But it does not follow that there is no greater coherence than there appears to be. It is not, I think, appropriate to respond to these reservations directly. The only satisfactory way to support the claim that the concept of justice is coherent is to present and defend a particular view of that coherence. If the argument of this thesis is successful then the foregoing reservations will thereby have been shown to be over-cautious. I shall endeavour to show that they are indeed over-cautious, that the concept of justice has a greater coherence and unity than appearances may suggest, and that an understanding of this coherence will, in turn, enable us to achieve a better understanding of the differing conceptions of justice, and of the disputes to which they give rise.

I have distinguished between the concept of justice and a

(5) The notion that some concepts are essentially contested is presented in GALLIE (1955-6). Gallie's account is discussed in GELLNER (1967-8).

particular conception of justice, and in so doing I have followed Rawls' discussion in the opening pages of A Theory of Justice. It may not be inappropriate therefore to indicate very briefly why I do not wish to follow Rawls further and endorse the characterization of the concept of justice offered in A Theory of Justice. Rawls' view is that the concept of justice is to be understood by reference to the role which principles of justice, conceptions of justice, play. He writes:

Thus it seems natural to think of the concept of justice as distinct from the various conceptions of justice and as being specified by the role which these different sets of principles, these different conceptions, have in common. (6)

Now, of course, in order to make use of the suggestion that the concept of justice is to be understood by reference to the role of principles or conceptions of justice, it is necessary that we are able to distinguish between those principles which are, and those which are not, principles of justice. Unless we are able to isolate principles of justice from other principles, we shall hardly be able to proceed to the stage of trying to determine the role they "have in common". It is, I think, only fair to add that we almost certainly misread Rawls if we read him as commending a two stage process for determining the nature of the concept of justice. Rather he is concerned only to distinguish

(6) RAWLS (1972), p5.

concept from conceptions, and to offer what he takes to be a "natural" and uncontentious view of each. What, then, is Rawls' view of the concept, and conceptions, of justice? In summarizing his account, he writes:

... I have distinguished the concept of justice as meaning a proper balance between competing claims from a conception of justice as a set of related principles for identifying the relevant considerations which determine this balance. (7)

Now Rawls is, of course, only concerned with social justice, and, indeed, only with an, albeit important, portion thereof. His theory is an attempt to work out an 'ideal theory' for the 'basic structure' of society. Continuing to summarize his view, he explains that the theory he will propose:

... is not offered as a description of ordinary meanings but as an account of certain distributive principles for the basic structure of society. I assume that any reasonably complete ethical theory must include principles for this fundamental problem and that these principles, whatever they are, constitute its doctrine of justice. (8)

The basic idea, then, seems to be that any set of principles offered for determining the division of benefits and burdens among the members of a society is a conception of justice, that

(7) Ibid, p10.

(8) Ibid, p10.

this may not be in accordance with the 'ordinary meaning' of 'justice', but, if this is so, it is not of major significance, and that any decent moral theory is going to have to come up with principles of the type which Rawls is calling principles of justice. Whether such principles are called 'principles of justice' or not is merely a terminological matter.

I propose to reject the view that the concept of justice is intimately linked with the division of benefits and burdens between the members of some group or society. I do not, of course, wish to deny that the division of benefits and burdens between the members of a group may be just or unjust. Clearly, principles of justice have a role to play when it comes to arguing about the division of benefits and burdens within a society. But it does not follow that such a role must, or should, be taken as the defining characteristic of justice, as Rawls suggests. (It seems presumptuous, without argument, to speak of the role which principles of justice have "in common". It is hardly obvious that principles of justice have only one role 'in common'.)

I want to argue that Rawls' approach is cavalier: there are, it would seem, clear disadvantages to adopting Rawls' characterization of the concept of justice, but no obvious compensating advantages. Rawls implicitly concedes that his use of 'justice' may be a departure from the 'ordinary meaning' of the term. But if this is so we shall require reasons for the adoption of what, in the absence of such reasons, would simply be

a perverse use. There is an obvious and basic presumption against increasing ambiguity. The substantive issue which Rawls discusses, (namely, the question of what constitutes a proper balance of claims to be embodied in the basic structure of a society) is, undeniably, an important one. But it is, surely, possible to discuss this issue without requiring that the term 'justice' be appropriated to label any answer to the question which the issue raises. My objection to Rawls' use of 'principles of justice' to refer to any principle which is held to play a role in the determination of the proper balance of competing claims when it comes to the division of benefits and burdens within a society, is that this is to do serious violence to our moral vocabulary. Let me illustrate this violence, and then explain why I regard such violence as of consequence.

One of the standard objections of utilitarianism is that, in principle, it is consistent with gross injustice. And the standard hard-nosed response to this objection is: 'so much the worse for justice'. Such an exchange is immediately intelligible. Of course, it raises many questions as to the nature and importance of justice. But it is a normal use of the language. It would, however, appear to be inconsistent with what Rawls claims is a "natural" way to think of the concept of justice. For if one holds that some utilitarian principle should play the role of determining how the benefits and burdens in a society should be distributed, then that utilitarian principle is, on Rawls' view, ipso facto, a principle of justice. The

standard objection cannot then be put by saying that utilitarianism 'does not take justice seriously', nor the standard hard-nosed reply by saying 'so much the worse for justice'. We cannot say that it is justice, rather than some particular conception of justice, which the utilitarian (rightly or wrongly) ignores, for utilitarian principles are, on this view, principles of justice. I do not see how this way of speaking can be said to seem "natural" and thus nor, I think, can the view that justice is simply the proper balance of competing claims. The question is, then, whether such distortion matters. I believe it does. I will explain why in my discussion on philosophical method. But first I want to introduce the main idea of justice as fitness. This will, I hope, enable the reader to benefit from knowing in which direction he is to be led.

1.2 The Main Idea of Justice as Fitness

Consider first the view that justice requires that we 'treat like cases alike'. As Hart says:

...we need to add... 'and treat different cases differently'. (9)

for, of course, the requirement that like cases be treated alike is satisfied by treating all cases alike.

This view of justice is widely accepted, and it is inconceivable that it is wholly mistaken. (10) However, as an account of the concept of justice it is inadequate for obvious and well known reasons.

(9) HART (1961), p155.

(10) It is to view justice, to borrow Feinberg's terms, as comparative rather than non-comparative. See Feinberg's 'Non-comparative Justice' in FEINBERG (1980), especially p266. (Feinberg's analysis is discussed in MONTAGUE (1980).)

Hart suggests that justice is fundamentally comparative; he writes (HART (1961), p155):

The general principle latent in these diverse applications of the idea of justice is that individuals are entitled in respect of each other to a certain relative position of equality or inequality.

For a similar view of justice as comparative see BENN AND PETERS (1959), p11.

Firstly, the view is consistent with always acting unjustly: for example, if all guilty defendants were found not guilty, and all innocent defendants were found guilty, this would satisfy the requirement to treat like cases alike and different cases differently. But, obviously, it would not be justice. The point can be generalised. Justice requires not only that like cases be treated alike, and different cases differently, but that the treatment should be appropriate.

Secondly, justice does not require us to treat all different cases differently, irrespective of what the difference is. Some differences are of no significance, and do not call for differences in treatment. The point is often made by saying that justice requires us to treat relevantly different cases differently, and relevantly similar cases similarly. This may be true; but it raises the question of how we are to determine which differences are relevant, and which are not.

The injunction to treat like cases alike and different cases differently may be viewed as a precept urging impartial action and unbiased judgement. This may be enough for fairness, but, as we have seen, it is not enough for justice. We may, therefore, say that the requirement that we act impartially and without bias - perhaps fairly - is a consequence of the requirement that we act justly. But impartiality cannot be constitutive of justice. Justice is the deeper and richer concept: it is the requirement to act justly which accounts for the requirement to act impartially or fairly.

Let us suppose that the concept of justice has a greater degree of structure than appearances suggest. One way in which this might be so is for all cases of injustice to have some particular form, and for some, but not all, cases of injustice to manifest this form. If this were the situation we could distinguish between transparent cases (i.e. cases of injustice which manifest the form of all injustice), and opaque cases (i.e. those cases which possess, but do not manifest, the form of injustice). If there are opaque cases then understanding justice is not simply a matter of 'looking'. Certainly we need to look. But we need to think too.

Let me introduce an example of what is, I believe, a transparent use of the concept of justice. Suppose that I believe you are untrustworthy. When you make me a promise I go out of my way to avoid relying upon you. I warn other people not to rely upon you. And now suppose I discover that my belief that you are untrustworthy was based on a misunderstanding. I have no reason to consider you untrustworthy. I shall - I hope - admit my mistake and say that I have done you an injustice, that my treatment of you was unjust. Such a case is - I claim - a transparent use of the concept of justice. (11)

(11) Cf. FEINBERG (1980), p268 (emphasis added):

The clearest examples of non-comparative injustice are cases of unfair punishments and rewards, merit grading, and derogatory judgments. Of these three kinds of activities, the third seems to be the most basic from the point of view of justice,...

Some readers may be surprised at the choice of this example. Let me try to anticipate their reservations. Firstly it may be said that this is not 'really' a case of injustice. My reply is that people do call such treatment 'doing an injustice'. I am happy to take this at face value. It is for those who wish to argue this way to try to do so.

Secondly it may be thought the example is a trivial case of injustice - of insufficient importance to constitute a paradigm case. My reply is that, even if this were true (and I do not accept that it is), there is no reason to suppose that a minor injustice may not be transparent. I shall use this example, not because I believe it to be an example of an important injustice, but because it is - I claim - an example of a transparent use.

Thirdly it may be held that the example does not manifest the general form of injustice. That is, my claim that the case is a transparent case may be rejected. This is, of course, precisely the question at issue, and everything I shall say in this work can be viewed as an attempt to buttress my claim that this particular case is transparent. (Anyone who wishes to claim that this example is not transparent but opaque will, of course, owe us an explanation of our use of 'injustice' in this context.)

Let us now return to the main argument. The points I have made regarding the inadequacy of the precept 'treat like cases alike, and different cases differently' can be illustrated by the example we have just introduced. Firstly, the injustice of

treating a trustworthy person as untrustworthy would not disappear if we were to treat all trustworthy people as untrustworthy (and all untrustworthy people as trustworthy). The suggestion that justice requires that our treatment be appropriate is consistent with this case: treating a trustworthy person as untrustworthy is, clearly, an example of inappropriate treatment.

Our second point was that difference and similarities had to be 'relevant'. Not any difference, nor any similarity, is sufficient for justice to require that two people be 'treated differently' or 'treated alike'. Again the example is consistent with this requirement and suggests how 'relevance' might be understood: by the use of the notion of 'treating as'. If A has property P, and B lacks property P, then this difference is relevant to the justice of act W, if act W constitutes treating A or B as possessing or lacking P. In the particular example we have considered, whether a person is trustworthy or untrustworthy is, obviously enough, relevant to the justice of any act which constitutes 'treatment as trustworthy' or 'treatment as untrustworthy'.

There is a further point worth noting about the example: the attribute concerned (trustworthiness) is a virtue; it bestows merit on its possessor. And it seems plausible to say that if we did not consider trustworthiness to be a virtue, we should not consider treating a trustworthy person as untrustworthy to be

unjust (or, at least, not obviously unjust). I will argue that the relationship between injustice and a virtue which occurs in this example - namely, that an unjust act is constituted by the treatment of a person as lacking some particular virtue (that is, an attribute conferring merit on its holder) which they do possess - is not accidental, but rather, that this relationship between an injustice and a virtue appears in all cases of injustice, and, indeed, that that pattern is part of the nature of justice.

By way of a summary let me now present the fundamental idea of justice as fitness: to act unjustly, I will argue, is to treat someone inappropriately or, as I will say, unfittingly, that is, as lacking some virtue (or possessing some vice) which they do not lack (or possess). The point can be put in a familiar metaphor: to do someone an injustice is to treat them as less, or lower, than they are.

I have called this view 'justice as fitness' since, on this account, the essential feature of an unjust act is that it is unfitting: we act unjustly when our treatment of a person does not fit the person treated. The term 'unfitting' is sometimes used to refer to any act which should not have been performed. I will not be using it in this manner. I will use the term in the specific sense I have indicated: an act is unfitting if and only if to perform the action is to treat a person, A, as possessing (or lacking) some attribute which they do not possess (or do not lack). And, since 'fitness' may be used to mean what is

appropriate - as in the expression 'the fitness of things' - I shall use 'fitness' rather than the somewhat inelegant 'fittingness'.

I will claim that to act unjustly is to act unfittingly. But I do not claim that to act unfittingly is to act unjustly. In other words there are, I believe, actions which are unfitting, but not unjust: we may say that fitness is the genus, and justice the species within that genus. Justice is one of a family of concepts.

Let me illustrate this point with the following example. Suppose Brown shows contempt for a judge in a court of law. He refuses to stand up, swears, and so on. Now we may wish to say that Brown has treated the judge inappropriately or unfittingly, that he has treated the judge as less than he is. But this point would not normally be made by describing Brown's actions as unjust. Rather such actions might be described as disrespectful or contemptuous. Here, then, we appear to have a case of an unfitting action which is not unjust. This is no objection to the theory I propose to defend: my claim is that all unjust acts are unfitting, not that all unfitting acts are unjust. However the case does raise the question of which unfitting acts are unjust. How does injustice differ from other types of unfitting acts? This issue will be explored later.

It may be helpful to compare justice as fitness, with another

familiar characterization of justice, namely, that of 'giving to each according to their due'. (12) It is clear that the two views are not unrelated; if we treat a person unfittingly we are, it would seem, failing to provide what is due to them. (If we fail to provide what is due we may or many not be acting unjustly. In our previous example Brown - we are to suppose - failed to treat the judge with the respect which was due. But - I suggested - he did not act unjustly. It would appear, therefore, that 'to each according to their due' is - like fitness - a wider notion than justice.)

Nevertheless, despite the affinity between justice as fitness and 'to each according to their due', justice as fitness - if sound - is to be preferred for its greater potency. It is, I suggest, quite unclear how we might extract from the formula 'to each according to their due' any indication of what is due to anyone. (This is, of course, widely acknowledged, and 'to each according to their due' is described as a purely 'formal' account of justice.) But the notion of fitness I am using is more potent; it contains within it a suggestion of how we might set about

(12) Among countless reiterations see MILLER (1976), p20:

... the most valuable general definition of justice is that which brings out its distributive character most plainly: justice is sum cuique, to each his due.

and FEINBERG (1980), p266.

In all cases, of course, justice consists in giving a person his due,...

determining what is due to a particular person. As I have said an action which constitutes treating a person as less than they are is unfitting. In order to determine what is due we may, therefore, consider which actions constitute treating the person concerned as less than they are. I do not wish to pretend that answering this question is a simple matter. But it does suggest an avenue to explore.

Justice as fitness derives its greater potency - as compared with 'to each according to their due' - by being more specific and assertive and, thereby, more contentious and risky. Let me illustrate this point with two examples. Consider first the case of needs. It is held by some that, in appropriate circumstances, to act justly requires the distribution of benefits in accordance with need. Such a view appears to raise no problem for the view that justice is a matter of treating each according to their due. What is due to someone is, it is claimed, what they need. But the view that justice requires (at least sometimes) distribution according to need appears to raise a problem for justice as fitness, for it requires us to hold - if we hold that what is just is 'to each according to their needs' - that to fail to distribute in accordance with need is to treat the needy as less than they are. But is this so? (If it is, how is it so?) After all, it is not generally held that to be in need is, ipso facto, to be a higher or more worthy person.

Consider also the case of entitlements. Suppose I appear to be failing to honour a contract we have made, and you go to court.

The judge, however, has accepted my offer of a bribe and decides against you. You complain that you have been treated unjustly, that you have been denied that to which you are entitled. Now clearly, this can happily be put by saying that you have been denied that which is due to you. But have you been treated as lower or less worthy than you are? It seems not. It is not generally held that to become entitled to some goods or services is to become higher, to be rendered more worthy. How could it be, then, that to be treated as unentitled when one is entitled, is, at least sometimes, to be treated as less than one is?

One response to these apparent problems for justice as fitness would be to deny that failing to treat people in accordance with their needs and/or their entitlements is unjust. But this would be to abandon the project we have set ourselves: I do not wish to offer justice as fitness as a conception of justice - as one among many possible variants - but as the explicit characterization of the concept of justice which we share. In any case, to reject needs and entitlements as irrelevant would be too quick and wholly unpersuasive. Justice as fitness is, then, a contentious view: it can be sustained only if these (and other) problems can be resolved.

In this section we have been concerned only with the fundamental idea of justice as fitness. There are, no doubt, many points which lack clarity and require expansion and further elucidation. To aid the reader I have introduced the idea in a simple form;

but it would be surprising if qualifications of, and refinements to, this idea are not required. And, as we have already seen, justice as fitness is contentious, its defence calling for solutions to a number of problems.

1.3 Issues and Methods

Our task, then, will be to understand the concept of justice. How is this to be achieved? What methods are we to use? What questions are we to ask?

We are to investigate the concept of justice. We might, therefore, begin by considering what kind of object the concept of justice is. What kind of an object - if it is an object - is a concept? But if we tackled this question seriously we should be unlikely to tackle any other. I shall, therefore, assume that our intuitive ideas on this matter are sufficient.

I shall take it that there is an intimate relationship between the concept of justice and the use of the term 'justice'. (I presupposed this to be the case when, in my opening remarks, I associated the ideas of sharing an understanding of what 'justice' means with sharing a concept of justice.) But what exactly is this relationship, and how intimate is it? In particular, must our account of the concept of justice be consistent with all (current) uses of the term 'justice' and its cognates? If not, to what degree must it be consistent?

It is clear enough that the our account of the concept of justice must be consistent with at least many uses of 'justice'. If we fail to satisfy this condition then - it would seem - it would be perverse to claim that the concept we have described is the concept of justice. It seems also clear that the existence of

some uses of the term which are apparently inconsistent with an account of the concept constitutes at least a prima facie objection to that account. And, if we have two rival accounts, the account which is consistent with more uses (or, perhaps, more types of uses) of the term is, other things being equal at least, to be preferred.

But are we ever justified in ignoring some uses? And if so, what justification can be given for so doing? May we, as Sidgwick suggests, 'clip the ragged edge of common usage'? Or is to do so - as Wittgenstein suggests - to indulge our 'craving for generality' and to display a 'contemptuous attitude towards the particular case':

Philosophy really is 'purely descriptive'. (13)

As an example of what is at issue here, consider a question which we shall be discussing later: Is it unjust to fail to keep a promise? (Let us grant, for the sake of argument that it is wrong to fail to keep a promise. The question is: Is it unjust?)

Let us suppose - as I believe is the case - that failing to keep a promise is described by some people, though not many, as

(13) WITTGENSTEIN (1969), p18.

unjust. If we are content to be 'purely descriptive' we may simply record this fact. But are all uses 'all right as they are'? Or are some uses to be avoided?

There appear to be two distinct ways of taking these questions. Firstly, we might consider whether some term uses are misuses of the concept. If this were so then to make such a use would be to make a mistake, an error. Secondly we might consider whether some term uses are inappropriate, imprudent - but not mistakes. If we find reasons for thinking that some uses are inappropriate we shall have reason to recommend the adoption of a revised use. (The general ground for such proposals is - presumably - that current use fails to mark a distinction which ought, for some reason, to be marked by the term in question; or that current use marks a distinction which ought not, for some reason, to be marked - at least, not by that term.)

Consider first the question of whether a term use may ever be said to be mistaken, an error. Consider again the question of whether failing to keep a promise is unjust. Could it be a mistake to call failing to keep a promise 'unjust'? At first sight this may seem an intelligible question. But there is a problem: in order to decide this issue we need an account of the concept of justice. But - it would seem - our account of the concept of justice is to be derived from the uses of 'justice' and its cognates. Do we require that our account of the concept takes note of the fact that 'unjust' is used (by some people) of failing to keep a promise? Whichever view we take we seem to be

in danger of begging the question at issue.

Sidgwick's suggestion was that our objective should be to produce a definition:

...which will be accepted by all competent judges as presenting, in a clear and explicit form, what they have always meant by the term, though perhaps implicitly and vaguely. (14)

According to Sidgwick, then, there is the possibility of error by those who are not competent judges. (Competence is, no doubt, a matter of degree. But there are clear cases of non-competence - resulting, for example, from insufficient fluency in English - to set against the hard cases.) The possibility of this type of error is, surely, uncontroversial.

But, Sidgwick appears to imply, there is the possibility of error by competent judges: a speaker (who is, let us assume, a competent judge) may, after reflection, come to the view that an occasion on which he used a particular term was not one on which what he had 'always meant by the term', albeit 'implicitly and vaguely', was present. In such a case the speaker could refer to his previous use of the term as a misuse or a mistake.

(14) SIDGWICK (1981), p264.

I do not claim such an account settles the matter: there are no doubt, responses which may be made at this point. Nevertheless I propose to leave the argument here - except to ask the reader to consider whether the foregoing is a reasonable description of an experience which he has sometimes had. I shall assume that it is at least possible for a competent judge to be in error in the manner indicated; and I shall suggest that to call failing to keep a promise unjust may be one such case. If this argument is successful we shall be able to conclude that the (existing) concept of justice need not be consistent with all uses of 'justice' and its cognates.

Let us now turn to the second interpretation: Are there uses of 'justice' which are inappropriate or imprudent, but not properly described as mistaken? Are there reasons to recommend revisions, to change (whether it be to extend or limit use), and reasons to adhere to established usage?

What reasons are there to adhere to established patterns of term use? To change for no reason would be perverse. It is plausible to suppose that the language or languages we know restrict what we are able to think and say (or, at least, what we are likely to think of and speak of). But if this is so, it is worth noting that it is no less plausible to suppose that an established use of terms, and the associated conceptual system, are enabling as well as restrictive: that is, they both enable us to think, and constrain - or, at least provide a resistance to - our thinking. It is also plausible to suppose that such empowering and

constraining are interrelated. As Kant, in a different context, wrote:

The light dove, cleaving the air in her free flight, and feeling its resistance, might imagine that its flight would be still easier in empty space. (15)

It is, of course, important not to be oblivious to the constrictions or resistance offered in any given conceptual system. But it is also important to remember that there are dangers attached to ignoring established use. Theories couched in novel terms are, at the limit, unintelligible.

What reasons are there to change existing uses? Let us begin by noting that a correction of the kind we have been discussing - so as to bring our use into conformity with 'what we have always meant by the term', albeit only 'implicitly and vaguely', will be a revision of term use. Such a revision might be said to be of the term use rather than the concept. But are there reasons to modify the concept?

Consider the suggestion that we should change our term uses where necessary in order to make the respective concept accord with 'the world' or 'reality'. Is such a suggestion intelligible? Is 'what there is' - including actions - divided into naturally

(15) KANT (1929), p47 (A5/B8).

occurring kinds? And even if this is so, how are we to discuss these kinds? This does not seem (to me) a promising line of inquiry; I do not, therefore, propose to explore it.

Mention has already been made of what is, I take it, the general ground for change: to revise a term use so as to enable the concept to mark a distinction which ought to be marked by the concept or to avoid marking a distinction what ought not to be marked by the concept. But what distinctions ought or ought not to be marked?

In part it would seem that which distinctions ought or ought not to be marked will depend upon our purposes. But, of course, we have many different purposes. And, at least sometimes, these different purposes will conflict. A rather crude illustration of this is the following. Sometimes we want to win a particular argument, and we have no interest in the validity of our arguments - as long as they are not exposed as invalid. We may, for example, be seeking funding for a particular project from paymasters who do not share, or cannot understand, our objectives. Here a vocabulary which enables us to beg any difficult questions should be adopted. This situation may be contrasted with one in which we are seeking the truth by engaging in debate with persons we respect as equals in that search. In this situation the vocabulary we require is one which, as far as possible, does not beg any of the questions at issue, but enables all views to be put with force and clarity. A distinction which it may be important to mark in this later cases, it may be

important to have collapsed in the former, and vice versa.

What are we to assume are our purposes? I shall assume that at least one of our purposes is indeed the search for truth (however this is to be understood), and that where possible we should avoid adjusting a concept in such a way as to beg a question at issue.

I have said that to justify revision of a concept we must show that the revision introduces the marking of a distinction which ought to be marked. But it should be noted that any argument for a revision must show, not simply that the use of a term fails to mark an important distinction (or draws one which it is important not to draw), but also that the distinction should be marked (or not marked) by the particular term in question.

In order to satisfy this requirement it would seem that we are required to look at the concept in the context of other concepts available. (There is, for example, less need to adjust a concept to mark a set of distinctions which are already being marked, though perhaps not exclusively, by some other concept.) And we may then be led on to the thought that it is not the appropriateness of individual concepts which we should consider, but whole vocabularies.

These accounts of the arguments for and against changing term use are extremely general. But they are, I hope, sufficient to show

that there can rarely be any possibility of an entirely conclusive argument. At best it will be a matter of evaluating and weighing various considerations, and there will be room for differing judgements. Indeed it may be doubtful whether there is any real place for arguments in this area except those which amount to the outlining of some new vocabulary and conceptual scheme, in the hope that the new scheme will attract followers by the promise of fresh insights on old problems.

We have considered both the correction and revision of term use. The arguments I shall offer are primarily aimed at achieving Sidgwick's objective, that is, of providing a definition which:

will be accepted by all competent judges as presenting, in a clear and explicit form, what they have always meant by the term, though perhaps implicitly and vaguely. (16)

However, my arguments may instead be taken as recommending a revision of established use (and the existing concept).

Is it reasonable to take two bites at this cherry? I suggest it is. The central notion here is coherence. It is not unreasonable to suppose that our (abstract) concepts have some measure of coherence: if this were not so it is not easy to see how we could have any feeling of 'having always meant something' by the respective term, albeit 'implicitly and vaguely'.

(16) SIDGWICK (1981), p264.

But it is not unreasonable to suppose that, other things being equal, our concepts ought to possess more coherence rather than less. If, then, the reader rejects justice as fitness as a description of what he has always meant by 'justice', the arguments to be presented may be viewed as indicating how our concept of justice could be 'tidied up', made more coherent than it is.

As I have said, I will argue that our concept of justice has more structure and more coherence than, on the surface, appears to be the case. Let us suppose for a moment that such a deep structure or undiscovered coherence does exist. What would be the consequences of the existence of such a deep structure, and how should we attempt to uncover it?

The existence of a deep structure would mean that it is possible to make discoveries about concepts. We should not be condemned to a choice between having merely to describe existing concepts, or to construct new ones. (I take it that by 'describe' we mean simply recording the evidence, that which lies for all to see.) Such discoveries would be insights enabling us to see into the inner workings of the concepts, as it were; and they might also be held to have explanatory force, perhaps playing a significant role in accounting for disagreements over what is just and unjust. At the very least, to organize a seemingly disparate set of beliefs is to remove the problem of why there is a seemingly disparate set of beliefs.

How might this (posited) deep structure be uncovered? Firstly we may distinguish between disputed and undisputed uses of 'justice' and its cognates. I propose to use 'undisputed uses' to refer to those where it is agreed by all parties that some act, policy, outcome, or whatever may, with conceptual propriety, be described as just or unjust, that is, that the concept of justice is applicable to the particular case. (The parties may, of course, disagree as to whether the act, etc., is just or unjust.) In disputed cases the question of whether the question of justice arises is itself in dispute. I have suggested already that to describe failing to keep a promise as unjust would be at best controversial or disputed. I have also suggested that the application of the term 'unjust' to describe the treatment of a trustworthy person as untrustworthy is undisputed.

I have spoken of a distinction between disputed and undisputed uses of 'justice'. But what we have is, of course, not a simple distinction but a continuum. At one extreme we have applications which are universally accepted, at the other extreme uses which are not tolerated. Between these extremes we have applications which are, to varying degrees, disputed.

A second distinction (which was introduced in the last section) is that between transparent and opaque uses. A transparent use of a concept is one which not only possesses, but also manifests, the general form of the concept.

It seems reasonable to begin an analysis by concentrating upon the undisputed cases, and to attempt to determine which (if any) cases are transparent. The opaque undisputed cases must then be shown to possess - even though they do not manifest - the form possessed by the transparent cases. Of course, to describe a particular case as transparent is tantamount to adopting a particular view of the concept. We are not, therefore, describing a process by which a view of the concept of justice may be reached so much as a process by which a particular view (or hypothesis) can be presented and defended. The example, given in the last section, of treating a trustworthy person as untrustworthy, was, I shall try to show, an example of a transparent use of the concept of justice. To say justice requires that (in certain circumstances) a person be compensated is, I shall suggest, an example of an opaque use of the concept of justice. As such, compensation - like needs and entitlements - poses a problem for justice as fitness.

Having identified those cases whose surface structure is the same as the concept's deep structure, and having exposed this same structure in those cases where the term use is uncontentious but where the structure does not lie on the surface, we may attempt to account for cases where the very application of the term is disputed, or not widely practised. In the discussion of disputed cases the sources of the dispute over use may be illuminated. And on the basis of this examination, it may be possible to offer support to one particular party to the dispute, to suggest that the case does, or does not, involve 'what we have always meant'

by 'justice', and to recommend the adoption or rejection of the term use at issue.

The search for a deep structure is, perhaps, to be conducted in a manner akin to a scientific research programme. (17) There is a need to propose as simple and as elegant a theory as seems to have any chance of fitting 'the facts'. The idea for such a theory might be drawn from the application of the concept of justice in one area, and the programme consist in showing how this view of the concept may be profitably applied in other areas. In a research programme in conceptual analysis it would, I think, be distinctly odd to be able to defend an hypothesis which seemed initially implausible in relation to all uses of the concept. (This would be the case if there were no transparent cases.) But I have no wish to rule out such a possibility. Typically, then, the research programme will consist of trying to show how the analysis can deal with seemingly difficult cases. To deal convincingly with such cases is to illuminate them. A theory will be attractive only if it is able to handle difficult cases in a fashion which seems plausible. If a view has to be distorted in order to preserve the theory from falsification the victory, or rather the defence, will most likely turn out to be pyrrhic. I would add, however, that, just as there may be no

(17) On the notion of a scientific research programme see Imre Lakatos 'Falsification and the Methodology of Scientific Research Programmes', in LAKATOS AND MUSGRAVE (1970), pp91-196.

'crucial experiments' in the sciences, so there may be no crucial 'difficult cases' in conceptual analysis. The success or failure of the programme must be judged on the basis of how the hypothesis fares in relation to the various cases, viewed as a whole.

The body of views about what is and is not just might be considered the analogue of scientific experimental data. It is, therefore, important to be alive to the variety of conceptions of justice, both contemporary and historical. But it is must also be remembered that, at some point, views become so radically different as to be disparate, and to defy being integrated within a single given theory, even though the same term may be used in regard to them. We may, therefore, face a choice between invoking ambiguity and abandoning the particular organizing hypothesis with which we are working. Again, this is a matter requiring judgement. A hypothesis needs to be given a reasonable run, but there is nothing to be gained from flogging it to death.

The important point is to be alive to temptations. Those who defend theories may succumb to the temptation to deny too readily that apparent counter-evidence to a preferred theory is significant. We may be tempted to deny that someone's conception is 'really' a conception of justice. Or claim that 'just' and 'unjust' are being used only metaphorically. We must, of course, remember that what we have ulterior motives for saying is sometimes true. In the case of justice there are obvious reasons why people find it advantageous to extend the use of the term.

But, as I have implied earlier, there are limits beyond which a term's use may be extended only at the cost of pulling the concept to pieces and destroying its internal coherence. It has been remarked that political concepts, being used in political life, are particularly prone to suffer this fate at the hands of the politically active. It would, however, be a mistake to underestimate the influence, at least on theorists, of the sometimes (but only sometimes) more subtle distortions perpetrated by theorists as a means of protecting their preferred theories.

We must be sensitive to the subtleties of different theories of justice (at least where theorists have, themselves, been sufficiently sensitive to produce subtle theories) and to the subtleties which abound in what people actually say and do not say. Close attention to the finer points of the linguistic practices of native English speakers has not had a good press since the reaction to the excesses of 'ordinary language philosophy' set in. But, though we should avoid getting bogged down in collecting specimens, I do wish to endorse Austin's dictum that ordinary language is the - or at least a - first word. (18) To trample roughshod over contemporary usage is perverse, being nothing less than to obliterate many of the available clues to significant distinctions and interrelations.

(18) See J. L. Austin 'A Plea for Excuses' in AUSTIN (1970), especially p85.

It is as important to avoid dogmatic antagonism to the characteristic questions of 'ordinary language philosophy', as it is to avoid embracing its excesses.

As I have said, it is important not to be ahistorical. A full understanding of a concept is to be drawn, not only from contemporary sources, but from historical ones too. To fully understand a concept it is necessary to have not merely a snapshot portrait but a biography. The writing of such a biography is a task to be undertaken by historians of ideas. But the work of historians of ideas and philosophers should be complementary: historians may discern conceptions which may (or may not) be worked up into possible loose side-constraints on views of concepts; philosophers will provide theories which may be worked into historical hypotheses, and suggestions as to what it might be worth looking out for.

Faithfulness to the complexity of the actual use of a term, and the desire to find coherence in its structure may, at least on occasions, give rise to divergent demands. To philosophize, to seek coherence, is to risk paying too little attention to the complexity involved in the employment of a concept like justice. Over-simplification is the occupational hazard of the philosopher. We must try to guard against this. Nevertheless, for the reasons I sketched earlier, we need not view all existing uses as sacrosanct: in conceptual analysis, as in surgery or archaeological excavation, it is necessary to combine sensitivity with an ability to recognize a foreign body. There is no place

for indiscriminate hacking: decisions to amputate and remove sections need to be taken with extreme caution. To change the metaphor, analysing a concept like justice requires the careful unravelling of a very convoluted thread. It is, of course, easier and quicker to cut the knot. But that would not help us to achieve the task we have set ourselves.

I have concentrated so far on how we might uncover the characteristic forms of justice and injustice - the source of the coherence (if there is any) of the concept of justice. But fully understanding a concept is not simply a matter of understanding its internal coherence. It is also necessary to grasp its role or function in our conceptual system, its relationship to other concepts.

The concept of justice is first and foremost a concept employed in practical reasoning. Above all else, to say that an action is unjust is to say that, other things being equal at least, it should not be performed. It is also, I take it, to say that there is some reason why the action should not be performed. But not all reasons for not performing an action, for thinking the action a wrong action are, even if other things are equal, unjust. An understanding of the role of justice in practical reason requires, therefore, clarification of the distinction between those reasons failure to act in accordance with which results in injustice, and those reasons failure to act in accordance with which results in a wrong, but not unjust, action.

In short, then, we must look for an answer to the question of how reasons for acting justly differ from, and relate to, other reasons for action. I will suggest later that utilitarianism is best understood as involving the rejection of considerations appertaining to justice. If this is so, we should expect a striking contrast between the utilitarian's reasons for action, and the reasons for acting justly. I will offer an account of the nature and origin of that contrast later.

An examination of this issue may shed some light on the relative importance to be attached to acting justly. It has seemed to many that we are often faced with a choice between acting justly and pursuing some other objective; in substantive moral and political philosophizing we often find divergent considerations: 'on the one hand equality, on the other efficiency' or 'on the one hand rights, on the other utility'. Now the relative importance of acting justly in general is, of course, simply a function of the relative importance of that type or types of reason for action failing to act in accordance with which results in injustice, as compared with other types of reason for action. The first task is to distinguish that type, or those types, of reason for action failing to act in accordance with which results in injustice, and this task we have already set ourselves as part of the general project of coming to a full understanding of the concept of justice. But, having distinguished between the various types of reasons for action, we should then ask what 'weight', is to be attached to the various (types of) reasons for action, and how this is to be defended. Or, alternatively, and

less positively, to explain why various (types of) reasons for action are incommensurable.

A proper understanding of the role and context of the concept of justice requires an understanding of the relationship between justice and the other concepts whose roles are also, first and foremost, in practical reasoning. In most cases such relationships will be brought out by indicating similarities and dissimilarities, of comparing and contrasting; in others, it is a matter of establishing relations of entailment. But in the case of concepts more distantly related to justice this task requires nothing less than the uncovering of the structure of our thought in that area with which justice is primarily concerned, that is, the uncovering of the conceptual system (or systems) employed in practical reasoning. A full understanding of justice requires, then, an understanding of how justice stands in relation to such concepts as integrity, trust, obligation, desert, merit, authority, value, respect, honour, entitlement and so on. One particular conceptual relationship which we shall be concerned with is that between justice and virtue. I will argue that a conception of justice presupposes a view of what constitutes a virtue. If this is so then at least some disagreements over what is and what is not just may arise as a result of more fundamental disagreements over the nature, and relative importance, of the various virtues. If this argument is sound it will, I believe, be of some assistance in clarifying debate over substantive issues.

This point may be generalized. The task of delineating and defending a view of the concept of justice will require, as I have already intimated, close attention to the structure of arguments and claims about what is, and is not, just. In a sense, then, the project is an attempt to answer a second order question, a discussion of discussions about which actions are just. But it should not be assumed that a second order debate leaves first order topics 'as they were'. The distinction between first and second order levels of discourse is, I think, rather like a distinction between two geological layers. The distinction is useful, and the interface often clear and distinct enough. Nevertheless, almost by sheer proximity, a change in our thinking about the concept of justice may produce movement in our thinking about what is, and is not, just. It is not to be expected that developments, even changes, in our view of the concept of justice will force us to ~~make~~ changes in our view of what is just and what is unjust. As I have said, the objective is to delineate the concept of justice which, I posit, we share. Justice as fitness should, therefore, be consistent with the various different substantive views of what is, and is not, just. Nevertheless, though we may not be forced to change our substantive views, the process of coming to an understanding of those views, by way of exposing their structure and presuppositions, may lead us to wish to revise those views. This point can be illustrated with the case of need which we have already introduced. I have suggested that the view that, in some

circumstances, distribution should follow need presents a problem for justice as fitness. Now this problem will need to be resolved. A successful resolution of the problem will require it to be shown (in a convincing manner, of course) that, on the appropriate occasions, to fail to treat people in accordance with their needs is to treat them as if they were lower than they are. If we are unable to do this, then we must reject (or suitably amend) justice as fitness (or, of course, deny that 'to each according to their needs' is a principle of justice). But, if this problem for justice as fitness can be successfully resolved, what is at present only implicit will be made explicit; that is, it will become explicit exactly why (it is held that) to fail to treat people in accordance with their needs is to treat those in need as less or lower than they are. Needless to say, on some occasions, when our implicit assumptions are rendered explicit, we choose to revise those assumptions and the views which flow from them. But even when we do not change our views, the process of having their structure and presuppositions exposed can hardly fail to increase our understanding of them. In short, then, we have every reason to hope that an examination of the concept of justice will not leave our substantive views 'as they are'.

As I indicated earlier, I shall be suggesting that it is mistaken to believe that failing to keep a promise is unjust. It may be wondered why, if this is so, the topic of promising is included in a work which aims, primarily, at elucidating the concept of justice. Leaving aside any claim to intrinsic interest, I would

make two points. Firstly, it has indeed been held (19) that failing to keep a promise is, ipso facto, unjust. It might be objected, therefore, that the theory I will develop is unable to accommodate this type of (alleged) injustice. And it is, therefore not inappropriate to attempt to deal with such an objection. Indeed to fail to meet this objection would, I think, be a serious lacuna.

But, and this is my second point, even if it had never been held that it is unjust to fail to act in accordance with a promise, the investigation of that issue would not, I think, be irrelevant to an inquiry into the nature of the concept of justice: a full understanding of a concept requires that we are able to say, not only when and why the concept may be employed, but when and why it should be withheld. Needless to say not all occasions on which the concept of justice is not used merit detailed consideration. However, in the case of obligations generally,

(19) The view was held, for example, by Hobbes (HOBBS (1968), Chapter XV):

And in this law of nature, consisteth the fountain and original of JUSTICE. For where no covenant hath preceded, there hath no right been transferred, and everyman has right to every thing, and consequently no action can be unjust. But when a covenant is made, then to break it is unjust: and the definition of INJUSTICE, is no other than the not performance of covenant. And whatsoever is not unjust is just.

by Hume (See HUME (1888), Book III, Part II, Sections I and V), and by J. S. Mill (MILL (1962), p229):

... it is confessedly unjust to break faith to anyone."

and the obligation to keep a promise in particular, we have an apparently related or neighbouring concept. It is difficult to see how an understanding of the relationship between justice and obligations (i.e. an understanding of their respective places in the conceptual system or systems we employ in practical reasoning) - irrespective of whether that relationship is such that failing to act in accordance with an obligation is unjust - could fail to add to our understanding of the concept of justice.

To summarize: we shall require an explicit account of the concept of justice, and of the reasons for action we act contrary to when we act unjustly; we shall require an account of how such reasons relate to, and differ from, other possible reasons for action; and we shall require an account of how justice relates to, and differs from, the other concepts used in practical reasoning. It would, no doubt, be over-optimistic to hope that we shall be able to answer fully all of these questions. Nevertheless, we should keep them in mind, in the hope that at least some light can be shed upon each of them.

The foregoing, then, is the method by which we shall proceed. It is not, of course, a mechanical procedure. I have spoken of the need for sensitivity, for tolerance, for being alive to temptations, and for judging matters 'as a whole'. To call this collection a 'philosophical method' may seem preposterous. But I doubt that anything more hard and fast is defensible.

1.4 A Starting Point

It has become customary to begin a discussion of justice by noting that we speak of justice and injustice in relation to many different 'objects' - actors or agents and their dispositions, actions, laws, institutions, treatments, distributions and so on. Such uses are, it would seem, interrelated in a fairly obvious manner: an unjust actor is a person who has a disposition to act unjustly, that is, a person who may be expected to be ready to act unjustly when placed in an appropriate situation; an unjust act is, it would seem, an act which involves the unjust treatment of someone (or, perhaps, something); and when someone is treated unjustly, an unjust state of affairs is brought about. To speak of actions raises the question of whether, and if so which, failures to act, that is, omissions, are to be included. But this topic is too large to be pursued here.

It seems a reasonable conjecture that the use of 'just' and 'unjust' in relation to one of these objects is primary, their use in relation to other objects being derivative, that is, explicable by reference to the primary use. Thus David Miller claims that the justice of states of affairs

... must be regarded as the primary one, for when we describe a man as just we mean that he usually attempts to act in such a way that a just state of affairs results ... If we did not have independent criteria for asserting the justice of states of affairs, we could not describe men as just or unjust. (20)

(20) MILLER (1976), pp17-8.

However, according to Julia Annas, Plato took the opposite view:

The whole development of the argument is summed up vividly at 443c-d, where Plato says that the sphere of justice is not external actions but a person's own inward self. He has made the just agent primary, not the question of just actions which dominated the concerns of Thrasymachus, and of Glaucon and Adeimantus. (21)

The issue of whether just agents, actions, states of affairs or whatever, should be taken as primary, unexciting though it may seem, is a crucial one. It is one of those fundamental 'first water' choices of a kind we are often disposed to make too easily, sometimes less than fully consciously, and which are likely to radically affect the analysis which then follows. The fundamental character of the choice also means that it is very difficult to argue for a particular choice. Now I am inclined to think that it is inadvisable to try to discuss the issue entirely in the abstract. I propose, therefore, to postpone the discussion of this issue until, but only until, the topic of justice has been rendered a little more manageable.

Where, then, are we to begin our investigation of the concept of justice? In view of the difficulty of the task we have undertaken, it would seem prudent to see whether there is not some alternative to a frontal assault, as it were. Is there some route, albeit more circuitous but less dangerous, than a direct

(21) ANNAS (1981), pp158-9, original emphasis.

attack? I want to suggest that a discussion of the concept of justice in relation to rules (or sets of rules) may prove to be just such a route. Let me say a few words about the use of justice in relation to rules, and then try to explain why this may not be an unsuitable point of departure.

We often speak of justice in contexts where some particular set of rules is to be taken for granted. The state's law courts - the Courts of Justice - are an example of such a context. The law of the state can, at least as an approximation, be thought of as, in part, providing a set of rules to be followed by citizens. And these rules are to be taken as given as far as the proceedings of the courts are concerned. This is, no doubt, a crude picture, but it will, I trust, suffice for my purposes. I do not propose to discuss the nature of law, nor to argue from the example of the state's law. My discussion of the state's law courts will be for the purposes of illustration only. If the reader finds the picture too obviously uninformed to be helpful, then he or she is asked to ignore the illustration, and perhaps to supply alternative examples. It may be worth adding that it will be as well to remember that there are many other institutions and practices in addition to the laws of the states where rules appear to play a similar role, and where justice, relative to a set of rules, seems equally readily intelligible. An obvious set of examples are competitions for prizes and honours, such as football championships, flower arranging contests, and the like.

The concept of justice is, then, used in contexts where a set of rules is to be taken as given. But, of course, the relationship between justice and rules is more than one of contingent contiguity, of sometimes being used in the same place at the same time. But what exactly is the nature of the conceptual relationship between justice and rules? How intimate, as it were, are the concepts of justice and rules? Are they so intimate as to preclude the possibility of meaningfully using the concept of justice without (at least implicitly) employing rules? Or are there, perhaps, different 'senses' of 'justice', one intimately related to rules, the other not? Or is there a single concept of justice which may, but need not, be employed relative to a set of rules?

I propose to examine the question of the nature of the relationship between rules and justice in Chapter Two. We will there be concerned with the question of what is required for there to be justice (and injustice) in relation to a set of rules. I will refer to such justice as 'rule-relative justice'. With an account of rule-relative justice on hand, I propose to proceed to enquire into the nature of non-rule-relative justice and, if there is such a thing, the relationship between rule-relative and non-rule-relative justice.

Now this may indeed seem a circuitous way to proceed and I had better make clear my reasons for attempting to go forward in this way. It seems pretty clear that we do, in fact, use justice both

in relation to rules, and in abstraction from rules. It seems equally clear that rule-relative justice and non-rule-relative, or absolute, justice are not unrelated. We should, at the very least, resist the temptation to think that there are two senses of 'justice'. As Anscombe put it:

Where we are tempted to speak of different senses of a word which is clearly not equivocal, we may infer that we are pretty much in the dark about the character of the concept which it represents. There is, however, nothing wrong with taking a topic piecemeal. (22)

Now if there is indeed a single coherent concept of justice, and if we do indeed wish to take the topic piecemeal, then it would appear prudent to examine the concept in the least controversial, most straight-forward, area in which it makes an appearance. On the face of it, the topic of justice in relation to a set of rules which are to be taken as given, may prove to be a comparatively uncontroversial topic. (For the purposes of comparison, the alternative is, I think, desert. I am willing to concede that this might appear a more controversial topic.) This is, then, my reason for beginning my investigation of justice with a discussion of justice relative to rules.

My hope is, of course, that a discussion of rule-relative justice will not prove worthless when we come to consider what counts as just when no set of rules can simply be taken for granted. We

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(22) ANSCOMBE (1963), p.



may imagine that, rather like Darwin, we are familiarizing ourselves with a phenomenon in its domestic setting in order to be better equipped to recognize it when it appears in the wild. But we should not forget the inherent danger involved in the piecemeal approach, namely, that in the chosen area, the concept may exhibit an uncharacteristic appearance. This is, I think, a risk which must be taken. And we must also bear in mind the possibility that justice only really makes sense when used in relation to rules. I will try to show that this is false by arguing that the essential features of justice allow, but do not require, justice to be used relative to rules.

Chapter 2. Justice and Rules: Rule-relative Justice

In this chapter I will be concerned exclusively with rule-relative justice, that is, with justice and injustice when these concepts are used relative to some given set of rules. The issue with which I will be primarily concerned is that of the nature of rule-relative justice and injustice. What, exactly, constitutes justice and injustice when these terms are used in relation to a set of rules?

These questions may seem straightforward enough. But they are, I think, more difficult - and more interesting - than may be first thought. Let me try to support this contention by briefly mentioning two approaches to answering them which I propose to reject.

Firstly, it might be thought that an account of the nature of rule-relative and injustice might be given in terms of the relationship between the (just or unjust) act or treatment and the source or origin of the rule. But clearly this will not do. As I have already suggested it is, at least, possible, for the purposes of an argument as to the (rule-relative) justice of some act, to take for granted some given set of rules. But to take the rules for granted is tantamount to not looking at the source or origin of those rules. (Rule-relative justice can, therefore, operate on a set of non-conflicting rules derived from a number of different sources - from, for example, both established practice and the will of a legislative assembly.) Rule-relative justice is to be elucidated, not in terms of the source of rules, but rather in terms of some feature of rules themselves.

Secondly, it might be claimed that an account of (rule-relative) justice and injustice is to be given in terms of the contravention of rules. On this view 'unjust' and 'illegal' are held to be synonymous - which, of course, they are not. On a more sophisticated account it might be held that unjust acts constitute some subclass of illegal acts. Rather than argue specifically against this view I propose to develop an alternative, and, I hope, more convincing account. In the light of this alternative account, I hope to exhibit exactly what is wrong with trying to elucidate rule-relative injustice in terms of rule contravention. And we should, thereby, be in a position to distinguish the unjust and the illegal.

2.1 Rule-relative Injustice: Agents, Actions and Sufferings

In the last chapter I noted that the term 'just' could be applied to an actor or agent, to an action, to the way in which person was treated, or to the state in which a person was placed. I mentioned also the issue of priority, the question of whether one of these types of application is logically prior to the others, the remainder being derivatives. I want to begin my discussion of the nature of rule-relative justice by considering this 'priority issue' in relation to rule-relative justice.

Let us use the term 'standard case of injustice' to refer to a case where there is an unjust agent, who acts unjustly, treating someone unjustly, the person treated suffering an injustice and being placed in an unjust situation. We may then consider whether each component of the 'standard case' is necessary in order for there to be a lack of justice. In the present section I will be initially concerned with two questions. Firstly, is it possible for there to be a lack of justice even though no-one has suffered an injustice? Secondly, is it possible for there to be a lack of justice even though no-one is unjust, or has acted unjustly?

But, first, why should we even try to answer these questions? One reason for trying is this: though it is not necessarily true, it seems initially plausible to suppose that the application of 'just' and 'unjust' to a particular 'object' (e.g., an agent, an action or a person's situation) is logically prior only if an object of that type is present whenever there is a lack of justice. Thus, if it is the case that there can be a lack of

justice without there being an unjust agent it seems initially less plausible to suppose that just and unjust agents are prior, unjust acts and the suffering of injustice being derivative therefrom. I have said only that this view seems plausible. I do not wish to deny that it is possible, by dealing with the exceptions, to argue that a type of unjust object, sometimes absent when there is a lack of justice, is, in fact, logically prior. I mention this point regarding initial plausibility as no more than the basis of a hunch as to what one might choose to try to defend - not as part of a defence.

Let us begin, then, with the question of whether it is possible for there to be a lack of justice even though no-one has been treated unjustly. Now at first sight the claim that this is indeed possible may seem highly implausible. It may even seem to be simply a contradiction. But let me try to show that the admission of such a possibility may be the most plausible solution to a particular problem.

Consider the notion of a miscarriage of justice. We speak of a miscarriage of justice (on certain occasions) when a person is convicted of a crime they did not commit, or when a guilty person is found not guilty. There is an important - if obvious - distinction to be drawn between miscarriages of justice in which someone is judged to be entitled (or not liable) to something to which they are, in fact, not entitled (or liable), and miscarriages of justice in which someone is judged to be not entitled (or liable) to something which they are, in fact, entitled (or not liable). In the first type of miscarriage the

judged person stands to benefit (in some general sense) from the miscarriage (as when, for example, a guilty person is found not guilty), in the second type of case the judged person stands to suffer (as when, for example, an innocent person is found guilty). Let me borrow from the economists and refer to cases of the first type as 'up-side' miscarriages, and to cases of the second type as 'down-side' miscarriages.

Now in the case of up-side miscarriages of justice it seems possible, at least at first glance, that no-one has been treated unjustly. If we accept this claim, should we argue that, since no-one has suffered an injustice, no-one has been treated unjustly, and hence there has been no injustice, and hence there is no lack of justice? This, surely, cannot be right. We cannot have both a miscarriage of justice, and no lack of justice. Should we, then argue instead that since there has been a miscarriage of justice, there has been injustice, and hence someone must have been done an injustice, that is, treated unjustly? On this view the alleged problem case of the miscarriage of justice whereby no-one is done an injustice is held to be, in principle, impossible. Let us briefly consider this response.

Down-side miscarriages of justice involve the person judged being done an injustice. We are, therefore concerned only with upside miscarriages of justice, that is, miscarriages where, on the face of it, the person judged is not done an injustice. At this point the argument can proceed either by denying that, in fact, the person judged is not done an injustice, or by asserting that, in all such cases, there is someone (someone other than the person

judged) who is done an injustice, and on account of which there is injustice.

The first of these views is embodied in the well-known, even notorious, view that a guilty person is done an injustice if they are left unpunished. (1) This view seems, to say the least, initially implausible, and, consequently, it is usual to run certain metaphysical claims with it. The point of these additional claims is (at least initially) to support the view that, contrary to appearances, the person judged does suffer if there is a miscarriage of justice. But, for our purposes, the truth or otherwise of these claims is beside the point. For even if they were true - and even if they were necessarily true (in the sense of true in all possible worlds) - the point to be emphasized is the fact that they had to be given at all. For to accept the need to give the additional metaphysical arguments is to concede that a miscarriage of injustice is not a conceptual impossibility, but a metaphysical impossibility - it is, if you will, at most a fact about all possible worlds. But this is not enough to solve the problem with which we are dealing. Our problem concerns the relationship between concepts and the apparent existence of an incompatibility in our set of concepts. Nothing less than conceptual impossibility would, therefore, be sufficient.

The second approach is to claim that a miscarriage of justice will always mean that someone has suffered an injustice, and if

(1) See HONDERICH (1976), pp47-8 and the works there cited.

the person judged benefits by the miscarriage, someone else must suffer the injustice. I want to make two initial points about this view. Firstly, it is, surely, false to suppose that merely to suffer, in the sense of 'be made worse off than one would otherwise have been', as a result of a miscarriage of justice, is ipso facto to suffer in injustice. Suppose, for example, that the result of a lottery is in dispute, and suppose that someone is called upon to decide the issue and, wrongly, judges that Smith rather than Brown has won. Now Brown has been done an injustice, having been denied that for which she has qualified. But Brown's husband, who might have expected to profit from Brown's win has not suffered an injustice, even though he may suffer as a result of this miscarriage of justice.

Secondly, it is true that on many occasions a miscarriage of justice which favours the person judged, does entail that another, or others, thereby suffer an injustice. This will, presumably, usually be the case in competitive situations, and, of course, quintessentially in zero-sum situations. A referee who wrongly awards a goal to one team may be thought to do their opponents an injustice. But the question is not whether this is sometimes the case. The question is whether this must always be the case.

Consider again the case of a lottery. If Brown is held to have won when actually Smith did, then clearly Smith has been done an injustice. But suppose that Brown is wrongly declared the winner when, according to the rules, no-one won. (And suppose that in such cases the rules stipulate that the prize money is to be thrown away.) Who has been done an injustice? Is it possible to

argue that all the other losers have been done an injustice - by being treated as losers? It is worth noting that such an argument cannot, I think, be made as far as rule-relative justice and injustice is concerned. If we want to press this claim we shall need to appeal to an understanding of justice beyond the rules. In the present chapter I am concerned only with rule-relative justice and I propose, therefore, to defer proper consideration of claims of this type. But I do want to make the point that, as far as rule-relative justice is concerned, it does appear that no-one is done an injustice, but even as regards only rule-relative justice this case would appear to constitute a miscarriage of justice. It appears to follow then that, at least as regards rule-relative justice, it is possible for there to be miscarriages of justice even though no-one suffers an injustice.

(2)

Can we give any further support for the view that there can be a lack of justice yet no-one be treated unjustly? It is, I think, interesting to note that we sometimes say of a situation that it is 'not unjust', rather than 'just'. We sometimes show a similar reluctance with 'fair'. In his discussion of pure procedural justice, Rawls writes:

(2) Cf MONTAGUE (1980), p140:

... one can act unjustly without doing anyone an injustice.

Feinberg, writing of what he terms the 'Platonic notion' of justice writes (FEINBERG (1980), p276):

When "functions" ... are not performed by the thing or person best fitted by its (his) nature to perform them, there is injustice done, at least from the cosmic point of view, whether or not any assignable individual is denied his due.

What makes the final outcome of betting fair, or not unfair, is that it is the one which has arisen after a series of fair gambles. (3)

Now we might wonder why we should trouble to use the double negative. Why not simply say of a situation that it is just, rather than not unjust? I suggest it it precisely because we want to assert that no-one has been done an injustice, without committing ourselves to the view that 'all is just', which would imply that there has been no up-side miscarriages of justice. Our reluctance to use the simpler form reflects our desire to distinguish just and not unjust: use of the former suggests that there is not up-side injustice; use of the latter makes no such suggestion.

It is also, perhaps, worth pausing to note that the term 'miscarriage of justice' exists at all. Why do we not simply say that someone has been treated unjustly or that there has been an injustice? Now in part it seems reasonable to suppose that the term functions to mark a refusal or reluctance to hold the person whose act results in the miscarriage responsible for the lack of justice. This is so because the term 'miscarriage of justice' would seem to be appropriate only when an attempt has been made by the person applying the rule to act justly. The idea of miscarrying suggests accidental rather than deliberate failure. If so it is, at least, misleading to use the the term in cases of deliberate failure to judge justly. But it does not seem unreasonable to suppose that the existence of the term 'miscarriage of justice' is also fostered by the possibility of

(3) RAWLS (1972), p86.

up-side miscarriages of justice which result in no-one suffering an injustice.

The term 'miscarriage of justice' is, I think, rarely used beyond rule-relative justice. If, despite having taking pains to come to a correct judgement about you, I come to the wrong conclusion - say, I think you unreliable, when in fact you are not - I will not speak of a miscarriage of justice, but rather of having done you an injustice, of having judged you unjustly. My concern here is not to dwell on the finer points of linguistic usage, and certainly not to investigate them for their own sake. There is, I contend, a distinction to be drawn between those cases where there is a lack of justice and someone suffers an injustice, and those cases when there is a lack of justice and no-one suffers an injustice.

Now these arguments may be less than wholly convincing. The interpretation of the examples and the linguistic evidence may be contentious. There may be counter-arguments and ways of dealing with 'the facts' which I have not considered. Let me add, therefore, that I have not sought to convince the reader that there can be a lack of justice without anyone having been treated unjustly. It will, I think, be enough for my purposes if I have shown that it is possible, or arguable, that it is so. For my own part I consider this interpretation to be the most plausible and coherent way to deal with the problem. But I do not wish to insist that it is the only interpretation - only that it is not an unreasonable one.

I want now to pass on to the second issue: is it possible for

there to be a lack of justice yet no-one to have been unjust or to have acted unjustly? Let me say immediately that I do not propose to discuss the significance of the acts-omissions distinction. Rather I will try to make it seem at least possible that there can be injustice without there being an unjust actor or act, without recourse to the contentious acts-omissions distinction.

Suppose that a judge makes a mistake and decides a case wrongly, resulting in someone suffering an injustice. Such injustices may be suffered as a result of an unwillingness or an inability on the part of the judge to apply the rules properly. A judge may, of course, be apprised of the relevant facts and familiar with the rules, but deliberately choose to misjudge the case. Or a judge may be ignorant of relevant facts appertaining to the case judged, or fail to fully understand the rules which are to be applied, and may, in consequence, unknowingly misjudge the case. Judges who are ignorant of the rules to be applied, or ill-equipped to ascertain relevant information regarding the case are incompetent or unfit to judge, and are likely to perpetrate injustices: a person ignorant of the law or unable to follow a complex legal argument makes a poor judge in a law court; a person unfamiliar with the rules of soccer, or lacking reasonable eyesight would make a poor football referee.

Now it is, obviously, possible for even the most careful, competent and conscientious judge to make a mistake. These are cases for regret rather than blame, and we sympathize with both victim and judge. We say, unreservedly, that the victim has

suffered an injustice and we do not say that the judge is unjust. Should we say that the judge has acted unjustly? I want to suggest that to speak of the judge as having acted unjustly is, at least normally, to suggest that the judge deserves criticism or censure. Now it is possible to argue that not everyone who acts unjustly merits condemnation, and that 'acted unjustly' implies no more than that an excuse is required if one is to deserve to escape censure. But this way of organizing matters does seem to miss a difference in emphasis between saying that a judge made a mistake, or acted wrongly, and saying that a judge acted unjustly. This contrast, and the fact that, at least in my view, 'acted unjustly' is not an entirely happy phrase in the circumstances, is a reflection of the fact that 'just' and 'unjust' do take so many objects. (Notice that a man who habitually judges unjustly is an unjust man. But a man who habitually judges wrongly is not a 'wrong man'.) The consequence of this wide use is, I think, a tendency to think that although a good defence is enough to get one completely off a charge of having acted (merely) wrongly (say, having backed the wrong horse), it is less clear that even a good defence will get one completely off a charge of having acted unjustly. In consequence we are, I think, reluctant to say that a person has acted unjustly if it is the case that he is in no way at fault.

Again I do not wish to insist that the particular account I have given here is the only reasonable view to take. These issues are largely concerned with questions of focus and emphasis, and the relationships are usually more subtle than strict logical ones.

Let me summarize the position. I have suggested that it is at

least arguable that there can be a lack of justice without anyone suffering an injustice. I have also suggested that there can be a lack of justice without anyone acting unjustly. We must now consider why, if this is so, it should be. And we must consider what, if any, significance it has.

Consider again the standard case of injustice where, for example, a judge acts unjustly, perpetrates a miscarriage of justice, and the person judged is done an injustice. There are, of course, a gamut of locutions we may use to describe this situation in which there is a lack of justice. If we concentrate upon expressions which refer to actors, actions and recipients or 'experiencers', we can arrange these expressions in order according to their shifting emphasis from the actor to the recipient. Such an ordering might be indicated by the following:

- (i) the judge is unjust
- (ii) the judge acted unjustly
- (iii) the judge treated the victim unjustly
- (iv) the victim was treated by the judge unjustly
- (v) the victim was treated unjustly
- (vi) the victim suffered an injustice.

It would be tedious to discuss the relationship between each of these expressions. There is, clearly, a shifting emphasis from actor to action, to treatment, to sufferer. This change in emphasis is able to make one or more of these expressions appropriate or inappropriate (or, more or less appropriate) on any particular occasion, depending, in part, upon the circumstances of the case. It should, however, be noted that it

is not simply a matter of changing emphasis in all these cases. The distance between (i) and (ii) has, I think, a harsher logical form. It is not simply a question of emphasis because the question of whether someone is unjust depends not on whether they have acted, or will act, unjustly, but rather on the circumstances in which they are willing to act unjustly.

The standard case is, as I have said, the case where an unjust actor acts unjustly thereby treating a victim unjustly, the victim thereby suffering an injustice. When, in general, do matters not conform to the standard format? When, in general, do we have reason to be reluctant to embrace all its aspects? On the basis of the foregoing discussion we may, I think, offer the following account. To say that someone is unjust, and to a lesser extent, to say that someone has acted unjustly, is, at least normally, to condemn or criticize him. To say that someone has been treated unjustly is, at least normally, to be taken to imply that they have been wronged. The standard case is not always appropriate simply because we do not always want to condemn anyone even when someone has been wronged, and we sometimes do wish to condemn someone even when no-one has been wronged.

These are, it would seem, the basic ideas underlying the positions I have tried to make plausible. But what of the significance, if any, of these results? Let us return now to the priority issue, the issue of whether unjust actors, actions, sufferings, states of affairs or whatever are to be taken as primary, and as the basis upon which the other uses are to be explained. It is, I think, worth pausing to reflect on the

simple fact that 'just' and 'unjust' do take so many objects. Perhaps those most general terms of our moral vocabulary, 'right' and 'wrong', and 'good' and 'bad', can be applied over a similar range, though such an application of even these terms seems less obvious than the wide use of 'just' and 'unjust'. Why should 'just' and 'unjust' take such a wide range? Can such a fact be accounted for? And why should they take the particular range they do?

The picture I have attempted to build up in these paragraphs is one of justice being concerned with both someone acting or judging, and someone being judged or acted towards. And I want to suggest that the way to think about justice is to begin, not with just and unjust actors, nor with just and unjust sufferings, but with this relationship, or axis, between the person (or whatever) who acts or judges, and the person (or whatever) who is acted towards or judged. This axis is one of treatment: the judge or actor treats the other in some way, the person judged or acted towards is treated. The place to begin thinking about the concept of justice is, I suggest, by considering not the judge nor the judged, but the relationship between them; not one of the ends of the axis, but with the axis itself. It should then be possible to develop the analysis by exploring each end: by examining the use of 'just' in relation to the sufferings of people; and by examining the use of 'just' in relation to acts and actors. The standard case of injustice, then, is to be thought of in terms of one person wrongly treating (that is, acting towards) another. Deviant cases, such as cases where no one acts unjustly, but someone suffers an injustice, or someone

acts unjustly, but no-one suffers an injustice, if they are held to be possible, may be explained by accounting for their departure from this standard case. And this I have already tried to do. But at this stage the cases to be examined are not the deviant ones but the standard ones. Accounts of deviant cases presuppose, of course, that an account of the standard case is on hand. It is also worth noting that the reasons for avoiding a miscarriage of justice in which no-one suffers an injustice may be different to the main reason for avoiding acting unjustly in a manner which does result in someone being treated unjustly. It is widely held, of course, that injustices of the second type are, in general, more serious than those of the first. This is, I suggest, a further reason to take the two types separately, and to tackle the (presumably) more important type first.

Finally, we may note that the view that justice is centrally concerned with a relationship between judge and judged would appear to have the virtue of being able to account for the fact that 'just' and 'unjust' take the wide range of objects they do. Being centrally concerned with treatment, it is a simple matter to extend the use both to the person who treats, and to the way someone is treated, and it is, therefore, hardly surprising that we find the range of uses we do.

2.2 Rule-relative Justice: the Application of Rules, the Classification of Cases

I want now to discuss the nature of rule-relative justice and injustice. We have, of course, already been examining rule-relative justice for some time and thus the present discussion will be largely a matter of attempting to make explicit what has been implicit in the foregoing discussion. We have seen that the notion of treatment is central to justice. We must now connect together treatment and rules.

I want to suggest that questions of (rule-relative) justice and injustice arise when a rule is applied. (4) Rule-relative justice and injustice are to be understood by reference, not to the keeping and breaking of rules, but to the application and misapplication of rules. (5) To act justly it is necessary to properly apply the rules; a miscarriage of justice occurs only when the rules are improperly applied. This is, of course, no more than a rough first statement. Let me proceed by first trying to add a few comments on this first approximation, before going on to consider some of the refinements which will need to be made.

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- (4) Questions of justice also arise, of course, when rules are introduced or changed. But these are not, unless they violate higher ordered rules, the occasions for rule-relative injustices. On the possibility of injustices arising from changes of rules see CAMPBELL (1972-3), HOLBOROW (1973-4) and CAMPBELL (1974-5).
- (5) Rights and entitlements are often held to be rule-relative (in contrast to deserts which are not relative to any given rule). The view I am arguing against, therefore, is that any violation of a right or entitlement is unjust. I am opposing, therefore, the view I take to be the orthodoxy. See, for example, NOZICK (1974), Chapter 7, Section 1, and MILLER (1976), Chapter 2.

Let us begin by considering the notion of applying (and misapplying) a rule. It is useful, I think, to relate this notion to that of classification. The rules with which we are here concerned have categories associated with them. These categories may be explicitly or implicitly delineated, and their boundaries indicated more or less specifically. Nevertheless there must be some indication as to how a person, team or whatever qualifies for membership of any given category associated with a rule, if the rule is to be capable of being applied. By 'qualifying' I simply mean satisfying the rule-governed conditions for membership of a given category. It is, of course, useful to distinguish among 'qualifyings': we speak of being eligible for election, entitled to a prize, liable for punishment or compensation, and so on. (6) But for present purposes the general notion of qualification should suffice.

Now a rule does not apply itself: it has to be applied; and in order for a rule to be applied it is necessary for a judgement to be made. Thus the application of a rule requires a judge. The judge applies the rule by giving a judgement indicating the category or categories into which the case being judged falls.

It is often desirable for judgements to be made explicitly, and, on some occasions, for specific persons to be appointed as judges. Thus for the conduct of, for example, legal trials or tennis championships judges are appointed to give explicit judgements bringing cases under rules. But even when there is no specific person appointed to apply the rules, and even when no

(6) On these distinctions see FEINBERG (1970), pp57-8.

explicit judgements are given, the rules are applied only by the making of judgements, albeit implicit ones. Thus when a game of tennis is played without a referee it is necessary for the players themselves to make judgements and to apply the rules. Such judgements may, of course, be made explicit only at intervals or when there appears to be a disagreement, that is, when the parties appear to judge differently, or wish to ascertain that they have not.

We are now in position to specify what is required for the proper application and the misapplication of rule. The proper application of a rule, I have suggested, requires the making of a (correct) judgement as to how the given case falls with respect to the categories associated with the rule. Thus if rule-relative justice is to be understood in terms of the proper application of the rules, failures to achieve justice are to be understood by reference to the notion of failing properly to apply a rule, and the consequent failure properly to classify a case. If we express the same point in terms of treatment, we may say that, in the standard case of injustice, the judge treats (that is, acts towards) the person who is judged as if having liabilities, or lacking entitlements, which, in fact, the judged person does not have, or does not lack. Injustice, then, is a type of mistreatment.

To accept the tenor of this approach is to regard misclassification as a necessary condition of justice. But we need not, of course, regard misclassification as a sufficient condition of injustice. We must now consider whether there are any additional necessary conditions for injustice. I will argue that there are.

2.3. Further Necessary Conditions for Rule-relative Injustice

What is required for rule-relative injustice, in addition to a misclassifying judgement? It is, I think, clear that the misclassification must be significant, in some sense. By this I mean only to exclude those cases of misjudgement which do not matter. If, for example, I am judged to be entitled to one particular copy of a book, rather than to another which is, to all intents and purposes, identical, when in fact I am entitled to the second and not to the first, I can hardly claim that I have been unjustly treated. The misclassification must matter if there is to be a lack of justice.

As I have said, I am going to be concerned with what I have called the standard case of injustice, that is, with cases where there is someone who is done an injustice. To be done an injustice is, I take it, to suffer in some very general sense. (7) (I take it that to have fewer options available, or to have one's reputation impugned are forms of suffering in this general sense.) In so far as we are concerned with standard cases of injustice we shall, therefore, be concerned only with misclassifications which result in someone suffering. We shall not be concerned with those misclassifications which result in those up-side miscarriages of justice as a result of which no-one suffers an injustice.

(7) Though, as we have seen, the converse is false.

I want, now, to consider a number of putative additional necessary conditions which I want to reject. Firstly, it is sometimes held that justice is concerned only with relations between people; thus we are said to risk injustice only when we have dealings (or perhaps neglect to deal) with other people. To put the matter picturesquely, if there were only one person there could be no injustice. I know of no argument for this piece of conventional wisdom. Indeed it seems to be usually taken as a consequence of a stipulative definition adopted for the purposes of 'organizing the conceptual field'. In my view such a stipulative definition is unhelpful, serving to mark an (in this context) unimportant distinction and, thereby, to direct attention away from what is important and fundamental. It is widely held, no doubt rightly, that in general a person should not be judge in his own case. But this is held to be - for obvious reasons - undesirable. It is not held to be conceptually impossible. Now suppose one judges one's own case and misapplies the relevant rule in such a way as to disfavour oneself. On such occasions we speak of having 'done oneself an injustice'. Is this phrase in any way deviant? I see no reason to suppose that it is. Of course, people who find themselves having to judge their own cases may often prefer to err on the side of doing themselves an injustice. Such action, when recognized for what it is, does not occasion censure since it is normally taken to be indicative of honourable, rather than dishonourable, intentions, and it is not, therefore, normal to say that a person who does himself an injustice is an unjust person, or even, perhaps, that he has acted unjustly. But clearly such reluctance is a (straightforward) refinement on the fundamental conceptual pattern which does allow us to speak of justice and injustice

when we judge ourselves.

The topic of the 'circumstances of justice' has attracted some attention in recent years (8) and a brief word on this topic is, perhaps, to be included here. As I have said, I am concerned in this thesis with justice in general, and not simply with what has come to be known as distributive or social justice. Those who have written on the 'circumstances of justice' have been primarily concerned only with distributive justice. To discuss the matter thoroughly would require an examination of the question of whether the alleged circumstances of justice are indeed necessary conditions for the possibility of social or distributive justice and injustice, before then considering whether these circumstances (if there be any) carry over to be circumstances of justice understood in a wider sense. But this seems unnecessarily tedious. Instead, therefore, I propose to consider the alleged circumstances of distributive justice as suggestions for necessary conditions for (rule-relative) justice and injustice in general, without implying that anyone ever has made such a suggestion, and to explain why I wish to reject them. I will not consider the question of whether they are reasonable simplifying assumptions, but only the question of whether they constitute conditions for questions of justice to arise.

Consider first the suggestion that one may be just or unjust only to someone who is of similar mental and physical capacity as

(8) See RAWLS (1972), Section 22, and Barry's 'Circumstances of Justice and Future Generations' in SIKORA AND BARRY (1978), pp204-48.

oneself. This condition may be thought to embody the notion that a person acts justly or unjustly only if they are subject to the (collective) power of others. It is enough, I think, simply to note that God is spoken of as being just. Whether such a claim is true or false is beside the point. It is simply false to say that to make such a claim is to concede that God is within our collective power. Of course it might be said that we should stop speaking of God as just. But I will not try to anticipate what argument might be given for such a claim.

The claim that moderate scarcity of material goods is a necessary condition for social or distributive justice would hardly be expected to apply to justice in general. It is not easy to see why this claim in connection with social justice amounts to more than a particular instance of the truism that if there is no problem then no solution is needed. But we may simply note that even in conditions of superabundance or extreme scarcity it is possible to have football matches. And where one can have a football match one can have a just or unjust referee.

The foregoing suggestions do not appear to supply additional necessary conditions for the possibility of rule-relative justice and injustice. But there are, I think, other suggestions which are at the same time more plausible and more interesting. I have argued that justice (and injustice) are to be understood by reference to classification (and misclassification), and hence to judgement (and misjudgement). If the making of a judgement is a necessary condition of acting justly or unjustly, then it will follow that the necessary conditions of judging are necessary conditions of acting justly or unjustly. I propose to explore

this line of enquiry in the next section.

A further issue concerns the point at which the misapplication of a rule first appears. If we distinguish between 'mere judgement' and putting the judgement into effect, in some sense, we could ask whether the effectuation of misjudgement is necessary. (9) This question raises some interesting points, I think, but I propose to defer discussion until after the nature of justice beyond rule-relative justice has been examined, for it is, I think, only in the light of the contrast between rule-relative and non-rule-relative justice that these points can best be made.

(9) On this issue see FEINBERG (1980), p272.

2.4. Necessary Conditions for Judging: the Presumption of Authority

In this section I want to consider the claim that authority to judge is a necessary condition of being able to act justly or unjustly. Another way to put this claim would be to say that to call an action just or unjust is to concede that the actor possessed - or at least did not lack - the relevant authority to judge.

Towards the end of the last section, I suggested that, since the making of a judgement is a necessary condition for the possibility of acting justly or unjustly, the necessary conditions of being able to judge are necessary conditions for being able to act justly or unjustly. What, then, are the necessary conditions for being able to judge, and thereby, for being able to act unjustly or perpetrate injustice?

There appears to be something like (at least) two senses of judging. Let us begin by distinguishing between them. There is, firstly, judging in the sense of coming to a belief, or forming an opinion, by the use of one's rational faculties. It would most likely be in this sense that I would be using the term 'judge' if I were to say that I judged Kant to be the most important philosopher, or the distance from where I am sitting to the furthest ship I can see to be seven miles. Secondly, there is the notion of judging in the sense of deciding the issue. To judge in this sense is not simply a matter of forming an opinion. When the judges at a flower-arranging contest announce their decision they are not merely expressing a view, but deciding the

issue, deciding issues such as who has won first prize. The competitors might judge in the sense of 'form their own views' as to whose arrangement was the best. But they could not judge in the sense of 'decide the issue'.

The appointment of persons to positions which carry with them the authority to judge, that is, the authority to decide an issue, is a familiar enough feature of social life. Tennis umpires, football referees, members of the judiciary are variously appointed and are said to possess the authority to decide (certain specific) issues which arise. What are we to understand by the phrase 'decide an issue'. I take it that at least part of what we mean is that when, in order for matters to proceed, some question has to be taken as having been decided, it is the judgement of the person with authority to judge whose judgement is to be taken as give. (10) The judgement of the judge with authority to decide the issue is to be accepted, not in the sense that it should be believed to be correct, but as forming part of the basis on which future actions and decisions are to be based. Or, to put the matter the other way round, to refuse to accept a judge's judgement as a basis for proceeding is to deny, or to question, that judge's authority, that is, it is to refuse to accept that the judge does indeed possess the authority to judge in the sense of 'decide the issue'.

The two senses of judging are, I think, independent in the sense

(10) This point would need to be refined slightly to take account of the existence of appeals procedures - that is cases where it is not the case that 'the judges decision is final'.

that it is possible to be able to judge in either sense, without being able to judge in the other sense. I may have the rational capacity to come to a view about a legal case, but, having not been appointed as a judge, I am not able to judge in the sense of 'decide the issue'. By contrast a senile judge may be unable to come to a view about a case but able to decide the issue. This independence of the two senses of 'judge' is a consequence of the fact that the conditions which must be satisfied if one is to be able to judge are different in the two cases. To be able to judge in the sense of deciding an issue it is necessary to have the requisite authority.

The distinction between possessing (or claiming to possess) the authority to judge, in the sense of decide an issue, and 'merely' possessing the capacity to judge, in the sense of forming a view, is not only important from a conceptual point of view. It is, of course, a distinction of major social significance. To judge in the sense of decide an issue is something like an event, and, typically at least, involves the making of a performative utterance. The possession of authority to decide an issue (or rather, the claim to possess such authority) is often to be accompanied by a heavy symbolism - at least in cultures which lack a republican ideology. This symbolism finds a reflection in the metaphors we use to speak of those who 'sit in judgement' to judge those who may 'stand condemned'. (Perhaps sitting is associated with power and dignity, not only because it is easier on the body, but being a position from which it is difficult to run away, it indicates a lack of fear. Lying down might be even better in these respects - but it might also be associated with defeat and a lack of attention. Running is hardly dignified, and

even football referees are not said to 'run in judgement,') Judges able to sustain their position without symbolism must presumably rely on the wisdom of their decisions to maintain their authority in the eyes of the judged. It would, of course, be uncharitable to suggest that systems of judgement replete with symbolism indicate a lack of confidence, either in the abilities of the judges, or in those who would judge the judges.

Let us take stock of the position we have reached. I have suggested that (rule-relative) justice and injustice arise only when rules are applied, and I have argued that for a rule to be applied a judgement must be made. The necessary conditions for being able to judge are, therefore, necessary conditions for being able to act justly and unjustly. But, I have now suggested, there are two senses of judging, each with their own necessary conditions. In order to determine the necessary conditions of acting justly or unjustly, it is necessary to decide in which sense of 'judging' judging is a necessary condition of acting justly or unjustly. What sort of judging - forming and expressing a view, or deciding an issue - is required if it is to be possible for the action which gives expression to the judgement to be just or unjust?

I propose to take seriously the claim that judging in both senses is required if an action is to be just or unjust. If this view were right, it would follow that the necessary conditions for judging in each sense would be necessary conditions for an action being just or unjust.

The claim that in order to act justly or unjustly it is necessary to have the rational capacity to form a judgement, to be capable of discrimination, is, I suspect, the less contentious claim; I shall not, therefore, try to construct a defence for it. If the claim is true then the insane judge in the criminal court cannot act unjustly, and cannot provide us with evidence that he is just or unjust. (It does not follow from this that no-one may suffer an injustice as a result of such a judge's 'judgements'.)

The claim that judging in the sense of deciding the issue, and therefore authority to judge, are necessary conditions for the possibility of an action being just or unjust is, I think, a more controversial, and more interesting, claim. The possibility of there being an important conceptual connection between justice and authority has not, to my knowledge, received attention in recent work on justice. I do believe that there is an important conceptual relationship between justice and authority along the lines I have indicated. (I do not suggest it is as simple as the relationship suggested so far.) At the very least it seems not hopelessly implausible to suggest that the less appropriate it is to say of a judgement that it is given with authority, the less appropriate it is to say of that judgement that it is just or unjust. And even if we were able to say only this, we should still, I think, have a significant result.

Before I discuss the claim that authority to judge is a necessary condition for being able to act justly or unjustly, I want to say a few words about the concept of authority. My primary concern is, of course, with the concept of justice, and I am, therefore, concerned with authority, not for its own sake, but only for the

purposes of an understanding of justice. My remarks concerning authority are not intended as even the beginnings of an account of the concept. Indeed I shall assume what may well be false, namely, that the concept is unproblematic. (11)

I begin with the distinction between authority (to judge) and the ability to enforce one's will. As far as conceptual propriety is concerned it is, I take it, neither necessary nor sufficient to be able to enforce one's will in order to be said to have authority. A football referee who is unable to enforce his decisions does not thereby lose the authority to judge which has been bestowed upon him. Nor do the spectators gain such authority simply by invading the pitch. Of course, were it to be successfully argued that 'might implies right', that is, that those able to enforce their wills do, by virtue of that fact, possess authority then there would, on my view, be a connection between the ability to enforce one's will, and the capacity to act justly or unjustly. But such a connection would rest on the claim that 'might implies right', a claim which certainly requires argument, and which I have no wish to try to defend.

Let me now turn to the relationship between authority and the capacity to make someone (or something) a member of a class by judging them to be so. I want to suggest that no such capacity is required in order to possess the authority conceptually connected with justice. Indeed it is, I believe, arguable that

(11) For discussion of the notion of authority see BENN AND PETERS (1959) p279 ff.; R. S. Peters 'Authority (1)' and Peter Winch 'Authority (2)' reprinted in QUINTON (1967) pp83-111; WOLFF (1970) pp3-12; and NISBET (1967), Chapter 4.

the possession of such a capacity in an unlimited form would render one unable to act justly or unjustly.

It seems sufficiently clear, so as not to require argument, that it is possible to have authority to judge without it being necessary that one's judgement possess a stipulative character. A duly appointed jury possess the authority to decide (subject to appeal) whether the defendant is guilty. But the defendant is not made guilty by being judged to be so. (Of course one could adopt a use of 'guilty' which did make it true by definition that all and only those judged to be guilty are guilty. But nothing follows from that.) Judgements possess a stipulative character if, but only if, membership of the category of which the judged is held to be a member, is defined by reference to the judgement of the judge. In general, categories may, but need not, be defined in such a manner.

It is arguable, I think, that were all relevant categories to be defined by reference to some judge's decision, the possibility of that judge's decision being just or unjust would be precluded. This would seem to follow if injustice is characterized in terms of making a (miscategorizing) mistake, for there would be no logical possibility of making a mistake (or, therefore, of categorizing correctly). I say that this is arguable because the impossibility of acting justly or unjustly in such a case might, at least at first sight, be thought to constitute the basis of a reductio ad absurdum argument against the claim that justice is to be characterized by reference to the notion of correctly and incorrectly categorizing. To mount such an argument it would be necessary to show that we may intelligibly talk of a just or

unjust decision in such a situation. Now it might be thought that the decision can be judged just or unjust on the basis of the process followed by the (stipulative) judge in coming to his decision. If this process is unfair, then, on the basis of the canons of pure procedural justice (12), the judge may be described as unjust. To defeat such an argument it would be necessary to show that to fail to follow a fair procedure is itself to be understood by reference to the notion of miscategorizing. And this is, I suggest, highly plausible: to act unfairly in coming to a decision might, for example, be understood as failing to give someone's interests the attention they deserve, and thereby failing to treat that person as he deserves, and hence (as will be argued later) to treat him as less (and hence other) than he is.

This is, of course, no more than a sketch of a counter-argument to my characterization of justice, and a sketch of a counter-argument to that counter-argument. It would, I think, be inappropriate to pursue these arguments further at this stage of the analysis. If the original claim - namely, that were all relevant categories to be defined by reference to some judge's decision, the possibility of that judge's decision being just or unjust would be precluded - can be defended, it would appear to follow that if, for example, we held that God could not misjudge by virtue of the fact that whatever He judges simply is right, it would follow that God cannot (logically) be just or unjust. This argument presupposes, as I have said, the categorizing or

(12) I borrow this term from Rawls. See RAWLS (1972), p85f.

classification characterization of justice. It would seem that an agent-centred conception of justice (that is, a view of justice which determined just acts by reference to the acts of just agents (13), and then identified the just agent independently of acts) might allow us to speak of just and unjust applications of rules, even where there was no logical possibility of mistake or misclassification. But, as I argued earlier in this chapter there is, I think, much to be said for the view that it is actions, not agents, which are primary as far as justice is concerned.

Who has authority to judge? This is too general a question to be usefully tackled. If instead we ask how, in general, may someone come to possess authority to judge, then we may begin by noting that authority to judge may be rule-governed, that is, a person may qualify under some rule for the right to judge, or it may be non-rule-governed. A flower-arranging club might have a rule stating that judges are to be appointed from the membership list in alphabetical order, or chosen by some committee. To be next on the list, or to be chosen by the committee would then be to qualify to be a judge.

Although authority is sometimes acquired by qualification under a rule, it would seem that this cannot always be the case. If rules require promulgation by persons or bodies with authority, then it would appear that any rule-governed system must have some supreme (sovereign) authority, whether it be God or 'the people'

(13) As we noted in Chapter One, Annas attributes this view to Plato.

or whoever, whose authority has not been acquired by qualification under a rule. There is, of course, no requirement that non-sovereign authority to judge be acquired by qualification under a rule. To discuss how non-rule-governed authority may be acquired would take us too far from our topic. However it seems reasonable to suppose that where authority is not possessed by virtue of qualification under a rule, it is possessed by virtue of the characteristics of the possessor. As I have said, it would be imprudent, in a thesis on justice, to attempt an analysis of authority. But were the concept thought to be problematic, and were the present strategy successful in analysing justice, it might be worth attempting to analyse authority by beginning with a careful study of authority in a rule-governed context, before attempting to extend that analysis to the non-rule-governed cases.

It is, of course, important to distinguish between the role played by a rule in relation to rule-relative justice, and the role played by a rule in relation to rule-governed authority. This is not to deny that a rule governing authority may not also be a rule relative to which an act may be just or unjust. For there to be justice or injustice the further necessary conditions mentioned in the previous section must be satisfied. Thus to treat someone as lacking authority to judge, when they have, in fact, qualified for the possession of authority, is unjust only if we regard the possession of authority as significant in the sense discussed in 2.3. If it were not the case that to be treated as lacking authority for which one has qualified is to suffer (in some general sense), it would not be the case that to be treated as lacking such authority is unjust. An illustration

may help here. Suppose that Jones has qualified under the rules to referee the next F. A. Cup Final, but is denied that honour by the Football Association. In such a case it would be appropriate, other things being equal, to say that Jones had been treated unjustly.

I have distinguished between rule-relative and non-rule-relative justice, and I have now distinguished between rule-governed and non-rule-governed authority. How do these two pairs of concepts fit together? I see no reason in principle to deny that all four combinations are possible. Thus rule-relative justice or injustice may arise when someone with rule-governed or non-rule-governed authority judges, and similarly in the case of non-rule-relative justice (assuming there be such a thing). But it is, of course, common for rules to be applied (and hence rule-relative justice or injustice to be perpetrated) by judges who have come to possess authority to judge by qualification under a rule. And, by contrast, when we are in a situation where we are unwilling to take any specific rules as given for the purposes of deciding what is just and unjust, and hence unwilling to make use of rule-relative justice, we are likely to be equally unwilling to take any authority conferring rules as given.

Let us proceed with our discussion of the question of whether authority to judge is a necessary condition for being able to act (rule-relatively) justly or unjustly. I have distinguished between cases where the relevant authority is governed by rules, and those where it is not. Let us consider cases of the former type.

Given a set of rules governing authority, questions of who has, and who does not have, authority to judge are likely to be relatively straightforward. This is not to deny that there may be hard cases and points for interpretation. But given that rules are usually made to clarify matters, it would be odd if some measure of clarification were not achieved.

Now it seems that, not only is the question of who has, and who does not have, authority to judge clearest in the cases we are presently considering, but the requirement that one have authority to judge if one is to be able to act justly or unjustly is also clearest in these cases.

Consider again the case of Jones being denied the honour of refereeing the F. A. Cup Final for which he has qualified. If the thesis that acting justly and unjustly presupposes authority is true, then it should be the case that a denial of authority (A) to someone entitled to have authority is unjust only if the person or body denying authority (A) itself possesses the necessary authority (A') to decide the issue of who has authority (A). And this is, I suggest, precisely what we find. Jones is treated unjustly by the Football Association if he is denied the authority for which he has qualified by being denied the opportunity to referee the match. But now suppose that Jones, having been duly appointed, finds that his judgements and decisions are treated with contempt by one of players. Is the player treating Jones unjustly? We would not say so. The reason, I suggest, is that, though the player is treating Jones as unentitled to have his decisions taken as given when, in fact,

Jones is so entitled, the player is held to lack the authority to judge whether the referee possesses the authority to decide issues that arise in the course of the game. We speak, therefore, not of the referee being treated unjustly by the player, but of his being treated with contempt, with a lack of respect.

Suppose we did say that the player was treating the referee unjustly. It is, I think, significant that we find it necessary to refocus to make full sense of such a remark. To call the player's treatment of the referee unjust is to make a point, not about the player's treatment of the referee qua referee, but about his treatment of the person holding the office of referee. In other words, it would be to make a point to be taken in a wider context, wider than the context within which the structure of authority, and the referee's and player's places within it, were to be taken for granted. And in that context it is no longer clear that the player does lack the necessary authority to judge the person who holds the office of referee.

Similar remarks would appear to apply to describing the action of those who fail to show the respect allegedly due to judges in courts of law. Such actions are described, not as unjust, but as contemptuous. But note the similarity. If a judge denies to someone that to which they are entitled he may be said to act unjustly. But if that person denies to the judge the respect to which he is entitled that person will not be said to act unjustly. The difference arises, I suggest, from the (presumed) possession of the appropriate authority to judge in the former case and the (presumed) lack of appropriate authority to judge in

the latter case.

As I have said unjust and illegal are not synonymous. If my account of the nature of (rule-relative) justice is correct there is a straightforward distinction between the two notions: to act illegally is to act in a manner prohibited by law, to act unjustly (as far as rule-relative justice is concerned) is to misapply the law. But it is also worth noting, I think, that, whereas authority to judge is presupposed in the case of an action being described as just or unjust, there is no such presupposition in the case where an action is described as illegal or legal. It is not that an illegal or legal action cannot give expression to a judgement (in the sense of a discriminating belief), for an illegal (or legal) act may well do so. Thus to describe the activities of Al Capone as illegal is not to preclude that they expressed judgements about other people (say, for example, that other people are unworthy of respect), but nor is it to concede that Al Capone had the authority to judge those other people; but, I suggest, to call Capone's actions unjust would be tantamount to conceding that Capone did not lack the authority to judge his victims.

One may, of course, call Capone's actions unjust. But to call them unjust is to take the 'wider' view, comparable to the case of calling the player's contemptuous treatment of the referee unjust. To be willing to call Capone's actions unjust, to be willing to take the wider view, is, I suggest, to betray a republican cast of mind for precisely this reason: that it is to be willing to allow that Capone did not lack the necessary

authority to judge his victims.

Of course, republicanism is a part of the dominant ideology of our times, and many - at least among philosophers - may well wish to concede or at least not deny, that Capone (or Robin Hood) did not lack the necessary authority to be able to act unjustly. Given this view the presumption of the necessary authority to judge becomes less significant simply because it is taken for granted that everyone possesses it. The belief that some capacity is universally possessed makes it easier, I suggest, to fail to see when the possession of that feature is presupposed: it is simply taken for granted. It is tempting to speculate that the distinction between acting unjustly and acting illegally has been eroded, in part, for precisely this reason - namely that one of the differences has come to be overlooked. Perhaps this has facilitated the use of these terms to mark a much less interesting distinction, from the analytical point of view, namely, the distinction between what the state (or some relevantly similar entity) requires of us, and what (part of) morality requires of us.

What of cases where the relevant authority to judge is not rule-governed? As I suggested earlier, it seems plausible to suppose that such cases are more likely to feature non-rule-relative justice rather than rule-relative justice. I propose therefore, to leave the discussion of the presumption of authority claim for the moment, and to return to the issue when we come to discuss justice 'beyond the rules'.

2.5. Beyond Rule-relative Justice

In this chapter I have been concerned with what I have termed rule-relative justice. I have suggested that rule-relative justice is to be understood in terms of the application of rules to cases, such application requiring judgement. An unjust act gives expression to a mistaken judgement. I have suggested that, as regards rule-relative justice, it is plausible to suppose that certain other necessary conditions must also be satisfied if the epithets of just and unjust are to be applicable to an action. The most interesting of these is, I think, the requirement that the action be one which gives expression to a judgement which the actor does not lack the authority to make. But I have also suggested that the misclassification must be significant, and the person misclassified must be placed in a less desirable category than the one which they have actually qualified for membership of under the rules, if they are to have been done an injustice. I have not, of course, said anything yet to suggest that these necessary conditions are applicable to the employment of the notions of just and unjust, where those terms are not used in relation to rules taken as given.

At the end of Chapter One, I suggested that the use of the concept of justice in relation to rules which are to be taken as given, was a comparatively uncontroversial topic and, as such, was an appropriate place to begin a discussion of the concept of justice. We have now taken this journey through the foothills, as it were, and we must now consider how we are to make our way

towards the higher peaks.

I do wish to stress the importance of considering which fundamental approach to thinking about justice should be adopted. It is all too easy to leave one's fundamental assumptions unexamined. Thus, for example, the question of whether we can, or should, use justice without presupposing rules is not, I think, an idle question. The fact that we can, and do, ask whether some specific set of rules are just, does not decide the issue. To criticize rules as unjust we do not necessarily have to adopt a use of justice unconnected with rules. It may be enough to criticize one set of rules by appeal to another (more fundamental) set. The question of whether we can, and must, go beyond rule-relative justice is one aspect of an important 'first water' question about the nature of justice, and we should beware of assuming that we all know the answer already. The different approaches are, perhaps, no more than ways of emphasizing different aspects of justice. But differing emphasis - even if that were all that is at issue between the different approaches - is extremely important. What we emphasize, what we take to be fundamental, is highly influential as regards our patterns of thought, our style of argument, our choice of metaphor and our beliefs about what is, and is not, plausible, what does and does not require defence. It is easy to think that such matters are of little consequence, particularly when compared with the question of the validity or invalidity of an argument. But I do not think that this is so.

How, if at all, is it possible to move beyond rule-relative justice? And if it is so possible, how are we to understand the notion of justice when not used in relation to a set of rules to be taken as given? I propose to begin the task of answering these questions by considering how, in general, rule-relative and non-rule-relative justice (if there be such a thing) might stand in relation to each other. There are, I think, three basic positions which may be adopted on this issue.

Firstly, one may hold that the term 'justice' is (properly) used, both in relation, and not in relation, to a given set of rules, but that there is no connection between these uses. Thus, on this view rule-relative and non-rule-relative justice are radically different, unrelated in any significant sense, and 'justice' is ambiguous. If this were so then we have, of course, been wasting our time in climbing the foothills of rule-relative justice. The peak we aspire to climb is simply unconnected with those foothills.

It will be recalled that, at the end of the last chapter I suggested that we should at least resist the temptation to think that there are two senses of 'justice'. The possibility of fundamental ambiguity should always be kept open. But so should the possibility of a fundamental interconnection which we have so far overlooked. The way to demonstrate that this view is false is, of course, to do that which those who hold this view claim is impossible, namely, exhibit the relationship between rule-

relative and non-rule-relative justice.

The view that non-rule-relative and rule-relative justice are radically different represents one of the extreme possibilities. At the other extreme is the view that there is no such thing as non-rule-relative justice. To take this view is to preserve the relationship between justice and rules in all cases; the absolute character of absolute justice being viewed as a function of a particular set of rules. There is, on this view, no need to conceive of justice in other than a rule-relative fashion. The belief that (absolute) justice is to be understood in terms of natural law, of treatment in accordance with natural or fundamental rights, is, I take it, a belief which presupposes this view. On this view the concept of justice presupposes the concept of law; the foothill we have already climbed turns out to be all there is - at least as far as justice is concerned.

The foregoing views represent the extremes: in the first, non-rule-relative justice is conceived to be entirely distinct from rule-relative justice; in the second, non-rule-relative justice is denied existence, absolute justice being (if anything) identified with rule-relative justice, with some particular set of rules. The question arises, then, whether there is a way between these two extremes. What would such a middle way look like? To take the middle way is, I suggest, to conceive of non-rule-relative (and hence, perhaps, absolute justice) in a manner analogous to, but distinct from, rule-relative justice. On such

a view rule-relative and non-rule-relative justice will be congruent, that is, they will have the same basic patterns of argument, the same basic 'shape'. It is, of course, only on this view that our strategy of looking to rule-relative justice for clues to the nature of non-rule-relative justice makes sense.

The reader will, then, have had no difficulty in anticipating that it is this third approach to the relationship between rule-relative and non-rule relative justice which I endorse. I take it that it is the most intuitively attractive of the three views, and is to be adopted provided only that it is coherent. The view requires, it would seem, the achievement of what, on each of the other views, is held to be not possible. In contrast to the first view, it requires a significant conceptual relationship to be exhibited between non-rule-relative justice and rule-relative justice. And in contrast to the second view, it is necessary to show how justice can be intelligibly employed without recourse to rules. The other views derive their plausibility, at least in part, by virtue of the fact that it is less than obvious how both of these requirements can be satisfied at the same time.

To adopt the view that rule-relative and non-rule-relative justice are congruent is to be led to ask what the similarities and differences between rule-relative and non-rule-relative justice are. We shall, then, need to look again at the features of rule-relative justice which have been identified in the present chapter, and consider which of them are preserved in non-rule-relative justice, or justice 'beyond the rules'. This is,

of course, what I propose to do. For if it can be shown that justice as conceived in justice as fitness is congruent with justice when used in relation to rules, then we shall, I think, have a not insignificant argument in favour of justice as fitness. But before I attempt to develop such an argument further, I want to undertake another piece of preparatory work, namely, a discussion of practical reasoning.

Chapter 3 Two Systems of Practical Reasoning

3.1 Justice and Reasons for Action

Justice is first and foremost a concept employed in practical reasoning, that is, in reasoning about how we should act. To call an action unjust is to say that, other things being equal, it should not have been performed; and it is to imply that there is a reason (though not necessarily a conclusive reason) why the act should not have been performed. Acts which are unjust are, ceteris paribus at least, wrong acts, though not all wrong acts need be unjust. An act is unjust, I propose, if and only if it is contrary to a particular type of reason for action. In the present chapter I will try to show what type of reason for action, when acted contrary to, produces an unjust act. In order to achieve this objective, it will be necessary to isolate different types of reason for action, and to outline the systems of practical reasoning within which they make sense. In the course of the present chapter, therefore, it will be necessary to build up a picture of practical reasoning, and to locate the various concepts we employ in practical reasoning therein. As a consequence of doing this, it will become clear how the concept of justice is related to (some of) the other concepts we employ in our practical reasoning.

One (though only one) factor in judging the plausibility of any particular characterization of the concept of justice will be the extent to which the characterization makes sense of the fact that

to call an action unjust is to imply that there is reason not to perform it. I hope to show that justice as fitness is successful in this regard. Conversely, a characterization will be suspect if it appears to preclude our being able to account for the fact that there is reason not to act unjustly. (To be avoided at all costs is the temptation to believe that simply by labelling an action as 'unjust' we somehow manage to conjure up a reason not to perform that action.)

I am inclined to think that this point weighs against the view that justice is essentially a matter of producing the right pattern of distribution. Now I do not, of course, deny that distributing is something which may be done justly or unjustly. But I think that it is a mistake to concentrate upon different patterns of distributed goods, to suppose that one of them must be just, and that the problem is to defend the pattern. The difficulty arises because it is not easy to see how the possibility of creating a pattern could provide a reason for action - leaving aside aesthetic considerations which, I suggest, are too weak to form the foundation of justice. A particular pattern will be provided by acting justly (1), but it is not the pattern that matters - it is, I think, something else. Perhaps the emphasis upon distribution in thinking about justice is part of the legacy of the dominance of utilitarianism. Utilitarianism, of course, has no intrinsic interest in how the

(1) This is denied by Nozick; see NOZICK (1974) pp155-64.

good gets distributed. To think of justice primarily in terms of distributive patterns is, perhaps, to preserve fundamental utilitarian ways of thinking, but to tack on a concern for justice. (2) I think this kind of approach is a mistake for, as I will try to show in the present chapter, justice and utilitarianism have very different roots.

What reasons for action do we have? We act for, and attempt to justify our actions by reference to, a whole variety of reasons for action. The reader may, therefore, be forgiven for wondering whether this is not a preposterous question to ask. Nevertheless, what I want to consider is whether there are fundamentally different types of reason for action. If there are, what are they?

How might we go about task of uncovering fundamental divisions amongst reasons for actions? Reasons for actions are often discussed in terms of desires and beliefs. I want to eschew this approach, at least to begin with. To concentrate upon the desires and beliefs of agents is, perhaps, to place the individual actor at the centre of the stage. I do not say that there is anything wrong with concentrating upon the individual actor. But what would be wrong would be to suppose that, in doing so, we were not taking a particular view, and that no other

(2) Barry for example, offers us a distinction between 'aggregative' and 'distributive' principles; and suggests that justice is a 'special case' of distributive considerations. See BARRY (1965), pp43-4.

approach is possible. I propose to try to take what might be described as a wider view.

When people argue about matters of public policy, they talk of rights and justice, the public interest, decent and civilized treatment, behaving honourably and with integrity, and so on. We use, obviously enough, many different concepts and arguments. Are these concepts interrelated? Is it possible that they all hang together in one single coherent conceptual system?

We are, of course, all familiar with the clash between efficiency and equality, or between utility and rights. (3) It is easy to feel that much recent philosophical discussion in practical ethics reduces to 'on the one hand rights/equality/justice, on the other utility/efficiency'. Arguments purporting to defend some point of trade-off are notoriously unconvincing.

It seems plausible to suppose that there is not one single conceptual system of practical reason but, rather, at least two.

(4) Indeed I will argue in this chapter that there are indeed

(3) Cf. for example, the very title of OKUN (1975): Equality and Efficiency: the Big Tradeoff.

(4) Cf. FINDLAY (1961), p293:

Moral systems of the right are mainly concerned with the avoidance of evil and particularly of injustice, whereas moral systems of the good have been concerned with quite different tasks. It is not remarkable that these two systems have, except by confusion and trespass, found so few meeting points.

two distinct systems: the levels of being system and the system employed by utilitarianism. I will also try to indicate why I think these two systems cannot be integrated. Each system, I will suggest, has its own concepts, each has its own pattern or patterns of arguments (and hence type or types of reasons for action), and, indeed, each system has its own distinctive conception of action. I am inclined to think that each is also, in some sense, based upon a metaphor. It is, I believe, difficult to over-estimate the importance of the use of metaphor in our practical reasoning. This point has been made by Iris Murdoch. She writes:

The development of consciousness in human beings is inseparably connected with the use of metaphor. Metaphors are not merely peripheral decorations or useful models, they are fundamental forms of awareness of our condition: metaphors of space, metaphors of movement, metaphors of vision. Philosophy in general, and moral philosophy in particular, has in the past often concerned itself with what it took to be our most important images, clarifying existing ones and developing new ones. Philosophical argument which consists of such image-play, I mean the great metaphysical systems, is usually inconclusive, and is regarded by many contemporary thinkers as valueless. The status and merit of this type of argument raises, of course, many problems. However it seems to me impossible to discuss certain kinds of concepts without resort to metaphor, since the concepts are themselves deeply metaphorical and cannot be analysed into non-metaphysical components without a loss of substance. (5).

If it is the case that there are two distinct conceptual systems as far as practical reasoning is concerned, and if it were also

(5) MURDOCH (1970), p77. On metaphor in general I have found LAKOFF AND JOHNSON (1980) of particular interest. See also ORTONY (1979).

the case that these systems were not only exclusive but also exhaustive, then we should have here the basis of an account of the difficulty of defending trade-offs between considerations expressed in the language of the two systems. For, it would seem, we should simply lack any concepts with which to think through the question of how the different considerations should be traded off. We should, then, face the spectre of incommensurability.

3.2 The Value System

I want to begin by discussing the system employed by utilitarians. I propose to call this system the 'value system'. There are, of course, many variants of utilitarianism, but I shall not examine their differences. My concern is with how in general utilitarians think about action and reasons for action. I take it that we will find the clearest and most authentic indication of 'how utilitarians think', if I may put it that way, in classical utilitarianism. (6) The reader will be familiar with utilitarian systems of thought, and I will do no more, therefore, than draw attention to what I take to be the salient features.

The fundamental idea of utilitarianism is strikingly simple: all possible states of affairs, it is to be supposed, have positive, negative or zero value, and the right action, on any occasion, is that action which will bring about the maximum possible value (or, taking account of uncertainty, the maximum possible expected value). It is common to talk in terms, not of value, but of utility. It may be as well to remind ourselves that when utilitarians speak of 'utility' they do not - or at least should not - simply mean usefulness. Not only instrumentally valuable states of affairs are said to have utility, those which have only

(6) See, for example, SIDGWICK (1981), Book IV.

intrinsic value are also said to have utility. But it would, of course, be bizarre to suppose that we could account for the intrinsic value of a state of affairs in terms of the notion of usefulness. Readers of this work will not be prone to identify value with monetary value; I propose, therefore, to speak not of utility, but of value.

The eye of the utilitarian is fixed firmly on the future, on the consequences of action. He must try to work out what the future holds, what the possible consequences of the various possible actions will be. This is, of course, a task of mind-boggling complexity. He must come to terms with the natural and social sciences, with game theory and risk analysis, and so on. But the complexity of utilitarianism lies, not in understanding the principle, but in operating it, not in the metaphysics but in the calculations. As far as concepts are concerned, the utilitarian travels light. He will distinguish between value and disvalue (positive and negative utility), between means and ends, will speak of effects, effectiveness and efficiency, of usefulness, utilising and utility, and will use exploitation to refer to making use of opportunities, of avoiding the occurrence of an opportunity cost. But it is difficult to imagine a more elegant - or, as some would say, impoverished - conceptual system of practical reason.

The utilitarian has a no-nonsense approach to practical reasoning: whatever must be done, must be done. In principle, the end may always justify the means; it is simply a matter of

the costs and the benefits, of the size of the pay-off, and whether the 'winner' can pay-off the 'loser'. There is, in principle, no difference between an act and an omission. Nor is the distinction between what is done intentionally and what is done only knowingly, in principle, of any significance. Such distinctions are at best only contingently related to what comes about, what is produced.

Of course most people do not actually conduct their practical reasoning in terms only of value and disvalue, of efficiency and expected utility. Rather they make use of a whole plethora of notions - integrity, degradation, obligations, honour, dignity, self-respect, deserts, self-realization, justice and so on. Now these concepts are not immediately and obviously reducible to the utilitarian's preferred concepts. These notions must be explained, explained away, or simply abandoned.

The concept of value (or utility) bears enormous weight then, in the system of thought employed by utilitarians. Questions concerning value occur on two levels. There is, firstly, the question of what has value. The traditional answers are in terms of happiness or pleasure. More recently, notions such as welfare and preference, want or desire satisfaction have been canvassed. Aesthetic considerations have also been thought relevant. Secondly, there is the question of what it means to say that something has value. And this is, of course, a question which

has been at the centre of analytic moral philosophy since Moore claimed that good is a non-natural, indefinable quality. (7)

Reasons for action are, for the utilitarian, of a uniform type: if some state of affairs has value there is reason to bring it about. Action is viewed primarily as enabling us to change what exists, or to prevent such changes. For the utilitarian there is reason to act to change, or to prevent changes if, in so doing, we can create what has positive value (eg happiness) or destroy what has negative value (eg suffering). Thus we have reason to create and preserve what has value, to destroy and prevent what has negative value, to improve (that is, to add value) and to resist deterioration (that is, to prevent the erosion of value). The utilitarian would, then, have us conceive action in terms of creation and destruction - and related notions of preservation, prevention, improvement and resistance to deterioration. Actions most readily conceived in this fashion are actions which may be said to be consequential, or 'make things happen'. To insist on viewing all actions in this way is likely to lead to distortion: such practices as kissing and the removing of hats or shoes when entering holy places are not, first and foremost, attempts to make things happen. They may, of course, have effects.

Let me now emphasize and summarize a number of features of utilitarianism. Firstly, it is a system which purports to have

(7) See MOORE (1903), pp5-10. For a review of analytic moral philosophy see HUDSON (1970) or WARNOCK (1966).

universal application. To embrace utilitarianism is always to know how to go about deciding how to act: the theory deals with all the 'moral' issues, leaving only 'the figures' to be calculated. Secondly, and relatedly, it is a system which emphasizes quantification rather than qualification (or classification). Mathematics (or at least arithmetic) has an important role to play. (This point is illustrated by the fact that John Stuart Mill's notorious attempt to introduce the notions of higher and lower pleasures (8) seems so out of key.) Thirdly, utilitarianism is, as I have said, a theory with a strikingly simple conceptual apparatus. At the heart of the system is one simple concept - which, it has been suggested, is indefinable - namely, value. And finally, we have seen that utilitarianism places at centre-stage those conceptions of action which see action as making or preventing changes; and utilitarian reasons for action appear to be tied to those conceptions of action.

Utilitarianism is an attractive theory, and it employs an attractive system of ideas. The fundamental idea is that we ought to produce as much of that which is good as possible. How could anyone object to this, one might wonder? And once the fundamental idea is accepted the rest of classical utilitarianism seems to follow, easily and irresistably. (The other side of this particular coin is the botched character of variations on

(8) See MILL (1962), pp258-60.

classical utilitarianism: the variants avoid classical utilitarianism's allegedly unacceptable conclusions only by measures which appear ad hoc. (9) Yet how is it possible, we might wonder, for so much to flow from so little? How is it, that by embracing this seemingly innocuous idea - the idea that we ought to bring about as much good as possible - we are led to conclusions which many find impossible to accept? How is it that so much of substance can flow from a claim which looks positively banal, and even, perhaps, has the appearance of being no more than a definition of what it is to act rationally?

It is tempting to think that this system has more built into it than meets the eye. The first point to be made is that it seems to assume that the only reason to act is to produce, create, destroy and so on. But this is not the only way we conceive action. We speak also of treating. (As I have suggested, to regard all actions as producing or destroying is to simply fail to understand them.) Does the system of ideas employed by utilitarianism assume that the (whole) point of life is to produce, to create? This is a view of life associated with a particular class in a particular type of society. But it is, surely, less than an obvious truth. (10)

(9) An example of the kind of variant I have in mind is 'person affecting' utilitarianism; see NARVESON (1967). For a critique of this theory see PARFIT (1984), pp393 ff.

(10) For a discussion of utilitarian ideas from a sociological perspective see GOULDNER (1970), Chapter 3.

Attacks on the claim of the utilitarian system to be neutral are often met with the reply that, each of us may assign value to the various possible states of affairs as we wish. In consequence, the utilitarian way of thinking is neutral for, in itself, it is contrary to no view; any result can be obtained if you only 'fiddle the input'. This particular 'argument' has, it seems, been pressed into service to deal with the problem which many have thought justice posed for utilitarianism.

If we give up hedonism, they ['John Laird, Ewing and others'] point out, we can hold that there are a number of different kinds of things which are good: pleasure, knowledge, love, aesthetic experience, and the like. We can even hold that one of the good things to be promoted is an equal or just distribution of the other things. Then when we are calculating our scores, we must figure in, not only the value of the pleasure and other such goods that are produced, but also the value of the pattern of distribution involved. (11)

Frankena goes on to say that he finds the view 'unconvincing':

... I do not see that a pattern of distribution is ... a normally good thing in itself. (12)

Nor do I. The point is that, though it may be possible to get any conclusion out of the utilitarian algorithm, in order to do so, it may be necessary to distort some views to the point where they appear simply bizarre. This is hardly neutrality.

(11) FRANKENA (1973), p42.

(12) Ibid.

But why should this be so? In part, it is, I think, because the system which utilitarianism employs conceives action exclusively in terms of creation, destruction, and so on. And this requires some views to be presented in less than their best light. (Indeed it is, I suggest, to make nonsense of some views.) But I am also inclined to think that there may be analogy or metaphor hovering at the back of utilitarianism. Might not the notion of value, and of what has value, be understood by reference to an analogy? If we take this possibility seriously, what would we expect? We should expect, I think, that when exposed the restrictive impact of the analogy will be disavowed. But we might also anticipate that its operation will in part be insidious, and that the concept of value will continue to be informed by the analogy (or some other) even after disavowal of the analogy. We might doubt that, were we not to continue to employ the analogy, or some other, in some way, we would be able to attach significance to 'value', and to utilitarianism.

We may expect to feel resistance to the idea that value is (understood as) an analogue. It is easy, when one has been indoctrinated into a system of thought to the extent that one can happily operate it, to think that there is nothing problematic, mysterious or unliteral about it. But if value were to be understood as an analogue, would that not help to explain how we are able to operate the concept without being able to define it in an illuminating fashion?

If value were an analogue of some other concept, then it would be reasonable to expect utilitarianism to be analogous to some other theory. Such a theory would presumably need to be one which has been sufficiently powerful and impressive to affect men's thinking in areas beyond the realm to which it applies (though we should remember that today's specialization is a fairly recent phenomenon); and it must possess the relevant salient features we identified earlier in utilitarianism: we would expect the theory to be conceptually economical and elegant, complex in its application, emphasize quantification over classification, and have at its centre a notion similar to value, a simple, indefinable property which may, in principle, vary between positive and negative infinity. There is, I think, a theory which fits this description sufficiently well to be worthy of further investigation. But before we explore this issue further it is necessary to introduce the conceptual system in which justice finds its home: the levels of being system.

3.3 The Levels of Being System

3.3.1 The System

I now turn to a radically different and distinct system of concepts. The fundamental assumption of this system is that it makes sense to speak of beings or entities as existing on different levels. What is meant when it is said that some being is higher or lower than another is not, of course, that one entity is physically (ie spatially) above or below another. The system has, then, a metaphor at its heart, and indeed, a much more obvious one than utilitarianism. What is meant when it is said that some entity is higher than another is that it is more meritorious, has a higher status, is more worthy or virtuous, or some similar claim.

The use of the height metaphor is ubiquitous. We speak of higher degrees, the lower divisions of the Football League, the High Court, upstarts, higher motives, high table, a low trick, of sinking to depths of depravity, of heaven being on high and hell being the underworld, judges sit above the court, important people sit on platforms at gatherings, and so on. Why we should employ this particular spatial metaphor is a topic on which it is difficult to resist speculating. The sun is both impressive and (was thought to be) above, though if this is the source we do seem to have generalized from the particular in an extremely reckless fashion! Perhaps the metaphor arises from a straightforward identification of right and honour with might:

someone in control is 'on top', has power over those under him. The explanation of the metaphor is, then, presumably, the obvious one, that those literally on top of others have power over them.

The positions in a hierarchy or on a scale are variously referred to by such terms as 'grade', 'degree', 'rank', 'status' and so on; the general terms for the quality on account of which assignment to a particular grade (or whatever) is to be made are 'virtue' and 'vices', 'merits' and 'demerits', 'qualities' and 'flaws'. These, in turn confer merit or demerit, worthiness or unworthiness. The 'higher' may be spoken of as: high-ranking, worthy (worthies), noble, honourable, precious, worshipful, revered, sacred, holy, meritworthy, reputable, respectable, estimable, inestimable, dignified, dignitaries, highly-regarded, and so on. The 'lower' by low, low-ranking, base, ignoble, unworthy, dishonourable, humble, brutish, undignified, profane, disreputable, depraved, despicable, unrespectable, and so on. It is sometimes possible to raise or lower an entity. We speak of promoting, dignifying, deifying, ennobling, raising, elevating, consecrating, civilizing and so on; and of degrading, relegating, debasing, humbling, desecrating, dehumanizing, barbarizing and so on. To keep down is to repress. Some of these terms, such as 'elevating', are evidently connected etymologically with the higher and lower metaphor. Others are not. Thus 'defile' is derived from making foul or dirty, and 'deprave' from making crooked. The height metaphor is not, then, the only one which has been employed. But notice that we say 'sinking to the depths

of depravity'. The height metaphor, though not the source of all our terms in this area, is, I think, a particularly powerful, and unifying image.

In addition to raising and lowering, we are able to treat an entity as possessing the status it has: we may honour the honourable, praise the praiseworthy, revere the fearful, worship the worshipful, esteem the inestimable, show respect to the respectable, as well as despise the despicable, and show contempt for the contemptible. To treat an entity in such manners, to treat it as it is, is to treat it appropriately (perhaps properly), or, as I will say, fittingly - in a manner which befits it. The notion of 'treating as' is an important one. I propose to examine it a little more closely later in this chapter.

We are able to act, not only fittingly, but also unfittingly. To act unfittingly is to treat an entity as if it were higher or lower than it is. To treat in an entity as having a higher status than it has is to flatter it; to show a respect which is not due. We treat entities as having a lower status than they have when we act disrespectfully, when, for example, we show contempt for what is not contemptible, not worthy of contempt, or when we refuse praise to the praiseworthy. And, of course, to treat someone as lower than they are is (at least sometime) to do them an injustice. Injustice, I want to suggest, is to be understood in terms of this idea of unfitting treatment, of treating entities as lower, or less, than they are. To do

someone justice is, by contrast, to treat them fittingly - to treat them as they are. Hence justice is to be understood in terms of fitness.

A single feature of unfitting treatment is its capacity to occasion strong emotional responses. We feel resentment and indignation when we are treated unfittingly, when we are treated unjustly or contemptuously. We resent being treated as if we were less than (we think) we are: we resent being accused of crimes we have not committed, being treated as unreliable when we consider ourselves reliable, being treated as unfree when we consider ourselves free. We - and, apparently, God - are jealous of our status; we are jealous when those who are not our equals (ie those who are lower) are treated as if they were our equals. The man who works all day is jealous of someone who works for only an hour and is treated the same. We are jealous when our spouses bestow sexual favours on their lovers - treating them as our equals. And we are envious of those whom we regard as no better than ourselves, but who are treated with more favour. Why should we be moved by unfitting treatment? This is also a question to which we shall need to return.

How does the levels of being system compare with the utilitarian system? The first point to which I want to draw attention concerns classification and quantification. It will be recalled that, in my discussion of utilitarianism, I suggested that utilitarianism emphasizes quantification. (Whether the

quantification can be achieved is, of course, an open question.)
But in the case of the levels of being system there is no drive towards quantification. I do not mean to deny that we distinguish between, for example, more and less serious injustices. We do indeed speak of gross and grave injustices. Nevertheless we seem less willing (or perhaps I should say even less willing) to quantify when using the concepts of the levels of being system, than when using those of the value system.

The situation with regard to qualification and classifying seems quite the reverse. The utilitarian eschewal of classification is the other side of the coin to utilitarianism's elegant simplicity and conceptual economy. As we have seen, the levels of being system includes a multiplicity of concepts, and includes many concepts which are themselves to be made sense of in terms of classifying and misclassifying.

The array of concepts found within the levels of being system are, perhaps, partly responsible for the fact that reasoning in this system seems often chaotic and to rely on intuition (13). The drive for order within the system can be seen as leading to the view that there is one single and complete hierarchy or scale - hence the notion of a great chain of being and the principle

(13) Thus, for example, Sidgwick discusses the concepts of this system under heading of Intuitionism, his title for Book III of SIDGWICK (1981). The term is, of course, also associated with the work of Ross.

of plenitude. (14) But the point I want to emphasize is that use of the concepts of the levels of being system does not commit one to a belief in a single 'great chain of being'. The system of concepts may be equally happily employed - and, of course, usually is now employed - in connection with the view that there are a vast number of different scales, with different parameters, different virtues, and with entities able to occupy different places in different scales. The conceptual system requires only that we agree that it makes sense to talk of different levels.

The second contrast between the levels of being and the utilitarian systems concerns the contrast between the concept of merit, and the utilitarian concept of value. These concepts have strong claims to be regarded as the fundamental concepts of their respective systems. A utilitarian theory, to be applied, requires that a theory of value - that is, a theory of what has value - be on hand. Similarly, a levels of being theory can be applied only if a theory of merit - that is, a theory of what kind of entities are more or less meritorious than others - is adopted. A comparison of the conceptual schemes would be incomplete without a comparison of these fundamental concepts. It would not be prudent to attempt to answer the questions of what has value and what is meritorious at this stage of the argument. I shall be indicating some of my views on the question of what confers merit in later chapters.

(14) On the great chain of being and the principle of plenitude see LOVEJOY (1936).

It is imperative that we do not confuse merit with value. Or, at least, if we do insist on regarding them as synonymous, it is important to find terms to distinguish the two notions I am about to discuss. I do not deny that some people may use these terms interchangeably. I will not. If, in so refusing, I am thought to 'clip the ragged edge of common usage' then so be it. The important point is to recognize that there is a distinction between the concepts I use the terms 'merit' and 'value' to label. Obviously, I do not think it inappropriate to use these terms to bring out this distinction.

The possibility of confusion is perhaps made easier by the fact that it is possible, and even appropriate, to believe that merit is (sometimes) a function of usefulness or capacity to produce happiness. Typically, man-made objects which have been made with the intention of being used - machines, cars, knives, footballs and so on - may well have their merits judged in accordance with their usefulness. This is hardly surprising since what we make to use is (normally) intended to be useful. Thus we might say that a particular football has certain features; that, for example, it has an even bounce and is unlikely to burst in reasonable use, and in virtue (as we say) of these features it is a good football. The fact that some object can have both merit and value does not mean that 'merit' and 'value' are synonymous. Nor yet does it follow from the fact that some object has merit because it has value, that 'merit' and 'value' are synonymous. Indeed the terms need not be synonymous even if it were the case

that all and only objects with merit had value. Indeed such a coincidence does not exist. The merits of people, animals, works of art - and, I venture to suggest, Ph.D theses - are not thought to be solely determined by their respective capacities to bring about that which has value. In short, there are other merit-conferring features besides usefulness, or the capacity to bring about happiness, pleasure, welfare, interest satisfaction - or whatever is thought to have value. And, as I have said, I will try to indicate what some of these might be later.

Let me now try to bring out something of the contrasting character of the concepts of value and merit. It is, I want to suggest, not implausible to suppose that being meritorious is, essentially, a comparative notion, while value is not. I do not mean to deny that values can be compared. Rather, what I want to suggest is that in the case of value we work out relative values on the basis of our assignment of a value to the states of affairs to be compared. Thus we believe that, for example, happiness has value without any need to compare happiness with, say, suffering. And if we say that happiness has more value than, say, material possessions, we do this, not so much on the basis of some comparison of happiness and material possessions, but on the basis of a comparison of the values we have already assigned to happiness and material possessions. I do not say that it is actually possible to do this. What I am saying is that we tend to think and talk as if it were possible to do this. Now it seems at least arguable that the reverse is the case with the concept of merit. Here again, I do not mean to deny that we

speak of the meritoriousness of some particular person. Of course we do. But I want to suggest that we arrive at a view on the meritoriousness, say, of a particular case on the basis of an (albeit sometimes implicit) view of the meritoriousness of the case in comparison with some other case or cases. Examples will certainly not prove this point. But simply for the purposes of illustration, let me suggest that we would not try to decide on the respective merits of a set of bridge players by, first, trying to assign some level of merit to each one, and then comparing the levels assigned. Rather we should make the assignment to levels on the basis of some sort of comparative basis.

The point can, I think, be put in a slightly different way. I am suggesting that it is plausible to suppose that when we use the notion of merit, of a level, we have no fundamental independent criteria for assigning an entity or being to a particular level. The type of hierarchy or scale employed may, perhaps, be calibrated by means of some changing quantity. (This is rather like the way in which temperature might be calibrated by means of an expanding column of mercury; our notions of hotness and coldness are prior to, and are only found to conveniently coincide with, changes in lengths of mercury columns.) The height metaphor at the heart of the levels of being system is, perhaps, appropriate only if this is the case. To say of an object that it is literally high or low is to say that it is high or low relative to, or in comparison with, some other body or

location. It is a feature, I think, of scales without independent external criteria of allocation that the zero point, if there is one, is notional and of no particular significance.

By contrast, scales which do have independent external criteria of allocation will, at least typically, have significantly placed zero points. The case of temperature is, I think, again an instructive one. The acceptance of the theory that temperature is a measure of molecular vibration transforms the temperature scale from an essentially comparative scale, a scale without independent external criteria of assignment, to a scale which is not essentially comparative, and does have external criteria of assignment. Notice, incidentally, that with this change comes the introduction of a significant, rather than notional, zero point - absolute zero.

Merit, in the levels of being system, is, perhaps, similar in form to a conception of temperature prior to the adoption of the theory that temperature is a function of molecular vibration, and value, as conceived within the utilitarian system, has a form similar to that of temperature after the adoption of that theory. The value scale is supposed to function as a scale with a significant zero point, and independent criteria of allocation. Height, and presumably meritoriousness, is a comparative scale. In a later section I will suggest that the concept which value is analogous to is indeed not an essentially comparative one. Further consideration of this will, however, need to be postponed until then. But I hope I have done enough even in these

tentative remarks to bring out something of the contrast between value and merit, and hence of the contrast between the value and the levels of being system.

Let me, on this matter, make one final point at this stage. Ceteris paribus it is, I think, better to employ an external criteria scale: our understanding is clearly meagre if we can do no more than say that some entity is more or less meritorious - or whatever - than another, and we have no independent criteria for the allocation of entities to levels of merit. But were such external criteria to be lacking, any presumption of superiority on behalf of a concept which appeared to provide an absolute, non-relative scale would be bogus. It remains to be seen whether there are external criteria for the assignment of value, and if there are, what restrictions if any this places on what may be said to have value.

The third contrast between the value and the levels of being systems concerns their respective conceptions of what constitutes a reason for action. In terms of the value system, one has reason to act if and only if one is able to bring about an increase, or prevent a decrease, in value. One has reason, it is supposed, to maximize value. But what reasons for action are there in the levels of being system?

There seems to be no general view that we have reason to try to maximize merit by, say, trying to turn as much base matter into

as many noble human beings as quickly as possible. My point is not to deny that there is such a reason to act - though I see no reason to adopt such a view. My point is rather that this is not the characteristic view associated with this system of thought.

It is supposed that we have reason to avoid acting unfittingly, particularly where so to act is to treat someone as of lower status than they are. It is supposed, therefore, that we have reason to avoid doing a person an injustice or treating them with inappropriate contempt. But what reason is there - contingent considerations apart - to avoid acting unjustly? What reason for action do we (necessarily) act contrary to when we treat someone as of lower status than they are? Of course, given our sense of justice, people treated unjustly normally resent being so treated, are made unhappy, and are, perhaps, unwilling to give their allegiance to a system which contains injustice. But these are not reasons for acting justly, but reasons for not openly acting unjustly. People only resent being treated unjustly if they know they have been so treated. I do not wish to deny that utilitarian-type reasons for actions are indeed reasons for actions, nor that they do, at least sometimes, provide us with reasons to act justly. But the issue is whether, and if so why, we would have reason to act justly if, for any reason, such consequences were not to apply. Again, I will return to this issue later in this chapter.

It does seem to be held that, though there may be no reason to create worthy entities per se, there is reason, ceteris paribus,

to raise beings, to avoid preventing beings from being raised and from raising themselves, to avoid lowering beings, and to prevent beings from being lowered or lowering themselves. Thus we should, it is supposed, try to make ourselves noble, virtuous and civilized; we should try to prevent others and ourselves becoming contemptible, unworthy, uncivilized, depraved and brutish. But here again there seems to be a problem: given that there is no reason to 'maximize worthiness' why do we have reason to raise, to avoid lowering ourselves, and to prevent the lowering of others?

It would seem, then, that even on this sketchiest of discussions the reasons we have for acting as regards the value system are radically different to the reasons for acting we have as regards the levels of being system. Each system has its own conception or conceptions of what constitutes a reason for action. But this is not all. I want now to suggest that even the manner in which action itself is, in general, conceived differs between the two systems; the two systems emphasize different characteristics of action.

The utilitarian, as we have seen, views action as primarily a matter of making or preventing change - of creating, destroying or transforming. It is, I suggest, a conception of action particularly appropriate for, and to be expected to be emphasized by, people who consider themselves in control of their own - and perhaps others' - destinies, people who think of their lives

actively rather than passively, and who consider themselves able and even duty-bound to play a role which others might reserve for a God. Historically, of course, utilitarianism has been associated with a humanistic conception of value (happiness, welfare, pleasure, preference-satisfaction). It is worth noting, I think, that, even as regards its conception of action, utilitarianism has a disadvantage for (some) theists which it does not have for those of a secular outlook. To conceive of man's action as substantially creative might be thought to place man on a level with God. If this were so then, though the unbeliever might find such a conception of action unobjectionable, this might not be so for the believer. There is - or rather was - a greater readiness to view the actions of emperors and kings as creative. Given the present line of argument, this is hardly surprising, for the notions of gods, kings and emperors, are at no great distance from each other. (Kings and emperors are presented as possessing god-like powers, and gods are spoken of by such phrases as 'Prince of Peace', 'King of Kings', and so on.) Equally, it might be unsurprising if the notion of artists being creative were to have appeared only in a culture able to accept the creative conception of action which is so much a part of utilitarianism. The alternative view would require that, to the extent that the work of an artist is viewed as creative, it must be regarded as having been transmitted from God - or, perhaps, the devil (who anyway has his realm). Given the creative conception of action embodied in utilitarianism, it is not difficult to see - or at least to think one sees - why utilitarian thinking has flourished when and

where it has.

While the utilitarian views the ability to act as primarily a potentiality to create or destroy (what has) value, the conceptions of action associated with the levels of being system are of treating (of treating fittingly or mistreating) and raising or lowering (actions which change the place, or prevent changes of place, of entities in hierachies). This second view of action in the levels of being system allows us to speak of elevating, humbling, repressing (holding down) and liberating (setting free to rise). Is the existence of action of this second type compatible with the emphasis upon the 'treating' conception of action which, I have suggested, is a feature of the levels of being system?

It is certainly the case the such actions bring about changes. But it is worth noting that there appear to be, within the conceptual system, methods to tone down the transformative character of such actions. Thus the achievement of higher status may be spoken of as the realization of some already existing potential. The idea of self-realization, of being one's true self, seems, when employed, invariably to suppose that a person's true self is indeed his higher self. If this is so then it would seem that self-realization arguments should not be seen as based upon some commitment to overcoming alienation or estrangement. To argue in such a fashion would be to allow that, were a person to have a wicked true self he would have a reason to act wickedly

- thereby overcoming his alienation from himself. (The question is not whether such a 'reason' would be an important reason to act, but whether it is any reason at all. It seems less than plausible to suppose that it is.) Thus I would suggest that self-realization arguments (or at least those worthy of consideration) should be viewed as combining the view that, where possible, we have reason to raise ourselves and others, together with a view as to what is indeed possible. There is a much greater willingness to suppose that men can lower themselves and others; they are capable of self-degradation and humiliation, as well as defiling, desecrating and so on. Yet here again the notion of regression to some still existing, albeit latent, bestial nature is a popular image.

The final contrast I want to draw is between, on the one hand, the conceptual economy and universal applicability of utilitarianism, and, on the other, the plethora of concepts, and numerous diverging arguments found in the levels of being system. It is, I think, striking that literary works are invariably littered with the concepts I have located in the levels of being system. It is this system through which conflicts, dilemmas, tragedies are expressed and explored. Had Shakespeare confined himself to value and its maximization, we should not have heard of him!

But, of course, utilitarians do not wish to deny us the use of the concepts I have located in the levels of being system - or, at least, not all of them. Rather the argument is that a concern

for, say, justice or self-respect can be explained in terms of the maximization of value. This is implausible. I will suggest later that the two systems have at their hearts incompatible metaphors and incommensurable analogues.

3.3.2 Justice and Related Fitness Concepts

Justice, I have argued, is a concept which finds its home in the levels of being system. But how is it to be distinguished from other concepts within that system - in particular, of course, with other concepts of mistreatment? It is not the case that all forms of mistreatment are unjust. When we fail to revere, praise and worship God we are hardly doing him an injustice. When the defendant abuses, shows contempts, and otherwise shows disrespect for the judge he is not said to do the judge an injustice. Why should this be? Inappropriate treatment may be necessary for injustice but it is not, it seems, sufficient. What more is required?

It will be recalled that in Chapter Two I argued that a further necessary condition of acting unjustly or justly, as far as rule-relative justice is concerned, is the possession of the relevant authority to judge. To call an action unjust is, I suggested, to concede that the person alleged to be acting unjustly does not lack the authority to make the judgement to which the (unjust) act gives expression. Does a similar situation obtain in the case of non-rule-relative justice? (It will be recalled that, in the discussion of rule-relative justice and authority, I concentrated my attention upon what I there called rule-governed authority. In the present discussion I will concentrate upon non-rule-governed authority. Let me repeat that I have discussed rule-relative justice together with rule-governed authority, and non-rule-relative justice together with non-rule-governed

authority, for the purposes of simplifying the exposition only.)

The suggestion seems plausible. Suppose that I misjudge a friend, mistakenly believing him to have shown himself to be untrustworthy. To believe him unworthy of trust when, in fact, he is entirely reliable is to do him an injustice. In such circumstances, to say that I had done my friend an injustice would be an entirely natural thing to say.

But consider now a similar case where our lack of authority to judge seems least in doubt: cases relating to God. It is, I take it, to be assumed that the Christian God is to be thought reliable. Christians enjoin each other to rely upon God, to have faith in God, as would, of course, be an appropriate manner to act if God is a reliable being. We might expect then, that those who find themselves failing to trust God might criticize themselves by saying that they had 'done God an injustice' by their lack of faith. If we have such an expectation we will be disappointed. We do not refer to our treatment of God as just or unjust. Or, at least, if we do, to use such terms has an air of presumption about it.

Why are we unable to criticize ourselves by saying that we have been unjust without being presumptive, without, as it were, falling into another error? It is, I suggest, that to do so is to put oneself on a level with God. Justice and injustice, it would appear, are used in relation only to the treatment of

'equals' and 'lessers'. God is said to be just in his treatment of us, we may be just in our treatment of others (or, at least, some others, sometimes), but we may not be just or unjust in our treatment of God. We lack the (necessary) authority to judge God. To be neither a 'better' nor an equal (a peer, as we say) is to lack authority to judge. Similarly the judge may do the defendant an injustice, but the defendant is restricted to misplaced contempt and disrespect.

In Chapter Two I suggested that it seems plausible to suppose that the sense in which 'authority to judge' is to be understood, when it is said to be necessary condition of being able to act justly and unjustly, is that of having the right to make a decision to be taken as given in subsequent action and decision-making. This suggestion seemed plausible in the case of rule-relative justice and rule-governed authority. But is it plausible in the case of non-rule-relative justice and non-rule-governed authority?

The answer would appear to be that it is not. Consider again the case of doing a friend an injustice by treating him as untrustworthy. If it were the case that in order to act justly or unjustly it were necessary to have the authority to judge, in the sense of having a right to decide the issue, then it would follow that I have the right to decide the issue of whether my friend is, or is not, trustworthy. But we do not, surely, presuppose that we have such authority when we describe our action as unjust.

In the face of this particular example, we may be tempted to believe that what is required in order to be able to act justly or unjustly is authority to judge, not in the strong sense of being empowered to decide the issue, but rather only in the weaker sense of being free to form and, perhaps, express a view. But this will not do. Authority to decide the issue may be too strong a condition, but merely being free to form and express a view is too weak. We can see this by looking again at the case of failing to trust God. We do hold that we are free to form and express an opinion about God. Were this not so it would be presumptuous to revere and worship God! For the whole point of these activities is to give expression to a belief about God, viz that God is fearful and worthy of worship. To say that we must be able to decide that issue is too strong to be a necessary condition of being able to act justly or unjustly. But merely being able to pass judgement is too weak.

We may note that a capacity to form judgements is presupposed in the case of all the concepts which are closely related to justice and injustice. And it is not supposed that those who are lower are unable to judge in the sense of form a view. Quite the contrary. As we have seen we are able to treat our betters disrespectfully and contemptuously, to honour, revere and respect them, to hold them in high regard, to provide a reason for the belief that one believes the person to be contemptible. We should expect, therefore, that beings thought incapable of having

beliefs will be thought incapable of honouring, revering, worshipping, showing respect, contempt and ingratitude, and, of course, of acting justly and unjustly. And this is, I suggest, precisely what we do find.

If 'deciding the issue' is too strong, and merely 'passing judgement' is too weak, we may wonder whether it is possible to find a condition weaker than the former, but stronger than the latter. Is it possible to find a condition weak enough to handle the unpresumptuous admission that one has done a friend an injustice, but not so weak as to render worshipping God presumptuous?

In calling my treatment of a friend unjust we do not suppose that I am able to 'decide the issue', in the sense that my judgement is to be taken as given. But what we do suppose, I want to suggest, is something rather close in spirit, namely, that I am competent to serve as a full participant in an appropriate procedure for deciding the issue. Thus to call my treatment of my friend unjust is to concede that it is not the case that I am unfitted, say, to serve as a member of a jury to decide whether my friend is or is not trustworthy. Conversely, if we deny that I am fitted to serve, my action cannot be said to be unjust. If I describe the pilot of an aircraft which has crashed as negligent my judgement is just or unjust (depending upon whether the pilot was or was not negligent), only if I am competent to serve as a full member of an enquiry into whether the pilot was negligent. If I am not competent so to serve, my judgement may

happen to be right, but it will not be just. If I am wrong I will not have been unjust (as far as this particular judgement is concerned). To call a person's judgement unjust in cases where they are not competent to judge is to flatter them, to treat their judgement with more respect than it deserves.

In discussing rule-relative justice and authority, I made the point that it is possible (given that the possession of authority is held to confer merit) to treat someone unjustly by denying them the authority (A) to which they are entitled if, but only if, the person or body denying the authority (A) has the authority (A') to decide the issue as regards possession of the original authority (A). It will be recalled that I illustrated this point with the following example: if Jones is denied the honour of refereeing the Cup Final (for which he has qualified under some rule) by the Football Association, this may well be unjust. But for Jones to be denied authority by a player and treated with contempt will not be unjust, for the player lacks the authority to decide whether Jones should or should not have the authority associated with the position of referee.

We find a similar situation appertaining with regard to non-rule-relative justice and non-rule-governed authority. If, for example, an eminent scholar in some field is treated as less than an authority in the field by a second equally eminent scholar in the field, then we should speak of the second scholar as treating the first unjustly, of doing him or her an injustice. But

suppose instead that it was a complete ignoramus in the field who denied that one of these scholars was an authority. Such a judgement would not be unjust, and to call the judgement unjust would be to flatter the person who made it. Similarly, were the ignorant person to say that he judged them to be authorities in their field, again to describe this judgement as just would be flattery - it would be to presuppose that the judger were competent to judge when, in fact, he is not. The judgement, then, would be neither just nor unjust, but at best presumptuous, at worst foolish. Notice that in this case, unlike the case of Jones and the Football Association, the eminent scholar is not supposed to have the authority to 'decide the issue' of whether the other scholar is an authority or not. In describing his action as unjust we suppose no more than that he is competent to participate fully in a relevant decision-making process.

Let me now try to elaborate on a couple of points. Firstly, what is to be understood by the notion of playing a full role in the decision process? And, secondly, what is required in order for someone to be fitted or qualified to judge. Neither of these issues can be explored at any length here.

What is it to play a full role in a decision-making process? A distinction may be drawn between coming to a belief autonomously, on the basis of our own thought, research and so forth, and coming to a belief parasitically, that is, by simply taking a view on trust (perhaps having decided whose view to take on trust). In practice, no doubt, many of our beliefs are arrived

at by a combination of these two types of process. Nevertheless we can draw a distinction for analytical purposes. And we can say that some beliefs are arrived at in a more parasitic fashion than others, and that there are cases which are (at least almost) wholly parasitic or wholly autonomous. A person who serves on a jury and who decides to cast his vote in whatever manner some other jury member decides is judging in a (at least almost) wholly parasitic fashion. With this distinction on hand, we might begin to elucidate the notion of 'full role' in terms of coming to a judgement in a largely non-parasitic or autonomous fashion. If one is to be able to act justly or unjustly in a matter one must be able to judge the issue in an autonomous fashion.

It seems doubtful that a judgement made parasitically can be just or unjust. Consider the case of the use of references. To knowingly write a false and damning reference is to do the person of whom the reference is written an injustice. But to reject an applicant on the basis of a false and damning reference which one has no reason to believe is false is, it would seem, not thereby to do the applicant an injustice. The fact, if it were a fact, that a parasitic judgement can be neither just nor unjust does not mean that a person, in judging someone parasitically, may not be acting unjustly. To fail to take the trouble to consider the merits of a case for oneself, where one is able, may, at least on some occasions, itself constitute doing the judged person an injustice. But this is a different matter.

Let us now turn to the second question: what is required for someone to be fitted or qualified to judge? It seems reasonable to suppose that the sense in which fitted or competent to judge is to be understood must be such as to deny competence to those who are disqualified on such grounds as ignorance and mental incapacity. These are, I take it, fairly uncontroversial claims. But as we saw earlier, an inferiority - a lower level of worthiness - than the person to be judged has been regarded as incapacitating. We are not worthy to sit in judgement over God. Carlisle reminds the usurping Bolingbroke and Northumberland:

Would God that any in this noble presence
Were enough noble to be upright judge
Of noble Richard! then, true noblesse would
Learn him forbearance from so foul a wrong.
What subject can give sentence on his King?
And who sits here that is not Richard's subject?

Richard II, Act IV, Scene 1, 117-122

Why should it be held that a person is treated as less worthy by being judged, and his fate being decided, by inferiors? The only plausible explanation would seem to be a general presumption that a person in the power of another, at the mercy of that other, is inferior to (that is, less worthy than) the person who has power over him. Perhaps the idea that power confers merit, worth, dignity, rank is just too obvious for us to notice. Gods are held to be all-powerful and small boys argue over the relative strengths of their fathers. Wealth is not merely a mark of success, it also confers status; money, particularly in the

modern world, is power. The height metaphor, if it does indeed arise from the idea that those (physically) on top are more worthy, of a higher status, is yet another manifestation of this general presumption. Footballers may be told that some particularly skilled (and hence powerful) opponent deserves their attention - though the opponent may well not complain of injustice if he does not receive what he deserves. We are told to treat electricity with the respect it deserves; it has power over us. It seems plausible to suppose that many of us have not lost the belief that power confers worth, though, of course, such a belief sits unhappily with the Christian claim that it is 'the meek' who are blessed. Of course, it is rarely held that only power confers status. It is possible, I think, that many would not disagree with Carlisle as regards the inappropriateness of a 'lower' being sitting in judgement over a 'higher' being. What many of us now wish to reject is the notion that some people are of higher rank than others.

The reader will recall that I began my discussion of justice and authority (in Chapter Two) by distinguishing between two senses of 'judging': 'coming to a belief', and 'deciding an issue'. A necessary condition for the former is the rational capacity to judge; for the latter a necessary condition is authority. Those who are committed to the ideals of republicanism, of course, take the view that those with the rational capacity to judge have satisfied all the conditions required in order to be fitted to serve as full members in their societies' decision-making procedures. (The fact that, given certain (egalitarian)

assumptions, these two classes are extensionally equivalent is no reason to overlook the distinction between the two senses of 'judge'.)

Ignorance, mental incapacity and lack of necessary rank are, then, possible grounds for holding that a person is not competent to serve in a decision-making procedure; in the appropriate circumstances such failings may preclude a person from being able to act justly or unjustly. But what are we to say in the case of prejudice? Is prejudice to be considered a defence against a charge of injustice? The requirement (for just and unjust action) that the actor possesses the authority to judge, understood as a requirement that the actor be competent to serve as a full member in a decision process, taken together with two views concerning prejudice, appears to produce an inconsistency. These two views are, firstly, that those who are prejudiced are not competent to judge, and, secondly, that a person does not avoid doing an injustice by virtue of his or her prejudices. Taken in the light of our ambivalent attitude to the relationship between a person's abilities and will, that is, our uncertainties as to the extent to which it is proper to say that those who are unwilling are, ipso facto, unable, I am inclined to believe that this apparent conflict does not provide good grounds for rejecting the view presently being considered, but rather may actually lend it support. Let me explain.

Extreme prejudice is, perhaps, a form of irrationality, and

certainly competence to judge diminishes with an increase in irrationality. At some point in the increasingly prejudiced rantings of a judge it ceases to be appropriate to refer to his judgements as unjust. This is, I suggest, precisely the point at which it ceases to be appropriate to try to argue and persuade (as opposed to manipulate), to condemn (as opposed to consider for clinical treatment), to regard as free, and to resent. (15) If the judgement (or perhaps 'judgement') of a judge cannot occasion resentment against the judge, the judgement cannot, I think, be regarded as (in itself) unjust. (Again, this is not to say that there is no injustice in the situation. Those who, through action or inaction allow senile and bigotted judges to remain in office may well be guilty of injustice.)

On the other hand there are lesser forms of prejudice which do not preclude argument and attempts at persuasion. Such forms may not therefore constitute grounds for disqualification from being eligible to play a full role in a decision-making process. And just as these lesser forms do not preclude the possibility of resentment, nor do they preclude the possibility of moral condemnation, and, in particular, the condemnation of a judgement as unjust. My point here is that our thinking on this issue may be confused, but if it is, it seems not unreasonable to suppose that it is confused in a consistent fashion! The problem is not a little local difficulty for a theory of the relationship

(15) The relationship between the freedom of someone, and its being appropriate to resent their actions, is discussed in STRAWSON (1962).

between justice and authority. The problem is (at least one aspect of) the free-will problem. If the theory we are presently considering is unclear in this area that is, perhaps, a point in its favour. For given the free-will problem this area of our thinking is unclear.

I propose to conclude, then, that there is indeed an analogue in justice 'beyond the rules' of the requirement that, as regards rule-relative justice, an actor must possess authority to judge in order to be able to act justly or unjustly. And it is this condition which serves to distinguish a just and unjust treatment from the closely related notions of honouring, respecting, treating with contempt, and so on, for justice appears to be the only member of the 'fitting treatment' family of concepts which presupposes authority.

3.3.3 Justice, Merit and Neutrality

Just as the application of utilitarianism presupposes some theory of the good, so the application of the levels of being concepts presuppose some theory of merit. If we have no view on what makes a being more or less worthy, more or less meritorious we cannot apply the family of concepts: justice, respect, and so on. In this sense there cannot be a 'neutral' theory of justice: the right (which includes the just) cannot logically precede the good (in the sense of what makes a being worthy of respect). Some writers have attempted to characterise liberalism as the

view that the right does precede the good in this sense. Thus Dworkin, speaking of the theories of Rawls, Nozick and himself said:

In a way, we're all working the same street. If you accept the characterization of liberalism I offered earlier - that liberalism is the theory that makes the content of justice independent of any particular theory of human virtue or excellence - then we're all trying, though in different ways, to define and defend the consequences of liberalism so conceived. (16)

If this is indeed liberalism's project then accepting justice as fitness is tantamount to accepting that the liberal project is an impossible one. To illustrate: most of us believe that to call a man a liar when he has not lied is to do him an injustice. Why is such treatment unjust? It is, surely, because we believe that honesty is a virtue - that is, that an honest man is, other things being equal, more admirable than a dishonest man.

The belief that we are all equally worthy and admirable is sometimes thought to find support from moral scepticism. (17) We are asked to believe that it is impossible to show that one being is more worthy of respect than another, that one way of life is more admirable than another. The argument can proceed on one of two levels. We may be told that we cannot know one form of character is more admirable than another because this talk of admirability has no sense; it is, literally, meaningless. But of course such a claim implies that the proposition that we are all equally admirable would also be meaningless.

(16) MAGEE (1982), p223. See also HAMPSHIRE (1978), p127.

(17) See, for example, ACKERMAN (1980), p11.

We must suppose, then, that it is meaningful to speak of lives being more or less admirable, but, as a matter of fact we cannot know which ones are more, which ones are less, admirable. (In which case how do we know that they have admirability?) We are then invited to infer that we should treat people (and other creatures?) with equal respect.

It is not easy to see how this argument is supposed to work. It is, obviously enough, a non sequitur to infer from 'I do not know that A is better than B' to 'I do know that A is not better than B'. If this argument were sound we could, of course, add that, since I also do not know that B is better than A, I know that B is not better than A. Hence I know that A and B are equal. But as I say, this is, obviously, an invalid argument.

I suppose, then, that what must be argued is that though we do not know people are equally meritable, we have reason to treat them as such. But why? Certainly we have no reason to treat them differently, but it does not follow from this that we have a reason to treat them the same - that is, that we do have a reason not to treat them differently. Why may I not treat them in a random fashion? What would be wrong with a 'respect lottery'?

What would be wrong, of course, is that the liberal believes we should treat people with equal respect because, in some sense, they are equals. But this requires that they spell out in what sense. (In what sense were, for example, Hitler and Martin

Luther King equally worthy of respect?) Liberals who are willing to do this are, of course, offering a conception of justice consistent with justice as fitness. It is unjust to treat people as unequals because they are (in some sense to be explained) equals. But equality is not to be mistaken for neutrality.

3.4 Justice and Belief

3.4.1 'Treating As'

In this section I want to take up a topic which I raised, but did not discuss, in section 3.3.1. What does it mean to treat some entity as a member of a particular class?

I suggested earlier that the notion of an unjust act is to be understood by reference to the idea that unjust acts are (a particular type of) unfitting acts. An unfitting act is an act which involves failing to treat some entity, X, as if it were a member of some class, A, when, in fact, X is a member of A. This characterization of justice relies on the notion of 'treating as'. But what do we mean when we say, for example, that someone treats a dog as a person, a screwdriver as a chisel, or a human being as a human being? Put generally, what do we mean when we talk of treating an entity, X, as if it were, or were not, a member of some class, A? What is 'treating as'?

To treat X as an A is to act towards X as if X were an A, that is, to act in relation to X as, ceteris paribus, one would if one regarded or believed that X were an A. (To talk of acting towards is another spatial metaphor. I can certainly treat you badly without facing or moving towards you.) Now it is not necessary to believe that an entity, X, is an A in order to act as if X were an A. One may treat a screwdriver as a chisel without needing to believe that the screwdriver is a chisel. One

cannot, therefore, infer from the fact that someone treats X as an A, that he or she believes that X is an A. Nevertheless there does appear to be an important conceptual relationship between 'treating as' and the beliefs of the 'treator'. Let us explore this relationship.

The suggestion that treating X as an A implies believing that X is an A is wrong, but not wrong-headed. It is necessary to make (at least) two revisions. Firstly, the connection is not between treating and actual beliefs, but between treating and rational beliefs. In other words, we cannot infer from the fact that John is treating the screwdriver as a chisel that he actually believes the screwdriver to be a chisel. The most we could hope to infer would be that John is rationally committed to the belief that the screwdriver is a chisel. The connection between 'treating as' and 'believes that' may break down in the case of less than fully rational agents. But, of course, even this is too much: we cannot even infer from 'treating X as an A' to 'is rationally committed to the belief that X is an A'. A second revision is necessary.

I want to suggest that the treatment of X as an A by an actor provides a reason, but not a conclusive reason, for holding that the actor is committed to the belief that X is an A. If this is right, then to say that John is treating the screwdriver as a chisel is to say that there is a reason, but not a conclusive reason, to believe that John is rationally committed to the

belief that the screwdriver is a chisel. Now there are, of course, any number of reasons why one might use a screwdriver as a chisel. One may not have a chisel, one's chisels may be even less suitable for chiselling than one's screwdriver, one might wish to irritate people who are horrified by the misuse of tools, and so on. But suppose that we believe the actor acted from no such reason (suppose he had plenty of chisels to hand, and so on), but still chose to use the screwdriver. May we not then reasonably conclude that the actor believed that the screwdriver was a chisel?

To act in such a manner as to treat an entity, X, as if it were a member of a class, A, is then, ipso facto, to supply a reason for the belief that one is rationally committed to the belief that X is an A. The presumption that one must (rationally) believe Z to be an A can be defeated by a (strong enough) reason for holding that one is not rationally committed to the belief that X is an A. Perhaps the presumption is easily defeated. Nevertheless my point is that the presumption does always exist: to 'treat as' does always provide a reason for believing one believes, or at least must, on pain of being irrational, believes, that the entity treated is a member of the category it is being treated as a member of, and that (adequate) countervailing reasons are required to defeat the presumption.

It may be necessary to introduce a third caveat. To say that to treat X as an A is to provide a reason for the claim that X is (on pain of being irrational) believed to be an A may be too

strong: it may be necessary to replace 'is rationally committed to the belief that X is an A' with the weaker claim 'is rationally required not to believe that X is not an A'. Thus, to use a screwdriver as a chisel is only to provide a reason for the claim that one does not believe the screwdriver is not a chisel. But having noted this point, I propose to set it aside so as to avoid a too convoluted exposition.

The general approach presupposed in this discussion of the relationship between actions and beliefs is not, of course, limited to actions construed as 'treating as'. The inferral of an actor's beliefs from his or her actions requires that we assume the actor is, at least in some degree, rational. (To say that an agent is wholly irrational is to say that there may be no ordered relation between beliefs and actions. The possibility of inferral from actions to beliefs is, thereby, brought into question.) Similarly, the presumptive character of the relationship between treating X as A, and believing that X is an A, seems to be a general feature of the inferral of beliefs from actions. If I struggle up a mountain on a hot day you may reasonably infer that I believe I shall derive some satisfaction from the experience of reaching the top. But, of course, there may be any number of reasons why I may be climbing the mountain (to lose weight, to win a bet, and so on) which, were they to be thought operative, would readily defeat any presumption favouring the attribution to me of a belief that reaching the top will be a satisfying experience.

If the essentials of the foregoing account are correct, then it would appear that the adoption of the justice as fitness approach allows us to make sense of two features of justice. Firstly, we shall be able to account for the fact that, whether, on any particular occasion, there has been an injustice, will depend, not simply on 'what was done', but on the proper interpretation of what was done. Of course, there is a sense in which one cannot say 'what was done' without engaging in interpretation - there is always the problem of selecting the appropriate act description. But let us suppose (as is, it would seem, often the case) that the parties to a dispute can agree on some rough and ready, apparently relevantly-neutral description of what has been done. My point is that it is not simply a matter of deciding whether this act is one of the set of unjust acts. (Nor, for that matter, is it a matter of deciding whether the outcome is one of the set of unjust outcomes.) To suppose that this is an accurate description of the kind of discussion which occurs when people talk about justice is to close one's eyes to the existence, and to close one's mind to the significance, of the complex debate which often accompanies a genuine discussion of whether someone has acted unjustly. There is, at least often and perhaps typically, considerable scope for 'explaining away' one's apparently unjust acts by accounting for the relevant act in a way which defeats the presumption favouring the attribution to one of the relevant (false) beliefs concerning the person (or whatever) treated. It is important not to confuse this complexity (whereby the character of justice is, in part,

exposed) with the problem of finding the correct description of an action, nor with the issue of the proper description of actions in cases of tragic choices. Let me illustrate the point, once more using the example of relying on a promise.

Suppose that you make me a promise which I go out of my way to avoid relying upon. And let us suppose that you are, in fact, trustworthy. Have I done you an injustice? The answer is, surely, possibly, but not necessarily. To avoid relying on people, whether trustworthy or not, is not, in itself, to act unjustly. There is, surely, no general duty to rely on others. (Or rather, to speak strictly, one does not need to believe that there is such a duty in order to have reason to believe that someone, in avoiding reliance, was acting unjustly.) To go out of one's way to avoid relying on someone provides evidence for, but does not prove the truth of, the claim that one believes they are untrustworthy. To rebut such evidence, it is necessary to provide an alternative (satisfactory) explanation of why one acted in such a way as to avoid reliance. This may well be possible and if so, the charge of injustice is defeated.

Secondly, the justice as fitness approach, together with the foregoing account of unfitting treatment, enables us to make clear the relationship between justice and expression. The existence of the presumptive relationship between 'treatment as' and the beliefs rationally attributable to the actor accounts for the existence of the expressive character of actions construed as

'treatment as'. To treat a person as one's lover, for example, is to engage in behaviour which (if one is thought rational) provides evidence for the existence of, and therefore (in the absence of reasons for the contrary) gives expression to, a belief that the person treated is one's lover. Roughly, then, to treat someone as inferior, incompetent, unreliable and so on, is to give expression to the belief that that person is inferior, incompetent, unreliable or whatever. In this way, justice as fitness suggests that the notion of expression has a central role to play in relation to justice. And this is, surely, the case.

How do particular actions give expression to particular beliefs? This is an enormous topic, and not, perhaps, one best discussed in general terms. But let me make a few points. Firstly, there would seem to be some cases which are straightforward enough. To take a case already discussed, if I make a point of going out of my way to ensure that I never rely upon you, whilst happily relying on many other people, you would be forgiven for thinking that I considered you to be unreliable. It is as well to remember that there are relatively straightforward cases to be set against the complex and ambiguous ones.

Secondly, to view actions as, inter alia, expressions of belief is to regard the set of possible actions as analogous to a language. Now it would seem to be undeniable that languages are highly conventional. Basic forms of expression are, characteristically, learnt - or, at least, they are not typically deduced. We should not be surprised, therefore, if at least some

actions construed as 'treatments as' are conventional in character. Nevertheless we should not allow this possibility to inhibit us from investigating the nature and origins of expressive behaviours, to which there is, no doubt, more than meets the eye.

3.4.2 Injustice as Degradation: Social Reality?

Let us now consider a question we raised earlier: why should we act justly? As I have said, I understand this question to mean: what reasons do we act contrary to when we act unjustly? Needless to say, we shall not here be concerned with (contingent) connections between acting justly and bringing about that which has value. (To suppose that the only possible reason for action is to bring about or increase that which has value is to beg the question with which I am here concerned.)

To treat someone unjustly is, on my account, to act in such a manner as to give expression to the (false) belief that the person treated is lower than, in fact, they are. To act unjustly may be thought, therefore, to be akin to making a mistake (a mistake: to take something for what it is not) if the unjust act is unintentional, while an intentional unjust action is akin to the telling of a lie.

We might begin by wondering whether it makes any sense to try to give a reason why, in general, one should try to avoid making

mistakes. Is it not obvious? And would there be a point in trying to offer reasons to someone who saw nothing wrong in principle with making mistakes? Such an argument is hardly convincing. And it is surely even less convincing if we tried to apply it to the case of intentional unjust action. It might be said that perhaps some other argument was to be offered to cover such cases. But this is, surely, implausible. Both intentional and unintentional acts are unjust, and whatever is wrong about unjust actions would, surely, be expected to apply in both cases.

It can, I think, be argued that in acting unjustly, either intentionally or unintentionally, we make ourselves less reliable, that is, less worthy of being relied upon. People who are less willing to lie are more reliable than those more willing to lie, and this feature of the situation carries over to deliberate acts of injustice. Similarly, people who are more prone to make mistakes are less reliable than those who are less prone, and again this feature presumably carries over to the case of unintentional unjust acts. Now I am willing to allow that reliability is thought to be a virtue. But the problem with this view is that if it were held to be the only reason why one should not act unjustly, it would appear to suggest that there is no difference between making a mistake which involves treating someone unjustly, and making a mistake which does not. (And similarly, in the case of lying and intentional injustice.) But this, surely, is false. We do believe that there is a difference. Increasing one's unreliability may be a reason for not acting unjustly. But it is not the only reason. Nor is it

the distinctive reason which makes unjust acts wrong. When we talk of unjust acts, we talk not of wronging ourselves (unless, of course, we have done ourselves an injustice), but of wronging the person unjustly treated. It would seem, then, that the reason must be, in some way, connected with what we do to the person we treat unjustly. But how? Of course, sometimes the person's interests suffer - such as when someone is wrongfully imprisoned. But is this not a contingent matter? May there not be times when the wronged person's interests do not suffer?

In my discussion of the levels of being system, I suggested that there were two different types of reason for action. Firstly, I suggested, we have reason not to act unfittingly (and hence unjustly), that is, we have reason not to treat someone as significantly different from what they are. The second type of reason for action relates to changing the status of some person. There is reason not to lower an entity - to dehumanize, humble, debase and so forth. Now I have spoken so far as if these two types of reason are distinct. And indeed, it is, I believe, very important to distinguish between them. But this does not mean that, at some deeper level, they may not be interconnected.

Suppose we were to say that, when a person is treated unjustly, they are not merely treated as less than they are, but, to some degree, in some way, thereby made less than they were. We are, of course, all familiar with the idea that a person who suffers an injustice may have his reputation damaged. Now there is the

(Hobbesian) point that damage to one's reputation damages one's interests: if people consider you untrustworthy, they are unlikely to lend you money. But what of cases where one's reputation is damaged (unjustly) but (what we normally think of as) one's interests are not damaged? The point might be put by asking whether we have something like an interest in our reputation, our being thought well of, our being of good repute, our having a good name - per se? Of course, one can say that people just deserve to be thought well of - even when they are dead? - and so being thought well of just has value for them. But this is, I think, an uninteresting response to an interesting question. Why does our 'name' matter? Why do people devote so much energy to 'clearing their names'? Why do people attach importance to clearing the names of the dead? Why should a figure like Proctor (in Arthur Miller's play The Crucible) who dies rather than give up his 'name' be not only moving (a fact which might be accounted for by our respect for his integrity), but actually intelligible?

The distinction between 'that which is thought to be the case' and 'that which is the case' is, of course, an important distinction. We believe that, usually at least, things are not made true by being thought to be so. We talk of wishful thinking. But perhaps, when we think about this issue, we overestimate the distance between thought and reality. Our conceptions of ourselves are in large measure, determined by who others think we are.

The suggestion, then, is that the distinctive wrongness of acting unjustly relies on the fact that, to all intents and purposes, we are, to some degree, whatever we and others think us to be. And, as I argued earlier, unjust actions are related to the expression of beliefs about the person acted towards. If this line of argument is sound, then, in treating someone unjustly, we would actually be tending to lower them from what they are, and from what, but for our unjust action, they might have continued to be. And therein may lie the wrongness of acting unjustly.

It is, perhaps, worth noting that we typically resent treatment we regard as unfitting, particularly, of course, contempt we regard as unjust. Such treatment constitutes an attack upon our self-respect, our ego. The strength of our sense of justice - particularly in our own case - is, perhaps, a consequence of the fact that unjust treatment is an attack upon the ego. Is an over-scrupulous attention to being treated justly associated with insecurity? And is, perhaps, the keen, and often too keen, sense of justice, particularly in their own cases, which children develop an accompaniment of, and intelligible in relation to, a particular stage of psychological development? (If we come to believe that this is so, then we would expect our theory of Justice to be capable of casting some light on the fact. Justice as fitness, in locating justice close to such concepts as dignity, respect and self-respect, would seem well placed to do so.)

The suggestion that to treat someone as less than they are is wrong because it is, in some way, to make them less than they were is, at best, no more than a beginning to the story. One question which it raises is this: if we can lower people by treating them as lower than they are, are we similarly able to raise people by treating them as higher than they are? (Perhaps we have, here, the starting point for an argument explaining why down-side injustice is more important than up-side injustice.) A second issue concerns the question of why it is wrong to make someone less than they were. If we have agreed that there is no requirement to maximize worthiness, why is it wrong to dehumanize, to debase or whatever?

We may, perhaps, wish to argue that though there is no requirement to create worthy entities, or maximize worthiness, there is a requirement to help people (and possibly other entities) to realize themselves, or, at least, not to prevent people from so doing. And 'realizing themselves' might be understood to include achieving the highest level of worthiness of which they are capable, their full potential. This, in turn, raises the further question of why we should so act, or refrain from so acting. This is no longer a question directly concerned with justice, and I must offer that reason as my excuse for not speculating further. Certainly, if we are able to relate justice to the notion of self-realization along the lines I have sketched, we shall have a significant result.

It is worth noting, I think, that the argument I have sketched

here for acting justly would apply to acting justly in a rule-relative sense only if rule-relative injustice could be shown to entail non-rule-relative injustice. To treat someone as if they have failed to qualify under a rule, when, in fact, they have qualified, may be to tend to make of them a being who has not qualified. But it is not thereby to tend to make them less than they are. There remains, then, the question of why we should act to avoid rule-relative injustice - leaving aside contingent utilitarian type considerations.

3.4.3 The Appearance of Injustice: Mere Judgement or Effectuation?

In Chapter Two I raised the question of whether injustice first occurs with 'mere' mistaken judgement, or whether the effectuation of a mistaken judgement is necessary for injustice. I said that I would defer discussion of this question in relation to rule-relative justice until the nature of non-rule-relative justice had been discussed. I now propose to take up this topic.

Let me begin with a few words about the distinction between 'merely' judging (ie forming a view) and putting it into effect. This is, I take it, straightforward enough. I may (mistakenly) merely think you unreliable, but not let my words or actions be affected by my belief. Or I may think you unreliable and give expression to my belief in my words and actions - say, by telling people not to rely on you, by refusing to lend you money, and so

on. Or, to take a rule-relative example, a judge may come to a (mistaken) belief that you are guilty, but not give expression to this belief; or he may both come to a (mistaken) belief, and express this belief, and his belief may be given effect by the forcible imposition of punishment. The question I want to consider now is whether injustice occurs with mere mistaken belief, or whether expression and effectuation are required in order for there to have been injustice.

There are, I think, cases where it seems plausible to say that misjudgement without effectuation does not result in injustice (or justice). And there are cases where it seems plausible to say that mere mental misjudgement is sufficient in order to do someone an injustice. It may seem, therefore, that no clear general answer can be given. I think this would be a mistake. The situation may be more complex than one might at first think. But there is, I think, some order to be uncovered here. Let me begin with examples to illustrate my suggestion that it is plausible to say that effectuation is sometimes required for injustice, sometimes not.

If we think ill of a person - believing them, for example, to be callous, unfaithful, incompetent and so on - and later discover our judgement to be mistaken, to have been based on a misunderstanding of the evidence, for example, then we will speak of having done the misjudged person an injustice. These seem to be cases where, even if we did not give expression to our misjudgement, and even if we did not act on our misjudgement, we

still speak of having done an injustice. In such cases, then, mere (mental) misjudgement appears to be enough.

But now consider the following example. Suppose that, in the course of refereeing a football match, I mistakenly believe that one of the teams has scored a goal. Suppose I decide, however, not to award a goal. (Perhaps I am endeavouring to ensure that the game remains an exciting one and I judge this to be more likely if a goal is not given.) My action is, no doubt, sufficient to show that I am an unjust judge. But, of course, it does not follow from that fact that there has been an injustice. To be an unjust judge it is enough to be willing or disposed to act unjustly. It is not necessary to act unjustly. Has there been an injustice?

I am inclined to believe that there has not been. If this is so then it would appear that it is at least possible for there to be misjudgements which do not give rise to injustice unless put into effect. (Had I put my misjudgement into effect and given a goal then the defending team would have been done an injustice.) The argument for the claim that there has been no injustice is, I think, the following. In a case of this type there is injustice only if someone is denied something to which they are entitled, that is, have qualified for under the rules. But neither team has been denied anything to which they were entitled. Hence there has been no injustice. No goal was actually scored, neither team was entitled to be given a goal and no goal was

given. That there has been no injustice is, of course, no thanks to me. It is simply a matter of good fortune that events combined to result in there being no denial of entitlement, and no injustice. If this argument is accepted then it would appear that we have an example of a case where injustice does not arise at the stage of (mental) misjudgement, but would have arisen had the misjudgement been effected.

There are two responses which can be made to this argument and which I want to discuss. I do not believe that either of these responses is sufficient to show that the refereeing example does not serve to demonstrate the point which I am using it to make, namely, that there are cases where injustice occurs only with the effectuation of a misjudgement, not with the making of it. But the responses are, perhaps, instructive and worth consideration.

Firstly, it might be suggested that merely in judgeing (wrongly) that a goal had been scored I do an injustice to the team thought to have conceded the goal, for, it might be argued, so to judge is to believe that team to be less competent footballers than in fact they are. If this argument were sound it would show that even in the present case, injustice arises from mere misjudgement. But this argument is fallacious. It simply does not follow from the fact that a team is thought to have conceded a goal that it is, therefore, thought to be less competent at football than would have been the case had the goal not been conceded. The outcome of a football match is only in part a reflection of the skill of the teams, and it is always possible

to believe that the scoring and the conceding of the goal were matters of luck. Notice that had I wrongly believed that one team deserved to concede a goal then (it seems plausible to say) I should have done them an injustice, even if I had not given expression to, or otherwise given effect to my belief. I will return to this point in a moment.

Secondly, it would seem that it is possible to argue that mere misjudgement of entitlement (without effectuation) is unjust if either one of two additional premises holds. Firstly, if there were a rule such that, a person is entitled to whatever a judge rightly or wrongly believes that that person is entitled to (under rules other than this rule). The effect of such a rule would be to render (unaffected) misjudgements unjust. But, though formal inconsistency might be avoided by the use of priority rules, such a rule would be highly undesirable: there would be an entitlement to the effectuation of a misjudgement, which by its very nature required the denial of some entitlement. Such a rule would be likely to undermine the coherence of appeals against judgements.

Secondly, it might be held that people are not only entitled to that which they are entitled under first-order rules, but also entitled to be thought to be entitled to that which they are entitled under first-order rules - or, perhaps, more strictly at least entitled not to be thought to be not entitled - and that to merely think someone unentitled (to their first-order

entitlement) is to deny them something to which they are entitled by this second-order rule, and thereby to do an injustice. The existence of such a second-order rule would appear to be one of the necessary conditions for the possibility of rule-relative injustice (and justice) beginning at the point of (mental) judgement. I suspect that, in general, we do not have such a rule, and that there would be no point in having one.

There is, I think, an interesting contrast to be drawn between rule-relative and non-relative justice as regards the present topic. I want to suggest that, as far as rule-relative injustice is concerned (and hence, as far as cases in which only the question of rule-relative injustice occurs are concerned) the possibility of injustice arises only at the stage of effectuation. But, in the case of non-rule-relative justice this is not so. Where we are concerned, not with qualifications under rules, that is, with entitlements, but rather with deserts, the possibility of justice and injustice arises at the stage of judgement. At the beginning of my discussion of this topic I mentioned a number of cases where we do (appear to) hold that injustice arises at the stage of misjudgement. Merely to think you callous, unfaithful or incompetent when you have none of these attributes is, I suggested, thought to be to do you an injustice. These are, of course, all cases of non-rule-relative injustice; we do not suppose that the uncallous, faithful and competent are entitled (ie qualify under a rule) not to be treated as callous, unfaithful or incompetent. Rather they deserve not to be treated as callous, unfaithful or incompetent.

Let me emphasize that I am suggesting that injustice occurs only with effectuation only in cases of pure rule-relative injustice, that is, in cases where there is no question of non-rule-relative justice arising. Thus to be merely thought guilty of a 'technical offence' is not, on the view presently being considered, to be treated unjustly. Needless to say, these examples do not prove the point. But they do, I hope, make the view appear to be at least initially plausible, and worthy of consideration.

But why should rule-relative and non-rule-relative justice be different in this respect? Let us look a little more closely at the case of misjudging the reliable. Suppose I mistakenly believe you to be unreliable and untrustworthy. And suppose further that, for some reason I have decided not to let you know that I think you unreliable, and that I am successful in keeping my judgement from you. Do I thereby avoid doing you an injustice, and if not why not?

I suggested earlier that it appears to be at least part of the sufficient conditions for holding that rule-relative injustice begins at the point of misjudgement that those entitled to X are entitled, not only to, but to be thought to be entitled to X, or at least, not thought to be not entitled to X. (I raised the question of whether there would be any point to such a second order entitlement.) Is there a comparable (and more plausible) second order claim in the case of non-rule-relative justice? The

comparable claim appears to be the following: those who deserve \bar{X} , deserve to be thought to deserve X. If this claim is endorsed then we should expect non-rule-relative injustice to arise at the point of misjudgement - for even at that point the misjudged are denied something which they deserve, namely, to be thought to deserve X. Is there any reason to believe that the virtuous deserve not to be thought undeserving, but the entitled are not entitled (nor deserving) not to be thought unentitled? Perhaps this point connects up with my earlier suggestion that what makes (non-rule-relative) injustice wrong is that by thinking people less than they are we (tend to) make them less than they otherwise would have been. In the case of rule-relative justice, to think someone unentitled when they are entitled may have a comparable tendency to make them different from what they are (ie lacking the predicate on account of which they would be thought to have qualified), but not lower. If the account of why we should act justly sketched in the last section is rejected, then we shall need to try to find some other account for the divergence between rule-relative and non-rule-relative justice we have been discussing in this section. Or, of course, show that there is no such divergence.

3.5 Value as Analogue

In this section I want to deal with the objection to the levels of being system that it is ineradicably metaphorical and mysterious: that all this talk of levels, virtue and fitness cannot be cashed. I accept the 'charge' that the levels of being system is metaphorical, but I do not regard it as damaging. Metaphor, I believe, is inevitable in moral thought.

If this is so then it should follow that the utilitarian system is also metaphorical. I believe this to be so and in the present section I propose to sketch a defense of the claim that utilitarianism is best conceived as a derivative of an analogy with Newtonian gravitational theory. If we do view utilitarianism in this light, then it would seem that a comparable role to that played by the concept of (gravitational) mass within the theory of gravitation, can be said to be played by the concept of value in utilitarianism. If this is so then we may say that value is analogous to mass.

The similarity between mass and value is, I think, striking: both concepts have been regarded as fundamental and indefinable, as intrinsic properties of whatever they are held to be properties of, and as simple non-directional scalar quantities which may be summed. Above all, both mass and value have been held to give rise to a force of attraction. In the case of mass, 'force of attraction' is used quite literally. But in the case of value, I take it that most of us, at least, would regard the

'force of attraction' as figurative or metaphorical; we do not suppose that we are literally pulled towards that which we believe has value. If we hold that what has value has a metaphorical power to attract, the (metaphorical) force being proportional to value, should we not, perhaps, regard the notion of value as being metaphorical in character, and as being analogous to the notion of mass? I am not in a position to offer a full-scale defense of these views. What I will do is try to make the approach appear sufficiently plausible to merit further investigation, and to justify looking briefly at what some of the consequences of adopting such a view might be.

I have indicated already some of the similarities between value and mass. If we compare the utilitarian and gravitation theories, we will, I think, discover some equally striking similarities. We have seen that utilitarianism is a conceptually economical theory, elegant and simple in its basic principles, though complex in its application. This, surely, is true also of the theory of gravitation. Secondly, I suggested that utilitarianism emphasizes quantification, and has little use for classification or qualification. Again, this would appear to be as much a feature of the theory of gravitation, as of utilitarianism. And thirdly, there is the point which has already been made: at the centre of each theory is a simple, indefinable notion, a scalar, summable property, a quantity which may take any value between positive and negative infinity, and which is viewed as the source of a force of attraction. Mass is,

I take it, held to be indefinable. (It is sometimes said to be the quantity of matter, but this seems hardly more illuminating than the standard definitions of value.) Anti-matter may be thought to play a similar role in relation to the gravitation theory as that which is said to have negative value plays in utilitarianism.

There are, I think, at least two reasons why we should not be surprised to find that the gravitation and utilitarian theories are closely related. The first of these reasons is that, in a very general sense, they are both concerned with 'things moving about'. We are, of course, used to emphasizing the difference between the (mere) movement of physical bodies and human actions. But we should not be surprised if we find evidence that, at a very basic level, men have been impressed by the similarities; and on the basis of these similarities, sought to describe and explain the phenomena in parallel fashion. (There would be no point in emphasizing the difference between physical movements and human action were it not the case that such differences were set against a background of similarities.) The predilection to think of physical motion and human action as analogous has resulted in so many terms finding employment in both areas. (The terms have, of course, acquired different senses - notably technical senses in physics. But that does not affect the point.) Such terms include 'action' itself (we speak not only of human action, but of 'action at a distance', and 'action and reaction being equal and opposite'). A common thread runs through motion, motives, motivation, and motive power; the terms

used by physicists to account for the motion of objects include 'force', 'work', 'power' and 'energy'. And, of particular note for our present concern is the literal and figurative uses of 'attractive', 'repellant' and 'repulsive'.

There is a second reason why an intimate relationship between the gravitation and utilitarian theories should come as no surprise: there appears to be something like a similar relationship between their respective predecessors. We think of the Newtonian synthesis as having replaced an Aristotelian world-view, a view which emphasizes quality and classification, rather than measurement and quantification; and employs a hierarchy or 'ladder of nature', a system at least analogous to that which I have referred to by the phrase 'levels of being'.

I have so far been concentrating upon the similarities between gravitation theory and utilitarianism. There is an obvious difference between them which we must now consider: utilitarianism is a theory about how we ought to act, while gravitation theory is concerned with providing a description or explanation of what does, in fact, happen. But does this preclude the possibility of utilitarianism being analogous?

The way to respond to this point is, I think, to say that utilitarianism - at least in its classical form - is to be viewed, not as an exact analogy with gravitation theory, but as closely related to a theory which is an exact analogy, namely,

psychological egoism. If we take psychological egoism to be the view that people always and only strive for their own happiness, and we regard happiness as the sole and universal object of desire, then we have the analogue of gravitation theory: a body will tend to move towards that which is attractive (ie happiness). We can then reach utilitarianism by moving, first to ethical egoism, and then to utilitarianism. Now these moves are, of course, notoriously difficult to justify. The move from psychological to ethical egoism would require an argument that showed that what is the case (what is 'natural') ought to be the case. The second move, from ethical egoism to classical utilitarianism is equally problematic. Nevertheless it is possible to view classical utilitarianism as something like ethical egoism 'for society as a whole'. Now my point here is not that arguments for those moves can be given, but rather that the various theories are structurally very similar. It is this structural similarity between psychological egoism and utilitarianism, together with the analogical relationship between gravitation theory and psychological egoism, which allows us to describe utilitarianism as analogous to, or, at least, the derivative of a theory which is analogous to, gravitation theory. If this account, or something like it, could be developed, then it would seem that it may have a number of not insignificant ramifications.

Let us begin by considering again the case of someone who argues that there is no conflict between justice and utilitarianism because all we need to do is recognize that a just state of

affairs per se has value. Thus we simply assign a value to just states of affairs, and justice is part of that which is to be maximized. Assign a sufficiently large value to justice and utilitarianism will never require anyone to act unjustly. Now I think it is pretty obvious that this is a silly argument; it is far too quick, and is little short of an insult to those who have thought that justice does pose a problem for utilitarians. But the problem is to see exactly why it is a silly argument. Let us see if the foregoing discussion can help to illuminate what is going on here.

The theory of gravitation supposes there to be a force of attraction between material bodies directly proportional to the mass of each body. The mass of any body is, therefore, a measure of how attractive that body is to other bodies. Now if utilitarianism is to be analogous to the gravitation theory, the value of any object must also be a measure of its attractiveness, even if this attractiveness is only figurative or metaphorical. If we abandon the view that value gives rise to attraction, two consequences will follow. Firstly, the theory will no longer be analogous to gravitation theory. The idea of attraction is, after all, what holds the two theories together. The second consequence will be that we shall owe an account of what is to be understood by term 'value'.

Let us suppose, for the moment, that we do accept that value is to be made sense of in terms of attractiveness (that is, the

capacity to attract). What follows from this? The first point to be made is that the question of what has value becomes a relatively straightforward one: what has value is to be determined by reference to what attracts us (in some appropriate condition). I add the final rider because it seems plausible to suppose that this view can accommodate, at least to some extent, the kind of problems which arise from ignorance of consequences, weakness of will, and so on. (Thus we might suppose that what has value is what attracts a well-informed, rational actor. To extend this by saying that what has value is what attracts a rational actor who knows what is (intrinsically) good for him would, of course, be to render the test worthless.)

Now if utilitarianism is an analogy with gravitation theory, and if the notion of value is understood in terms of attractiveness, we should not be surprised to find the classical utilitarians offering hedonistic and similar theories of value. Look around you, they might say. Can you deny that pleasure, happiness, or whatever are the things which attract people? If they are indeed attracted by these and only these things, can you deny that it is these things that have value?

Well, of course, the answer is yes. As we all know, the mere fact that people are attracted to something does not mean that they ought to be attracted to it. To make such a move is to commit the so-called 'naturalistic fallacy'.

In a famous passage Mill made the comparable move from 'desired'

to 'desirable':

The only proof capable of being given that an object is visible, is that people actually see it. The only proof that a sound is audible, is that people hear it: and so of the other sources of our experience. In like manner, I apprehend, the sole evidence it is possible to produce that anything is desirable, is that people do actually desire it. (18)

Moore, in an equally well-known passage, sneers at this argument.

Referring to the foregoing passage, he writes:

Mill has made as naive and artless a use of the naturalistic fallacy as anyone could desire... The important step for Ethics is the one just taken, the step which pretends to prove that 'good' means 'desired'.

Well, the fallacy in this step is so obvious, that it is quite wonderful how Mill failed to see it. The fact is that 'desirable' does not mean 'able to be desired' as 'visible' means 'able to be seen'. The desirable means simply what ought to be desired or deserves to be desired;... (19)

How did Mill fail to see 'so obvious' a fallacy?

Consider, for a moment, what happens if we cast Mill's argument, not in terms of desires, but in terms of attraction. The argument then runs:

... the sole evidence it is possible to produce that anything is attractive, is that people are actually attracted by it.

(18) MILL (1962), p288.

(19) MOORE (1903), pp66-7, original emphasis.

And now compare this argument with the following:

...the sole evidence it is possible to produce that a physical body is attractive, is that other bodies are actually attracted by it.

In the literal sense, this is what attractive does mean. It would also seem to be true if we use 'attractive' in the, albeit figurative, sense required if we are to take the metaphor, and the analogy with gravitation theory, seriously. And this is, perhaps, what Mill was doing - consciously or unconsciously - when he moved from 'desired' to 'desirable'. If this is so, then perhaps Mill's argument is not so much a fallacy, as an enthymeme. The suppressed premise is simply the fundamental tenet of assuming that we can talk about human action in a manner akin to the way the gravitation theory would have use think about motion. I do not, of course, wish to suggest that we can. But Mill does appear to have had consistency on his side. What is less clear is whether there is not something disingenuous about a utilitarian theory which does not identify the attractive with that which attracts, or in psychological terms, the desirable with the desired. Suppose we do allow 'attractive' to go the way of 'desirable', and thus allow that something attracts us but wonder, in a perplexed tone, whether it is really attractive. If we separate 'attracts' and 'is (really) attractive', we have, I think, taken the heart out of the metaphor. The question then is what are we to make of utilitarianism - with its metaphor removed? It would be disingenuous to continue to regard utilitarianism as possessing such substance as it possessed only

on the basis of the metaphor, and my fear is that it may not be an easy trap to avoid.

Let me try to set out the arguments in terms of a dilemma. Utilitarianism presents us, I want to suggest, with a dilemma. One view is the one which appears to have been taken by the classical utilitarians. On this view we think of human action in terms suggested by the gravitation theory. We may do this either in a literal way or metaphorically. We suppose actions to be directed towards certain 'ends', and those ends are the ends which attract us. To take this view with any seriousness is to identify the ends (the good, the desirable, the valuable) by reference to what is attractive, that is, what actually attracts us. There are then limits on what can be said to be valuable. One may say that, for example, a 'just distribution' has value only to the extent that people are actually attracted to it. One may not, therefore, simply go merrily assigning whatever value one likes to justice just because one thinks justice is 'important'. One may only claim justice has a high value if one is willing to claim that people are actually strongly attracted to justice. But a theory of justice which implies that we only have a reason to act justly when we desire to act justly, or are attracted to acting justly, is obviously unsatisfactory.

To take this view, then, is to tend to rule out the question: Why should I try to obtain that which I am attracted towards? It is not so much that the classical utilitarian has no answer to

this question. It is, rather, that, within the limits of an account based on the gravitation theory, this question does not arise. It is as if someone were to concede that the sun attracts (that is, drags towards itself) the earth, but then fail to regard this as relevant to the question of why the earth should, ceteris paribus, move towards the sun.

Moore's refusal to identify the desirable (the good) with what is desired is, I take it, tantamount to a refusal to identify what is attractive with what attracts. We can then ask - or, at least, we might think we can then ask - whether something which attracts us is really desirable (or attractive, or valuable). We can - or, at least, we might think we can - then go attaching values to whatever we wish: beauty, justice, promise-keeping or what you will. We might suppose that this value is recognized by some distinctive faculty, or attributed on the basis of an 'original choice', or some similar procedure which is, to all intents, beyond the bounds of rational criticism. In short, then, within the bounds of consistency, anything goes. The action we should perform is the one which maximizes value - but there are no longer any substantive limits on how value is to be allocated. But what are we to understand by 'value'? It would seem that by value, we are to understand, not actual desires or wants for this would take us back to the attraction metaphor, but rather something like 'matters' or 'is important'.

The problem with this view is that, at best, it renders utilitarianism jejune. Suppose someone were to propose the

following theory: the right action to be performed on any given occasion is to be determined, firstly, by deciding what matters, and, secondly, by determining how one can best do or bring about what matters, all things considered. Who could object to this fine theory? Perhaps no-one. But, then, could anyone pretend that it was not entirely unilluminating? Now, what is the difference between this 'theory' and what becomes of utilitarianism cut off from its roots? I suggest that, if we sever the link between value and attracting (being desired), utilitarianism withers into a theory as unobjectionable only as it is banal and unhelpful. If we fail to notice this banality is it not because we continue to invest utilitarianism with an aura on the basis of a (perhaps unconscious) analogy, the basis of which we have rejected?

Let me now turn to a second consequence which might be thought to follow, were we to accept a view along the lines of the one just sketched. (Again, I can here do no more than gesture in a direction which might merit proper investigation.) Suppose we accept that there are, to say the least, close affinities between the utilitarian system and the system of thought and concepts we understand by the term 'classical physics'. And suppose further that there is a similar affinity between the levels of being system and the system of natural philosophy we think of as having held sway before the scientific revolution. (The former systems have been supposed rational, scientific, empirical, the latter occult, metaphysical, metaphorical.) What do such analogies

suggest as regards the prospects for translating from one system to the other, or for reducing the concepts of one system to those of the other?

It is difficult to resist the temptation to believe that the existence of such analogies, were they to be demonstrated, suggest that the prospects for reduction are bleak. At least this is so if we believe that what we call the scientific revolution - and the emergence of the classical physicists' system of ideas - constituted a radical break with the earlier tradition. Would we suppose that the classical physicist could make sense, in his own terms, of the fundamental explanations of the Aristotelian system? If not, then can we really expect to be able to translate the reasons for actions which arise in relation to the levels of being system, into the reasons for action which arise in connection with the value system? Can we really expect that the central concepts of the levels of being system - notions like dignity, degradation and justice - can be made sense of in terms of the concepts of the value system? I suggest not.

Now suppose, to speculate still further, that we come to think that the prospects of reduction are not good, but hold that both systems are able to provide us with reasons for actions. If this is our predicament, then we should not be surprised at the fact that we seem often to be faced with incommensurable reasons for action, the situation to which I referred at the beginning of this chapter. And if this characterization of our predicament is accepted, then talk of 'balancing', if the weighing metaphor is

taken with any seriousness, is misleading. (20) And, as I noted earlier, if it were the case that all our concepts of practical reasoning were located in one of the systems I have described, that is, if the two systems could be shown to be, not only exclusive, but also exhaustive, then we would appear to lack any concepts with which to think about the 'trading off' of one type of reason for another. To employ concepts which make sense only within one of the systems would be to take for granted that there is no problem of translation or reduction.

The spectre of incommensurability is likely to drive terror into the heart of any rationalist. I share this terror. But perhaps the first point to be made is that there may be reason to believe that practical reasoning is no more threatened by incommensurability than are the natural sciences. If we hold that in choosing our scientific theories, we are required to give due consideration to a number of incommensurable considerations (21), then, perhaps, practical reasoning may be in the same boat as scientific reasoning. But is it not cold comfort to know that we are all at sea? Perhaps. But might not part of the difficulty here lie with our notion of what is required for an action or belief to be rational? We may be tempted to think that rationality excludes judgement, in the sense that what is rational must be capable of being shown to follow, by a 'handle-

(20) Cf. MACINTYRE (1981), p229.

(21) For a discussion of these issues see Kuhn's 'Objectivity, Value Judgement and Theory Choice' in KUHN (1977).

cranking' type process, from some algorithm. One problem with this image of rationality - conformity with some 'external' objective standard - is that it tends to neglect the fact that it is we who must decide which external standard is to be adopted. Criteria of what is rational do not come with labels attached. Once we recognize that judgement has to be exercised at some higher level anyway, we may find it easier to come to terms with the fact that we must exercise judgement lower down, giving appropriate consideration to incommensurable reasons for action. Easier perhaps - but not easy.

I am very much aware that this present section has been little more than a series of gestures and conjectures. I have included it because I think it is important to try to place the system of ideas in which justice and fitness are, in my view, to be found in some kind of wider perspective. Some resistance to talk of higher and lower states of being is to be expected from those who hold that such talk is ineradicably metaphorical and ought to be abandoned as such. What I have tried to suggest is that utilitarianism, if it is to say more than 'always act for the best', may also need to be regarded as having a metaphor at its centre, and, perhaps, as being attractive (if I may use that word) only because thinking in the manner which utilitarianism requires of us has been made acceptable by our willingness to think in a similar fashion in a different - but closely related - field.

One final point. As regards the movement of the planets,

Newtonian physics is, by any reasonable test, superior to Aristotelian physics. At least let us assume that this is so. I see no reason to suppose that this fact provides any reason to believe that the Newtonian analogue, utilitarianism, is superior to the levels of being system.

3.6 Conclusions

By way of a conclusion to this chapter, I would like to add a few words on the question of why we should take the levels of being system seriously. It may be felt that the levels of being system is a hopeless piece of speculative metaphysics, a relic of a bygone superstitious culture with an enchanted world-view, ineradicably metaphorical and hierarchical - indefensible and inappropriate for a culture with democratic and egalitarian values. I think such a view is, in all essentials, mistaken and I would like to make three points.

Firstly, metaphorical the system may be. But it is far from clear that the major alternative is any less metaphorical, or that a conceptual system for practical reasoning either can or should avoid the use of irreducible metaphor.

Secondly, I have tried to show that a vast number of concepts we use in our practical reasoning are to be located within the levels of being system, and that there is reason to suppose that they cannot be translated out of that system. The system also allows us to make some sense of a number of our important emotions. One of my objectives in stringing these concepts together has been to raise the stakes against anyone who wishes to say that any of the concepts of this system should be abandoned, or that the way of thinking which makes sense of these concepts should be abandoned. Perhaps it is possible to reject the entire system. But it is as well to reflect on just how many

of the concepts we use for practical reasoning we should be required to reject, and how impoverished would be that which remained. Anyone who wishes to abandon, for example, the concept of desert must consider whether they are also willing to abandon the concepts of degradation, human dignity, self-respect and so on, or whether they have some means of making sense of the latter in a way which does not also make sense of the former.

The final point I wish to make concerns the suggestion that the levels of being conceptual system is hierarchical and, therefore, inherently anti-egalitarian. This is a mistake and an important one. Egalitarianism is the view that in some very basic sense, all people are equal. To say that people are equal is, I suggest, best thought to be a metaphor. A rather better metaphor, in my view, would be to say that all people are on the same level. The egalitarian denies that there is a 'natural' hierarchy among men and women. But to deny that men and women fall into different places in a hierarchy, it is not necessary to deny that it makes sense to talk about a hierarchy, to use the concepts of the levels of being system. On the contrary, to deny that men and women are placed at different levels in a hierarchy, it is necessary to accept that it makes sense to talk of (different) levels. Far from the levels of being system being anti-egalitarian, the system is ideally suited for the defense of egalitarianism, and has good claim to be the only system of concepts within which egalitarianism can be defended. Egalitarians who abandon the concept of justice - and, as I will

argue in the next chapter, desert - make a serious mistake.

3

Chapter 4 Justice as Desert

Let me begin by reviewing the results of the previous chapters. In Chapter Two we examined rule-relative justice. I began that chapter by arguing that the notion of unjust treatment is primary. I suggested that unjust treatment is to be understood in terms of the misapplication of a rule and, thereby, the misclassification of a case, and I argued that in order to be able to act unjustly (and justly) it is necessary not to lack the requisite authority to judge. The question was raised whether justice 'beyond rules' has the same 'shape' as rule-relative justice.

In Chapter Two, then, we took a narrow view of justice. We have now complemented this view with the discussion in Chapter Three. In that chapter we examined the conceptual context in which the notion of justice - and not merely rule-relative justice - is to be found, thereby seeking to bring out the relationships between justice and at least some of the other concepts we employ in our practical reasoning. I suggested that within this wider context the notion of treating, and, in particular, of 'treating as', is again the prominent conception of action as far as justice is concerned. We examined the suggestion that injustice is to be understood as a type of unfitting treatment, of failing to treat someone 'as they are'. Again the notion of misclassifying appeared central to an understanding of the concept of justice, and 'authority to judge' to be a necessary condition of being able to act justly or unjustly.

The account of justice 'beyond rules' so far given is highly abstract, and its impact on the question of what is just remains, perhaps, less than manifest. In the remaining chapters I hope to go some way to remedying this deficiency by arguing that to view justice as a fitness concept is tantamount to regarding injustice as a failure to treat someone in accordance with their deserts. In short, justice as fitness makes desert central to justice - and provides an account of why desert should occupy such a position.

The claim that justice is always (and only) a matter of treatment in accordance with desert is controversial. There are a number of objections which will need to be considered and satisfactory replies found if the claim is to be sustained. But our first task will be to ensure that we have an adequate account of the concept of desert.

4.1 The Concept of Desert

4.1.1 The Triadic Structure of Desert

The concept of desert has received attention in a number of recent studies. (1) Desert is a triadic relation, the variables of which are a deserver, that which is said to be deserved, and that which gives rise to the deserver deserving the deserved. The latter has come to be known as the 'desert basis'. Thus, for example, if we say that Liverpool Football Club deserve to win the Championship because they have shown the most consistent form all season, the deserver is Liverpool Football Club, the deserved is the Championship, and 'showing the most consistent form all season' is the desert basis. We may, of course, be content to leave one or even two of the variables implicit. If we say 'John is deserving' we leave implicit what he deserves and the basis of his desert. But, it appears, it is not (conceptually) possible to be deserving for no particular reason. Nor is it possible to be deserving of nothing in particular.

What or who may deserve, what may be deserved, and what may function as a desert basis? Consider first the question of who or what may be said to deserve. Although we are often concerned

1. The seminal work in this field is Joel Feinberg's 'Justice and Personal Desert' (reprinted in FEINBERG (1970)). I have found this work invaluable. I have also been helped by KLEINIG (1971), MILLER (1976) Chapter III, and GALSTON (1980) pp170-91. Other works on desert include BARRY (1965) pp106-15, BEARDSLEY (1969), HOLBOROW (1975), STERBA (1976), RACHELS (1978), SANDEL (1982) Chapter 2, HESTEVOLD (1983), SVERDLIK (1983a), SVERDLIK (1983b), and SHER (1987).

with personal desert, ie. cases where the deserver is a person, use of desert is certainly not restricted to such cases. We may say that a poodle, a pig, or a pansy deserves a prize, that a manuscript deserves to be published, that a railway engine, building or wilderness deserves to be preserved, that electricity and typhoons deserve respect, and so on. There seems no obvious restriction on what kind of being or thing may be said to deserve. Of course the being or thing has to be deserving (and hence must be of a kind able to deserve) - but this is no more than the requirement that there be a desert basis.

What can be deserved? We think first of deserving pleasant or unpleasant, welcome or unwelcome, forms of treatment: rewards and respect, prizes and praise, punishments and sufferings. Preservation and publication are forms of, or necessary conditions for, flourishing, and seem not unrelated. It seems plausible that what is deserved must stand in some relation to the ground of the desert - the desert basis. What we deserve cannot, surely, be unrelated to why we are deserving. But even if this is so, it remains to be seen what the precise nature of this relationship is.

It would seem, therefore, that the focus of our attention should - at least initially - be on the desert basis. It is the desert basis which determines who or what is deserving, and hence who or what may be said to deserve; and, I have suggested, it is the desert basis which - in some manner yet to be discovered -

governs what is deserved (and deservable).

4.1.2. The Desert Basis as a Fact about the Deserver

What, then, may function as a desert basis? The most fundamental restriction, Feinberg suggests, is that:

In general, the facts which constitute the basis of a subject's desert must be facts about that subject. (2)

Thus Liverpool Football Club may be said to deserve to win the Championship for having shown the most consistent form throughout the season only because having shown the most consistent form is a fact about Liverpool Football Club.

The significance of this restriction - from the perspective of justice as fitness - is this: if justice is a matter of treating people as they are (and, in particular, as not less than they are), then facts about the person concerned are of unique relevance. Thus it is no happenstance that the concept of desert finds a central role in justice as fitness; it is this requirement that only a fact about the deserver can function as a desert basis which, inter alia, equips desert to play this role.

Thus from a logical point of view this requirement is important in accounting for the close relationship between desert and justice - or, at least, justice when viewed as a fitness concept. But what of the significance of the restriction from a

2. FEINBERG (1970), pp58-9.

substantive point of view? How successful is the requirement that the desert basis be a fact about the deserver in restricting what may count as a desert basis? What exactly does the restriction rule out? Feinberg offers the following example:

If a student deserves a high grade in a course, for example, his desert must be in virtue of some fact about him - his earlier performances, say, or his present abilities. Perhaps his teacher ought to give him a high grade because it will break his neurotic mother's heart if he does not, but this fact, though it can be a reason for the teacher's action, cannot be the basis of the student's desert. (3)

But is it clear that there is no requisite fact 'about the student' to function as the desert basis in such a case? Why may we not say that it is a fact, call it F, about the student that he has a neurotic mother whose heart will be broken if a low grade is awarded to her son? (4)

The example can be generalised. Suppose good (or bad) consequences can be expected to result from treating A in a particular manner; then is it not a fact about A that he is a person of whom it can be said that, when he is treated in some particular way, good (or bad) consequences follow?

3. Ibid, p59, original emphasis.

4. It should be noted that we may agree with Feinberg that the case of the student is not one properly described by using desert, while disagreeing that there is no fact 'about the student' in the required sense. There are - or so I will argue - other conditions which putative desert bases must satisfy; thus even if the fact discussed in the text is a 'fact about the student' it does not follow that it qualifies as a desert basis. Thus agreeing with Feinberg that the case is not one of desert does not settle the present issue.

The problem, evidently enough, is that the notion of 'a fact about' requires interpretation. If we wish to deny that F is really a fact about the student, or, at least, is a fact about the student in some required sense, we shall owe an account of what is to count as being 'a fact about' a subject in the required sense, and an explanation of why that sense of 'about' should be employed in the delimitation of the use of 'desert'.

Feinberg himself - and here he is speaking only of personal desert - writes that the desert basis must be:

.... some possessed characteristic or prior activity. (5)

though he does allow that:

The basis of desert may be a complex relational fact, but in that case the subject must be a party to the relation. The basis of desert cannot be wholly separate from the subject. (6)

Again these comments hardly resolve the issue. What precisely counts as a 'possessed characteristic'? Is this the same requirement as that the desert basis must be a fact about the deserver? If so, why the separate mention of 'prior activity'? (A 'prior activity', would, presumably, give rise to a fact about the actor, in the required sense. Thus if 'possessed characteristic' was equivalent to 'fact about' in the required

5. Ibid, p58. A similar claim is made by Kleinig (KLEINIG (1971):

Desert can be ascribed to something or someone only on the basis of characteristics possessed or things done by that thing or person.

6. FEINBERG (1970), p59, footnote 6.

sense the addition of 'prior activity' would be redundant.) But if not, we have the new problem of what is to count as a 'possessed characteristic'.

Let us take stock. We may, I think, agree that any reason to believe that F is not really a fact about S is, ipso facto, a reason to believe that F is not a desert basis for S's desert; and we may also accept that being 'a fact about S' in the required sense may entail more than that the fact be capable of being expressed in a sentence of which S is the grammatical subject. The idea - at an intuitive (and no doubt unsatisfactory) level - seems to be that, at least in general, desert bases must be facts which state or imply something about deserters 'in themselves', not merely indicating how a subject stands in relation to other beings or objects. Even this view is not without its difficulties. Suppose we say that John deserves to beat James because he is the better poker player. Does the statement that John is a better poker player than James state or imply anything about John 'in himself'? We can, presumably, infer that John is a poker player of some merit. (How much merit will, of course, depend on James' ability: James' ability sets the lower bound.) But 'being a poker player of some merit' is not the desert basis for John deserving to beat James. What makes John deserve to beat James is the fact that John is a better player than James. Thus, it would seem, we must either regard such comparative facts as 'John is a better player than James' as facts about John (and James) 'in themselves', or allow

such comparative merit cases to be exceptions to the general requirement that desert bases be facts about deservers 'in themselves'. If we take the latter view we must hope to find an explanation for these exceptions to the proposed general requirement. Let us set this matter aside for the moment. (We will consider it again shortly.)

I have admitted that the account of the requirement so far given is intuitive and probably unsatisfactory. How, then, are we to attempt to develop a more precise account of the sense in which a desert basis must be a fact about a deserver? (7)

I am inclined to think that the best route here is an indirect one. Consider the following question: Why should desert bases be restricted to facts about deservers? It might, I suppose, be argued that it is only with such a restriction that desert is able to play the central role allocated to it by justice as fitness. But this is, some will object, to put the cart before the horse. Or, secondly, it might be claimed that the restriction on desert bases we have discussed is simply a fact about the use of 'desert', and that there is no more to be said about the matter than that.

Is there any more to be said? Let us call the requirement that the desert basis be a fact about the deserver Rf. One way to

7. For a view of how the sense of 'about' in this context might be restricted see STERBA (1976), footnote 2, and the works there cited.

account for the existence of Rf is to suppose there is some further restriction (call it Rx) such that Rx entails Rf. (Needless to say, the account will be incomplete unless we can give an account of why desert bases are subject to the restriction Rx. And we should make progress only if it is, for some reason, clearer why desert bases should be subject to Rx, than to Rf.) Identifying a restriction which satisfies the description of Rx should not only account for the existence of Rf, but provide us with a way in to determining the relevant sense in which a desert basis must be 'a fact about' the deserver: the desert basis must be 'a fact about' the deserver in such a sense as to make possible the satisfaction of Rx. The question is: Is there a condition which satisfies the description of Rx? We shall need to consider this question after we have considered other possible restrictions on what may function as a desert basis. It is to that issue that I now turn.

4.1.3 The Desert-Merit Hypothesis

We have seen, then, that there is reason to suppose that, at least in general, a desert basis must in some sense, be a fact about the deserver. Are there other restrictions which set limits on what may function as a desert basis? It would seem so; that is, it seems implausible that all facts about A can function as bases for A's deserving some treatment. I now wish to consider the following requirement: desert bases of A are facts which confer merit or demerit, worthiness or unworthiness, on A.

(8) We may term this the 'merit requirement'. The suggestion has plausibility. If we are told that John deserves a rest after having walked twenty yards, we should expect to be able to be told - of course the context may make it obvious - why walking twenty yards has made John worthy. And it seems clear enough that there is some connection between desert and merit or worthiness. The terms are, in some contexts, virtual synonyms - as when we say that a book deserves, merits, or is worthy of, attention. (9)

8. Feinberg appears reluctant to endorse this view. He writes (FEINBERG (1970), p61):

It is necessary that a person's desert have a basis and that the basis consist in some fact about himself, but neither of these conditions is sufficient. ... It is impossible, however, to list the necessary and sufficient conditions for personal desert in the abstract, for the bases of desert vary with the mode of deserved treatment.

In his discussion of the various types of deserved treatment Feinberg writes that prizes "are taken to be tangible expressions of admiration" (Ibid, p63) and rewards are "means of expressing recognition, appreciation, or approval of merit or excellence" (Ibid, p69). But in his discussion of compensation, reparation, and liability (Ibid pp74-76) there is no suggestion that a person deserves compensation on account of a merit-conferring desert basis. It would appear, therefore, that Feinberg's view is that the desert basis is only sometimes merit conferring.

Miller does appear to endorse the view that all desert bases are merit-conferring. He writes (MILLER (1976), p89):

The range of possible desert bases coincides with the range of possible bases for appraising attitudes.

By 'appraising attitudes' Miller refers to such attitudes as admiration and approval (Ibid p88).

9. Feinberg suggests that 'deserving' and 'being worthy of' are used synonymously except in competitive situations when to deserve is equivalent to being most worthy of. See FEINBERG (1970), p63, footnote 9.

Again we may note the significance of this requirement for the relationship between desert and justice (viewed as a fitness concept). Only if desert bases are necessarily merit-conferring can it be the case that justice is both a matter of treating people as not less or lower than they are, and of treating people in accordance with their deserts. In short, justice makes sense within a levels of being system of reasoning, and desert is a part of that system, by virtue of the fact - if it is a fact - that desert bases are merit (and hence 'level') conferring.

However, there are difficulties. In particular, there is (at least) one important case where we speak of desert, but where there is no obvious merit-conferring basis. The case I have in mind concerns compensation. It is widely held that those who suffer as a result of some event which is (held to be) some other person's fault deserve to be compensated. (The use of 'deserve' here is natural enough.) But it is not (widely) held that a person is made more worthy (or, for that matter, less worthy) by suffering through someone else's fault. Is this, then, a case of desert where the desert basis does not bestow merit? And if so, must the merit requirement be abandoned - or, at least, restricted?

At first glance one might think that the case of compensation poses no problem for the merit requirement; one might think that it can be argued that people who suffer through no fault of their own do not deserve to suffer, and hence deserve compensation.

But there is a problem with this argument. We may agree that those who suffer through no fault of their own do not deserve to suffer. However, to say that someone deserves compensation is to say that that person deserves not to suffer. The argument we are considering, then, requires us to move from the claim that a person does not deserve to suffer, to the claim that the person deserves not to suffer. But, the latter claim does not follow from the former (at least, not without additional premises). To say that a person does not deserve to suffer is to say that there is no reason (of a desert-generating type) for that person to suffer. To say that a person deserves not to suffer is to say that there is a reason (of a desert-generating type) for that person not to suffer. And it does not follow, merely from the fact that there is no reason, of a desert-generating type, for the person to suffer, that there is a reason, of a desert-generating type, for the person not to suffer. Some additional presumption is necessary. Needless to say, some general presumption that, ceteris paribus at least, people who do not deserve to suffer should not suffer does nothing to save the merit requirement. The conclusion we require is not that a person should not suffer, but that they deserve not to suffer. Thus the problem for the merit requirement remains: we do talk of people deserving compensation, and we do not suppose that to suffer through someone else's fault (or, indeed, through no-one's fault) renders a person more worthy than they would otherwise have been.

Now one might take the view that, in the light of this case, the

merit requirement should be abandoned. This temptation should, I think, be resisted. The merit requirement was not simply an empirical generalisation, something which happened to be true in the cases investigated. We expect a (putative) desert basis to confer merit. It is not something we can - or should - abandon lightly.

There is a second point about compensation which ought to make us wary of using it as a ground for abandoning the merit requirement. Is it plausible to regard having suffered through no fault of one's own as a fact about the sufferer in themselves - or as implying such a fact?

To say that a person suffers through no fault of their own is, I suggest, to portray that suffering as an event which is happening to the person, rather than as a result of that person's action (or negligence). Now it seems to be that one cannot make inferences about agents (qua agents) merely on the basis of what happens to them. The 'qua agents' is important: We can - and do - make inferences about material objects, say, from what happens to them: that they are impenetrable, have particular densities and so on. The 'merely' is also important. We might infer from the fact that someone was being punished that they had intentionally acted wrongly, (We might, of course, be mistaken in making such an inference: by saying that 'we might infer' someone was guilty of intentional wrongdoing I mean no more than that we would have a reason for drawing such a conclusion, not

that we should have a conclusive reason (i.e. proof.) But such an inference cannot be made merely from what happens to a person. We must bring in other beliefs, thereby attaching significance to what has happened - by construing the 'happening' as in some way related to an intentional action. Thus if I (unintentionally) drank poison and died you might, given other beliefs, be able to reason that I had been murdered by the Mafia whom I had betrayed. Such reasoning would be from what had happened - that I had unintentionally drunk poison - to a fact about me - that I was disloyal. But, in this case obviously, the inference would not have been made merely on the basis of 'what had happened' to me.

It would seem, then, that we cannot infer anything about an agent merely from what happens to that agent. If suffering through no fault of one's own is indeed a mere happening, then, it seems, nothing can be inferred about the sufferer in himself. But if this is so, deserving compensation represents a threat not only to the merit requirement, but also to the requirement that the desert basis be a fact about the deserver. What are we to make of this?

There are, I think, three possible responses. Firstly we might regard compensation as a sound objection to both of the requirements we have discussed - and abandon both. Secondly, we might claim that compensation is simply another exception to these merely general requirements. After all, it may be said, did we not see an exception to the requirement that a desert

basis be a fact about the deserver when we acknowledged that John may deserve to beat James because he is the better poker player without the desert basis being any fact about John in himself?

The third response would be to accept that compensation poses a problem for both requirements, but to argue that, the fact that it offends against both makes it more plausible that compensation is a 'rogue' case for desert, that it is at least possible that there is more to the deserving of compensation than is immediately apparent, and that a fuller explication may reveal that deserving compensation is no more than an apparent counter-example to the two requirements we have discussed.

The first response is, I suggest, premature in the light of the possibility developed in the third response. But the second response calls for more comment. There are two interrelated points I want to make.

Firstly, we should note that the case of John deserving to win the poker game, being the better player, is a case which does not go against the merit requirement. The compensation example would, then, be the first to go against both requirements.

My second point concerns the relationship between the requirement that the desert basis be a fact about the deserver, and the

requirement that it confer merit on the deserver. (10) The first requirement is, I wish to suggest, a consequence of the second; that is, the merit requirement satisfies the description of Rx sketched at the end of the previous section. If we are willing to accept the merit requirement we will thereby have an explanation for the requirement that a desert basis be a fact about a deserver - for what else could confer merit on a subject but some fact about the subject himself?

If the requirement that a desert basis be a fact about a deserver is indeed a consequence of the merit requirement, then progress appears possible on each of the questions left over from the last section. Firstly, the sense in which a fact must be 'about a deserver in himself' is such as to enable the fact to confer merit on the deserver. Or, to take the argument a step further, the issue of whether a fact is indeed a fact about a (putative) deserver (in the relevant sense) will become otiose where it is

10. Notice that it might be argued that it is the merit requirement which precludes Feinberg's 'neurotic mother' example being a case of desert. Thus, even if it were conceded that a fact about the student is that he has a neurotic mother whose heart will break if he fails, this fact would not (or, at least, would not normally be thought to) confer merit upon the student. (If we were to discover that someone really did think that having such a mother confers merit then, I suggest, we should not object to his use of desert in such a context. We would, of course, want an account of how having such a mother confers merit. But that does not affect the point.) Thus in objecting to the use of 'desert' in such a case we make the (not unreasonable) presumption that having such a mother does not confer merit on the student. But if this presumption were challenged we should, I suggest, be willing to withdraw our objection to the use of 'desert', and to switch our attention to the claim that merit was conferred on the student.

agreed that the fact is such as to confer merit on the putative deserver.

The reader may wonder whether, if it is indeed the case that the requirement that a desert basis be a fact about the deserver follows from the requirement that a desert basis be a fact which confers merit on the deserver, then might he not have been spared the discussion of the former requirement provided in the last section? This has not been possible, in part because of the need to make reference to what has become a point of reference in discussions of desert. But it must also be noted that we are at present arguing (with reference to compensation) that the merit requirement is controversial in a way that the requirement that the desert basis be a fact about the deserver is not. If the merit requirement is established, then it is possible to view other requirements as consequences thereof. The work of establishing the merit requirement remains to be done. But generous readers might be willing to take the fact (assuming it is a fact) that the merit requirement accounts for the existence of the requirement that the desert basis be a fact about the deserver as some evidence for accepting the merit requirement itself. How else is the phenomenon to be accounted for?

But what about progress on the other issue left over from the last section, viz the case of John deserving to win the poker game being the better player, but the relevant fact - being the better player - appearing not to be a fact about John in himself?

If, as I have suggested, the merit requirement is logically prior to the requirement that the desert basis be a fact about the deserver in himself, then any worries about such comparative merit cases are, surely, diminished. Such cases satisfy the primary requirement for desert - namely the merit requirement - even if the merit conferred is comparative. (And the failure of the desert basis to be a fact about the deserver in himself is accounted for by the fact that the merit is comparative.) To return now to our discussion of the three responses, the foregoing, I suggest, leaves the second response in a sorry state. If we are able to account for our earlier apparent counter-example (the comparative merit case) in this way, the compensation counter-example is left on its own, thereby making the third response that much more attractive.

Few theorists have expressed reservations about the relation between desert and compensation: John Kleinig is an exception to the general rule. Kleinig asserts that:

Desert can be ascribed to something or someone only on the basis of characteristics possessed or things done by that thing or person. (11)

and that:

If a person deserves compensation for some loss, then he does so not because things will be very difficult for him if he does not get some, but because his loss has been sustained through someone else's mismanagement, negligence or deception, etc. (12)

And at this point Kleinig adds the following footnote:

11. KLEINIG (1971), p73.

12. Ibid.

This fits a little awkwardly into the stipulation "characteristics possessed or things done by that thing or person". Perhaps it is closer to the former - damage sustained through no fault of one's own. If no damage is done, no compensation is deserved. (13)

Kleinig is, surely, right to think that there is 'awkwardness' here.

I want to suggest, then, that the deserving of compensation is not straightforward, and should not, therefore, be used as a counter-example with which to dismiss the merit requirement. We cannot, of course, simply ignore the problem posed for the merit requirement by compensation. I propose, therefore, to refer to the claim that a desert basis must confer merit (or demerit) upon the deserver as the 'desert-merit hypothesis'. We may hope to find that, as our theory becomes more developed, it is possible to show that deserving compensation is only an apparent anomaly. For the present, speaking of the desert-merit hypothesis will record that there is a problem here to be resolved.

4.1.4 Desert and Rules

I now turn to the topic of the conceptual relationship between desert and qualification under a rule. (14) There are a number

13. Ibid, footnote 10.

14. I speak of 'qualification under a rule' here, rather than 'entitlement' or 'right' since, though qualification under a rule may be a sufficient condition for having an entitlement or right, it is less clear that it is a necessary condition. If it were possible to possess rights or entitlements without qualifying under a rule then to speak of right or entitlements here would be to introduce a wider topic than that with which I am presently concerned.

of issues here. Firstly, there is the question of whether desert always presupposes qualification under a rule; that is, can a deserver be said to deserve only by virtue of having qualified under some rule? Although this view - that desert is a type of qualification or entitlement - may have been held at one time (15), a consensus appears to have now emerged (16) that this is not so, and that, as Feinberg put it:

... desert is a 'natural' moral notion (that is, one that is not logically tied to institutions, practices and rules) ... (17)

15. Thus, for example, Benn and Peters argue (BENN AND PETERS (1959), p137):

'Desert' is a normative word; its use presupposes a rule having two components: (i) a condition to be satisfied; (ii) a mode of treatment consequent upon it. ... We cannot estimate desert, therefore, in a vacuum; we must be able to refer to some standard or rule from which 'X deserves R' follows as a conclusion.

This passage is cited in FEINBERG (1970) and MILLER (1976).

16. Notably as a result of Feinberg's 'Justice and Personal Desert': see FEINBERG (1970), pp55-8 and pp85-7. See also MILLER (1976) pp90-2; STERBA (1976) pp191-5; SVERDLIK (1983a) pp585-92.

17. FEINBERG (1970), p56.

It might be thought that Rawls rejects this view when he argues (RAWLS (1972), pp312-3):

The essential point is that the concept of moral worth does not provide a first principle of distributive justice. This is because it cannot be introduced until after the principles of justice and of natural duty and obligation have been acknowledged. ... For a society to organize itself with the aim of rewarding moral desert as a first principle would be like having an institution of property in order to punish thieves.

This would, however, be a mistake. When Rawls speaks of 'moral desert' he means what we deserve on account of our tendency (or otherwise) to act morally; while 'acting morally' means, inter alia, acting in accordance with the principles of justice. Now it is, of course, evident that such 'moral desert' is dependent upon principles; but this is the result of the desert basis in this particular case being defined by reference to principles. There seems no reason to suppose that Rawls is claiming that desert per se is dependent upon principles. (For a different interpretation of Rawls see Thomas Nagel, 'Equal Treatment and Compensatory Discrimination', in CONEN ET AL (1977), p9, footnote 2.)

A second question is whether desert ever arises directly from qualification under a rule; that is, can mere qualification ever function as a desert basis? (18) And if not, why not? Consider the following example. Suppose John has run a 1500 metres race in the shortest time and has not broken any of the rules of the competition. He has, let us suppose, qualified for the first prize. But does he therefore deserve it? Does qualification entail desert?

It is tempting to argue that, since it makes sense to say that John has qualified for the first prize but does not deserve it - say because he won as a result of some unfair (though not

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18. The claim that qualification can function as a desert basis appears to be made by Carr (CARR (1981), p213):

All material principles of justice clearly involve a determination of desert, but these determinations range over a vast and heterogeneous territory. One might, for example, merit something, have a right to something, or be entitled to something, and so on. One might deserve something because one's case is comprehended by a general norm or rule ... or because of one's individual achievements ...

Notwithstanding Carr's claim to be 'following Feinberg', his use of 'desert' is such that:

... it comprehends the broad variety of ways in which we express the rightness or justness of some treatment for a subject.

This is, of course, a much broader understanding of desert than I, following Feinberg, Kleinig, and Miller have adopted. Yet it remains to be seen why qualification cannot function as a desert basis.

illegitimate) advantage - qualification cannot entail desert.

(19) On the face of it this appears a decisive argument. Yet there is, I think, reason for caution.

Consider another example. Suppose a panel of judges is considering whether to award a prize to some particular book. They attempt to balance the book's merits against its demerits in order to decide whether or not the book deserves the prize. Suppose the judges come to the view that the demerits outweigh the merits, and that therefore the book does not deserve the prize. What is meant, of course, is that all things considered the book does not deserve the prize. And - obviously enough - it does not follow from the fact that, all things considered, a book does not deserve a prize that there was no ground for believing that, other things being equal, the book deserved the prize.

In the light of this point consider again the case where John has qualified for, but does not deserve to receive, the first prize. Is this case really a counter-example to the claim the qualification entails desert? A defender of the thesis that qualification entails desert might, it seems, respond to the alleged counter-example by arguing that when we say John does not deserve the prize we mean only that all things considered John

19. Cf. FEINBERG (1970), p57:

... it is often plausible and always intelligible to say that the man in fact elected president did not deserve to be.

does not deserve the prize. But this claim is consistent with the claim that there is a ground for believing that John deserves the prize, namely, that he has qualified for it.

Indeed the defender appears to have a second string to his bow: he might argue that, if the claim that John does not deserve the prize does not mean that John does not deserve the prize all things considered, then it must mean only that there is a ground for believing that John does not deserve the prize. But this latter claim is also consistent with the claim that there is a ground for believing that John does deserve the prize (namely, that he has qualified for it).

In order to press the case as a counter-example it must be argued that, even though John has qualified for the prize, it might yet be the case that there is no reason at all to suppose he deserves it. Put this way it seems doubtful whether consideration of the example sheds any light on the logical relationship between qualification and desert. For deciding whether there could be such a case immediately raises the question at issue: does qualifying entail deserving? We must, it would seem, consider whether qualification under a rule is able to satisfy the restrictions on what may constitute a desert basis outlined earlier.

The first requirement is that the desert basis be a fact about (or an attribute of) the deserver. Is it reasonable to view 'having qualified for' as a fact about, or attribute of the

deserver? This would appear to be, at the very least, arguable, and, in the absence of a defense of a more restrictive account of what it is to be a 'fact about', or 'attribute of', must, I suggest, be allowed.

However it is wholly implausible to suppose that qualifying under a rule - irrespective of what the rule is - confers merit (or demerit) upon the qualifier. (This is not because a person may qualify by luck. Of course qualification may be the result of good fortune. But (I will argue) the fact that a person comes to possess an attribute by good fortune does not preclude that attribute functioning as a desert basis: desert does not presuppose responsibility.) The reason why qualifying under a rule cannot function as a desert basis is, surely, simply that qualification under a rule per se is not held to be merit conferring. This is not, of course, to deny that some rules are satisfied by possessing an attribute which is merit-conferring. But it is the possession of the attribute which enables a person to qualify under a rule, not the qualifying under a rule, which confers merit. The relationship between qualification under a rule and the possession of any merit-conferring attributes is wholly contingent upon the content of the rule. If being over six feet tall confers no merit, then qualifying for entry to a club for tall people by virtue of one's height confers no merit either.

In conclusion, then, we may say that, providing the desert-merit

hypothesis is accepted, qualification under a rule does not entail desert. But we have found no other ground to exclude qualification as a desert basis.

4.1.5 Conclusions

We have been concerned with the nature of desert. We have seen that desert is a triadic concept, and have concentrated our attention, so far, upon one of its three elements: the desert basis. We have seen that the desert basis must be a fact about the deserver which - if the desert-merit hypothesis is sound - confers merit upon the deserver. I have indicated that I reject the view that there is any requirement that the deserver be responsible for the desert basis. (This claim will be defended later in this chapter.) And I have argued that, again if the desert-merit hypothesis is sound, the claim that qualification under a rule can be a desert basis is to be rejected.

If we turn our attention to the question of what or who deserve, the answer appears to be implicit in what has already been said: anyone or anything able to possess merit or demerit. Despite the wide range of the uses made of desert, this idea - even at the extremes - does not appear to be ever entirely lost. It is to be expected that in some uses connections may become somewhat tenuous. Thus we are able to say that electricity deserves respect because, firstly, electricity is powerful, and secondly, power is (or was) generally considered to make its bearer admirable - a point to which the etymology of 'revere' bears witness.

There are two loose ends from our discussion. One concerns compensation and the status of the desert-merit hypothesis. This

issue will not be considered till the next chapter. The second concerns what may be said to be deserved.

We noted (4.1.1) that it is reasonable to suppose that what is deserved must, in some manner, be related to the desert basis. But we have yet to make clear the nature of this relationship. This I propose to do below (4.2.2) when I consider the alleged indeterminacy of desert. The objections to the use of the concept of desert - of which its alleged indeterminacy is one - is our next subject for discussion.

4.2 Objections to Desert

This century has seen, to borrow Brian Barry's phrase, something of a 'revolt against desert' (20). If the argument of this thesis is sound then this fact is, at first sight, somewhat surprising for there has been no similar revolt against the concept of justice - and certainly no growing inclination to restrict justice to rule-relative justice. Nor have the concepts which I have suggested are closely related to justice in the levels of being system - such concepts as respect, dignity, degradation and contempt - suffered any loss of popularity. Indeed, along with the concept of rights, these concepts seem very much in vogue, at least in circles where desert and merit are not. Why has there been a 'revolt against desert' to the point where desert seems to have lost its claim not merely to be

20. See BARRY (1965), pp112-5. There is reason to suppose that the tide may have turned in the last few years, though Sterba is surely mistaken when he prefaces a review of the work of Robert Nozick and Murray Rothbard, John Rawls and Ronald Dworkin, C. B. Macpherson and Kai Nielson, and Alasdair MacIntyre and John Finnis with the claim that (STERBA, (1986), p1):

While everyone agrees that justice, almost by definition, is giving people what they deserve, there appears to be little agreement concerning what it is that people deserve.

Sterba offers no defence of his astonishing claim that there is such an agreement as to what the disagreement is about. Indeed, in the course of ascribing theories of justice to these philosophers, Sterba finds it necessary to speak of desert on only two occasions: when outlining the view of Rawls and his critics on the question of whether a person may be said to deserve his 'natural assets or initial social assets' (*Ibid*, p5 and pp7-8), and when reporting Galston's claim that 'only after needs have been satisfied does desert become the basis of the distribution of goods.' (*Ibid*, p18).

the only consideration relevant to justice, but even to be a relevant consideration?

I propose to discuss three objections to the use of the concept of desert. Firstly there is the view - perhaps more often felt than expressed - that desert is inherently inegalitarian. If this view were sound then at least those who are egalitarians would have reason to object to the use of desert.

Secondly, there is the view that desert is inherently vague and, consequently, a person's deserts indeterminable. This point might be put by saying that even when we can agree who is deserving it is unclear what, in any precise sense, they deserve, or even how what is deserved could be determined.

A third source of difficulty for desert has arisen as a result of the belief that 'determinism undermines desert'. On this view we may be said to deserve only on the basis of that for which we are responsible. (Thus if we are unable to demonstrate that we are responsible for the possession of any particular attributes we shall be unable to demonstrate that we have any deserts.)

I propose to deal with these objections in turn.

4.2.1 Desert and Egalitarianism

It seems not implausible to suppose that a reluctance, on the

part of at least some people, to employ the concept of desert has arisen as a result of an association between the use of the concept of desert and arguments for unequal treatment and distribution. Certainly many of those who have defended an unequal distribution of material goods have done so by claiming that the larger shares were, in some way, deserved. But this does not, of course, show that there is anything inegalitarian about the concept of desert. The association may simply be contingent. If so then desert may be used in both inegalitarian and egalitarian arguments.

I shall suggest that this is indeed the case. If the ground or grounds on which people deserve to be treated - the desert bases - vary from one person to another, then, of course, different people may deserve different treatment. But where a relevant desert base is possessed in equal measure people do not merely not deserve different treatment, but deserve not to be treated differently. This point is made by Nagel:

... I am suggesting that for many benefits and disadvantages, certain characteristics of the recipient are relevant to what he deserves. If people are equal in the relevant respects, that by itself constitutes a reason to distribute the benefit to them equally. (21)

There is, however, a line of argument which may be thought to give rise to an objection to this view. The possible objection stems from a claim made by Sterba that any desert basis must be a fact about the deserver (X):

21. Thomas Nagel, 'Equal Treatment and Compensatory Discrimination', in COHEN ET AL (1977), p9.

which generally does not characterize all those who along with X could conceivably be similarly appraised. (22)

If Sterba's claim is sound then the use of desert for egalitarian purposes might be jeopardized. Are desert bases restricted in the manner Sterba suggests? He argues:

The facts which support desert claims generally do not characterize all those objects whose desert could conceivably be similarly assessed... The reason for this is that desert claims presuppose a context in which it is generally possible to assign different grades to those whose desert could conceivably be similarly assessed ... While it is possible for the fact which is the basis for X's deserving Y to characterize all those who could conceivably be similarly appraised, for example, there could be some fact which characterizes each and every parent and is the grounds for each parent's deserving gratitude from their offspring, this is generally not the case for desert contexts.

... Since under the usual interpretation, general rights are necessarily possessed by all men, the fact that Jones has a general right to life... could not be the basis for his deserving anything in a context where only men are being appraised since such a fact necessarily characterizes each and every man... (23)

Sterba concedes that:

There is no reason, however, why the fact that X has a general right or the fact that the conditions of X's general entitlement are satisfied could not be understood to be grounds for his deserving that to which he is said to have a general right when a comparison class larger than the class of all men is presupposed. (24)

But, Sterba continues:

22. STERBA (1976), p192.

23. Ibid, p192-3.

24. Ibid, p193.

... normally when questions of desert arise involving the appraisal of individuals who happen to be men, the relevant comparison class is taken to be the class of all men or some subclass thereof. Consequently, for all practical purposes, condition (3) of the analysis [i.e. X deserves Y only if there is some fact about X which generally does not characterize all those who along with X could conceivably be similarly appraised] does serve to exclude facts characterizing men as having certain general rights from qualifying as the basis for claims of desert. (25)

What replies are available to such an argument? One reply would be to challenge Sterba's claim that the use of 'desert' is, as a matter of fact, restricted in the manner he suggests. Another would be to deny that such a restriction should be maintained. A third would be to note Sterba's concession that an even necessarily 'universal' attribute (to some class, A) can function as a desert basis providing that we adopt a 'comparison class' wider than A, and to argue that since this can always be done, there is, in fact, no restriction on the use of desert. Is this third reply plausible? And what follows if we adopt it?

Suppose we claim that all men deserve a fair trial. According to the third reply, we can make this claim only if we are willing to be thereby committed to the possibility of some being or entity which does not possess the attribute on the basis of which men deserve a fair trial. It would seem to follow, therefore, that the only facts excluded as possible desert bases are those facts which are true of all possible beings.

25. Ibid.

But is this at all restrictive? Is it to say any more than that a deserver can deserve only on the basis of a fact about the deserver? Are there any facts which are true of all possible beings? There is one obvious candidate: that the being must be possible. Thus no being could be said to deserve any treatment by virtue of its possibility. I can think of no other candidates.

We need not, I think, pursue this question any further here. Instead we may, I think, conclude that, even if we were to accept Sterba's suggestions (and concession), there is no reason to suppose that the use of desert for egalitarian arguments would be subject to any significant restriction.

Let us turn now to a radically different source of reluctance to express egalitarian arguments in the language of desert. Consider the suggestion that, although there is no conceptual connection between desert and inequality, given the existence of the contingent association between desert and inequality, the egalitarian would be making something like a tactical mistake if he were not to object to the use of desert. Such reluctance is, in part, based upon an empirical claim; I will not attempt to evaluate that claim. What I do wish to note is that, any such concern must be set against the following point which favours the use of desert by egalitarians: by the use of desert egalitarians are able to frame non-contingent arguments for equal treatment; an egalitarian who eschews desert may find that he must rely upon highly contingent arguments for equal

treatment, such as the utilitarian argument from diminishing marginal utility, or from an alleged hypothetical choice in an original position. Worse still the egalitarian who eschews desert may find difficulty even in giving a distinctive account of his position. Egalitarianism is characterised, I suggest, not simply as a view of how people should be treated (namely, as equals), but as a view of why they should be treated in a particular way (namely, because they are equal). My suggestion is that egalitarianism is characterised by the belief that people (or whatever the relevant group) should be treated as equals because they are equals. (26) If this is so then it follows that we should not identify an egalitarian as someone who believes everyone has a right to treatment as an equal. (27) To hold the belief that every person has a right to treatment as an equal may be a necessary condition of being an egalitarian, but it is not sufficient. A person who holds that all have a right to treatment as equals, but denies that all are equal is not, I suggest, an egalitarian. Such a view is not, of course, inconsistent: suppose I believe that the members of two races are unequal, but have, in order to comply with a condition set by God for entrance into the land flowing with milk and honey, been a party to a social contract to treat all, irrespective of race, as equals. I thus hold that all have a right to treatment as

26. This is in no way to deny that there may be problems in making sense of the claim that people are equals. (See, for example, Bernard Williams 'The Idea of Equality' in WILLIAMS (1973), pp230-49.)

27. I borrow this phrase from Dworkin; see DWORKIN (1978), p227.

equals, but not that all are equals. (The inappropriateness of the notion of a right to characterise egalitarianism stems from the conclusory (28) nature of rights. Desert is not conclusory. Egalitarianism must be characterised in non-conclusory terms since the egalitarian is distinguished not simply by his conclusions, but by his reasons.)

4.2.2 The Alleged Indeterminacy of Desert

A reluctance to employ the concept of desert may, at least in part, stem from an indeterminacy which has seemed inherent in the concept. Barry's observation that:

... one may endorse a certain specific allocation as 'deserved' without saying that this exact amount is derivable from the concept of 'desert'. (29)

may seem to understate the problem: we may wonder how even an approximate assessment of what is deserved is to be derived 'from the concept of desert'. Is there any significant relationship between the desert basis and what is deserved? The apparent lack of such a relationship - of a means of determining what, on any particular occasion is deserved - has, no doubt, led some to regard desert as a mysterious notion, too inherently vague to be a satisfactory concept. (30)

28. I borrow this term from John Finnis, see FINNIS (1980), p211.

29. BARRY (1965), p106.

30. This difficulty for proponents of desert theories of justice is noted by Steven Sverdlik. (See SVERDLIK (1983a), p586.)

Before we consider whether, and if so how, the gap between desert basis and deserved can be bridged, it may be as well to note that our task is not that of trying to bridge that gap on all occasions the concept of desert is employed. There is no reason to assume from the outset that all uses of 'desert' do avoid indeterminacy. There is no reason to assume that all uses of 'desert' are 'alright as they are'. How, then, is what is deserved to be determined or, at least, restricted? Miller argues that:

The good I am distributing will determine the type of desert which is relevant - in the case of [a coveted office] it is ability to occupy that position, and other kinds of desert, whether moral virtue or athletic prowess, can safely be neglected. This way of putting it is perhaps too simple: there may be controversy both about the nature of the good being distributed, and about the precise basis on which it is deserved. ... But these complications do not invalidate the essential point, that in deciding upon the just allocation of a good, it is not necessary to take account of desert in general, but only of those deserts which are relevant to the good being distributed. (31)

We cannot, I think, deny Miller's conclusion: we should hardly wish to take irrelevant deserts into account. But which deserts are relevant? How does the type of good 'determine the type of desert which is relevant'. What is it about the ability to occupy an office which makes that ability a relevant desert basis so far as the appointment of someone to that office is concerned? Of course, we often - though by no means always - have reason to see the duties of an office are discharged competently, and hence have reason to appoint someone who is able

31. MILLER (1976), pp117-8, emphasis added. The relevance requirement is endorsed by Galston. (See GALSTON (1980), p170.)

and likely so to discharge them. But this alone is not a ground for saying that a (relevantly) able person deserves the appointment. Appointment by lot may be an inefficient system, but it is not by that fact a system which fails to treat people in accordance with their deserts. (There may be good utilitarian reasons for appointing someone who is not the most relevantly able. And certainly there is no reason to suppose that such a person normally deserves the appointment.)

We say (let us suppose) that the most able candidate deserves the appointment, and that the best boxer deserves to win the fight. The desert basis must in each case be relevant to what is deserved; the boxer does not deserve the appointment (coincidences apart), and the able candidate does not deserve to win a fight. But what exactly is it that makes being the best boxer relevant to deserving to win the fight. It is easy to overlook the difficulty here, and to think that there is no question to be answered. This would be a mistake - though it may suggest that the answer, whatever it is, will have to be obvious. It is, perhaps, less easy to overlook the question in the case of the most able person deserving an appointment, though in that case it is easier, perhaps, to think the answer will make reference to the consequences of the appointment. I have argued that this would be a mistake. In any case the nature of the relevance should be the same in the two cases: whatever it is that makes ability to perform a job relevant to deserving an appointment, should make boxing ability relevant to deserving to win a fight. Certainly if this is not so we shall not be able to

speak of a distinctive relationship between desert basis and deserved.

Is the connection between the desert basis and what is deserved simply governed by rules, norms, and conventions? Does the able person deserve the position because there is (we are to assume) a rule or norm that an able person deserves - should there be one available, at least - a coveted position for which he is qualified? If this is so then it is difficult to see how we can avoid regarding desert as a particular form of entitlement (32) - an entitlement where the qualifying condition is the possession of a merit-conferring attribute.

We need to proceed with caution. What exactly would it mean to say that the relationship between the desert basis and what is deserved is based simply upon a rule or convention? Here I would make two points. Firstly, it is not, clearly, merely to say that the relationship follows a regular pattern. Consistency alone would give rise to regularity. And the claim that a practice is rule-governed must, if it is to be of any interest, make a bolder claim than that of mere consistency.

32. This appears to have been the view of Benn and Peters (BENN AND PETERS (1959), p137):

In questions of income distribution the condition [to be satisfied in order to deserve] is usually the performance of service (and in this respect it differs from 'entitlement' which is more general, since one might be 'entitled' to benefits under rules which prescribed need, or insurance contributions, or sale of goods as the qualifying condition).

Secondly, to say that the relationship between the desert basis and what is deserved is based on rules should not be accepted simply because rules or norms (perhaps sometimes) have a role to play at some point in the account of the relationship. The claim that the relationship between the desert basis and deserved is rule-governed is the claim that the explanation of the relationship terminates immediately with an appeal to a rule or norm. (Only if the account of the relationship immediately brings in a rule or norm will desert be a form of entitlement.)

The question arises, therefore, whether an account can be given of the relationship between desert basis and deserved which does not make immediate appeal to the notion of a rule. I suggest that it can. One - though perhaps not the only - account is provided by the expression theory. What a person deserves is governed by the requirement that he should not be treated in such a manner as gives expression to the belief that he lacks some desert basis which he possesses. Thus, to take Miller's example, when distributing some coveted office we are to pay attention to the able candidate's ability to occupy that position since to ignore such ability would (we must suppose) be to act in such a manner as to give expression to the belief that the candidate lacked the ability to occupy the position, or, perhaps, to fail to give expression to the belief that the candidate possessed that ability. A desert basis is relevant to the distribution of a good if the distribution of such a good gives expression, in some way, to beliefs concerning the possession or lack of the desert

basis. When making, say, a professorial appointment attention need not be paid to 'moral desert' since to appoint a man as professor is not (we are to suppose) to give expression to the belief that the man is righteous. (33)

The most able boxer deserves to win the fight: if he does not win he will have been treated (by nature, the cosmos or the gods) in a manner which gives expression to the belief that he was not the best fighter. To deny the boxer some coveted position (a position, we are to suppose, unconnected with boxing) would not be to give expression to beliefs regarding his boxing abilities. (This is not, of course, to say that the trail of explanation must end here. We may ask for an account of when and how an action gives expression to a belief.)

The expression theory can, then, be called on to close the gap between desert basis and deserved, to provide an account of which desert bases are relevant when there is a good to be distributed. To that extent the charge of inherent radical indeterminacy can, I think, be rebutted - at least for some of the occasions on which 'desert' is used. But two more restrained indeterminacy charges may remain. Firstly, it may be said that what will be

33. Cf Feinberg (FEINBERG (1970), p82):

If this is so, then the kind of propriety characteristic of personal desert is ... to be likened to, or even identified with, a kind of "fittingness" between one person's actions or qualities and another person's responsive attitudes.

deserved on any occasion will be conventional, and hence, to that extent, arbitrary. Secondly, it may be argued that, since a particular form of treatment is rarely uniquely fitted to express a particular judgement, the adoption of the expression theory will rarely allow what is deserved to be determined more definitively than that it is any one of an (infinite?) set of appropriate of forms of treatment.

The reply to these two points is the same: we may agree with the objector's claim, but deny that there is any peculiar problem for desert. Thus we may agree that, at least on some occasions, the relationship between the action or treatment (the sign) and the belief to which that action or treatment gives expression (the signified), is, at least in part, conventional in character. And such conventionality may be said to introduce a measure of arbitrariness into what the deserver may deserve. But such problematic arbitrariness - if that is what it is - is not a problem for desert per se. It is, rather, an example of the more general problem of how it is that we are able to give expression to our beliefs. (34)

34. Cf Joel Feinberg, ('The Expressive Function of Punishment', FEINBERG (1970), p100 (emphasis added)):

To say that the very physical treatment itself expresses condemnation is to say simply that certain forms of hard treatment have become the conventional symbols of public reprobation. This is neither more nor less paradoxical than to say that certain words have become conventional vehicles in our language for the expression of certain attitudes, or that champagne is the alcoholic beverage traditionally used in celebrating great events...

Similarly, we may agree with Barry that it may not be possible to derive an exact amount, or precise form of treatment, from the concept of desert, or the desert basis. But again this indeterminacy is not peculiar to desert. The same indeterminacy arises whenever we encounter expression. The ideas and arguments set out in this thesis could (presumably) have been expressed using different words - and (presumably) in other languages. There is no one-to-one correlation between a belief or judgement, and the means (words, gestures, and so on) by which it may be expressed. If, then, we were to reject the notion of desert on this ground, we should be willing to reject the more general notion of expression.

4.2.3 Desert and Responsibility

4.2.3.1 The Conventional View

Most of us, prior to reflection, would say that there is a clear and straightforward relationship between desert and responsibility. We would say that to be deserving we must be responsible for that which makes us deserving. If we cannot claim responsibility - perhaps because the relevant fact was determined and could not have been otherwise, or because it was the result of pure chance, or because it was the result of some decision over which we had no influence - then we cannot claim to deserve. Lack of responsibility, we suppose, undermines desert.

This view is intuitively attractive. If someone condemned to be punished is able to show that he was not responsible for that which he is to be punished for, then, it seems, he has shown that he does not deserve to be punished. (It may, of course, be that punishing him can still be justified. But such punishment cannot be justified by being shown to be deserved.)

Again, it is often said that those who, through no fault of their own, lack marketable skills and talents do not deserve to suffer as a consequence. The point is perhaps most forcefully expressed in comparative terms; thus Sher, for example, notes that it seems intuitively unfair:

... for one person to enjoy benefits from which another is barred through no act or omission of his own. (35)

The attractiveness of the view that desert presupposes responsibility is, it would seem, a consequence of the more general fact that, in Nagel's words:

Prior to reflection it is intuitively plausible that people cannot be morally assessed for what is not their fault, or for what is due to factors beyond their control. (36)

There can, I think, be little doubt that this supposed inter-relationship between desert and responsibility, when combined with a growing tendency to view less and less as the responsibility of the individual, has contributed to the 'revolt

(35) SHER (1978-9), p371. Sher attempts to formalize the comparative argument in Section II (pp364-7).

(36) NAGEL (1979), p25. Nagel does not, of course, agree with this view; rather, he says, it 'seems to be wrong' (p24).

against desert' which was a feature of moral thought in the middle decades of this century. In one of the most well-known and discussed passages of A Theory of Justice, Rawls rejects desert in accordance with natural talents as a basis for distribution, arguing:

It seems to be one of the fixed points of our considered judgements that no one deserves his place in the distribution of native endowments, any more than one deserves one's initial starting place in society. The assertion that a man deserves the superior character that enables him to make the effort to cultivate his abilities is equally problematic; for character depends in large part upon fortunate family and social circumstances for which he can claim no credit. The notion of desert seems not to apply to these cases. (37)

Rawls' view appears to be that, firstly, we can deserve only on the basis of what is deserved, and, secondly, that a lack of responsibility - say, where we possess a characteristic by good or ill fortune - will preclude desert.

Rawls' assumptions, that the basis of desert must itself be deserved, and that desert presupposes responsibility, have been widely discussed and by many rejected. (38) Galston has even suggested that there is now a consensus which rejects the conventional view that desert presupposes responsibility. In summarizing the 'major findings' of 'recent scholarship' on desert he has been able to write:

(37) RAWLS (1972), p104, emphasis added.

(38) See NOZICK (1974), pp213-7; SLOTE (1972-3), DICK (1974-5), ZAITCHIK (1976-7), SHER (1978-9), and SANDEL (1982), Chapter 2.

Desert-related facts need not themselves be deserved - earned, merited, achieved through effort. They may, to use Rawls's phrase, be "arbitrary from a moral point of view", in that there is no moral reason why individual A rather than B should be characterized by a desert-related fact. But this does not mean that these amoral facts cannot be the basis of moral claims. (39)

But if the results of 'recent scholarship' are sound (40), if, that is, desert does not presuppose responsibility, then we are left with a puzzle: what was - indeed is - the source of the intuitive plausibility of the conventional view? How were - indeed are - we so easily misled into believing that desert does presuppose responsibility if, in fact, it does not?

Before we consider how this puzzle might be solved I want to look at a number of examples where the conventional view does not even seem plausible. Why should we consider such examples? Simply this: we should expect to find that whatever accounts for the conventional view, though present in many cases where 'desert' is employed, is absent in these particular cases. This difference, we may hope, will provide us with a clue to the resolving of the puzzle.

4.2.3.2 Counter-examples to the Conventional View

It is perhaps surprising to find that there are a number of

(39) GALSTON (1980), p172.

(40) David Miller is more cautious, concluding that the claim that deserts can depend only on voluntary action, or characteristics voluntarily acquired, is 'not proven' but that 'some weight' attaches to arguments in favour of the claim. See MILLER (1976), p100.

uncontroversial counter-examples to the conventional view - notwithstanding that view's intuitive plausibility. Nevertheless, counter-examples do exist. (To the extent that such examples are counter-examples, the result of 'recent scholarship' is, of course, thereby confirmed.)

The first examples I want to consider concern non-personal desert, that is, the deserts of non-persons. These cases pose a problem for any defender of the conventional view: why does non-personal desert exist at all? If desert presupposes responsibility, how can it be that what cannot be responsible can deserve?

There is no doubt that non-persons can deserve. Buildings can deserve preservation, manuscripts can deserve publication, fruit, vegetables, flower arrangements and poodles can all deserve prizes, flags and other national symbols, holy places, and areas of natural beauty can all deserve respect.

The existence of non-personal desert is not, of course, a knock down argument against the conventional view. Some, no doubt will be tempted to dismiss examples of non-personal desert as simply irrelevant. It is certainly possible to claim that the use of 'desert' is such that, if responsibility is possible then it is necessary, whereas if it is not possible it is not necessary. But it must be admitted that, as it stands, such an account is not only unilluminating and ad hoc, but leaves desert to look a most peculiar concept. If a merely contingent lack of

responsibility is enough to undermine desert, why should a necessary lack prove insufficient? This would, at the very least, be surprising. It would require an explanation of some sort.

The most tempting 'explanation' would be to make the shuffle of claiming that there are two concepts of desert: personal and non-personal desert. That is, that the term 'desert' is ambiguous. But this is hardly impressive. It is, surely, again better to agree with Anscombe that:

Where we are tempted to speak of 'different senses' of a word which is clearly not equivocal, we may infer that we are in fact pretty much in the dark about the character of the concept which it represents. (41)

I suggest, then, that we accept examples of non-personal desert as being putative counter-examples to the conventional view.

A second group of counter-examples concern the fundamental facts about a being. Most human beings are, we suppose, free and rational, and we say that they deserve to be treated as such. Rats and cockroaches we think are neither free nor rational. Let us assume we are correct in our ascriptions of freedom and rationality. Now suppose it is objected, on behalf of rats and cockroaches, that they are not responsible for being non-rational and unfree, and that they do not, therefore, deserve to suffer as

(41) ANSCOMBE (1963), pl.

a consequence. Similarly, the argument goes, we cannot claim to deserve on the basis of being free and rational, for we cannot claim to be responsible for being free and rational.

This argument is not, I take it, persuasive. Free and rational beings deserve to be treated as such - and their being deserving of such treatment is in no way undermined by any lack of responsibility for being free and rational. Similarly gods, if they deserve to be worshipped, deserve such treatment irrespective of whether they are responsible for being gods. Nor can my dog complain - when I do not worship her - that she is not responsible for being a dog, and for not being a god. In such cases, it appears, the question of responsibility simply does not arise. My dog deserves to be treated as a dog - no more, no less. (The issue of how dogs deserve to be treated - whether, for example, they deserve better or worse treatment than humans - is a separate question. I will say nothing on that issue.)

Finally, consider the case of competitions - beauty contests, athletic and other sporting events, games of skill (chess, bridge, poker, for example) and so on. In such cases we can speak of the various competitors as deserving or not deserving victory. The actual winner is not, of course, always the competitor who deserved to win - and thus, when the most deserving competitor does win, we are able to speak of the winner being a worthy victor or champion. In judging whether a particular competitor deserves to win we do not, I suggest, consider whether the competitor is responsible for possessing

those characteristics which are relevant to achieving success. Of course many competitions require effort and training by anyone who wishes to have any hope of success. But this is beside the point - for if it were the case that someone were able to outperform all other competitors without such training then he or she would deserve to win. (We might, of course, consider the competition poorly organised, or that the victor did not deserve those 'gifts' which permitted victory without effort. But these considerations are, again, beside the point.) As Miller notes:

When we say the prettiest girl deserves to win the beauty contest, the most skilful shot deserves to win at marbles, the ablest candidate deserves the scholarship, we look no further than the present qualities of the individuals concerned. (42)

Miller's point - that 'we look no further than the present qualities of the individuals concerned' - applies not only to the competition counter-examples to the conventional view, but equally to non-personal desert, and to those cases where we are concerned with fundamental facts about a being. It is enough for a building to be of historical significance to deserve preservation; it is enough for an area to be of outstanding natural 'beauty to deserve conservation. The question of its responsibility for being like that does not arise. Similarly it is enough to be free, rational, or a god in order to deserve treatment as such; it is not necessary to be responsible for so being.

(42) MILLER (1976), pp96-7.

It seems, then, that there are clear cases where a lack of responsibility does not undermine desert. If this is so then the conventional view must - as recent scholarship has suggested - be false. The alternative would be to claim that although we do speak of desert in these cases, we are mistaken. Anyone who wishes to defend that view owes an argument to explain why we should view present practice as mistaken or inappropriate. It will not be enough merely to assert that desert presupposes responsibility. That is the point at issue.

Let us take stock. We began with what I called the conventional view - that desert presupposes responsibility. We have now seen that there are a number of counter-examples to this view. Indeed it seems clear enough that, in an unrestricted form, the conventional view must be false. Desert does not always presuppose responsibility. Yet, as we saw at the beginning, there are cases where the issue of responsibility seemed unquestionably relevant to desert. Responsibility is then, sometimes relevant, sometimes not. If this is so, the question is: when and why does a lack of responsibility undermine desert? In particular, can we offer an account which explains not only why it seems so intuitively attractive to say that desert does presuppose responsibility, but also accounts for the fact that we feel no compunction to eschew the use of 'desert' in certain cases where there is simply no question of the putative deserver being thought responsible.

4.2.3.3 Accounting for the Relevance of Responsibility: Logical Error Accounts

The simplest possible account would be to claim that we confuse deserving with deserving to deserve, and by making such a conflation are able to deny desert claims in cases where the would-be deserver does not deserve to deserve. (Such a conflation will, of course, serve to undermine all desert claims, either immediately, or by reiteration: nothing can ever deserve to deserve to deserve to deserve ... ad infinitum.)

An example may help to make the issue clearer. Hitler, let us agree, was an evil man, and deserved to be treated as such. But did he deserve to deserve to be treated as an evil man? Let us suppose that he did not deserve to be an evil man; being evil was not, for example, some fitting punishment for his actions in a previous life. It follows then that he did not deserve to be in the position of deserving to be treated as an evil man. He did not deserve to deserve to be treated as evil. But it does not, of course, follow that he did not deserve to be treated as an evil man. Yet if we conflate deserving to deserve with deserving this is precisely what does follow.

It would, of course, be foolish to deny that such a conflation has ever been made. Yet it seems doubtful whether such a logical error can be the source - or, at least, the main source - of the plausibility of the conventional view. The response of those who defend the conventional view is likely to be that they are not

conflating deserving with deserving to deserve. Rather, they would argue, to deserve requires that the would-be deserver deserve to deserve. Those who find the conventional view plausible are likely to find this requirement, this inference, no less plausible. The issue is, then: Is it a plausible inference? Are our deserts undermined if we do not deserve to deserve?

Consider the following argument: people do not deserve their natural skills and talents. But it is on the basis of these undeserved skills and talents that they are said to deserve particular forms of treatment. Just as a receiver of stolen goods cannot have an (indisputable) title to ownership, so the holder of undeserved skills and talents cannot have an (indisputable) claim to deserve.

Whatever the merits or otherwise of the analogy, this argument has the weakness of confusing not deserving with deserving not. If people deserved not to have their particular skills and talents then it might plausibly be argued that they cannot deserve to benefit or suffer by virtue of possession of those skills and talents. But it is, of course, generally accepted that it is not the case that people deserve not to have their skills and talents; rather they merely do not deserve them. The distribution is not, we are to suppose, unjust or unfair; it is, in Rawls' phrase, simply 'arbitrary from the moral point of view' - that is, neither just nor unjust.

It may be said that this is a piece of sophistication not generally recognised, particularly by life's losers. It is, to say the least, tempting to view our misfortunes - and even the good fortunes of others - as evidence of the cosmic injustice which, we are taught from childhood, is to be accepted as part of life. The point is not unimportant: we are, after all, attempting to account for the plausibility of the conventional view, to account for the attractiveness of that view. In developing such an account it may matter less what is true, than what we are tempted to believe.

It may, then, be that we do, sometimes, confuse not deserving our skills and talents with deserving not to have those skills and talents, and thereby infer that deserts based on those (not merely undeserved, but unjustly held) skills and talents are undermined. But the commission of such an error seems far from explaining the intuitive appeal of the conventional view. That appeal, I suggest, survives the uncovering of the possible conflating of the undeserved (i.e. that which is not deserved) and the unjustly held (i.e. that which we deserve not to have). There is, in other words, an attraction in the view that we cannot deserve on the basis of what we do not deserve (but do not deserve not to have), and this we have yet to account for.

Finally this account offers little hope of explaining those cases where we do not regard a lack of responsibility as undermining a desert claim. Why should we suppose we are seduced by the logical error on some occasions, but not all?

4.2.3.4 Accounting for the Relevance of Responsibility: the

Attribute Requirement

We must, then, turn our attention elsewhere. The next account I want to consider draws on the analysis of desert we gave at the beginning of this chapter. Desert, we saw, is a triadic relation between a deserver, that which is deserved, and the desert basis. We accepted that the desert basis must be a fact about the deserver. We have also adopted the merit requirement as a hypothesis. Given this account of desert, is it possible to account for the initial intuitive plausibility of the conventional view? Are we able, given this analysis of desert, to explain why desert is sometimes - though only sometimes - thought to be undermined by lack of responsibility?

The account I want to consider is this: a lack of responsibility is able to subvert a desert claim by undermining the claim that the (would be) desert basis may properly be said to be a fact about the (would be) deserver. (43) As we have seen, the desert

(43) Sandel (SANDEL (1982) p85, emphasis original) suggests that an argument of this form is available to Rawls:

To say, as Rawls does, that I do not deserve the superior character that led me to realize my abilities is no longer enough. To deny my desert, he must show that I do not have the requisite character, or alternatively, that I have it, but not in the required sense.

But this is precisely the argument Rawls' theory of the person allows him to make. ...Rawls can accept that some undeserved desert base is necessary, only to claim that, on an adequate understanding of the person, this condition could never in principle be met! On Rawls' conception, the characteristics I possess do not attach to the self but are only related to the self, standing always at a certain distance...

We can see in this light how Rawls' argument from arbitrariness undermines desert not directly, by claiming I cannot deserve what is arbitrarily given, but indirectly, by showing I cannot possess what is arbitrarily given, that is, that 'I', as subject of possession, cannot possess it in the undistanced, constitutive sense necessary to provide a desert base.

This barest of conceptions of the self upon which Rawls would have to rely to exploit this argument is, to say the least, controversial. We could not, it would seem, identify the self of any particular individual. What reason, then, would we have to suppose that there is a self corresponding to each individual?

basis must be a fact about the deserver. The suggestion is, therefore, that the lack of responsibility does not undermine desert directly; rather it severs a vital link between the (would be) deserver and the fact which would, but for the lack of responsibility, function as a desert basis. I will call this the 'attribute requirement account'.

How does this process - this severing - occur? Consider again the distinction between what people do - their actions - and what happens to them. We are, at least in general, responsible for what we do, but not for what happens to us. Also, we can (and do), at least in general, infer facts about a person from what they do, which we cannot make from what happens to them. (44) If

(44) Again this is not to deny that we cannot make some inferences on the basis of what happens to a person. Considered as a body we may make inferences about humans as we may about other bodies. From the fact that you have a certain terminal velocity (in a given atmosphere) I may infer that you have a certain mass.

Secondly we may draw inferences about a person subsequent to the event in question. If you have been present in a serious car accident I may infer that you could be injured and reluctant to travel by car in the near future.

Thirdly, if a particular event has happened to you I may infer that you have characteristics which make that event possible (or likely). If you have had a mountaineering accident I may infer that you mountaineer, that you choose to place yourself at physical risk, that you are perhaps careless, and so on.

Fourthly, given a particular set of beliefs I may regard what happens to you as a sign: I may infer from the fact that you fail in business that you are not a member of God's elect; or from the fact that you float on water I may infer that you have committed some crime.

We can, then, make certain inferences on the basis of what happens to a person. But in the case of an action we may make inferences based on the associated intention. This is not the case with mere 'happenings' for in such cases there is no intention.

I believe you have deliberately trodden on my foot I will hold you responsible, make inferences about you (that you are violent, malicious, etc.), and believe you to be deserving (of censure, etc.). If, however, I believe you to have inadvertently (and non-negligently) trodden on my foot I shall not say of you that you deserve to be treated in some particular way. In the second case having trodden on my foot is something which has happened to you, treading on my foot is, in an important sense, not something which you have done. It is, then, plausible to view as associated a lack of responsibility, a failure to provide evidence of facts about the subject, and a lack of desert. (45)

A comparable argument can be developed in the case of aspects of character. If I am short-tempered I may view being short-tempered as something for which I am not responsible, something that has happened to me (and hence something which the real me is not), something from which no inferences about the real me can be drawn, and hence as not something on the basis of which I - that is, the real me - can have deserts.

Consider another example. Suppose John cannot help being cruel to cats. He is not - we are to suppose - responsible for being cruel, and he cannot therefore have deserts on the basis of his cruelty. He cannot, for example deserve censure. So, at least,

(45) Cf. RICHARDS (1986), p200 (emphasis original):

... it is scarcely radical to say that when we are concerned with what a person deserves, we are interested in his behaviour as a display of character.

it is argued. Why can he have no deserts on the basis of his cruelty? Because being cruel is not really a fact about John, not a fact about the real John, or John 'in himself': being cruel is at most something which has happened to John, not something he is.

A lack of responsibility undermines - or is thought to undermine - the claim that what we have is a fact about the putative deserver (a fact about the putative deserver's real self), and, since the desert basis must be a fact about the deserver, the desert claim itself is undermined. (And, we may add, to say that a requirement of desert presupposes responsibility, is little different from saying that desert presupposes responsibility.)

It will be recalled that we are to require proposed accounts of the plausibility of the conventional view - the view that desert is undermined by a lack of responsibility - to explain not only the plausibility of this view, but also the lack of plausibility of that view in the three types of case identified earlier, viz non-personal desert, cases where the desert basis is a fundamental characteristic, and competitive deserts.

How well does the attribute requirement account fare in explaining why a lack of responsibility does not appear to affect desert in the exceptions we have identified? The account is perhaps most successful in dealing with cases where the desert basis is a fundamental characteristic - membership of a particular kind (that is, being a god, man, or dog, etc.), or

being rational or free. If the attribute requirement account is sound, then the plausibility with which a lack of responsibility undermines a particular desert claim will be proportional to the plausibility of denying that the putative desert basis is really a fact about the deserver, that is, a fact about the putative deserver's real self. It will be most difficult to deny that 'fundamental' facts are really facts about the putative deserver, thus it will be most difficult for desert to be undermined in such cases. I may not be responsible for being free or being a man, but these characteristics are so fundamental to any conception of me - the argument goes - that it is simply impossible to regard being free and being a man as things which have happened to (the real) me. Thus this account of the origin of the conventional view is able to account for our apparent failure to apply that view in such cases.

What of non-personal desert? Here it might be argued that, since there is no possibility of action (in the relevant sense), and hence no distinguishing between what the putative deserver does and what happens to it, there is less impetus to seek to isolate the equivalent of a 'real self' to which events may happen but which remains untouched by them. Thus, the argument goes, it seems less plausible to deny that putative facts about forests, books, buildings, and so on, are indeed really facts about some forest, book or building. If the attribute requirement account were indeed to be the explanation of the normal attractiveness of the conventional view, we might not, therefore, expect a lack of

responsibility to undermine non-personal desert.

What of those cases I have called competitive desert? How can the attribute requirement account explain why we feel no compunction to deny that the most skilled chess player deserves to win the championship even if he cannot claim responsibility for being extra-ordinarily able at chess? Why, in other words, are we reluctant to divorce chess playing ability from the player in such cases, so reluctant to claim that being skilled at chess is simply something which has happened to him, not something which tells us anything about the player in himself?

It is not easy to see how the attribute requirement account can make sense of this reluctance to see desert undermined by a lack of responsibility in these cases. (We may even be tempted to abandon that reluctance, and to agree that, though we do not normally consider responsibility when judging who the most worthy victor would be, we ought to do so. Or, at least, that we ought to do so were there not extraneous reasons for not doing so.)

As I have said, it is not, I think, easy to see why we should have any particular reluctance in such cases. There would, of course, be enormous - probably insuperable - practical difficulties in trying to distinguish between the skills or talents which competitors could claim really to possess, and those which were, in some sense, merely associated with them. But such difficulties do not seem to be more severe in the case of competitions than elsewhere.

It might, I suppose, be suggested that it is simply a fact about the competitions we hold that they (at least in general) are considered to be well designed when the competitor who is most able in a relevant way, or possesses most of what is being sought - irrespective of whether possession of that skill, talent or whatever is something for which the individual competitor is responsible - has the best chance of winning. Thus it is, it might be argued, the nature of the particular competitions we hold that makes issues of responsibility irrelevant.

This argument, even if accepted, (and I do not suggest it should be) does not support the account we are considering; at most it removes a difficulty which the account might otherwise face. The argument is, we might say, account-neutral; it will remove these cases as a possible difficulty for any account.

The attribute requirement account of the plausibility of the conventional view has, then, limited success in making sense of cases where the conventional view fails, or seems to fail, to apply. But there is a more significant difficulty confronting this account: the conventional view is simply more plausible than are the premises of this account.

What I mean is this. The notion that there are real or transcendent selves which, in some way, come to have certain properties contingently associated with them, is a possible way

of thinking. We can, that is, suppose that John is indeed not really cruel to cats - that is, the real John is not cruel to cats. He merely has cruelty to cats associated (in some way yet to be explained) with him.

But being a possible description is not enough. We need to be willing to think of this description as the best description of the state of affairs if this is to be the source of our readiness to believe that a lack of responsibility undermines desert. And surely that is just not so. The best description, I suggest, is simply that John's propensity to be cruel to cats is a fact about John - the real John. He is not, we may agree, responsible for having such a propensity. But he is, nevertheless, cruel.

The attribute requirement account is, then, in the end, unsatisfactory: it is certainly a logically possible account of how the orthodox view could have come to seem plausible. But although it would account for the undermining of desert if we did believe that the pertinent facts were not really facts about the putative deserver, the problem is that we are ready to believe that desert is undermined without believing that the fact is not a fact about the putative deserver. That is, we feel drawn to denying that John has deserts on the basis of a propensity to cruelty which he cannot help, without wishing to claim that John is not really cruel, does not really have that propensity. And this view the account cannot explain. Again, then, we must look elsewhere.

4.2.3.5 Accounting for the Relevance of Responsibility: the Deserts Account

As we saw, desert is a triadic relation - a relation between deserver, that which is deserved, and desert basis. The account we have just considered focussed upon the desert basis. The argument was that the desert basis had to be an attribute of the deserver, and that a lack of responsibility undermined the claim that the putative desert basis was indeed an attribute of the deserver (at least in the required sense).

I now propose that we turn our attention to the deserts, that is, that which is said to be deserved by the deserver. Is it possible that deserts - or rather some deserts - presuppose responsibility on the part of the deserver? If this were so then, it seems, we would have an explanation of how a lack of responsibility can come to seem to undermine desert.

Now it is indeed sometimes - though by no means always - the case that what is said to be deserved presupposes a responsibility on the part of the deserver. Where this is so, to say that the treatment (or whatever) is deserved, while denying that the (alleged) deserver is responsible, is to make a conceptual mistake.

Perhaps the clearest example of this concerns blame. To blame someone is to hold them responsible. It is, therefore, a

conceptual mistake to say that someone deserves to be blamed for something they are not responsible for. (46)

A little more controversial, perhaps, is the case of punishment. However it is at least arguable that to describe a form of treatment as punishment is to imply that the person so treated is

(46) Cf J.E.R. Squires, 'Blame', reprinted in ACTON (1969), p211:

To blame a person is to be of the opinion that he is responsible for an undesirable upshot, that he has done what he ought not.

and Anthony M. Quinton, 'On Punishment', reprinted in ACTON (1969), p59:

'I am going to punish you for something you have not done' is as absurd a statement as 'I blame you for this event for which you were not responsible.'

Whether we should consider the meaning of blame to contain the notion of responsibility is, perhaps, unclear. William Kneale, (ACTON (1969), pp190-1) suggests that:

In its basic use 'blame' does not mean 'fix responsibility on', but rather 'speak ill of', 'censure', 'find fault with'.

Nevertheless Kneale goes on to concede (Ibid, p191) that:

In all cases [of blaming] it is assumed that the person blamed could have chosen to act otherwise...

Thus it would seem to follow that to blame is to impute responsibility. This appears to hold true even when we blame the inanimate - the weather, faulty wiring, and so on. In such cases we may say that the weather, the faulty wiring, or whatever, is responsible. (If, as seems reasonable, the central meaning of 'responsible' is 'liable to be called to give an account' or 'answerable' these non-personal uses of blame and responsibility are metaphorical.)

Whether a person is always blameworthy for an undesirable outcome for which he is responsible will depend, at least in part, on the view of responsibility taken. We normally suppose that a person is not responsible for what he could not have prevented. Notwithstanding the appeal of this view, it does not correspond to much of what we say, do, and feel. Many people feel a responsibility for the consequences of the actions of their children, and, under certain circumstances, the Government of their country, even where what has been done is not something they feel they could reasonably have been expected to prevent - or even, sometimes, could have prevented. These are times when we may feel responsible but would not accept blame. We may have to accept responsibility even where we have done nothing wrong. But as Squires suggests, blame does not extend to such cases.

On the topic of blame see also BEARDSLEY (1969).

viewed as responsible for that which they are being punished for. The distinction between punishment and the infliction of a penalty, Feinberg argues, is that:

... punishment is a conventional device for the expression of attitudes of resentment and indignation, and of judgments of disapproval and reprobation,... Punishment, in short, has a symbolic significance largely missing from other kinds of penalties. (47)

But an attitude of resentment or indignation is appropriate only towards those considered responsible. Thus, if this argument is sound, to punish a person is to give expression to a belief that the person punished is responsible (for whatever the punishment is for). If a person is, for some reason, not responsible it does indeed follow that they cannot deserve to be punished. It is not that they cannot deserve punishment; so much as that they cannot - logically cannot - deserve punishment.

Resentment is, of course, one of the 'reactive attitudes' discussed by Strawson. Other such attitudes include gratitude and forgiveness. (48) Again a lack of responsibility will undermine any claim to deserve gratitude or forgiveness; we can be grateful only when there is someone responsible for our receiving the benefit; we can forgive only when there is someone

(47) Joel Feinberg, 'The Expressive Function of Punishment', reprinted in FEINBERG (1970), p98, emphasis added, original emphasis deleted. If this view is sound we should, presumably, in cases of strict liability, be willing to speak of penalties rather than punishments. This is, I suggest, acceptable.

(48) STRAWSON (1962), p190. Strawson also mentions love and hurt feelings but these are not normally described as being deserved.

responsible for the injury we have received. (49) Lack of responsibility undermines the possibility of gratitude or forgiveness being deserved. But it is a misleading ellipsis to say of these cases that lack of responsibility has undermined desert.

A further example is reward. To give a reward is, inter alia, to acknowledge responsibility. (50) Rewarding contrasts with, for example, praising, admiring and criticising which do not presuppose responsibility on the part of the recipient. We are restricted in what or who we can give rewards to; while paintings, essays, buildings, machines, vegetables, etc can be praised, admired, criticised, and win prizes, none of these can be rewarded. The higher animals are in some ways hard cases - but it seems not unreasonable to say that, to the extent that we are willing to describe our action as genuine rewarding, we are viewing the dog, or whatever, as responsible.

My point, then, is this: it is not that the non-responsible cannot deserve rewards; it is that they cannot deserve rewards.

(49) Notice that we cannot forgive the weather or the wiring, or be grateful to either should they function in a way which brings us benefits. This confirms the suggestion made earlier that such cases are metaphorical.

(50) Cf BARRY (1965), p108:

... we can only speak of 'rewards' and 'punishments' where there is voluntary effort involved at some point.

This, no doubt, puts the point too strongly. We may speak of a person being punished for their laziness, and laziness requires little in the way of effort - voluntary or otherwise. The issue is one of responsibility, not effort.

I have suggested that certain forms of treatment - forms which are often said to be deserved - do themselves presuppose responsibility. To blame, punish, forgive, reward, resent, and show gratitude, are, I suggest, examples of cases where responsibility on the part of the recipient is (logically) presupposed. These are, to use Strawson's term, reactive attitudes. Examples of cases where responsibility is not presupposed appear to include: admiring, criticising, grading, praising, the giving of prizes, and the showing of respect and consideration. These may be appraising attitudes, but they are not reactive attitudes. I am not, of course, denying that we may hold responsible those whom we criticise and praise; what I am denying is that we must - logically must - hold responsible those whom we criticise and praise. Criticism and praise do not work like that; blame and rewards do. If this account is correct it suggests that the normal - and traditional - view of praise and blame as an opposing pair is to be questioned. (51)

(51) The pairing of praise and blame is ubiquitous. The association has a long tradition: it occurs (in translation, of course) in Aristotle. (See FREESE (1926) pp35 and 97. These are translations of The 'Art' of Rhetoric I. 3.5 and I. 9.28.) The association is repeated by innumerable modern writers. For example, Feinberg (FEINBERG (1970), p67, emphasis added) writes:

... the responses which persons are said to deserve in polar contexts come in neat contrasting pairs - reward and punishment, compensation and liability, charge and credit, praise and blame ...

See also FEINBERG (1970), p74. However praise and blame are not a 'neat contrasting pair.' The opposite of praise is condemnation or criticism; the opposite of being blamed is being pronounced blameless. Of course to blame is to impute fault, and thus to ascribe a fault or vice; to praise is to ascribe virtue. Praise and blame are, then, concepts attached to a member of a contrasting pair: viz virtue and vice. Nevertheless they are importantly different; the difference is clear, I suggest, if we think of what is to be contrasted with praising God. The contrast is, surely, with reviling the Devil; to blame the Devil would be something quite different.

It may be that praise and blame were at one time a 'neatly contrasting pair', for it may once have been possible to blame without implying responsibility. If so then it would have been possible to blame a pig for being a pig as it is (sometimes thought to be) possible to praise men for being men. But even if 'blame' did once have such a sense there can be no doubt that it does not still retain it.

An alternative account would be to claim there are two senses of 'praise', one implying responsibility, the other not. I am more sympathetic to this view than most 'multiple sense' accounts. There do appear to be two senses of 'fault': if I say x is a fault of S I do not imply responsibility; if I say x is the the fault of S I do imply responsibility.

Our third account, then, is this: a lack of responsibility often precludes the possibility of a particular form of treatment being deserved. This is not because, in itself, desert presupposes responsibility; rather it is because the particular form of treatment said to be deserved presupposes responsibility. In supposing that desert itself presupposes responsibility we make the mistake of transferring to the notion of desert what is properly associated only with some of those forms of treatment which can be deserved.

It is not easy to assess the extent and potency of this tendency. But there are two reasons to expect it to be extensive. Firstly, those forms of treatment which do presuppose responsibility - blame, punishment, rewards and so on - are a very significant sector of the forms of treatment which are said to be deserved. In other words, when we think of desert, we tend to think of such notions as blame, punishment, rewards, and so on. Perhaps philosophers are particularly prone to this distortion; as Feinberg writes:

... when philosophers themselves make judgements about personal desert, the deserved modes of treatment they have in mind are almost invariably punishment and rewards. (52)

A (mistaken) transfer of responsibility from deserved to desert itself, might not, therefore, be unexpected.

Secondly - and this is related to the first point - there is a

(52) Cf. FEINBERG (1970), pp55-6.

tendency to apply those forms of treatment which do presuppose responsibility beyond their proper range. This is particularly so in the case of reward and punishment. Thus it is tempting for all recipients of material benefits and sufferings to describe themselves as being thereby rewarded or punished. By describing benefits we receive as rewards we thereby claim that we are responsible for that which we are being rewarded for. This, in turn, has a tendency to justify our receipt of those benefits. Conversely, by describing our sufferings as punishments we thereby imply they are justified only if we are responsible for our suffering or its cause. In cases where we are not responsible, the description of a suffering as a punishment facilitates the demonstration that the suffering is unjust.

But such extensions of reward and punishment will, in turn, increase the tendency to think that all deserts - and hence desert itself - presuppose responsibility. Of course if the receipt of a benefit really is a reward, then the receiver will not deserve that benefit (not, at least, as a reward) if he or she was not responsible for what it was received for. Thus, if a substantial salary is thought of as a reward - and not unnaturally perhaps, people who get large salaries do like to think of them as rewards (or used to before they began to be described as 'compensation packages') - a claim to that reward is undercut if the employee is not responsible for the skills and talents which enabled him to gain his position. Such an argument does not, of course, show that a large salary is not deserved; it shows only that it is not deserved as a reward. It remains

possible that it is deserved as a compensation, an expression of praise, a mark of respect, or as some other form of treatment. And, of course, it remains the case that a particular salary may be justifiable though not deserved.)

How well does this account allow us to make sense of those cases where the conventional view seemed not to apply?

As regards the deserts of non-persons, deserved forms of treatment here never presuppose responsibility. (We cannot punish or reward non-persons.) Thus we might expect, in such cases, desert not to be infected by assumptions of responsibility. And this is, of course, what we have found.

Consider now cases of fundamental characteristics, or natural kinds. What can be said if, for example, my dog were to ask why she should suffer for being a dog when being a dog is not something she is responsible for? Why should she deserve less than, say, a child of mine. My suggestion is that the account just given enables us to pull the sting, or at least some of the sting, in this rebuke. We may agree that she - the dog - cannot deserve to be punished for being a dog. If her treatment was punishment it would indeed be undeserved. But if it is merely the treating of her as a dog, in an appropriate manner and with due respect, this is not, in itself, punishment. (Of course my dog may wish to know what makes her less worthy of respect than a human being. But that is an entirely different issue: it is an

issue which does not depend - at least not in any obvious sense - on whether she is responsible for being a dog. And as I said before, this is not an issue I propose to discuss here.)

Finally, consider the third type of difficult case for the conventional view: competitions. In these cases it is, I suggest, important to distinguish between deserving a prize and deserving a prize as a reward. I suggested earlier that the concept of a prize does not have the notion of responsibility (on the part of the recipient) built into it, the concept of a reward does. (53) A lack of responsibility will not, then, undermine any claim to a prize. But a lack of responsibility will undermine a claim to a reward - and hence a claim to deserve a prize as a reward.

My suggestion is, then, that responsibility is irrelevant to the deserving or otherwise of prizes qua prizes. The most beautiful

(53) This claim is in conflict with the view of the meaning of 'prize' given in the Concise Oxford Dictionary of Current English (4th Edition) which defines the relevant sense of 'prize' as: '

reward given as symbol of victory or superiority to student..., to competitor in athletic contest, to exhibitor of best specimen of manufactured products, works of art, etc., in exhibition;...

My claim is that a 'prize' is simply that which is given as a symbol of victory or superiority. Whether a prize is a reward depends on whether the recipient has done anything which can be rewarded. That which cannot act cannot, I claim, be rewarded. The Concise Oxford Dictionary of Current English (4th Edition) is at least consistent in defining 'reward' as 'return or recompense for service or merit'. Again if a reward is indeed, inter alia, a 'return for merit' it is unclear why we never speak of rewarding works of art.)

girl deserves to win the beauty contest, the most bouncing baby the bouncing baby contest, the most able chess player the chess championship. Questions of responsibility for being beautiful, bouncing, or skilled at chess are irrelevant. These cases of desert - the deserving of prizes qua prizes - are unaffected by the presence or otherwise of responsibility. But, as I suggested earlier, there is a tendency to extend the application of the notion of reward. It is, tempting - especially for victors - to think of a prize as a reward. Now, of course some victors can properly be said to be rewarded by the prizes they win. But these are, I claim, precisely those cases where the victor can claim responsibility for (at least some) of those virtues and skills which have enabled him or her to win the prize. (Where such claims are not possible - as in the case of a bouncing baby competition - though we may speak of a particular baby deserving the prize, we could not speak of the baby deserving to be rewarded by winning the prize.)

In short, then, the conventional view - that lack of responsibility undermines desert - breaks down in the case of competitions because we are there concerned with prizes. Though many forms of treatment which are said to be deserved - punishment, rewards and so on - presuppose a responsibility on the part of the recipient, prizes do not. Where we are concerned with prizes qua prizes, since the receiving of a prize does not presuppose responsibility, desert is not undermined by a lack of responsibility. The situation is made slightly more complex by our willingness on some occasions to view the receiving of a

prize as a reward. In these cases, since rewards do presuppose responsibility, a lack of responsibility will undermine the desert. But in none of these cases is the desert claim being undermined by any conceptual relationship between desert and responsibility - for there is none. In each type of case it is the relationship between what is deserved and responsibility which determines whether the desert claim is undermined or not.

At this point it may be objected that the account is jejune for it makes little difference whether we call a benefit a prize or a reward. We have, the objection goes, simply divided benefits on the basis of the responsibility of recipients, labelling one group prizes, the other rewards.

The objection would be sound if it were indeed the case that the question of responsibility was the only difference between a prize and a reward. But this is not so. Prizes and rewards are different notions and have different functions. Firstly, as Feinberg notes, the giving of prizes is 'non-polar' - people are divided into those who deserve the prize and those who do not. Rewarding, by contrast, is a 'polar' concept - the opposite being punishment. (54)

Secondly, the relationship between prizes and justice contrasts sharply with that between rewards and justice. If prizes are to

(54) FEINBERG (1970), p62.

be awarded then justice requires they be awarded to those who are entitled to them; and that those who win are those who deserve to win. (55) But there is never a requirement of justice that there be prizes. (56) In the case of rewards, however, the situation is different: at least on some occasions a person is thought to deserve a reward; and failure to offer a reward is unjust. (57) This is part of the notion of 'cosmic justice': the virtuous should be rewarded, the evil punished - even if there is no tangible reward and virtue has to be its own reward. As Miller notes:

The reasons for which one deserves a prize are rarely of the same kind as the reasons for which one deserves a reward. (58)

Rewards are often - though not always - tokens of gratitude; prizes never perform this function. (59) It is, however, normally the case that both rewards and prizes express praise of the recipient. (60) But neither of the converses hold: we may praise without either awarding a prize or bestowing a reward.

(55) The injustice which obtains when those who deserve to win do not win is a case of what has come to be known as cosmic injustice. It does not, of course, follow that anyone is to be blamed (still less punished) for such injustice. See FEINBERG (1970) pp83-5, especially Footnote 25.

(56) Cf MILLER (1976), p92.

(57) Cf Ibid, pp116-7

(58) Ibid, p88.

(59) FEINBERG (1970), pp68-9

(60) There are exceptions of course: a police reward paid to an informer who is himself a known criminal hardly expresses praise; and nor do booby prizes.

The distinction between rewards and prizes (and, for that matter, praise) is, then, clear enough. Their respective relationships with responsibility are not the only difference between these concepts. It should be expected, therefore, that the treatment which is appropriate if a prize is deserved will be different from, and based on different considerations to, what is appropriate if a reward is deserved. There is no reason to suppose, therefore, that distinguishing between prizes and rewards - as well as tokens of esteem and respect - will be, in any sense, a pointless exercise.

Our judgement on this third account of the origin of the intuitive plausibility of the conventional view must, I think, be that it is superior to the other accounts we have considered. It offers a plausible account of how we come to hold the (mistaken) view that a lack of responsibility undermines desert, together with a plausible explanation of why this belief is not held in certain cases. Unlike the previous accounts we considered, it requires us neither to hold that we are victims of simple logical errors, nor to abandon fundamental beliefs of what people are in themselves.

4.2.3.6 Conclusion

I propose to conclude, then, that the (mistaken) association of desert and responsibility has arisen as a result of desert having been - no doubt unconsciously - viewed as one of the concepts embodying reactive attitudes. (This, in turn, is to be explained

by the association of desert with blame, reward and punishment - concepts which do embody reactive attitudes.) It is true that the use of desert presupposes an appraising attitude. But reactive attitudes are no more than a proper subset of appraising attitudes. There is no reason to suppose, therefore, that desert presupposes responsibility, or to reject desert on that account.

We may, then, conclude that 'recent scholarship on desert' (at least if we are to accept Galston's summary of it) is sound: desert does not presuppose responsibility. Of course we could be reasonably assured of this by the mere existence of the counter-examples listed at the outset. But though it is something to have counter-examples to a view, it is more reassuring to have an explanation of why that view seemed plausible but is false. Knowledge of such an explanation protects us from the seductive attractions of the conventional view in the future.

But there remains the fundamental issue upon which we touched at the beginning: can it be right for the moral assessment of a person to be based on factors beyond their control? Can such a view ever escape the charge of being callous and uncivilised?

Once again the conventional view is attractive - but not without difficulties. Most of us would draw a distinction between the moral status of a person and that of a non-person (for example, a lower animal or young foetus). Yet these are not differences for which the respective beings can - in any ordinary sense - be

held responsible. Once again, then, the conventional view must, surely, be mistaken. The answer to this issue is, I suggest, no more than a truism: those who have virtues or vices for which they are responsible deserve to be treated as having virtues or vices for which they are responsible; those who have virtues or vices for which they are not responsible deserve to be treated as having virtues or vices for which they are not responsible. (Notice again that a lack of responsibility does not preclude desert, though it does affect what is deserved.) It may seem that this is simply a reformulation and constitutes no progress. But I think this would be a mistake. Certainly the issue has not been completely resolved; but I suggest, it is, in this form, easier to get to grips with. The issue is that of determining which practices give expression to a belief that a person has virtues or vices for which they are responsible, which practices to a belief that a person has virtues or vices for which they are not responsible. (To repeat: as with any language there will be a significant conventional character involved.) In each case, of course, the person will be treated as they deserve. Justice demands no less. But in what sense can it be callous to treat a person with a fault for which they are not responsible as having a fault for which they are not responsible?

4.3 Justice as Fitness and Justice as Desert

In the light of the account of the concept of desert developed in this chapter, and the account of justice outlined in the previous chapter, i.e. justice as fitness, we may now consider the nature of the relationship between justice and desert. My claim, as I have indicated, is that justice as fitness makes desert central to justice, and that to act unjustly is to fail to treat someone in accordance with their deserts.

The claim that desert is central to justice is grounded on the account of the concept of desert outlined above; in particular, the claim rests on the requirement that the desert basis be an attribute of the deserver, and on the desert-merit hypothesis. If (but only if) a desert basis must be an attribute of the deserver, it follows that to fail to treat an entity in accordance with its deserts is to fail to treat it in accordance with its attributes, that is, as it is. (To treat it as if it were other than it is is to give expression to a misclassifying judgement about it.) And if (but only if) it is also the case that the desert basis must confer merit or demerit on the deserver (that is, if the desert-merit hypothesis holds), then it follows that failure to treat an entity in accordance with its deserts will involve treating the entity as higher or lower than it is. But these are, of course, the central claims of justice as fitness, the consequences of locating justice within the levels of being conceptual system.

It would appear, then, that the concept of desert is, if justice is a fitness concept, perfectly - and perhaps uniquely - fashioned to play a central role in substantive debates about what is and is not just. We may, therefore, if we prefer, speak of justice not only as fitness but also as treating people in accordance with their deserts.

It is therefore not surprising that those uses of the concept of justice which most readily exemplify justice as fitness - the uses I referred to in Chapter One as transparent - are precisely those cases where the injustice is most evidently a failure to treat someone in accordance with their deserts. The example of a transparent use given earlier - that of a refusal to trust a trustworthy person - may, evidently enough, be properly expressed in terms of desert: a trustworthy person deserves trust, and to refuse to trust is unjust, being a failure to treat the person in accordance with their deserts. Similarly if I believe that you have betrayed me when you have not, or if I believe your last philosophical paper was a piece of plagiarism when in fact it was all your own work, I will have done you an injustice, and this may be naturally expressed by saying that I have treated you as you deserved not to be treated. In general, if I condemn you for a crime you have not committed, or blame you when you are blameless, I will have treated you as lacking some virtue you do not lack, or possessing some demerit you do not possess. Such cases are naturally to be expressed in terms of desert; and in each case the injustice arises through a failure to treat the

person in accordance with merit or demerit bestowing attributes they possess or lack.

Another set of cases readily expressed using desert concerns competitive situations where those with more of the relevant skill fail to win. The better football team loses, the faster runner comes second, the better bridge players take the wrong view; in such cases where luck interferes we may be moved to say that 'there is no justice', or that the losers deserved better luck. When the best team wins we may acknowledge this by saying that we have 'worthy champions' to salute.) Such cases, where virtue goes unrewarded, are, clearly, cases where people fail to receive in accordance with their merits or deserts. (61)

I have claimed that justice as fitness makes desert central to questions of justice: if justice as fitness is sound then to act justly is to treat people in accordance with their deserts. Thus if there are considerations relevant to justice which cannot be

61. We speak of such situations as being unjust, though most of us do not consider that there is reason to act to nullify the injustice. Talk of injustice here relies, I think, on an implicit personification of nature, a belief in Fortuna perhaps, or some other method of making sense of the claim that the victim of the injustice has been unjustly treated, that is, 'acted towards'. Someone capable of treating must be supposed, it would seem, if the victim is to have been treated. Now for most of us, talk of treated here is idiomatic - we do not actually believe that there is anyone who has treated the victim unjustly. If so, then to speak of injustice here is no more than a means of commiserating with the victim - who is a victim, not of injustice, but of bad luck. This is conceded, of course, in our acknowledgement that such cases of 'cosmic injustice' provide no reason for action.

expressed in terms of desert, then it would appear that the central claim of justice as fitness is false. The thesis I shall be concerned to defend from here on is, then, that to act justly is to treat people in accordance with their deserts - no more, no less. Justice as fitness is, then, justice as desert.

The view that one acts justly if and only if one treats people in accordance with their deserts is not a novel view. The view that justice is treatment in accordance with desert was expressed, notoriously, by Hopkins:

Justice is getting what one deserves; what could be simpler? (62)

But this view has been challenged. For my purpose the most important challenge was made by Feinberg. Feinberg argued, firstly, that the concept of desert is a more well-defined concept than had previously been assumed; and secondly that, given this narrow and specific definition of desert, there is more to justice than treating people in accordance with their deserts. (63) This was developed by Miller who argued that, from

62. HOSPERS (1961), p433, and cited in FEINBERG (1970), p56, footnote 3, and MILLER (1976), p83.

Cf. CAMPBELL (1974), p2 (original emphasis):

... it is arguable that justice, in its distinctive meaning, is to be defined as distribution in proportion to the deserts of possible recipients.

63. FEINBERG (1970), p80:

The claims of justice are hardly exhausted by the vacuous principle that everyone ought, ceteris paribus, to get what he deserves.

a conceptual point of view, justice could require treatment in accordance, not only with deserts, but also with rights and needs. (64) Justice as desert has also been rejected by the two most influential recent works on social justice. (65)

In outlining the concept of desert I have, to a large extent, followed Feinberg. It should be clear, though I wish to emphasize the point, that I do not wish to defend justice as desert by attempting to widen the scope of 'desert'. Nor - and again though this should hardly need saying I do wish to emphasize the point - do I wish to claim that those who deny justice as desert are making a substantive moral error. My claim that to act justly requires only attention to deserts is a conceptual claim.

4.3.1 Two Strategies

How, then, is the task of showing that justice is all and only a matter of desert to be achieved? There are, it must be admitted, considerations which seem relevant to justice, but which seem not to be expressible in terms of desert. (And there are, let us not forget, considerations which are expressed in terms of desert,

64. MILLER (1976), p151:

... I have attempted to separate the common notion of justice into three elements. Each of the criteria which have been distinguished - rights, deserts and needs - forms a part of that notion, and each is irreducible to the others.

65. I refer to RAWLS (1972) and NOZICK (1974).

but not without posing difficulties for the account of desert we have adopted: the claim to deserve compensation when one suffers through someone else's, or no-one's, fault is an example of such a case.) How are these difficulties, these apparent counter-examples, and anomalies to be accounted for, and explained away?

There are, I believe, two general strategies. The first - which the reader is likely (and rightly) to view with extreme suspicion - is to claim that the action in question is mistakenly referred to as unjust. Thus we might argue that failing to treat people in accordance with their needs, though wrong, is not unjust. (I shall not, in fact, offer such an argument as regards needs.)

As I have said the reader may rightly view attempts to defuse alleged counter-examples in this way with suspicion. At the limit the strategy is no more than the ruling out of counter-examples by definitional fiat - and such a move is, evidently enough, pointless. As I suggested in my introductory chapter, the linguistic practices of native speakers (and especially those who have no theoretical axes to grind) will be relevant. It is not the end of the story; but it is, to echo Austin, the first word. Broadly speaking, if native speakers do use 'unjust' to refer to a certain practice then it will be an up-hill struggle to demonstrate that we ought, on conceptual grounds, to eschew such use. Conversely, if the normal native speaker eschews the term unjust in referring to a particular action (while using other terms to condemn the action) then it will be a down-hill

'struggle' to show that the particular action is not, from a conceptual point of view, unjust.

This is not, I think, an area in which there can be knock-down arguments. We will always be faced with the choice of revising our view of the counter-example, or of accepting it as a genuine counter-example which undermines the general theory. It is for each reader to decide how best to adjust his or her 'web of belief' (66), to bring example and theory into harmony, and I cannot ask for more than a fair hearing. However, I would ask the reader to agree that it is possible that we (and, ironically, this is perhaps particularly true of philosophers) are mistaken - that is, conceptually mistaken, - in describing a particular action as unjust. It is a matter of setting this belief as a counter-weight to the suspicion that I may be excluding potential counter-examples by the convenience of definitional fiat; and of coming to a judgement as to whether to reject the theory, or revise the description of the apparent counter-example - all things considered.

The second strategy is far less controversial and - normally - far more satisfying. The normal argument against the view that justice is concerned only with deserts is to claim that there is some other consideration relevant to justice (e.g. needs) and that this consideration cannot (or does not) function as a desert

66. This phrase is, of course, the title of QUINE AND ULLIAN (1970).

basis - being either not an attribute of the deserver, or if an attribute, not merit-conferring.

This argument can be defeated by a demonstration of indirect desert. (67) Thus, for example, if there is some attribute X of P such that, X is merit-conferring, and to treat P in accordance with X it is necessary to treat P in accordance with his or her needs, then we may say that P deserves (albeit indirectly) to be treated in accordance with his or her needs, even though need is not functioning (and indeed may be unable to function) as a desert basis.

In short, then, it does not follow from the fact that X is not a possible desert basis, that a person cannot deserve to be treated in accordance with X. Whether any particular claim is to be construed as indirect desert depends on the plausibility of the actual (though only implicit) desert basis, and on the plausibility of alternative (and especially conflicting)

67. Cf CAMPBELL (1974), pp1-2 (emphasis added):

Against this tendency to subsume the principle of allocation in accordance with need under the heading of justice I wish to argue that it is conceptually mistaken ... for welfare moralists to imply that need per se is a criterion of a just distribution ...

My thesis rests on the premise that there is a close logical association between the concept of justice and that of desert or merit, an association which, I will argue, rules out any simple and direct conceptual link between the principle that distribution ought to be proportional to need and the idea of justice.

descriptions of the justification for the distribution of treatment in question.

To summarise: the defence of justice as fitness requires the completion of a programme, a programme of eliminating, or reducing to desert, those considerations which seem relevant to justice, but yet resist expression in terms of desert (as we have explicated that notion). The undertaking of this programme occupies the remainder of this thesis. I should make clear that I take the claim that there are considerations relevant to justice which cannot be properly expressed by the use of desert (as drawn here) to be the major objection to justice as fitness.

4.4 Treatment According to Deserts

I have spoken of justice as being the treatment of people in accordance with their deserts. But how is this phrase 'according to deserts' to be understood?

I propose that a person is treated according to their deserts unless, either they are not treated as they deserve to be treated, or they are treated as they deserve not to be treated. A person who is treated as they do not deserve to be treated is not thereby not treated in accordance with their deserts (and hence not thereby treated unjustly).

An example may make this clear. You may deserve an ice-cream (from me). By buying you an ice-cream I treat you in accordance with your deserts. But suppose I buy you an ice-cream without it being the case that you deserve one. This is still 'treatment in accordance with your deserts' for although you do not deserve an ice-cream, it is not the case that you deserve not to have one. If I buy you an ice-cream when you do deserve not to have one (presumably because you have done something which you ought not to have done) then I do fail to treat you in accordance with your deserts.

In summary, to fail to treat someone in accordance with their deserts is to violate a desert claim. But it does not follow from the fact that someone is treated in accordance with their deserts (and hence, on the view I am defending, are treated

justly) that they deserve whatever they receive.

If I have understood his argument correctly, Sverdlik would object to this account. He writes:

Suppose that there is a person who has no deserts with regard to punishments and that person is punished. Now in this case there is no desert-claim that has been contravened. Someone has no desert, but is intentionally harmed. Is there not, nonetheless, a moral problem here?

It may be responded that there is indeed a desert-claim here, *viz.*, a claim not to be punished. I myself find it odd to say that X deserves not to be punished. It seems more proper to say that X does not deserve to be punished. But ... [this] suggestion destroys the ... distinction ... between acts not in accordance with desert and acts contrary to desert. If one can turn a statement which, *prima facie*, holds that there is no desert-claim at all (but where a harm has been inflicted nonetheless) into a statement that the person deserved not to be harmed, then all wrongs are contrary to desert, and nothing would be left of the category 'not in accordance with desert' (but not contrary to it either). ... It seems preferable, therefore to hold that there are cases where there are no desert-claims and where a wrong is done precisely because there are none. The scapegoat is wronged not because he or she deserves not to be harmed. Rather, the scapegoat has no deserts, and is harmed: this is what is wrong. (68)

It appears to follow from this argument that an injustice can be done, even though no-one's deserts have been violated; that is, even though everyone has been 'treated according to their deserts' (in the sense explained above).

I agree, of course, with Sverdlik that one cannot simply turn a statement that A has no deserts into a statement that A deserves not to be treated in some particular way. But I suggest we may

68. SVERDLIK (1983b), pp322-3, emphasis added.

reject Sverdlik's - to my mind - paradoxical and confusing conclusion, without making such a move. Nor need we say - if it is to be considered 'odd' - that the scapegoat deserves not to be punished. We may say simply that the scapegoat is innocent and deserves to be treated as such. If he is punished he is not treated as he deserves; that is, he is not treated in accordance with his deserts.

Let me begin by reviewing the argument so far. I have suggested that justice is to be understood in terms of the notion of treating beings fittingly, and, in particular, of not treating them as if they were less, or lower, than they are. We have seen that this view of justice 'beyond the rules' is congruent with rule-relative justice. And we have also seen that, so conceived, justice takes its place as a concept within the levels of being system. That system has, we saw, two distinct types of reason for action associated with it: the requirement that we avoid 'treating as less', and the requirement that we avoid degrading, that is, reducing or 'making less'. The fitness concepts, of which justice is one, are, I have suggested, associated with the former type of reason for action, that is, with treating a being as less than it is.

This view of the concept of justice led us to regard desert as the fundamental concept with which to express considerations relevant to justice - if, but only if, we accept that an attribute of the deserver must function as the desert basis, and the desert basis must confer merit (the 'desert-merit' hypothesis). Now a problem with this view - the view that to treat someone unjustly is the fail to treat them in accordance with their deserts - is that it is widely held that there are considerations relevant to justice which cannot (properly) be expressed in the language of desert. In the present chapter I will be concerned with some of these considerations. The topics

we will deal with will include contributive, distributive and compensation principles.

The reader will recall that we encountered a particular problem with compensation. I suggested that, though it is widely held that people who suffer through no fault of their own (especially when this suffering is the fault of some other person) deserve compensation, it is far from clear that there is a (merit-conferring) attribute on account of which people may (at least sometimes) be said to deserve compensation.

In the present chapter, then, I will be concerned with a number of seemingly problematic cases for the thesis that justice is always, at root, a matter of desert. I will be attempting to show that, contrary to appearances, these cases do not demonstrate that the justice as fitness approach is, at best, an incomplete characterization of justice. Rather, they are cases of indirect desert.

It would be enough for my thesis to show that the arguments against the view that justice is always a matter of desert do not succeed. But to leave the inquiry at such a point would be most unsatisfactory. I shall, therefore, not content myself with arguing that the claim that there are considerations relevant to justice but irreducible to desert has not been made out; I will also try to show how these considerations, alleged to be problematic for justice as desert, can, with logical propriety,

be expressed in terms of desert. Indeed I shall suggest that these allegedly problematic considerations, far from being irreducible to desert, are only made fully intelligible when expressed in terms of desert. However, even if my attempts to carry out the reduction are unsuccessful, it will remain possible that a reduction to desert may be possible in some other manner.

5.1 Wholes and Members

I want to begin with a discussion of two concepts which, I will claim, play a major role in indirect desert; these concepts are wholeness and membership. At the risk of stating the obvious, let me say that the importance of these concepts in political thought and philosophy over the centuries has been of staggering proportions. Their role has not always been explicit - as is, indeed, suggested by my claim that they are important for indirect desert. Yet there is no ideology - whether (individualistic) liberalism, fascism, or socialism - which is not shot through with commitments for or against these two parameters of virtue.

What are we to understand by these values or virtues? First wholeness. The notion that some thing or being is to be thought a whole is to be contrasted with the view that it is a part - a mere part as we say. The notion of wholeness involves the idea of completeness, of lacking nothing. A whole may be composed of parts, but if so those parts must fit together, without fractures, to form an integrated and integral entity, a unity. Wholeness is a virtue, albeit a metaphysical virtue, for to be whole is to be superior to that which is a mere part. (1)

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1. The etymology of 'whole' is of some interest in this regard. 'Whole' in one of its senses means in good health; hence wholesome food and so on. Indeed 'whole' is etymologically related to 'heal' as well as to 'holy'. See The Concise Oxford Dictionary of Current English (Fourth Edition).

The idea that each person is a 'whole' a complete unity, may be seen as an attempt to express, albeit by use of a different metaphor, one of the central ideas of Kantian ethics, that is, that each:

... man and in general every rational being exists as an end in himself, not merely as a means for arbitrary use by this or that will: he must in all his actions, whether they are directed to himself or to other rational beings, always be viewed at the same time as an end. (2)

It is beyond the scope of this thesis to discuss whether men are indeed wholes, or, indeed, what would count for or against this proposition. Rather I will take it for granted that this view has been held, and that those who have held it have viewed the fact that each man is a whole as conferring dignity, as relevant to his status as a being. That is, I will take wholeness as merit-conferring.

The notion of membership functions, I suggest, in a similar way. To be a member is to belong to; again the distinction is one which divides higher and lower status beings. To say that someone is a full-member of a society, or to say that someone should no longer be considered a member of the human race, is to make a normative statement. To be made an outcast is to be denigrated. (It is true, of course, that many societies honour guests - who are, of course, outsiders. But such people are not thought of as non-members per se - rather as non-members of a particular society, normally as members of another society. Outcasts are not treated as guests.)

2. PATON (1948), p90.

It is, I suggest, immediately apparent that these two merit-conferring attributes - wholeness and membership - pull in opposite directions. To be a member is to be part of, or a partner in, something greater. How can we view a person as both whole in himself and a member of, a partner in, something greater? Is it possible to express both - or are such expressions necessarily contradictory? Is it possible to achieve a synthesis between these virtues, or can we hope for no more than a compromise? This is, I suggest, is one of the central questions of political philosophy. But it is not a question which can be directly taken up here, though I will make some comment on the issue later. We shall do little more than investigate how different views of what is, and is not, just can be understood as commitments to the virtues of wholeness and membership, operating through the medium of (indirect) desert.

I have spoken of wholeness and membership because these terms do, I think, emphasize the meritoriousness of these qualities. But they are, of course, closely related to many other political ideas and values: wholeness might be thought not unrelated to what many writers use individualism to refer to (3), and membership is, evidently enough, closely connected with community. (4) But the most elegant terms are, surely, those in

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3. For an introduction to the notion of individualism see LUKES (1973).
 4. On the topic on community see, amongst a vast literature, NISBET (1967) Chapter 3.

which Cohen describes the Hegelian dialectic of undifferentiated unity, differentiated disunion, and their synthesis, differentiated unity. Cohen argues that the:

... rhythm of primitive whole, fragmentation, and reunification asserts itself widely in Western thought. It beats not only in Hegel and ... in Marx but in much religious doctrine, in the Christian triad of innocence, fall and redemption, in Aristophanes account of love in Plato's Symposium, in some psycho-analytic narrations of the generation of the person, and - seminally for German philosophy of history - throughout Schiller's Letters on the Aesthetic Education of Mankind. (5)

An unrelieved determination to view man as a member will generate a view of human society as an undifferentiated unity; a similar determination to see man as a whole corresponds to differentiated disunion. Whether it is possible to preserve the virtues from both membership and wholeness is, as I have suggested, not obvious. But I shall claim that this 'rhythm' is to be found also in conceptions of justice.

Being whole and being a member may seem strange merits - and I am willing to accept that I may be extending the use of 'merit' in applying it in this sense. (It is perhaps less strange to say that wholeness makes a being worthy.) The notions are, of course, metaphysical; but, again that seems no reason to exclude wholeness and membership functioning as merit-conferring characteristics. We seem to have no reluctance to regard free beings as higher, more worthy, and freedom is also a metaphysical concept.

5. COHEN (1978), p21. See also COHEN (1973-4).

5.2 Contributive Principles

Social justice requires the specification of contributive and distributive principles: principles which indicate how much each person is to be required to contribute, and how much is to be distributed to each person respectively. It is normal to speak of desert in the case of distributive principles but we do not normally speak of what people deserve to contribute. But we may speak of a 'deserved liability' to contribute. (6)

5.2.1 Contribution According to Ability

What principles are offered governing deserved liability to contribute, and in what sense can they be viewed as desert? The most well-known contributive principle is probably: 'from each according to his ability.' Do we deserve to be held liable in accordance with our abilities? If so, what is to be the desert basis? At first sight it might seem that there is no problem: our abilities we might suppose function as the desert basis. But suppose someone prefers not to contribute in accordance with his abilities - suppose indeed he did not wish to contribute at all. Could we say that a failure to hold him liable would be to do him an injustice? If we admire someone's abilities there are, surely, less onerous and more appropriate ways of bestowing our

6. Here I borrow from Feinberg who notes a similar feature of reparation, namely that we do not '... say of a tortfeasor that he deserves to make reparation ...'. Feinberg goes on to suggest that 'The other pole of deserved reparation is deserved liability'. See FEINBERG (1970), p75.

praise than sending a large tax demand! It may be that ability is a desert basis, but it is implausible to view it as the desert basis for liability to contribute. We must look elsewhere.

There are two interpretations of the ability contribution principle, and it is important to distinguish between them. On one view the principle is the other side of the coin to distribution according to need (7); those who are able to provide less need to be given lighter burdens. On this view liabilities, like needs, are viewed as negative, and liabilities should, ceteris paribus, be made as light as possible. Here needs are viewed as necessary evils. If this is our view then it seems reasonable to suppose that whatever solution (if any) is found for explaining distribution according to need in terms of indirect desert, will, by natural extension, cover this interpretation of contribution according to ability.

But there is a more radical interpretation of the ability contribution principle. On this view from each according to their ability is interpreted as requiring - or indeed allowing - each to contribute as much as they are able. That is, on this interpretation we drop the assumption that contribution is a necessary evil, that ceteris paribus contributions should be as low as possible. (8) Justice demands that we be allowed to

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7. As, of course, it occurs in Marx's Critique of the Gotha Programme. See MARX AND ENGELS (1968), p321.
 8. Hence it is inappropriate to speak of liability when adopting this interpretation.

contribute all that we are able; only thereby do we contribute according to our ability. To be refused to be allowed so to contribute is to be done an injustice.

This is not a conception of justice with which those of us who live in Western liberal societies come much into contact - not, at least outside family life. It is a conception of justice which applies in a community which engulfs the individual. Suppose, for example, that a family is struck by a disaster and it is normal, in that society, for all members of the family to contribute as much as they are able to overcome the disaster; but one member's contribution is refused - perhaps because of some previous antagonism within the family. By having his contribution refused this person is treated as an outsider, an outcast; he is treated as if he were not a member of the family. If this is indeed his status then, of course, no injustice is done. But those who consider that this is not his status will regard his treatment as unjust. This is intelligible in terms of justice as fitness: he deserves (or is believed to deserve) to be treated as a member; and he is treated as less than this, as an outsider.

It is not difficult to think of examples of such injustice where solidarity or community feeling is particularly strong. Not to be allowed to contribute fully in a monastic community may be to be done an injustice of this type. In an Islamic Fundamentalist state (such as Iran) a young man who, for some reason, is not allowed to contribute fully to a holy war may consider himself

unjustly treated if such treatment represents treatment as an outsider, as an alien, and he considers himself to be a full member of the society.

The desert basis, then, when the ability contribution principle is interpreted in this way, is membership. The societies of which such injustice is characteristic are those exhibiting undifferentiated unity, societies where the individual is engulfed by the community.

It is, perhaps, arguable that any society which commits itself to the unwavering achievement of some ideal - the worship of a god, the building of some monument, the conquering of the world, the production of beauty - will find a place for injustices of this form. And it is arguable too that classical utilitarianism - the single-minded production of happiness (including the belief that we are obliged to produce people if this increases the total stock of happiness) is a theory of this type. It need hardly be said that many who are sympathetic to utilitarianism recoil from such an interpretation of their theory. Yet it is notoriously difficult to find a satisfactory alternative to the classical version of utilitarianism which does appear to carry this implication. (9)

9. See SIDGWICK (1981), pp415-6 and PARFIT (1984), Part Four.

5.2.2 Contribution According to Choice

Let us now turn our attention to societies exhibiting differentiated disunion - societies where the individuality of each member is emphasized to the exclusion of such values as solidarity and fraternity. What is the contributive principle characteristic of such societies, and how is it to be understood in terms of desert?

The most well-known recent expression of a theory of society embodying unremittingly the values of individualism, of differentiation, is, I suggest, that of Robert Nozick's Anarchy State and Utopia. (10) Setting aside acquisition and rectification, Nozick summarizes his contributive principle as:

From each according to what he chooses to do, ... (11)

On this view the deserved liability of each is precisely what he individually wills it to be; to require a greater contribution - against the will of the individual - is unjust; it is treat him as he deserves not to be treated.

Why is this? What in this case is the desert basis? I am, of course, going to suggest that the desert basis is the (presupposed) wholeness of the individual. Each person is not some mere part, to be used at (another's) will. Each individual's relation to society is not that of an arm's or leg's

10. NOZICK (1974).

11. Ibid, p160.

relationship to a person - to be used as necessary to the benefit of the whole. The 'root idea' according to Nozick is that:

... there are different individuals with separate lives, and so no-one may be sacrificed for others ...
(12)

Part of what it means to be treated as a whole is to have one's will respected: not to be used as a means or a tool to the achievement of some end to which one has not consented.

5.2.3 Prospects for a Synthesis

What, then, for the prospects of a contributive principle consistent with the demands of treating people both as members and as wholes? On the level of contribution there is not, I think, any problem. There is no incompatibility in practice in allowing all who are members to contribute, and to treat each as a whole by not requiring more than they choose to contribute. The problem is, of course, that for various reasons in most societies the adoption of such a contributive principle will lead to the state having little to distribute. (13) If, as I will argue, the various distributive principles also presuppose the values of wholeness and membership, then we can see the various arguments about what is just as, on some occasions, clashes between treating as wholes and treating as members, but on others as clashes between expressing wholeness in contribution thereby making it impossible to express wholeness in distribution or compensation.

12. Ibid, p33.

13. Though there are exceptions - a well-known being the giving of blood (in certain societies). See TITMUS (1970).

I need hardly say that it is not part of my task to show which principles we should adopt. It is enough for the matter in hand if we are able to show that no view of justice is inconsistent with justice as fitness and justice as desert, and, ideally, to show how casting debate in these terms enables us to bring into focus what is really at issue. This I claim to have now done with regard to contributive principles. I propose, then, to pass on to a consideration of distributive principles.

5.3 Distributive Principles

I propose to consider two distributive principles which may be thought to pose particular difficulty for justice as fitness and the claim that justice is, at root, always a matter of treating people in accordance with their deserts. These are the principles of distribution according to need, and distribution according to contribution. I begin with need.

5.3.1 Distribution According to Need

As in the case of the ability contribution principle there are two interpretations of the principle 'to each according to need'. Again the 'radical' interpretation - the interpretation corresponding to undifferentiated unity - is that of distribution to members according to the need of the social union. In other words, justice is done when each is provided with what is necessary in order to realize as fully as possible some social ideal, or the well-being of the whole. Again this is not a view of justice which those of us who live in Western liberal societies often meet. But suppose some community - organized on monastic lines perhaps - has set itself some ideal. In order to achieve this ideal a certain distribution of resources is appropriate. Now suppose one member is given more than 'his share' under this scheme. He is, I suggest, thereby done an injustice if he is a full member of the community, for he is treated as an outsider (eg a guest) might be treated. (Again, one can be done an injustice by not being required to make

sacrifices.) Here again, then, this possibly unusual aspect of justice can be understood in terms of desert - albeit indirect desert. A member - if he or she is indeed a member - deserves to be treated as such, and is done an injustice if not treated according to his or her deserts.

Needless to say this is not the interpretation of the need principle which most of its proposers have in mind. Rather they hold that justice requires each to be treated in accordance with their own needs. This is the view which Marx expressed in the slogan:

From each according to his ability, to each according to his needs! (14)

though it may be doubted whether Marx would have viewed this as a principle of justice. (15) Nevertheless the view that a just distribution is, sometimes or in part, a distribution according to need is both widely held and defended by some theorists. (16)

14. MARX AND ENGELS (1968) p321.

15. On the controversy over Marx's view of justice see WOOD (1971-2), HUSAMI (1978-9), WOOD (1978-9), and BUCHANAN (1987-8) pp120-32.

16. See, for example, MILLER (1976), pp122-6. Miller cites LUCAS (1972) and NATHAN (1971) as opponents of this view.

Lucas appears to have revised his view to allow need to be an appropriate criteria of just distribution - though not the only one. He writes (LUCAS (1980) p183):

Need, therefore, although a logically proper basis of apportionment, is not the only, or the prime, one, nor is it suitable to be elevated into being the only one. It's appearance of being impersonally objective is in many cases spurious, and is anyhow not a requirement of justice, which, being impartially particular to each party, is peculiarly concerned with personal factors, and is as much concerned with a man's personal merits, entitlements and deserts as with his particular, but in some sense impersonal, needs.

Lucas (LUCAS (1980), pp164-5, footnote 6) identifies a number of writers who have allowed distribution according to need as a potential basis of apportionment: BOSS (1974), pp270-2; PERELMAN (1963), pp6-7; HONORE (1968) pp77-103, VLASTOS (1962) p35; and RESCHER (1966).

Why should need be thought to raise a problem for justice as fitness? Why cannot people be said to deserve in accordance with their needs? The basic argument for this claim is that need will not function as a desert basis because need is not thought to confer merit (or, for that matter, demerit). More strictly, not all those who hold that justice requires that people be treated in accordance with their needs also hold that need confers merit. Miller argues:

... need is inappropriate as a basis of desert; being needy cannot make us deserving... What disqualifies needs from being taken as grounds for desert is, first, that (for most needs) everyone has them until they are satisfied, and, second that no one wishes to have them or admires others for having them. (17)

Notice how easily Miller slides from the claim that need is inappropriate as a basis of desert to the claim that being needy cannot make us deserving - thereby excluding the possibility of indirect desert.

Both of Miller's arguments are rejected by Galston. (18) Galston agrees that need cannot function as a desert basis but argues:

The correct reason is implicit in the nature of the relation between deserved treatment and desert-basis. If *f* is to serve as a desert-basis, it is a necessary condition that *x*, the treatment appropriate to it, be accorded the some normative or moral evaluation as *f*.

17. MILLER (1976), p86.

18. GALSTON (1980), p174.

If f is regarded as good or desirable, so is x, and similarly if f is regarded as bad. Clearly need does not satisfy this criterion; it is regarded as undesirable but the treatment to which it gives rise is considered desirable. (19)

Unfortunately Galston offers his opponent no reason why the principle from which he argues should be adopted. If it is simply a generalization about the (normal) use of 'desert' the argument can be turned on its head, and need offered as a counter-example. If it is more than a generalization we are entitled to know how it is to be justified.

Let us, however, for the purposes of the argument, assume that the case against justice as fitness is as difficult as it can be. Let us grant that need does not confer merit, that the desert-merit hypothesis holds, and that there is nothing conceptually inappropriate in speaking of 'to each according to their need' as a principle of justice. (20) At first sight it may appear that, if we accept these claims, we must abandon the view that justice is always a matter of desert. But, as we have seen, there is another possibility: indirect desert. The fact that need cannot

19. Ibid. Galston also asserts that (ibid):

Both Feinberg and Miller deny that need can be a desert-basis.

This is not quite true. Feinberg suggests that need seems an inappropriate basis for reward (FEINBERG (1970) p61), but does allow one role for need as a desert basis (ibid, p93):

It is only in respect to compensation that need can be a desert basis.

20. For an attempt to argue that distribution according to need is not a principle of justice see CAMPBELL (1974).

confer merit entails (let us grant) that need cannot function as a desert basis. But it remains possible that there is some attribute (or set of attributes), y , such that the possession of attribute (or set of attributes) y confers merit, and that to treat someone as possessing attribute (or set of attributes) y it is necessary to treat them 'in accordance with their needs'.

The concept of need in relation to practical reasoning is problematic and in need of analysis. To give the concept the attention it deserves would, however, distract us from the main line of argument. Let me therefore take the risk of working with an unanalysed and intuitive notion of need. I take it that what those who urge the principle of 'to each according to their needs' have in mind by a need is a lack or want of some basic (or perhaps not so basic) requirement necessary for life itself, or for a decent, and preferably fulfilling, life. (21)

There is, however, one apparent risk in neglecting the pursuit of this topic which deserves comment. In a moment we shall be examining how the notion 'to each according to their needs' is to be understood. In particular we shall be concerned with how the principle is to be interpreted in cases of relative scarcity, that is, cases where not all needs can be satisfied. This may be somewhat unfair to some of the proposers of distribution

21. For discussion of how 'need' is to be understood in the context of justice see BENN AND PETERS (1959) pp141-8, BARRY (1965) pp47-9, BRAYBROOKE (1968), CAMPBELL (1974), MILLER (1976) pp126-36, GALSTON (1980) pp162-8, and PLANT ET AL (1980) Chs. 2-5 and 7.

according to need for their (albeit possibly unstated) assumption has been that the principle is to be adopted only in conditions where all needs - or all real needs - as against mere wants, desires, or preferences, can be satisfied. (22) Indeed the phrase may be used in conjunction with the claim that, were resources not wasted on satisfying mere desires, whims, and false needs, together with allegedly wasteful competition and other commercial practices (advertising, packaging and the like) there would be little or no difficulty in satisfying all needs using present productive capacity. This view, evidently enough, makes the issue of the proper definition of need, or real need, paramount, and the interpretation of the principle in conditions of relative scarcity otiose.

It is, I think, clear that such a view is misconceived. This is, perhaps, most evident in the case of health care. It is not unreasonable to suppose that there is no limit to the benefits which additional resources are able to provide in this field, though they may, no doubt, be subject to the law of diminishing returns. Nor, I think, can it be denied that at least some of these benefits will satisfy real needs - many, indeed, allow the

22. Thus Marx argues (MARX AND ENGELS (1968), pp320-1, emphasis added):

In a higher phase of communist society, ... after the productive forces have also increased with the all-round development of the individual, and all the springs of wealth flow more abundantly - only then can ... society inscribe on its banners: From each according to his ability, to each according to his needs!

continuation of life itself. It is a truism to say that those who determine what proportion of available resources are to be used on health care and related research, and those who decide how those resources are to be used, will always face decisions which determine whether, and whose, real needs are to be satisfied. I take it, then, that the issue of the application of 'to each according to their needs' in conditions of relative scarcity is not otiose.

I also propose to take it for granted that needs can be quantified, and interpersonal comparison of need is possible, albeit, perhaps, only in some rough and ready fashion. These assumptions would appear to be necessary if we are to be able to apply the principle that people should be treated in accordance with their needs. In other words, these assumptions must be made if the objection to justice as desert from the principle of distribution according to need is to get off the ground.

It is necessary to be clear what it means to say that people should be treated in accordance with their needs. If someone claims that goods should be distributed 'according to needs' there are, I think, at least three possible (though perhaps interrelated) principles which they may have in mind. Let us distinguish between these principles.

A first suggestion might be that resources should be distributed in proportion to need: the greater the need the greater the resource allocated. But this proposal has an obvious difficulty.

Suppose there are five pints of blood available and three patients: A requires eight pints, B requires five pints, C requires two pints in order to survive. If we distribute in proportion to need A might receive two and two-third pint, B one and two-third pints, and C two-thirds of a pints. Thus no-one survives. It is difficult to see why such a division should be adopted.

But perhaps this example deals too quickly with the suggestion of proportionality. Perhaps we should say that each of the patients is in equal need: after all each requires blood to survive, so each is in the same danger. If we take this view of their needs then to assign the resources in accordance with need would be to give equal amounts, ie one and two-third pints, to each patient. Again this interpretation seems to have little to recommend it.

In such a situation it is reasonable to argue as follow: we cannot save patient A whatever we do; and we can save either B or C but not both. Assuming that the blood left over from treating C is useless, there is nothing to choose on grounds of need between saving B or C. The basis of our consideration here seems to be that to treat people according to their needs is to act in such a manner as to maximise the number of satisfied needs, or minimise the number of unsatisfied needs. (Where the number of needs are constant these will, of course, be equivalent.)

We come, then, to this second interpretation: goods should be

distributed so as to minimize the number of unsatisfied needs. Those who hold this view will, we may suppose, wish to 'weight' some needs as being more important than others. So let us say that this principle is the principle that the number of units of unsatisfied need should be minimized.

There is, however, a third interpretation of the principle: namely that we treat people according to need when we say that those in greatest need have first claim. On this view we are to satisfy the needs of those in greatest need first, then those in next greatest need, and so on.

It is clear enough that the second and third views are different and may come into conflict. They come into conflict when those in greatest need have needs which are expensive to satisfy, and those in less need have needs which are cheaper to satisfy. Illustrations are often contentious, but consider the following: suppose that with available resources a hospital is able to prevent one man losing both his legs, or one hundred men losing one leg. The principle of need interpreted as those in greatest need have first claim, the third interpretation, will imply that the man in danger of losing both legs is to be treated first. If we adopt the second interpretation we must try to weigh the greater needs of the few against the lesser needs of the many. At some point - assuming as we must this sort of talk makes sense - by increasing the number of men who are at risk of losing one leg we reach a point where more units of need are satisfied by devoting resources to the greater number with less need, but

whose needs are cheaper to satisfy.

Which of the two principles - that 'the number of units of unsatisfied need should be minimised' or that 'those in greatest need have first claim' - do those who propose distribution according to need as a principle of justice have in mind? Or rather, which ought they to have in mind? (23)

It is, I suggest, clear enough that the first principle - that unsatisfied need should be minimised - is a form of utilitarianism. It might be derived from the principle of maximising happiness on the basis of an empirical claim that to minimise unsatisfied need maximises happiness, or it may be defended as a form of utilitarianism in its own right by adopting the particular theory of the good that an unsatisfied need is intrinsically bad, or that a satisfied need is intrinsically good. (Again these are equivalent when, but only when, the number of needs is constant, or to be taken as given.) If we adopt this principle our justification will, presumably, be of the form applicable to utilitarianism generally: we identify what is bad and what is good (defending this claim when necessary) and claim that, rationally, we ought to act so as to minimise that which is bad, or maximise that which is good. I propose to refer to this principle as need-utilitarianism.

23. Scheffler suggests that the most plausible consequentialist principle is a compromise between these two principles. This may be intuitively attractive but if, as I suggest, they are incommensurable it is unclear how this could be defended. See SCHEFFLER (1982), p31.

But there seems to be no sense in which the claim that those in greatest need have first claim is a utilitarian principle. This is not a verbal quibble over how 'utilitarian' is to be used. The adoption of the principle that those in greatest need have first claim will, I have argued, on some occasions mean that total need dissatisfaction is not minimised. This principle cannot, therefore, be defended by arguing that we are acting so as to maximise what is good, or minimise what is bad. If the defender of this principle is to have a reply to the need-utilitarian he must adopt some other form of justificatory argument; in short he must appeal to some other reason for action. As I have said, this is not merely a quibble over the use of 'utilitarian' - though I do think it most unwise and confusing to refer to a view as 'utilitarian' when it departs so radically in its fundamental values and accepted patterns of justification from classical utilitarianism. (24)

24. My view may be contrasted with that of T. D. Campbell. Campbell argues that we may appeal to 'humanity' and that this is consistent with (negative) utilitarianism, the principle that those in greatest need have first claim and that aid should be proportional to need. He argues (CAMPBELL (1974), p15):

Humanity does not require us simply to relieve the sum total of suffering, but to relieve the suffering of individual human beings and the obligation is greatest where the suffering is greatest, in that the person who is suffering most has first claim on the available resources. That is, beneficence as embodied in the principle of negative utilitarianism embodies the distributive principle that those in greatest need ought to receive most assistance or, more specifically, that aid should be proportional to need.

How, then, is the principle that those in greatest need have first claim to be defended? The adoption of this principle will mean that (where the allocation of resources is useful, that is, does indeed assist in the satisfaction of need) we will, firstly, allocate resources to the most needy person until they are equal in need with the second most needy person. At this point we allocate resources equally to these two individuals until they are equal in need to the third most needy person, and so on. The effect of repeated application of the principle that those in greatest need have first claim may be a tendency to an equality of welfare. We may, therefore, suppose that the principle that those in greatest need have first claim is not unconnected with equality.

I will argue that there is a connection between the principle and equality, but that this is not it. The repeated application of the principle may have a tendency to equality of welfare but it need not. If we can most effectively improve the position of the worst off only by incentives to those who are already better off then a first concern for those in greatest need may, in practice, entail increasing inequalities of welfare. (25)

How, then, is the principle of need to be defended? Is it, indeed, a defensible position? I have suggested that the principle relies upon a ground or grounds outside the utilitarian's system of practical reasoning. It is natural,

25. Cf. RAWLS (1972), Section 13.

therefore, to look to justice as the underlying ground. And, after all the principle is offered by many as a principle of justice! If the argument of this thesis is sound it follows that the most needy deserves first attention. But why? What is - or are - the bases of this desert, if indeed desert (albeit indirect desert) it be?

If we consider what attribute might be thought not only merit-conferring, but also such as to satisfy the condition that to treat people as possessing that attribute it is necessary to treat them in accordance with their needs, we might think first of the attribute of 'possessing a good'. We suppose that human beings have a good of their own (and hence interests), and we do not - or at least do not usually - suppose that inanimate objects (rocks, railway engines, matchsticks and so on) have a good of their own (or interests). We appear to distinguish, then, between that which is said to be 'a being', and that which is merely 'a thing' on this, or something like this, basis. (To be treated as a plaything is to be treated as a mere toy, but also, I suggest, as an entity without a good of its own, without interests.) Between rocks and humans is an area of contention; it is, perhaps, unclear as to which, if any, animals and plants have a good of their own. This question I do not propose to explore.

Is the notion of 'having a good' to be regarded as an attribute which confers merit? It seems widely held that that which has a

good of its own is higher than that which is a mere thing. (26)
But it may, of course, not be that beings with a good are thought higher because they have a good, but rather for some other reason. (The possibilities might, I suppose, include possessing consciousness, being alive, and so on.) But even if possessing a good is not thought to bestow merit or worthiness itself, it may still be possible to do a being an injustice by treating it as if it did not have a good. This will be so if (though not necessarily only if) all and only beings possessing some merit-conferring attribute (call it 'Z') have a good; for if this were so then to treat a being as having no good would be to treat it as if it lacked Z when, in fact, it possesses Z. It seems not implausible to assume, therefore, that either 'possessing a good' is a merit-conferring attribute, or that the more complex state of affairs, outlined above, obtains. At any rate let us indeed assume so.

How are needs related to having a good? We need to assume here - if the present line of argument is to bear fruit - that beings which have a good are capable of having needs. If we make this

26. Though not universally. Campbell suggests (CAMPBELL (1974), p15):

But the idea of human worth, which is manifested in the view that the interests of all human beings are of equal moral significance, is quite distinct from the idea of merit. In fact, equality of human worth is presupposed by most if not all moral principles and has nothing specifically to do with justice in its distinctive sense.

As will become apparent I do not dissent from the view expressed in the second sentence.

assumption then we shall be able to say that to fail to treat a being in accordance with its needs is to treat it as if it has no good. I take it that this assumption is acceptable. Notice that we do not need to assume that only that which has a good can have needs (and hence that whatever has needs has a good). To make that assumption would mean that, were we to say that 'cars need petrol' we would either have to concede that cars have a good, or, perhaps, that there are different senses of 'need'. But we do not need to assume that only beings with a good can have needs. Let us, therefore, not make that assumption.

The next question concerns the question of whether, if we fail to consider the needs of a being we treat that being as not having a good. This will be so if, by failing to consider the needs of a being, we treat that being as incapable of having needs. Is this true? If A fails to give consideration to B's needs will A be giving expression to a belief that B is incapable of having needs? A failure by A to give consideration to B's needs can be thought to provide a reason for the belief that A believes that B is incapable of having needs. Why? Simply because were A indeed to believe that B could not have needs, A would not have considered B's needs. This evidence, such as it is, can, of course, be defeated by evidence which favours accounting for A's failure to consider B's needs in some other way. That is, it might be possible to believe that A believes that B does have needs despite his failure to give (any) consideration to them in his reasoning as to how he should act. (Or, I suppose, we might come to think that A believes that B can have needs but that he

has none at the moment.) The relationship between beliefs and actions is a complex one. Nevertheless we do attribute beliefs on the basis of actions. A's failure to consider B's needs may, then, be taken as evidence that A believes that B is incapable of having needs. There are all kinds of reasons why A might 'show consideration' for something which he did not believe existed. (An adult might show consideration for the needs of Santa Claus, without believing in the reality of Santa Claus' needs.)

It is, then, at least plausible to suppose that the belief that 'to each according to their needs' is a principle of justice can be grounded on a belief that people are beings with a good, and that to fail to treat a person 'according to their needs' is to treat them as if they do not have a good, and hence as they deserve not to be treated. In short, justice requires that people be treated with concern for their needs.

But this is only a beginning for both those who hold that those in greatest need have first claim (let us call this the 'principle of need') and need-utilitarians can argue that their view requires that the needs of each person are considered. Hence neither view treats people as lacking a good. In the case of need-utilitarianism, all needs are considered in order to determine which action will result in the minimum level of unsatisfied need. In the case of the principle of need, the objective will be to determine who is in greatest need. It would seem, then, that neither view is unjust as far as the requirement

that people be not treated as if they lack a good is concerned.
Thus we have no reason, as yet, to believe that justice requires the adoption of the principle of need.

Distribution in accordance with need has been regarded as connected with equality. Thus Miller writes:

... if the satisfaction of needs is seen as a matter of justice, [an] underlying premiss is required. The premiss is difficult to state with clarity, but it may be expressed by saying that every man is as worthy of respect as every other. That is to say ... there is an underlying equality... (27)

This view appears to be sound. If I am intrinsically more important than you, then, presumably, my needs are more important than yours. Conversely, if the person in greatest need has first claim irrespective of who he or she is, this presupposes an equality of concern - presumably on the basis of a belief that each is equally worthy of concern.

But, of course, the defender of need-utilitarianism can claim that his principle treats each as worthy of equal concern. (28) Need-utilitarianism does not treat one person's needs as more important than any other. (29) To paraphrase Bentham: each

27. MILLER (1976), p146.

28. For an argument that at the root of Rawls theory of justice lies a right to equal concern and respect, see DWORKIN (1976), Chapter 6.

29. Hare has suggested that this is sufficient for justice and hence there is no conflict between justice and utilitarianism (HARE (1963), p123):

... we find ourselves bound to give equal weight to the desires of all the parties (the foundation of distributive justice); and this, in turn, leads to such views as that we should seek to maximize satisfactions.

person's unit of need is to count for one, and no person's unit is to count for more than one.

How then is the principle of need to be defended against its rival, need-utilitarianism? As I have suggested, the supporter of the principle of need is likely to appeal to justice. He is likely to claim that the principle of need is more just than need-utilitarianism. But how can this be? The requirement that people be treated as beings with a good and as equals are not sufficient to defend the justice of the principle of need in opposition to need-utilitarianism.

If justice as fitness is sound, and if the principle of need can be said to be more just than need-utilitarianism, then it must be the case that there is some further merit-conferring attribute, treating people in accordance with which, requires that the principle of need be adopted. What might such a further merit-conferring attribute be?

The clash between the principle of need and need-utilitarianism is, I take it, the familiar clash between justice and utilitarianism, expressed in terms of needs. Now it is, of course, a standard objection to utilitarianism that it treats people only as a means. The characterization of utilitarianism as a theory which bids us view people as containers for happiness is a graphic means of making this point. It may be objected that utilitarianism supposes there to be some social entity whose good we are to maximize. And it may be objected that there is no such

entity. (30) But these arguments are only objections to arguments in defence of utilitarianism. If so, such arguments can, at most, demonstrate only that such a defence of utilitarianism was unsound - rather than that there is anything objectionable in utilitarianism. This may be of some importance as many people find utilitarianism intuitively attractive; the idea that there should be as much as possible of what is good is difficult to resist. But to defeat utilitarianism it is hardly enough to show that the utilitarian has some unsatisfactory arguments available to him.

Is there a positive objection to be made to utilitarianism?

Rawls makes the point that:

Utilitarianism does not take seriously the distinction between persons. (31)

To put the point positively, utilitarianism does not treat people as separate, as wholes. And if 'being a whole' confers merit (or if all and only beings with some other merit-conferring attribute are wholes), then it would follow that to treat a person as if they were less than a whole is unjust on the justice as fitness account: it is to treat them as they deserve not to be treated.

30. Cf. NOZICK (1974), pp32-3. See also RICHARDS (1971), p87, who cites (footnote 27, p87): GAUTHIER (1963), p126; GRICE (1967), pp190-7; and FINDLAY (1961), pp235-6 on this issue.

31. RAWLS (1972), p27. See also pp187-9. See also NOZICK (1974) p33; criticised by Nagel in 'Libertarianism without Foundations' (PAUL (1982), pp196 ff). Parfit has argued against the view that we are separate in the deep requisite sense. (See PARFIT (1984), pp329-47.)

How are we to treat people as wholes? How are we able to give expression to a belief that each person is a whole, complete in themselves, separate from others? Now one means - though only one means - would appear to be by way of the adoption of the principle of need in preference to need-utilitarianism. To adopt the view that treating people according to their needs should be understood to mean that those in greatest need have first claim is to give expression to the belief that each person is a whole, is separate, and complete in themselves; it is to do this by explicitly considering each person's needs separately. The person in greatest need is held to have first claim - irrespective of whether it happens to be the case that needs are to be found amongst others in such a way that it is possible to remove more needs by attending to the less needy. The adoption of such a decision procedure, particular in an extreme case, involving as it does a positive refusal to 'add up', will unequivocally assert the separate, 'whole' status of each person.

It is perhaps arguable that need-utilitarianism does not deny the 'whole' status of people, but rather simply fails to express that each person is a whole. If this were so, then we should need to consider whether such a failure to express is unjust. There are, it would seem, times when it is unjust to remain 'silent', and times when it is not. What, if anything, a silence expresses will depend upon the context, upon what is to be taken for granted.

What conclusions are we able to reach? I have argued that it is

possible to view the principle of distribution according to need, interpreted as the need principle, as a principle of justice without abandoning justice as fitness. I have argued that the principle of need can be understood as a case of indirect desert where the desert basis is that of being a separate, whole being, a being of equal moral status, and with a good. These are not unattractive beliefs and I conclude, therefore, that the argument is successful in providing a plausible ground for the principle of need.

The principle of need is most plausible when we are considering the division of goods which no-one has produced or contributed. This is not to say that it is not applicable in cases where this is not true, but clearly additional argument and judgement is necessary in those cases. A further factor concerns the responsibility or otherwise of the persons in need. Many supporters of the principle of need might at least hesitate to claim that it applies equally to self-inflicted needs. This is not inconsistent with the underlying rationale of the principle of need as I have sketched it: while the principle of need expresses in part the wholeness of each person, so too does holding each responsible for the consequences of self-inflicted injuries. The principle of need, restricted in application to those needs for which the needer is not responsible, is close to another principle: that of compensation. We will be examining this latter principle in a moment. Though its consequences may be the same, its grounds are, or so at least I shall argue,

radically different. But there is no inconsistency in this: liberals and socialists may advocate similar policies for different reasons.

As I have said, to defend justice as fitness it is, strictly speaking, enough merely to indicate the possibility of indirect desert. I have gone beyond this, and have tried to show how the reduction can be performed. Justice as fitness does not however, depend on whether the defence of the principle of need I have given is accepted. It does, however, have to be acceptable if I am to discharge my undertaking to show how justice as fitness allows us to make sense of certain moral principles, to uncover the source of our disagreements. I do not claim that the particular defence I have given (based on indirect desert) is the only ground for the principle of need. But I must confess I do not see how else it can be defended. As I hope I have shown, it is not defended by an appeal to utilitarianism, while appeals to humanity and equality are incomplete: need-utilitarianism is consistent with those concerns.

5.3.2. Distribution According to Contribution

I suggested that the distributive principle corresponding to the state of undifferentiated unity is the principle of need interpreted in terms of what is appropriate for each member for the efficient achievement of the needs of the whole. What, then, is the distributive principle corresponding to the state of differentiated disunion?

One possibility is proposed by Nozick:

...to each according to what he makes for himself (perhaps with the contracted aid of others) and what others choose to do for him and choose to give him of what they've been given previously (under this maxim) and haven't yet expended or transferred. (32)

As Nozick himself notes, this has certain defects as a slogan and he offers the summary.

...to each as they are chosen. (33)

If we grant that the state can have no distributive role (beyond that of enforcing Nozick's rules of acquisition, transfer and reparation) then we are, I think likely to be led to Nozick's principles of distribution, or something like them. There seems little difficulty in viewing Nozick's principles as indirect desert: the desert basis is, of course, that of wholeness.

But suppose we do not accept the anarchic aspect of Nozick's philosophy. How then might we view distribution? I am going to suggest that the principle of 'to each according to their contribution' is an appropriate response to this question, and that justice as fitness allows us to make sense of what would otherwise be a problematic principle.

The view that it is just for people to receive (from society) in

32. NOZICK (1974), p160.

33. Ibid

accordance with their contribution (to the social whole) has had, and still has, wide appeal. As Barry suggests:

...there is no doubt that desert is attributed on the basis of actions, efforts and results produced, and any attempt to say that we are always (confusedly) rewarding and punishing (say) efforts seems to me quite misguided. (34)

It would then, be a serious point against justice as fitness if it were not possible to express the relevance of contribution to justice in terms of desert. But it may be wondered, why should the contribution principle be thought to constitute a problem case for justice as fitness? Do we not say that people deserve in accordance with their contribution?

Our ability to contribute is, no doubt, often governed by factors beyond our control. But this is not in itself, a problem: I have argued that a lack of responsibility does not undermine desert. Lack of responsibility does, I suggest, preclude the possibility of deserving to be rewarded for one's contribution. (35) But it does not preclude deserving on the basis of one's contribution per se.

The problem with contribution nevertheless does indeed arise from a lack of responsibility. It is to be admitted that contribution is, at least in part, a matter of luck; making a significant

34. BARRY (1965), p107, second emphasis added. See also RESCHER (1966), pp78-9; FEINBERG (1970), pp89-90, RAWLS (1972), pp305-11; and MILLER (1976), especially pp102-9.

35. Cf. FEINBERG (1970), p92.

contribution is, to a large extent, a matter of being in the right place at the right time. We may make a major contribution to the common good without even having the intention of doing so. Conversely, we may intend to contribute but fail through no fault of our own. It would appear, therefore, that 'having made a contribution' cannot - and is not - automatically regarded as a basis upon which to ascribe merit. Indeed, it may be doubted whether 'having made a contribution' can, sometimes, even be regarded as an attribute of the contributor. It may, at best, be a consequence of the contributor's attributes together with other factors. Indeed, making a contribution may be no more than something which happens to the contributor. Desert on the basis of contribution is, then, similar to deserving compensation: we do speak of desert in these cases, but the nature of the desert basis is unclear.

As Barry suggests, it is important not to confuse contribution and effort. It is, perhaps, widely held that a willingness to make an effort is a virtue. If so, then it can be said that people who make an effort deserve not to be treated as if they have not made an effort. (This view will not, presumably, be held by those who do not believe that merit is bestowed by a willingness to engage in directed activity - perhaps seeing virtue in a willingness to wait patiently.) We are, I think, inclined to view the failure to succeed of those who make an effort to as yet another case of 'cosmic injustice'. Assuming the effort is well directed, the failure is to be attributed to bad luck. If we personify nature or fortune we may regard the

unfortunate as having been mistreated - treated unfittingly and unjustly. But if we do not personify nature or fate, then I am inclined to think that we do not really believe that the unfortunate person has been treated (that is, acted towards) at all, at least as far as the failure is concerned. By commiserating and sympathising with those who experience bad luck which thwarts their efforts, we treat those who make an effort as 'effort-making' thereby giving expression to our belief that they are effort-making. Anyone who believes that justice requires that material goods should, even sometimes, be distributed in accordance with effort will need to demonstrate how failing to do so gives expression to a (mistaken) belief that someone who has actually made an effort is indolent. I am inclined to think that we do not usually make such an inference. If this is so, then it would appear that a failure to distribute benefits in accordance with effort is not unjust.

But let us return to the role of contribution. If we accept the desert-merit hypothesis we must accept, I think, that contribution cannot function as a desert basis. But, as we have seen, it does not follow from the fact that contribution cannot function as a desert basis, that the manner in which people deserve to be treated is not in some way dependent upon their contribution. What is required, of course, is an argument that 'to each according to their contribution' is a case of indirect desert. If such an argument can be developed then we should be able to accept the conceptual propriety of 'desert in accordance

with contribution', while preserving the desert-merit hypothesis
(and justice as fitness) from a potential counter-example. We
may also hope to explain why people's deserts might be thought to
depend upon their contribution. But how is the principle to be
accounted for in terms of indirect desert?

To be alive is to be at risk. We are able, we suppose, to
control what happens to us to some extent. But we remain very
much at the mercy of fortune, of good and bad luck. We might
stumble into a land flowing with milk and honey, or perish in the
desert; secure a dream job by being in the right place at the
right time, or be made redundant; we may have a life of good
health or be struck down by accident or disease. Life, for all
of us, then, is a series of risks from the moment we are
conceived. (It might also be thought that life is a lottery even
before one is conceived - in the sense that 'who one is' is in
some sense a matter of luck. But this path needs to be trod with
caution.)

How are we to distribute these risks? One possible approach is
that we should allow the risks of life to 'lie where they fall' -
unless explicit risk transferring and risk sharing contracts have
been entered into. To adopt such a view is, I think, to respond
to the risks of life as the supporter of the principle of need
responds to needs - to view them as providing an opportunity to
give expression to the belief that each person is a separate
whole, each with their own relationship to fortune. Now, of
course, much of that which we produce must be regarded as a

'joint product'. How are the benefits (and losses) of joint production to be distributed? The person who appeals to contribution is, I suggest, arguing that the principle of leaving risks to lie where they fall should be extended into the field of joint products. To distribute 'according to contribution' is a natural extension of this principle of risk distribution. The benefits and burdens arising from the risks of life are returned to the individual considered to be their bearer. If leaving each with the benefits and burdens of their own good and bad fortune is a means of expressing the separateness, the wholeness of each person, then so too, it would seem, is the extension of this approach to the distribution of the benefits and burdens generated in societies whose processes of production are highly integrated; and this approach is, I suggest, the principle of distributing in accordance with contribution. To distribute according to contribution is to leave the risks of life with the individual.

People are, let us suppose, (separate) wholes, and, since wholeness confers merit, they deserve not to be treated as less than wholes. To distribute in accordance with contribution is to unravel and thereby to give expression to the belief that each person is a (separate) whole. Is to fail to distribute according to contribution to give expression to the belief that people are not wholes - and thereby (if people are wholes) to act unjustly? To fail to distribute according to contribution is, let us suppose, (ceteris paribus) to fail to give expression to the

belief that people are wholes. Whether to fail to give expression to the belief that people are wholes will be to give expression to the belief that they are not wholes will, as with needs, depend upon the context. There are times when it will be unjust to remain 'silent', and times when it will not. The basis of 'to each according to their contribution', then, appears to be that so to act is to treat each person as a whole. If this is so, then contribution does not constitute a counter-example to the desert-merit hypothesis, nor to justice as fitness. Indeed, if the argument I have given is sound it allows us to make sense of the notion that goods should be distributed in accordance with contribution.

It should not, I think, surprise us that the same virtue - 'wholeness' - underlies both the principle of need and the principle of contribution. We may think of the belief that each person is a whole as a (perhaps even the) fundamental tenet of liberalism; we find the principle of need supported by the 'welfare liberal', and the contribution principle supported by the 'free-market liberal'. In each case we find an attempt being made to give expression to the belief that each person is a whole. The problem of justice, as far as liberalism is concerned, is the problem of trying to determine how best to give expression to the wholeness of each person - no doubt in the context of other considerations.

36. On this issue see MILLER (1970), pp106-8.

I have said nothing of the problems which arise when we attempt to identify one person's contribution. (36) I have no wish to deny that these are formidable. They are, fortunately, beyond our present field of interest. It is not part of my task to show how other's principles should be applied, still less to argue that they should be applied. My task is simply to show that they are not counter-examples to justice as fitness, and, hopefully, to render such principles more intelligible by placing them within the context justice as fitness supplies.

5.4 Compensation

I want now to examine the case of compensation and to consider whether compensation poses difficulties for justice as fitness. I shall take 'compensation' to mean some benefit provided to someone who has suffered, with the intention of returning the sufferer to (or towards) the level of well-being experienced before the 'loss' which is being compensated. In short, the objective of compensation is, I take it, to nullify suffering.

We speak of people 'deserving compensation'. But, as with contribution the fact that we employ the term 'desert' in relation to compensation does not mean that compensation may not be problematic for justice as fitness. And, indeed, I want to suggest that compensation is problematic, the reason being that to speak of compensation being deserved is itself problematic, at least if we endorse the desert-merit hypothesis. A person is not always - on perhaps even generally - held to be made more worthy by suffering, even if the sufferer suffers through no fault of his own. Thus 'having suffered through no fault of one's own' cannot, I take it, function as a desert basis. I need hardly add that it does not follow from this that compensation cannot be deserved. What is required is, of course, for there to be some attribute which people are thought to possess, and which is thought to confer merit, and for it to be the case that to refuse to compensate (in the appropriate circumstances) is to treat the sufferer as lacking that attribute.

It is, as I suggested earlier, important to avoid overlooking the problem here: it is possible to overlook the problem if one argues that those who suffer through no fault of their own do not deserve to suffer, and hence deserve not to suffer, and hence deserve compensation. It is plausible to suppose that those who suffer through no fault of their own do not deserve to suffer. And certainly those who deserve not to suffer, deserve compensation. But it does not follow from the fact that A does not deserve to suffer, that A deserves not to suffer. Yet without this step the argument will not go through. How, then, can we speak of people deserving compensation?

Let us begin by considering in what circumstances compensation is thought to be due, and hence required as a matter of justice. As we have seen, it is necessary that someone has suffered in some way. And it is at least widely held that fault is relevant. The question of how fault is to be assigned cannot be discussed here. I will simply take it for granted that fault can, in some way, be assigned. In what way is fault relevant?

Let us begin by distinguishing between three different types of case. There are cases of suffering which are regarded as no-one's fault; cases which are regarded as the fault of the sufferer; and cases which are regarded as the fault of some person or persons other than the sufferer.

Consider first the case of someone who suffers through their own

fault. (Injuries caused through smoking, in the knowledge of the dangers, might be thought to fall into this category.) Argument here is unlikely to be over the question of whether the sufferer deserves compensation - that is, over the question of whether the sufferer deserves compensation (deserves not to suffer) or does not deserve compensation (does not deserve not to suffer). Rather, argument is more likely to be over the question of whether the sufferer deserves to suffer or does not deserve to suffer. The question of compensation ('not suffering') is thought by many not to arise. (37) The argument as regards compensation is usually between those who hold that all those who suffer through no fault of their own deserve compensation (the 'no-fault view'), and those who hold that those who suffer through no fault of their own deserve compensation only if the suffering is the fault of someone (the 'fault view'). (38)

The fault view might be thought equivalent to the view that those who suffer through no fault of their own deserve compensation, but no-one has a duty to provide it (that is, everyone may, without injustice, refuse to provide it) unless the suffering is their fault. To take this view will, presumably, then require a distinction to be drawn between cases where there is a duty to

37. Cf. FEINBERG (1970), pp75-6.

38. Feinberg reserves the terms 'compensation' for cases which are no-one's fault, and uses 'reparation' for cases which are the fault of some person or persons other than the sufferer. (See FEINBERG (1970), p75.) I have not followed him in this: I believe it is normal to speak of both as compensation, though I do, of course, agree that it is important to distinguish between the two types of case.

treat people in accordance with their deserts and cases where there is no duty to treat people in accordance with their deserts. I am inclined to think that this way of setting the matter out has nothing to recommend it. It is true that we may say that a person deserves praise without implying that anyone has a duty to provide the praise - there being only a duty not to refuse praise, or otherwise to act in such a manner as to treat the praiseworthy person as unpraiseworthy. But the case is different with compensation. The holder of the fault view believes it to be not unjust, not only for everyone to fail to offer compensation to the person who suffers through no-one's fault, but also for everyone to refuse so to offer. It would seem then that what the fault view holder believes is that those who suffer through no-one's fault do not deserve compensation. There is, it must be admitted, often a reluctance to say as much. This is presumably because we so naturally (though fallaciously) infer from 'does not deserve' to 'deserves not'; and, of course, the fault view holder need not (and usually will not) hold that those who suffer through no-one's fault deserve not to receive compensation. It is, I suggest, this conflation of 'not deserves' with 'deserves not' which leads people to want to say both that those who suffer through no fault of their own deserve compensation, and that everyone may without injustice refuse that compensation. But once we see that the move from 'does not deserve' to 'deserves not' is fallacious, there is no reason to talk as if there is sometimes no duty not to refuse to give that which is deserved.

What is the justification for fault compensation? That is, why should the person responsible for another's injury compensate the injured party? There are no doubt utilitarian reasons for enforcing such compensation. But why is compensation required as a matter of justice?

It is easy to overlook this question - to take it as self-evident that justice does require such compensation. But there is a question here, and it requires an answer.

Hart offers the following account:

From distribution in this wide sense we must distinguish compensation for injury done by one person to another. Here the connexion between what is just and the central precept of justice 'Treat like cases alike and different cases differently' is certainly less direct. Yet it is not too indirect to be traced and may be seen in the following way. The laws which provide for the compensation by one person of another for torts or civil injuries might be considered unjust for two different reasons. They might on the one hand establish unfair privileges and immunities.... But such laws might also be unjust in quite a different way: for while making no unfair discrimination they might fail altogether to provide a remedy for certain types of injury inflicted by one person on another ... In this matter the law might be unjust while treating all alike....

The connexion between the justice and injustice of the compensation for injury, and the principle 'Treat like cases alike and different cases differently', lies in the fact that outside the law there is a moral conviction that those with whom the law is concerned have a right to mutual forbearance from certain kinds of harmful conduct. Such a structure of reciprocal rights and obligations proscribing at least the grosser sorts of harm, constitutes the basis, though not the whole, of the morality of every social group. Its effect is to create among individuals a moral and, in a sense, an artificial equality to offset the inequalities of nature. For when the moral code forbids one man to rob or use violence on another even when superior

strength or cunning would enable him to do so with impunity, the strong and cunning are put on a level with the weak and simple. Hence the strong man who disregards morality and takes advantage of his strength to injure another is conceived of as upsetting this equilibrium, or order of equality, established by morals; justice then requires that this moral status quo should as far as possible be restored by the wrongdoer. (39)

This is an interesting argument. If successful it would not, I think, be incompatible with justice as fitness. The desert basis would, presumably be a 'moral equality' of some kind. But I do not think the argument is successful - or, at least, I do not think, it accounts for all our beliefs in this area. Suppose there were a society whose members were equal in strength and cunning. Reparation on Hart's argument, would not then be necessary. But this is not, I suggest, what we believe.

Feinberg's answer is as follows:

We say that a person deserves compensation for harm wrongly inflicted by others, in which case it is called 'redress of injury', 'amends' or 'reparation' and functions not only to repair the damage but also to 'restore the moral equilibrium', as would an apology or expression of remorse. Reparation 'sets things straight' or 'gives satisfaction'. (40)

Reparation ... is always the acknowledgement of a past wrong, a 'repayment of a debt' and hence, like an apology, the redressing of the moral balance or the restoring of the status quo ante culpam. (41)

Feinberg suggests, then, that reparation (ie fault compensation)

39. HART (1961), pp159-61.

40. FEINBERG (1970), p74.

41. Ibid, p76.

'repairs the damage' and 'restores the moral equilibrium'. But why should the damage be repaired by the person who has caused the injury? Why are such cases to be compared with the repayment of debts? The difficulty of such questions is that it seems to many of us self-evident that if you injure someone you should make amends. It is easy to fail to see the issue here.

It is worth noting that we are not exclusively concerned with the reparation of intentional harm. A society in which there was no intentional harm committed might still be considered unjust if it failed to provide for reparation where the injury to one party was the fault of another. But how could we set about persuading the members of such a society that their current practice was unjust?

I want to suggest that the fundamental purpose of a system of fault compensation is, yet again, to give expression to the fact that each person is a separate whole. The purpose of determining fault is akin to the purpose of determining contribution as far as joint products are concerned. If each person were to live in total isolation there would be no need to treat people in accordance with their contribution, or to compensate as far as the 'fault view' is concerned. For some people a 'one person to an island' situation has seemed to be one in which there is (almost) no problem of justice. 'Each has their own', as it were. It is also, of course, a picture which emphasizes the separateness - and hence, presumably, wholeness - of each person already. Distribution according to contribution, and fault

compensation are, I think, both attempts to unravel the convoluted affairs of men in a manner which provides each with the winnings and losings of his own private 'game of chance' with nature or fortune. The typical questions of the unraveller are counter-factual. 'What would have happened to John if...', 'Is anyone made worse off than they would otherwise have been?' (42) The execution of this unravelling may, of course, become hopelessly bogged down in attempting to answer these counter-factual questions.

I can do no more here than make this suggestion. It would, obviously, require a good deal of argument to show how viewing the function of fault compensation in this way might shed light on the kinds of distinctions we draw in this area. Nevertheless I hope there will seem at least some plausibility in the suggestions that contribution and fault compensation are closely related, that their relationship to justice is a similar one: that each person is a separate whole, and that the injustice of failing to compensate in the case of fault is to be explained in terms of treating wholes as less than wholes, that is as less than they are.

I want now to turn to the second view of when compensation is due: the 'no fault' view. On this view, all those who suffer through no fault of their own deserve compensation, including

42. Cf. Nozick's discussion of the 'Lockean proviso' in NOZICK (1974), pp178-82.

those who suffer through no-one's fault. It is possible to defend such compensation practices on grounds other than justice. If there is no requirement to prove fault, then, for example, much legal time and lawyers' fees will be saved. But I am concerned here, not with questions of efficiency and convenience, but with questions of justice. Justice as fitness, if it is to be successful, must allow us to make sense of this view too. How are we to do this?

It might be thought possible to account for this view as an application of the principle of need, and hence on the basis of concern and treatment 'as a whole'. But a problem with taking such a view is this: there appears to be reason to believe that no-fault compensation might be more plausible than the principle of need. If this were indeed so, then to defend a view that justice requires the adoption of the no-fault compensation principle on the basis of the principle of need would be to try to defend one principle on the basis of a less plausible principle. And this seems unlikely to be persuasive.

In what sense is the principle of need less plausible than the no-fault compensation principle? Consider again the case of those who suffer through their own fault. The no-fault compensation view does not, of course, cover these cases. But they are covered by the principle of need. Now it is, I suggest, widely thought to be more plausible that those who suffer through no fault of their own deserve compensation, than it is thought that those who suffer through their own fault deserve

compensation. At first sight then, it looks as if the principle of need is a principle with less plausible consequences (and is, therefore, a less plausible principle), than the view that those who suffer through no fault of their own deserve compensation.

Now it might be said that the principle of need does not operate in the case of self-inflicted injuries. But why not? One could argue that there are good utilitarian type reasons for not providing compensation in those cases. The problem with this line is that, for many people, this is beside the point. The point is that it is widely held (I suggest) that failing to compensate self-inflicted injuries is not unjust. Utilitarian type arguments can, at most, show that, though compensation in such cases is required by justice, it is wrong (for reasons which outweigh considerations appertaining to justice) to provide such compensation. What we require in order to prevent the principle of need 'coming into operation' in cases of self-inflicted injury is an argument to show that to compensate in these cases would be unjust. An argument to this effect would get the principle of need off the hook, as it were. Now the problem with this move is that it appears to require us to say that those who suffer through their own fault, do not merely not deserve not to suffer (ie not deserve compensation) but actually deserve to suffer! In other words, the mere fact that there are no reasons (of a justice related type) why those who have self-inflicted injuries should suffer, is not enough to defeat the presumption in favour of it being a matter of justice that those who suffer through

self-inflicted injuries should receive compensation (or strictly, be considered for compensation) once the principle of need has been adopted. In short, it would seem that the welfare liberal must either regard fault as wholly irrelevant as far as justice is concerned, or he must adopt a full-blooded retributivist attitude to self-inflicted injuries. The full-blooded retributivism here is the view that those who suffer through their own fault deserve to suffer. To say that people deserve to suffer is to say that, if they did not suffer, we might have a reason to make them suffer!

If the foregoing argument is sound, it would seem to suggest that that supporter of the principle of need faces something of a dilemma. Now perhaps the difficulty can be avoided, and I would not like to place any great reliance upon the argument I have given. But it does suggest, I think, that we should look elsewhere for an argument supporting the view that justice requires that those who suffer through no fault of their own deserve compensation.

The 'no-fault' view - that is, the view that all those who suffer through no fault of their own deserve compensation - can, I think, be defended from an entirely different position. I have suggested that the fault view is to be understood in terms of the notion of unravelling, and of treating each person as a whole. The idea is, I suggested, to leave each person with their 'own' risks, to arrange matters so that each person faces nature or fortune 'alone'. Now there is, I want to suggest, an entirely

different view of how the risks of life are to be distributed; we may take the view that risks should not be 'left' with the individual, but should be shared by the society or group. It is this view - the 'traveller's view', a view which bids us face nature or fortune with a common front - which underpins the no-fault compensation principle. This is not a novel idea - at least to those familiar with Rawls' theory of justice. As Rawls says:

In justice as fairness men agree to share one another's fate (43)

It is this view which, I suggest, underpins Rawls' justice as fairness. Our present task is to uncover by what this view is, in turn, underpinned.

How then can this view be defended as a view of justice? Can justice as fitness accommodate such a view? And if so what is the virtue or merit-conferring attribute on account of which people may be said to deserve compensation when their suffering is no-one's fault?

The answer, surely, is clear enough. By agreeing to share each other's fate, by facing nature with a common front, by not allowing risks to lie where they fall, we express to each other that we are members or partners. If the notion of being a member can, as I suggest it can, be viewed as merit-conferring then if

43. RAWLS (1972), p40.

men, or a particular group of men, are partners or members, to fail to provide (no-fault) compensation would be to fail to treat them as they deserve.

The belief that both being a member and being a whole are merit-conferring attributes, and the belief that a person possesses both attributes, and that justice requires that they be treated as possessing both attributes is, I suggest, a source of tension in our thinking about which actions are just. This is, it would seem, the source of the divergence between and within what might be termed socialist and liberal conceptions of justice. But it is important to note that there is no disagreement over the concept of justice here: each view is an interpretation of the same concept of justice, namely, that each person is to be treated as not less than they are, that is, each person is to be treated in accordance with their deserts. Where disagreement lies is over the virtues, the merit-conferring attributes, or, more often perhaps, over their relative importance.

For many of us, a satisfactory conception of justice will include both the requirement that people be treated as wholes and as members. The theory of justice we require, then, will be one in which we express, to use Cohen's terms, both our differentiation and our unity. (44)

44. See also RAWLS (1972), Section 79, especially p523, footnote 4.

Whether such a synthesis is possible is, as I have suggested, open to some question. But it is, I think, important to note that justice does not require us to go out of our way, ever searching for more ways to express our separate wholeness, and our solidarity or communality. What is required is only that we avoid acting in ways which give expression to a belief that others are either non-members or mere parts. It is, perhaps, this 'negative' character of justice - justice being a matter of avoiding injustice - which makes the possibility of expressing both at least plausible.

I suggest, then, that the justice of no-fault compensation is to be defended on the basis of such treatment being required in order to express our communality, that is, to avoid treating others as non-members when they are (allegedly) members. Such an argument presupposes, of course, that to be a non-member is to be inferior to a member. I have not examined the question of whether such a claim can be defended. It is, I think, clear enough that if we accept that being a member or partner is a merit-conferring attribute, then one way in which expression can be given to the belief that such an attribute is possessed by a being, is to share risk with that being: 'for richer, for poorer, in sickness and in health', as we say.

5.5 Entitlements as Deserts

I should like to conclude this chapter by returning to the topic of the distinction between rule-relative and non-rule-relative justice, and in particular, the relationship between entitlements and deserts. The reader will recall that I began my argument by distinguishing between rule-relative and non-rule-relative justice; I attempted to characterize rule-relative justice (in terms of misapplying a rule, and thereby misclassifying) and then went on to suggest that justice 'beyond the rules' is to be understood as analogous to, or congruent with, rule-relative justice. But is the relationship of congruence the whole story? Are rule-relative and non-rule-relative justice simply 'parallels'? Or is there some way in which we may infer from one to the other? In particular, is the fact that some act is rule-relatively unjust a reason to think that the act is unjust 'beyond the rules'?

In Chapter Three I tried to sketch an account of why it might be wrong, ceteris paribus, to act unjustly. The basic idea was that, in some sense, by treating a being as less than it is, we thereby render it less than, but for our mistreatment, it would have been. As I remarked in Chapter Three, such an account, even if successful in the case of non-rule-relative justice, seems to offer little hope of being able to explain why it is wrong to act unjustly in a rule-relative sense. Unless, that is, rule-relative justice can, in some way, be reduced to non-rule-relative justice. Is such a reduction possible? And if so, how?

It may seem that the prospects for reducing rule-relative justice to non-rule-relative justice, that is, for showing that cases of rule-relative injustice are, ipso facto, ceteris paribus, cases of non-rule-relative injustice, are less than bright. To achieve such a reduction would require it to be shown that entitlements, by their very nature, are reducible to deserts. But how might this be done?

As I have claimed in Chapter Four, 'having qualified under a rule' is hardly a plausible desert basis, at least if we accept the merit requirement. The reader will, by now, have anticipated the next question. Can we show that an entitlement is an indirect desert? It is not the case, we may agree, that 'having qualified under a rule' can function as a desert basis. Nevertheless, might it not be that there is some attribute, call it *y*, such that every person possesses attribute *y*, *y* is merit-conferring, and to fail to treat people in accordance with their entitlements is to treat them as if they lacked attribute *y*. If this is so, then is not to fail to treat people in accordance with their entitlements, to treat them as they deserve not to be treated?

The problem with this argument is that it is difficult to see what attribute *y* could be. This may, of course, be no more than a failure on my part. I shall certainly make no attempt to demonstrate that no attribute could satisfy all the features I

have ascribed to attribute y. Nevertheless, for what it is worth, my suspicion is that there is no attribute y.

But if we are unable to reduce entitlements to deserts, what are we to say of rule-relative injustice? What reason do we have to avoid acting in a manner which is unjust in a rule-relative sense? There will, no doubt, be good consequentialist reasons to avoid acting in a rule-relatively unjust fashion on many occasions. But this is a contingent matter and, as such, there seems no reason to hold that there must always be such reasons. There is also the problem, if we take this view, of why we call misapplying a rule unjust, rather than simply wrong, though I suppose it might be argued that this use of 'unjust' is based on an analogy with non-rule-relative justice.

Now I am inclined to believe that to treat a person as unentitled, when they are in fact entitled is, at least in the absence of disqualifying conditions, unjust, not only in a relative sense, but also (and thereby) in an absolute sense. I am inclined to think that most of us would not be happy with an account of rule-relative justice which failed to imply that there is anything unjust in an absolute sense, unjust 'beyond the rules', about rule-relative injustice - at least in the absence of reasons to the contrary. It is, therefore, a point against justice as fitness if it is unable to account for the injustice - in an absolute sense - of rule-relative injustice. And, I venture to hope, a point in favour of justice as fitness if it can.

I should, therefore, like conclude this chapter by offering an account of how it might be possible to 'reduce' entitlements to deserts on at least some occasions. If we are successful, then we will be able to connect up this argument with the argument designed to show what is wrong with failing to treat people in accordance with their deserts. We should then have an argument running from (at least some) failures to treat people in accordance with their entitlements, to degradation.

I want to suggest that to deny a person that to which they are entitled (that is, have qualified under a rule) may be unjust (in a non-rule-relative sense) because it may be thought, at least under certain conditions, to be to give expression to a belief that the person denied deserves not to receive that to which they are entitled. It is unjust to treat someone as if they deserve not to receive some good, if, in fact, they do not deserve not to receive the good.

Let me illustrate. Consider the case of a candidate who does well in a competitive entrance examination through good fortune. Now it may be agreed on all sides that this candidate did not deserve to do well, nor to be allocated a place. But if an entrance examination is held, and this candidate is successful, then to deny a place to the candidate may be thought no longer to be simply to give expression to the belief that the candidate does not deserve a place - which would have been the case had

there been no entrance examination and the candidate had been refused entry - but rather to give expression to the belief that the candidate deserves not to receive a place. As we saw in our discussion of compensation, it does not follow from the fact that A does not deserve x, that A deserves not to have x. To say that the candidate does not deserve a place is to say that, were the candidate not to be given a place, there would be no injustice; the candidate will not be treated as lacking some merit-conferring attribute which is, in fact, possessed. (To say that the candidate does not deserve a place is to say that there is nothing, ceteris paribus, unjust about the candidate receiving a place.) However, to say that the candidate deserves not to receive a place is to say that it would be unjust, ceteris paribus, if the candidate were to be offered a place. Now this latter claim - the claim that a candidate deserves not to receive a place - is a desert claim, and presupposes a desert basis, that is a merit, or in this case, demerit-conferring attribute.

I want to conclude, then, with this suggestion that entitlements may be reducible to deserts. It is not, I think, the case that to be entitled is to be deserving. What might be the case, I suggest, is that at least sometimes - and, perhaps, those times when we wish to say that a rule-relative injustice is unjust in some non-rule-relative sense - to deny (with the requisite authority, of course) someone that to which they are entitled, is to treat the person denied as if they deserve not to receive that which they have qualified for under the rules. And if it is not true that they 'deserve not', to treat them as if they 'deserve

not' may be said to be to fail to treat the person in accordance with their deserts.

The basic idea of this argument is that the existence of a rule renders acting contrary to that rule expressive of a belief which the action would not have given expression to had there been no rule. If a man enters a church wearing a hat, such an action may be thought to give expression to a belief, which the action would not have been thought to give expression to, had there been no rule that men are to remove their hats on entering churches.

If we are denied something for which we have qualified we may, at least on some occasions, conclude we are being denied because it is thought (wrongly) that we deserve not to receive that for which we have qualified. Now I do not wish to suggest that rule-relative injustice can always be reduced to desert in this way. It would seem that if the judge is understood to reject the rule, rather than to fail to judge in accordance with the rule in particular case, then there will be no reason to suppose that in failing to apply the rule in any particular case, the judge is giving expression to a belief that the judged deserves not to receive that which he has qualified for under the rules. There is, clearly, much more to be said on this issue. But I hope that I have at least done enough to show that it is not obvious that entitlements cannot be reduced to deserts.

Chapter 6 Obligations, Promises, Requests and Justice

In this final chapter I propose to discuss the relationship between fulfilling an obligation (1) - in particular, the keeping of a promise or the compliance with a request - and justice. Failure to fulfil an obligation has, by many theorists, been considered unjust. If this view is taken then these cases pose a problem for the account of justice I have given. How, it may be asked, does failing to keep a promise constitute treating one's promisee as less than he is? How does failure to comply with a request treat the requester as less than he is? How can these actions be viewed as failing to treat anyone in accordance with their deserts?

At the end of Chapter Four I indicated that there were two strategies available to the defender of justice as desert when faced with an alleged counter-example. One strategy we have deployed in Chapter Five: the uncovering of indirect desert. The other strategy is to deny that the alleged counter-example is indeed a case of injustice. Thus we may deny that failure to fulfil our obligations is unjust - though we shall not, presumably, wish to deny that such failures are wrong actions.

I do indeed propose to argue that failure to keep a promise is

(1) An obligation is a relationship which exists between two parties as a result of some prior committing action. On the concept of obligations see RICHARDS (1971), pp76-101; GAUTHIER (1963), pp174-91, LEMMON (1962) pp141-3; and BRANDT (1965).

not unjust. My argument may be viewed in one of two ways depending upon how much the reader is willing to concede. It is, I claim, a fact that native English speakers without theories to defend do not use the term 'unjust' in their criticism of those who fail to fulfil their obligations. My own view is, then, that whoever wishes to claim that failure to keep a promise is unjust faces an uphill struggle. This evident reluctance on the part of ordinary users of the language has, in some way, to be accounted for.

Those readers who are willing to agree with me that failure to keep a promise is not unjust may view the account which follows as an explanation of why such failure is not unjust. On the other hand, those readers who are not willing to concede this point may read on to find arguments recommending that their practice of calling such acts unjust be revised. The same argument will be offered to fulfil these different functions.

It may be asked - indeed the point has been put to me - why, if I do not believe failing to fulfil an obligation is an unjust act, I should discuss such obligations in a thesis on justice. I can only repeat what I said in Chapter One. Firstly, it is a fact that numerous philosophers have claimed that failure to fulfil a promise is unjust. To ignore the subject would, therefore, be to risk the accusation of having ignored a set of obvious counter-examples. And secondly, it is not true that our understanding of justice is advanced only by the study of the concept of justice itself. One may learn about a country by understanding the wider

region in which it lies; one can understand a concept more fully by understanding its context, that is, by adding an appreciation of neighbouring concepts. Obligation, I claim, is such a neighbouring concept.

Let me say at the outset that my concern is only with the relationship between obligations and non-rule-relative justice. Clearly if there is a rule to be taken as given and I am denied, by someone with the requisite authority, that which I have been promised I shall, of course, have been treated unjustly in the rule-relative sense. A judge in a civil case who fails to enforce a contract fails to ensure that the suing party receives according to their entitlement. This, I take it, is uncontentious. The issue is whether failure to keep a promise is unjust in a non-rule-relative sense.

I propose to conduct my exploration by using, as my guide, the account of reasons for action developed in Chapter Three. The reader will recall that I there suggested that we employ two conceptual systems in our practical reasoning: the value and the levels of being systems. In a sense then, the discussion we are about to undertake will constitute a test of whether the framework outlined in Chapter Three is an illuminating one. Justice as fitness locates justice within that framework, as within the levels of being system. A test of the illuminating capacity of the framework may be expected to be a test of the illuminating capacity of parts of that framework. The present

discussion may, therefore, be expected to test, not so much whether justice as fitness is true or false, but whether it is illuminating.

Promising is a practice which has received enormous attention from philosophers over the last few centuries. By contrast, the practice of making requests has received very little attention. The two practices are, I will argue, not entirely unrelated. I will discuss requesting in the final section.

6.1. Promises and Justice: Preliminaries

In this chapter I propose to try to develop an account of why we should keep our promises. It will facilitate the development of that argument if a number of issues can be dealt with first. This is the task which will occupy us in this first section.

There has been much discussion of whether the obligation to keep a promise can be accounted for by utilitarianism. (2) It would not be appropriate for me to try to review this literature here. For the purposes of orientation I will simply outline my position. There are often utilitarian reasons for keeping promises. But, it would seem, there are, or could be, promises which there are no utilitarian reasons to keep. However, this does not show that there is anything wrong with utilitarianism until it is shown that there is reason to keep such promises. It is indefensible to say simply that we should keep promises because 'a promise is a promise', or for no reason at all. What the utilitarian requires is a reason, and I do not see how this can be regarded as an unreasonable demand.

(2) In my discussion of promising I have drawn particularly on ATIYAH (1981), and FINNIS (1980), pp298-308. See also PRICHARD (1949), Chapter 7; MELDEN (1956); HAMLYN (1961-2); NARVESON (1962-3); GRICE (1967), Chapter 2; J. R. Searle, 'How to derive 'ought' from 'is' reprinted in HUDSON (1969), pp120-34; R. M. Hare, 'The Promising Game', reprinted in HUDSON (1969), pp144-56; NARVESON (1971); McNEILLY (1972); CAMERON (1972); CLARK (1972-3); LOCKE (1972-3); HANFLING (1974-5); ROBINS (1976); and ANSCOMBE (1981), papers 2 and 10.

We may say that to make a promise is to place oneself under an obligation to act as one has promised. Now this is, of course, true. But the utilitarian is right to say that it has not yet been explained how promising gives rise to a reason for action. It is true that if one has an obligation, one has a reason for action. But it is a mistake to suppose that the obligation gives rise to the reason for action. This is to put the cart before the horse: it is the reason for action which gives rise to the obligation. An obligation signals that there is a reason for action, for one has an obligation only if one has a reason for action. But it does not make clear what the reason for action is. To suppose that a reason for action can derive from an obligation - or for that matter, a right - leads to sterile and circular discussions. One can put this point by saying that the terms 'obligation' and 'right' are elements of a conclusory language. (3) Conclusory terms are fashioned for expressing conclusions - conclusions to such discussions as what is just. Talk of rights and obligations is appropriate in law, for there, there is an obvious point to expressing conclusions. But simply to give a conclusion when one has been asked to give a reason is to fail to engage in debate. Utilitarians are, in my view, justifiably mystified and irritated by arguments which end with appeals to rights and obligations.

It is not exactly helpful to say that one has a reason for action when one has promised 'because one has promised'. Of course, if

(3) I borrow this term from FINNIS (1980), p211.

one had not promised, then one would not have the reason for action which one does have because one has promised. But it is obvious that this is not an explanation of why one should keep promises.

It would be bad tactics, I think, to try to argue that the reason one should keep a promise follows from the fact that there is (allegedly) a rule that promises should be kept. If we take this line we must explain what reason we have to keep the rule that promises should be kept. Now it seems plausible to suppose that the reason to keep this rule will derive, either from the nature of the particular rule, and hence from the nature of a promise, or from the nature of rules in general. If the former is the case, then it is difficult to see what will have been achieved by the introduction of talk of rules. The latter suggestion requires us to believe that the reason we should keep a promise, utilitarian considerations apart, derives from the nature of keeping rules in general. Now it may be that the existence of a rule that promises should be kept adds some reason for keeping promises, deriving from the keeping of rules in general. But this seems less than satisfying. It is difficult to resist the temptation to believe that the rule exists because there is some reason to keep a promise, and not vice versa.

I will assume that our intuitive idea of what it is to promise is adequate for our discussion. But it is important to note that there is a distinction between promising and indicating an

intention. (4) It may not always be clear whether someone has promised (or merely indicated an intention), since we often make promises by the use of such phrases as 'I will'. (And by such imperatives as 'Rely on me!') Nevertheless it is, I think, clear that to promise is not simply to indicate an intention: it is readily intelligible to say, for example: 'I intend to come to your party, but I am not promising.'

It is worth noting that not all entities which can have intentions indicated to them can be promised. We can indicate our intentions to machines but we cannot make promises to machines. To be able to be promised, it is necessary to be able to trust or 'have faith'. And this might suggest that only a being with free will can be promised. (A machine might be dependent upon its programmer. But it cannot trust or lack faith in its programmer.) But an entity may be able to have an intention indicated to it if it is able to receive information. Thus I may indicate my intention to deposit \$100 next week to a bank's suitably programmed automated teller. But I cannot promise the machine that I will do so. (If the machine were to ask me to promise then I would have to regard myself as promising the bank, or suspect the machine of having ideas above its station!)

It is not obvious that the utilitarian can cope with the fact

(4) This distinction is discussed in ATIYAH (1981); see especially pp50-1 and pp100-2.

that we distinguish between promising and indicating an intention; it would seem that the utilitarian reasons for keeping our promises are also reasons to act in accordance with our expressed intentions. But if we give ourselves no additional reason to act by promising, why do we promise? Why might we indicate an intention but decline to promise? I do not mean to suggest that the utilitarian can offer no answer to this question. I mean only to suggest that the question should be pressed.

It is, no doubt, wrong to simply ignore (or fail to attach the appropriate significance to) the interests of someone who is relying upon us to perform an action. This will be so whether we have promised to perform the action, or whether we have only indicated our intention to perform the action, or indeed, even if we have done neither. If someone tells us, out of the blue, that they are relying upon us, then we should give due consideration to their interests. This is because it is wrong, other things being equal, to ignore someone's interests. It is, obviously enough, wrong on utilitarian grounds. It may also be unjust: we may argue that to ignore someone's interests (ie fail to take them into account) is to treat the person as if they have no interests, or, perhaps, as if they were beings incapable of having interests; and we may hold (as I suggested in the course of our discussion of need) that an entity which has, or is able to have, interests is more worthy than an entity which lacks, or is unable to have, interests. If this is indeed so, then to ignore someone's interests is unjust. (A similar, though

slightly more complex argument would presumably apply in the case of a failure to attach appropriate significance to someone's interests.)

Arguments along these lines provide reasons for (at least sometimes) keeping promises. But they are not, of course, the kind of reasons we are interested in. They are much too general. What we wish to know is whether there are any reasons to keep promises per se. Of course, there will be contingent reasons of various sorts to keep at least some promises. But are there any reasons to keep promises which arise out of the very nature of a promise?

If there are to be reasons to keep promises per se, and if the account of reasons for actions given in Chapter Three is accepted, then there are two possibilities in addition to utilitarian and rule-relative considerations. Firstly, there is the possibility that by failing to keep a promise we treat some being as less than they are. (This would, on the view that justice is to be understood in terms of fitness, be necessary if failing to keep a promise were to be unjust.) Secondly, there is the view that failing to keep a promise degrades, this is, makes some being less than it would otherwise have been. I propose to investigate these two possibilities in the next two sections. I begin with the possibility that failing to keep a promise involves treating some being as less than they are.

6.2. Promises and Justice

If we fail to keep a promise without good reasons, do we thereby treat the person promised as less than they are in some way? On the face of it this looks implausible. If to fail to keep a promise is no more than to treat the person promised as if they had not been promised, then it appears that we can do no more than treat our promisees as other than they are: to be promised does not make one more worthy than one would have been if one had not been promised.

There is, however, another consideration. I suggested in the previous section that to be capable of being promised, it is necessary to be able to trust and so forth. It is, I suspect, necessary to have free will. Now it is, of course, widely held that beings which possess free will are higher, more worthy, than those which lack free will. If it were the case, then, that if by failing to regard a promise as a reason for action we were to be treating the promisee, not as having been promised, but as unable to be promised, then failing to regard a promise as a reason for action might be unjust (on the justice as fitness account).

But is this possible? Why should we regard the ignoring of a promise as any more than treating the promisee as unpromised? Why should we go on to make the further claim that such action amounts to treatment, not merely as unpromised, but as unpromisable? What can be said in favour of this further claim?

Unless we actually deny that what we said amounted to a promise, we must concede that all that was necessary for there to have been a promise is, as it were, in place. If all the external signs are there, and we still treat the promisee as unpromised, are we not treating the promisee as unpromisable?

Notwithstanding this line of argument, the imputation of unpromisability to the (would-be) promisee is not made. It is not made, I think, because the promisor, having promised the promisee, has already treated the promisee as promisable. This is, I think, sufficient to head off any tendency to view the promisor's later conduct as giving expression to the view that the promisee is unpromisable.

I have suggested that, if a person is not thought to be made more worthy by being promised, then it cannot be unjust (on the justice as fitness account) to treat a promised person as if they had not been promised. Now this argument is, of course, invalid. To rely on this argument is to overlook the possibility of indirect desert.

It does not follow, from the fact that a characteristic or feature does not confer merit, that people do not deserve to be treated in accordance with their possession of, or lack of, this feature. All that follows (assuming the desert-merit hypothesis holds) is that this (non-merit-conferring) feature cannot itself function as a desert basis, and hence people cannot be said to

deserve some form of treatment directly on the basis of the possession of the feature or characteristic in question. It remains possible, however, that there exists some characteristic, X, such that, characteristic X is merit-conferring, and to treat someone as possessing X, it is necessary to treat them as they have been promised.

I am inclined to think, however, that it is implausible to suppose that such a characteristic exists in the case of promising. A promise is held to provide a reason for action only for the person who has made the promise; the fact that you have been promised a football by a third party does not, in itself, provide me with any reason to supply you with a football. This may not defeat the possibility of indirect desert. But it is far from easy to imagine how an argument developed along such lines will be able to account for the fact that the promisor has a reason for action, but third parties do not.

I am inclined to believe that it is not possible to argue that failing to keep a promise is (in a non-rule-relative sense) unjust. I also believe that this is not a point against justice as fitness, but rather a point in its favour. For, as I have said, native English speakers uninfluenced by theories do not call failing to keep a promise unjust. They say, of course, that it is wrong, immoral or something that one should not do. But they do not say that it is unjust. Our eschewal of 'just' and 'unjust' in this context is a fact which we need to take into account, and which needs to be accounted for. It might be argued

that failing to keep a promise is unjust, and that people who fail to talk in this way are failing to draw distinctions in the best places. But if so, that must be argued. I see no reason to attempt to develop such an argument.

I have attempted to cast doubt on the claim that it is unjust to fail to keep a promise - at least in a non-rule-relative sense. But I am not suggesting that promising and justice are unrelated. It is not failing to keep a promise which is, per se, ceteris paribus at least, unjust, but rather refusing to believe that (given a reasonably normal course of events) the promisor will fulfil his promise which may be unjust. To so refuse to believe is of course, unjust only if the promisor is, in fact, trustworthy. (Such a refusal of belief may, but need not, issue in an unwillingness to place oneself at risk with respect to the promised action. And an unwillingness to place oneself at risk with respect to the promise (that is, depend on) may, but need not, give expression to an unwillingness to believe. I may be unwilling to depend on you for reasons other than lack of trust; I may, for instance, have a fetish about self-sufficiency.)

The injustice of treating a trustworthy person as untrustworthy is, of course, readily intelligible in terms of the justice as fitness approach. It is my example of a transparent use of 'justice'. And this is, of course, a situation in which native English speakers would not hesitate to use the term 'unjust'. Talk of justice here is intelligible if (but presumably only if)

we are willing to regard being trustworthy as a virtue. As, of course, we are.

My primary concern is to exhibit the relationship between, on the one hand, just and unjust treatment, and on the other, merit-conferring characteristics, or virtues. I do not, therefore, need to argue, or even to claim, that trustworthiness is indeed a virtue. Nevertheless I should like to hazard a few remarks upon trustworthiness, and such closely related virtues as dependability, reliability, faithfulness and integrity. Why are these virtues?

The central image - we are back with metaphors again - employed by these concepts is one of a solid entity, of definite shape and high density, unchanging over time. (These are the characteristics possessed by, say, a billiard ball or a diamond - and lacked by a cloud.) To be dependable is to be 'hangable from' - the term being etymologically related to suspend, pendulum, pendant and pendulous. We speak of a reliable person as one who does not let people down, who may support others, be supportive. A person of integrity does not disintegrate, fall apart, when relied upon. All these uses are figurative, borrowing the idea of a solid physical object, an object which can be hung from and stood on, and will not collapse. A good walking stick, a trusty staff, is dependable and able to support; it is solid, not flimsy.

Closely related virtues are constancy or consistancy, of not

being changeable, capricious or fickle. Only if one has constancy can one be trusted, relied upon, over time. 'We'll support you ever more' sing the supporters on the terraces; Jesus calls Peter a rock; solidity and continuity are readily associated. But why are they virtues?

No doubt that which is solid and stable over time is useful for achieving many and various purposes. But are these virtues, virtues only because they are useful? No doubt supportive spouses and 'the party faithful' have their uses, but are they only admired because they are useful? (Utilitarianism, as is well-know, has problems with these virtues: it is far from clear how utilitarianism can avoid undercutting these (useful) qualities. One can trust a utilitarian to be a utilitarian. But it is not easy to see that 'trust' is doing any work here.)

I want to suggest that the virtues of being reliable, trustworthy, faithful, constant, dependable, possessing integrity, and so on, might be made sense of by reference to the notion of identity. (5) If we consider the image latent in these virtues, that is, an image of a steady, solid, substantial object (in contrast to something airy, nebulous, insubstantial, liable to disintegrate, changeable) it seems plausible to suppose that

- (5) A different argument might start from the claim that what is dependant (for its continued existence) on something is lesser than what depends on nothing for its continued existence. See Norman Malcolm's discussion of Anselm's Ontological Argument in HICK (1964), especially pp53-4.

the (separate) identity - and, indeed, the reality - of such objects is less in question. When we individuate the world we are, no doubt, able to divide up reality in a number of different ways. But if we find that one part of what there is is solid, well-integrated, and enclosed within a definable boundary where sharply contrasting mediums meet, then it is easy, it would seem, to regard such a 'part of what there is' as a separate thing, as an individual entity. We are also likely to regard such an entity as being more real, more substantial. As we move around, such objects impede us, offer resistance. Now perhaps it is not too far-fetched to suppose that these aspects of the metaphor are also transferred. The man of integrity, who is worthy of our trust, and offers resistance, is said to be a man of substance, a real man. (He may, of course, also be described as stubborn, immovable, inflexible, and obdurate (cf. durable) - a hard man.) Do we admire those who possess these characteristics because they seem to be more real, to partake, to a greater degree, of actuality? D. H. Lawrence, in his bitter poem 'How Beastly the Bourgeois is', suggests that the bourgeois lacks substance, goes 'soggy' when 'confronted with... a new life demand.'

Touch him, and you'll find he's all gone inside
just like an old mushroom, all wormy inside, and hollow
under a smooth skin and an upright appearance.

...

Standing in their thousands, these appearances, in damp
England
what a pity they can't all be kicked over
like sickening toadstools,... (6)

(6) 'How Beastly the Bourgeois is' in LAWRENCE (1950), pp137-8.

Notice how Lawrence uses 'appearances', suggesting that the bourgeois springs up overnight, as it were, but also questioning their reality.

In the case of constancy, we might again make sense of this virtue in terms of identity and reality. That which exists unchanging over time seems to have a greater claim to be regarded as a thing, as something, when we individuate. A man who is constantly changing his commitments, beliefs, allegiances and so on might be likened to a series of ephemera; he is not some firm point of reference in a changing world, but rather submerged in that changing world.

This account is, perhaps, contentious and what I have said, of course, amounts to no more than a suggestion as to the direction in which the matter might be investigated further. But I shall not attempt to pursue this topic here, for, as I have said, my thesis does not rely upon explicating the virtues. For my purposes, it is enough to claim that if one believes that to treat the reliable as if they were unreliable is unjust, then one is thereby committed to the view that reliability bestows merit.

Finally, in this section, I would like to say a few words on the question of whether failing to keep a promise is unjust in a rule-relative sense. I have already noted that I believe most people would be reluctant to describe failing to keep a promise as unjust, even when they believe it is something one should not

do. It would seem, then, that there is a reluctance to regard failing to keep a promise as unjust in any sense - including the rule-relative sense. If there were a law that promises must be kept, then a judge who misjudged a case and treated a promised person as if they had not been promised might be said to be acting unjustly, in a rule-relative sense. And, we should, I think, not hesitate to speak of injustice in this context. How, then, are we to account for our reluctance to describe failing to keep our promises as unjust - even in a rule-relative sense?

There is, I think, no question that we must allow that a rule that promises should be kept is thought to exist. We are, I take it, not reluctant to say that the promisee is entitled to that which has been promised. Does the person who fails to keep a promise lack the necessary authority to judge whether the promisee has qualified under the rule? As regards 'moral rules', authority to judge is not, I think, rule-governed. If the account of non-rule-governed authority to judge developed in Chapter Three is sound, it is difficult to see how there can be thought to be a lack of the necessary authority. Given their vested interests, it would be unwise to allow a promisor to serve on a jury to determine whether the (alleged) promisee had indeed been promised. But this is not, surely, a reason to regard the promisee as not competent so to serve. (Having a vested interest does not preclude one from acting unjustly!)

I suspect that the answer to this question must lie in the following direction. Although, when we fail to keep a promise,

we may be treating the promisee as if they had not been promised, that is, acting as we would have acted had we believed the promisee had not been promised, when we fail to treat our own promisees as if they had not been promised, this is (at least normally) not regarded as evidence that we believe that the promisee has not been promised. If I explicitly and sternly promise to come to your party and fail to arrive, your first thought is unlikely to be that I do not believe you have been promised. A quite different thought will cross your mind. By contrast, a sincere judge who treats a promisee as unpromised may very well, provided there is no countervailing evidence, be thought to believe that the would-be promisor has not promised. Our reluctance to call failing to keep a promise unjust, if indeed we are so reluctant, might be thought to lend some support to that part of justice as fitness which suggests that justice is intimately related to the expression of a belief. Where the relevant (false) belief cannot plausibly be imputed, we seem reluctant to employ the notion of justice.

6.3. Why Promises Should be Kept

Why, then, should promises be kept? What reason do we have to act in the manner we have promised, which we do not have if we have not promised? I have suggested that utilitarianism cannot provide an adequate account of the obligation to keep a promise. I have also suggested that, leaving aside the possibility of rule-relative injustice, it is not unjust to fail to keep a promise. If these two claims are sound, and if the typology of reasons for action sketched in Chapter Three is cogent and complete, and if there is indeed a distinctive reason for action generated by a promise, there would appear to be only one possibility remaining: the reason, or reasons, for action to which a promise, by its very nature, gives rise are of the 'raising' and 'lowering' type associated with the levels of being system. This set of reasons for action arises from the belief that we should not make a being less worthy, less meritable, than it was, and otherwise might have been; we should not lower, degrade, debase beings. The theory I have developed so far, then, appears to suggest that the distinctive reason to keep a promise - if there is one - is that to promise and to fail to keep a promise is, ceteris paribus at least, to debase, to lower, to degrade.

At first sight there appears to be an obvious reason to believe that to fail to keep a promise debases: by such action the promisor debases himself. (7) To make a promise, and to then act

(7) Sidgwick (SIDGWICK (1981), p224) suggests that a man may be moved to speak truly by:

... the sense of the degradation of falsehood, ...

as if one had no reason to act in accordance with the promise (arising from the fact that one has promised) is to be unworthy of trust. If we believe that being trustworthy (faithful, reliable) is a virtue, and if we believe that to make a promise and then to ignore the fact that one has promised (that is, to fail to regard oneself as having an additional reason to act generated by the very nature of the promise) is to render oneself unworthy of trust, then to fail to keep a promise is to debase oneself. Thus one has reason to keep the promise in order to avoid debasing oneself.

But now consider the following argument. It has been suggested that by failing to keep a promise we debase ourselves by making ourselves untrustworthy and unreliable. But consider the case where we do not promise, but do indicate an intention to perform some particular act. If we do not perform the act, do we not thereby make ourselves unreliable? And if so, do we not thereby debase ourselves? If this is so, then is it not the case that, as far as self-debasement is concerned, we have no more (though, of course, no less) reason to keep a promise than to act in a manner in which we have indicated an intention to act?

I am inclined to think that there is at least something in this argument, and if so, it would seem that we must look elsewhere if we are to make sense of the distinction we draw between making a promise and indicating an intention. But let me sketch how it might be possible to develop a counter-argument against this argument.

Suppose I indicate that I intend to act in a particular way, but fail so to act when I could. There are, of course, many different kinds of reason why one might so fail to act, but let me mention just three. Firstly, one might have a change of belief about 'the world' - one might change one's beliefs about what is and is not the case, in some sense. Secondly, one might have a change in one's fundamental beliefs about how one should act, what things are important, and so on. Thirdly, one might have a failure of will. (Of course we are often unsure how we are going to act, and, as a result, are only willing to offer predictions in conditional or probabilistic form. As regards the former, if the antecedent conditions are not met, then, of course, we cannot act in a manner contrary to our prediction. Probabilistic predictions can only be criticized over a long run.)

Suppose I fail to act as I have indicated an intention to act, on account of the fact that I have, in the meantime, changed my beliefs - I change my mind on some relevant point. Do I, by failing to act in accordance with the intention indicated, make myself less reliable? Perhaps it can be argued that I do not. It may be admitted that a person who changes their beliefs is, in general, less reliable than a person who does not. (They are also, perhaps, more stubborn and inflexible.) It may also be admitted that by failing to act in accordance with an expressed intention, I provide evidence of my unreliability. But, it might

be argued, a person's unreliability is in part a function of their having changed their mind, and this fact is not undermined simply by a person continuing to act as if they had not changed their mind. If so, then perhaps I do not make myself more unreliable by failing to act in accordance with an expressed intention because, given that I have changed my mind, I do not make myself less unreliable by acting in accordance with my expressed intention. The intuitive idea here is something like this: if I act in accordance with an intention I have indicated, the reasons for which action I have abandoned, am I not preserving a facade of continuity to cover my underlying change? On the one hand one might reply that a facade of continuity is better, as regards reliability, than no continuity at all. But on the other, it is less than clear how reliable one should regard a person who is willing to continue to act in a manner they no longer believe in - perhaps only for the sake of appearances. There is, obviously enough, a great deal more to be said about such a case, and clearly there are important distinctions to draw. But I cannot pursue them here. Let me simply conclude by saying that, perhaps, in failing to act in accordance with an indicated intention, I do not make myself more unreliable than I would be, were I not to fail so to act because, given the circumstances, I do not make myself less unreliable by continuing to act as I have indicated an intention to do.

But might not this argument be applied in the case where I have not (merely) indicated an intention, but promised? I think not. To fail to act in accordance with an indicated intention is to

give evidence that one lacks constancy, and hence to give evidence that one is unreliable. But we ought not, I think, to say that to fail to keep a promise (unless one has adequate reason not to do so) is to give evidence that one is untrustworthy, and, therefore unreliable. Surely, to fail to keep a promise (in the appropriate circumstances) is to be untrustworthy and unreliable. (Similarly, a person who suffers a failure of will does not merely give evidence that they are weak-willed. To suffer failures of will is to be weak-willed.) If this point is sound, then it seems plausible to say that a person who (without adequate reason, at least) fails to keep a promise thereby makes himself unreliable, and thereby debases himself. But a person who fails to act in accordance with an indicated intention does not thereby debase himself.

Does a person debase himself by changing his mind? It seems at least open to question whether changing one's mind is something one does, rather than something which happens to one. But a person prone to constantly changing his mind is widely thought to be, in consequence, less worthy. (Changing one's mind is, of course, said to be a woman's privilege - which suggests that it is not something to be admired!) This is not (much of) an argument for trying to avoid finding one's mind being changed (say, by restricting one's reading to those with whom one agrees), but rather an argument for trying to avoid having a mind which needs changing in the first place. But no doubt this, too, might be less than an unqualified virtue.

Finally, what of failing to act as one has indicated an intention to do, through a failure of will? Is so to act thereby to lower oneself? This seems doubtful since a genuine failure of will would appear to be something which happens to one, rather than something which one does. Though, of course, to be cowardly is held to be less worthy.

It is at least arguable, then, that the avoidance of self-abasement gives rise to a distinctive reason to keep promises. But it would be bizarre to suppose that such a reason is the only or distinctive reason for keeping a promise. If someone fails to keep a promise, they are, of course, more likely to be criticized for what they have done to their promisee than to themselves. People who fail to keep promises are said to wrong their promisee. How is this possible?

As I have said, if the theory being developed here is sound, we should expect failing to keep a promise to involve lowering. And we would expect this lowering to be, not only of the promisor, but of the promisee. How is the promisee debased by being promised, and the promise not being kept?

The answer is, I think, fairly clear. If I promise you that I will perform some particular action, and if you believe me trustworthy, and believe that I will perform the action in question, then if I do not perform the action (in those circumstances in which you believe I will perform the action), by

my failure to act I make false your belief. The result of this series of events (and non-event) is that you have believed a falsehood. A person who (too readily) believes falsehoods is commonly referred to as a fool. And if the particular chain of events I have outlined occurred, then you very well might say that you had been 'made a fool of'.

Let us begin by noting that you would say that you had been made a fool of. You would not say that you had been treated as a fool. Of course, we do often complain of being treated as fools, which, if we are not fools, is (if wisdom is a virtue) unjust. But in the circumstances with which we are here concerned, we are willing to admit that we are fools or, at least, that we have become fools, have been made fools of. We complain, then, that we have been lowered, debased, made into a fool.

The second point to be made is that, as I have already implied, we can only complain of having been lowered by having come to believe something which is false if we regard a tendency to believe falsehoods as a demerit. Again, we do not need to argue that to be a fool is indeed to be lowered; the contingent claim that 'if we regard being made a fool of as being lowered, then we are able to say that to fail to keep a promise (in the appropriate circumstances) is to debase the promisee' is enough. (I do not, of course, wish to deny that it is possible to argue that the promisee is debased in some other way.) Perhaps we regard wisdom as a virtue and foolishness as a vice at least in

part because we regard the wise as more free (more rational) than the foolish. And we believe that what is free is higher, has more dignity, than what is unfree. We resent being treated as unfree, and we feel our dignity threatened by 'creeping' determinism.

Thirdly, we are not, of course, made a fool of if we do not trust the promisor, if we do not believe that (in the relevant circumstances) he will perform the action he has promised. It appears to follow, therefore, that if the promisee does not believe that the promisor will perform the action promised, then the promisor does not have this particular reason to keep the promise - he will not degrade his promisee by failing to keep the promise. (There are, as it has been said, many and various reasons to keep promises: the preservation of the promisor's dignity, as well as utilitarian type reasons. It is not necessarily the case, therefore, that one has no reason to keep a promise when one's promisee has not trusted one.) Now one way to put this point is to say that, if the promisee does not rely upon the promise, the promisor does not have this 'avoidance of promisee debasement' reason to keep the promise. But if we put the point this way, we must be careful to avoid misunderstanding. It is necessary to be clear what is understood by the term 'rely'.

It seems to be sometimes assumed that a person can be said to have relied upon a promise only if he has placed himself materially at risk with regard to the action promised, that is,

if he stands to be financially affected by whether or not the promised action is performed. Notice first that one can rely (in this sense) upon a promise without trusting the promisor. One can choose to place oneself materially at risk without holding a belief that the promised action will be performed. Indeed a promisee may place himself at risk of loss if a promised action is not performed, and believe that the action will not be performed. Now mere material reliance, that is, placing oneself at financial risk, does not give rise to the reason for action which we are presently considering. (It may, of course, give rise to other reasons why the promisor should keep his promise.) But as long as we do not interpret rely to mean materially rely (ie risk financial loss), we may say that it is the case that reliance is necessary if the reason for action we are presently discussing is to operate. The reason for this is simple: to believe the promisor will keep the promise is ipso facto to rely upon the promise, for if the promise is not kept in these circumstances, then the promisee is made a fool of.

Belief in the promise is enough to place the promisee at risk. It may, of course, be that in law only material reliance is taken to be reliance. (If so, then the situation would seem to be comparable with the case of insurance where again, a material insurable interest is necessary if one is to be able to enter into an insurance contract.) But the fact that the non-material risk of being made a fool may be ignored in law is, of course, no reason for us to overlook the risk, and the consequent

automatic reliance which is generated by trust.

I have suggested that one reason for a promisor to keep a promise, assuming that the promisee has believed that the promisor will (given the appropriate circumstances) perform the action promised, is to avoid making a fool of the promisee, and thereby degrading him. But, we must now consider, does not the same reason for action arise when a person indicates an intention to act in a particular way, and the person to whom the intention is indicated, believes that the action will be performed? If I say that I intend to come to your party tomorrow night, but decline to promise, do I still make a fool of you if you believe that I will come, and I do not come?

Let us begin by noting that in such a case, the person to whom the intention is indicated does indeed come to believe a falsehood, namely, that the person indicating an intention will act as he has indicated an intention to act. He is, then, a fool - in the sense in which this term is being used. But it does not follow that he has been made a fool by the person indicating an intention. If I say that I intend to come to your party, and you believe I will come, and I do not, it may well be that I have not made a fool of you, but that you have made a fool of yourself. But if you said that I had made a fool of you, then perhaps you would have in mind one of the following: that I had decided not to come in order to make you believe a falsehood; or that I had actually promised to come; or that I had never intended to come and hence was deceiving you when I indicated to you that I had an

intention to come. Now the first case is one where I have deliberately set out to try to make you believe a falsehood. In such a case, it would be appropriate to say that I had made a fool of you since it would seem that I have the intention of ensuring that you believe what is false. But leaving this case aside, it would seem that in order to be said to have made a fool of you, I must have promised or deceived you as to my intentions. But, why should we say in these cases that I have made a fool of you? Why is it that it is I who make a fool of you when I fail to carry out what I promise? Why should we say this, rather than that you have made a fool of yourself? And why is the situation similar in the case of deceit or lying?

Let us take stock. If you believe that I will regard my promise to you as giving rise to a reason for action, when in fact I do not, then you believe a falsehood, and might be called a fool. But may we go on from this claim, and claim further that it is I who make you a fool - by which, I take it, we mean that it is I who am responsible for you having become a fool? And if so, why?

It is, I think, easy to go wrong at this point. It is easy to suppose that the promisor may be said to make the promisee a fool because what the promisee believes lies within the power of the promisor to make true. Now this will not do. The fact that I could make your beliefs true, that is, it is in my power to do so, is hardly a sufficient condition for responsibility. We do not believe (and, I suggest, rightly so) that we have any general

duty to try to make true as many of people's beliefs as we are able to. (Your belief that I will not complete this thesis on time does not give me a reason not to complete this thesis on time.) And even if there were such a general duty, this would hardly indicate that there is a reason arising out of the promise. The (alleged) reason for action would exist whether there had been a promise or not.

If it is not the fact that the promisor could make the promisee's belief true which gives rise to the promisor's responsibility for the promisee holding a false belief, is it simply the fact that the promisor has made the promise and thereby led the promisee to hold the belief? (Had the promisor not promised, the promisee would not have come to the belief.)

It would seem that this solution will not work either. Let us note that we distinguish between making a promise about our future actions, and making a prediction about our future action. You may predict that you will come to Hong Kong next year, while expressly denying that you are promising to do so. Indeed I see no reason to suppose that one cannot predict that one will (intentionally) perform some action while, at the time of the prediction, having the intention not to do so. I may fear - on the basis of the life-patterns of others - that in later life I will become an enthusiastic supporter of the Conservative Party. And I may, in moments of disenchantment with myself, predict that this will occur. But I do not, of course, intend this to happen, nor do I promise that it will.

If we predict, but decline to promise, then we may be under some duty to act as we have predicted. But we do not believe that, if we only predict, we are under (anything like) the obligation we are under if we promise. To break a promise (for no good reason) which has been believed is to make a fool of the promisee. If the person to whom one makes a prediction, a 'predictee', believes the prediction, and the prediction turns out to be false, then the responsibility for the predictee's false belief falls on the predictee. Or, at least, largely so. The point is that there is a distinction to be drawn between predicting and promising, and that this difference is, at least in part, the fact that a promisor has, we suppose, some reason to keep a promise which a predictor does not have for making the prediction come true.

To summarize. It appears to be held that responsibility for the promisee's false belief (and hence degradation) falls on the shoulders of the promisor. But this fact is not (fully) explained by the fact that the promisor has it within his power to make the promisee's belief true, nor by the mere fact that, had the promisor not acted as he has, ie had he not promised, the promisee would not have held a false belief. These conditions are satisfied, not only in the case of (at least some) promises, but also in the case of (at least some) predictions and expressions of intention. And in those cases the same responsibility does not fall on the shoulders of the person

making the prediction or indicating the intention. So how does a promise differ from a prediction? How does making a promise give rise to a reason for action which merely predicting does not?

I want to suggest that the crucial element in the case of promising is the fact that, as we have seen, if the promisee fails to believe that the promisor will act as he has promised (in the absence of adequate reason for not doing so), the promisee risks doing the promisor an injustice: a person treated as untrustworthy, when they are, in fact, trustworthy, is done an injustice. To be promised is, therefore, to find oneself in something of a dilemma. To believe that the promisor will perform the action promised is to risk being made a fool of if the action is not performed. But not to believe that the promisor will perform the action promised is to risk doing the promisor an injustice if the action is, or would have been, performed. We can set this situation out in a diagram.

A promises B that A will do X:

	A does/would have performed X	A does not/would not have performed X
B believes A will do X	B treats A justly; B does not become a fool	B becomes a fool
B does not believe A will do X	B does A an injustice	B does not treat A unjustly; B does not become a fool

It would seem that once A promises B there is no way that B can avoid being at risk, at risk of being unjust or being made a fool

of. The 'outcome' is dependent upon whether A does, or would have, performed the promised action, and this B cannot control. (B might force A to do what he has promised. But this does not make B less of a fool for having believed, if he has believed, that A would perform the promised action without being forced.) Nor, it would seem, can B avoid taking any risk by suspending judgement, by neither believing that A will perform the action, nor believing that he will not. At least this is so if we believe that declining to believe that a (trustworthy) person will perform a promised action as promised is to do that person an injustice. B cannot avoid risk by merely pretending (that is, acting as if) he believes that A will perform the promised action. If B fails to believe A will perform the promised action, and A is, in fact, trustworthy, then B does A an injustice merely by not believing that A will act as promised.

Finally, let us note how difficult it is to know whether someone is to be trusted. To be trustworthy is perhaps simply to be a person who will regard a promise as giving rise to a (significant) reason for action, a person who can be trusted not to go and make a fool of someone. This is rarely something of which one can be (rationally) certain.

How does this help? Why should the fact that the promisee is at risk of doing the promisor an injustice transfer the responsibility for the promisee becoming a fool (if he believes) to the promisor? Might it be argued that responsibility for harm

presupposes fault of some kind? If so, then the fact that the promisee must (on pain of risking doing the promisor an injustice) trust the promisor is, perhaps, sufficient to show that the promisee is not at fault if he believes the promisor, and hence he is not responsible for becoming a fool. But although this may show that the promisee is not responsible, would it be sufficient to show that the promisor is responsible? Why might it not be that no-one is responsible? (Of course there is a strong temptation to say that the promisor is responsible because he is at fault for not keeping the promise. But this is, I take it, to beg the question.) Perhaps it might be argued that at least one of the promisor and promisee must be responsible for the promisee becoming a fool. 'Broken promises do not just happen' we might say. If this is accepted, and if we regard the trusting promisee as having a good defense against an imputation of fault - namely, that he has to believe that his promisor will act as promised in order to avoid the risk of doing an injustice - then perhaps all the responsibility must, in normal circumstances at least, come to rest with the promisor.

This argument might be developed along the following lines. The promisee must treat the promisor as trustworthy if he is to avoid (the risk of) doing the promisor an injustice, and hence of acting wrongly. It is, therefore, in some sense necessary ('morally' or 'practically necessary') for the promisee to trust the promisor. The responsibility for the consequences of the promisor betraying this trust are laid on the shoulders of the promisor, on the basis of some principle that 'necessity

transmits responsibility'. If I cannot do other than I do, then I am not responsible when things go wrong. In the analogous (?) case of natural necessity, we do not hold responsible those who cannot act (or 'act') other than they do. If you throw me out of a window and I land on someone, killing them, then it is, of course, you who are responsible for the death of the passer-by. It is, presumably, naturally necessary that I fall. Responsibility for an event is transmitted back through the chain of events to someone who 'could have done otherwise'.

Such an account may be thought to raise as many questions as it answers. There will be those who will boggle at the idea of practical necessity, and one may wonder whether acting in accordance with reason is enough to transmit responsibility. There is also the problem of showing that the promisee, in trusting the promisor, has acted rightly - ie in accordance with reason - for the promisee, though he has reason to trust the promisor (ie to avoid the risk of doing an injustice), might also be thought to have reason not to trust the promisor. At least, this will be so if we regard allowing oneself to be made a fool of as a kind of self-abasement. (But is it?) If it were, then, although the promisee may not be responsible if he becomes a fool, he may be said to have reason to avoid becoming a fool if he can.

This is, however, as far as we can take this discussion here. If an account of the obligation to keep a promise is to be given, it

would seem that it must arise out of the fact that the promisee risks doing injustice if he does not trust his promisor, and becoming a fool if he does. This situation arises, not only in the case of promising, but also with regard to truth-telling and lying. If A tells B that he, A, believes that X, then B must believe that A believes that X if he, B, is to avoid the risk of treating A as dishonest when he is, in fact, honest. (The virtue of honesty is presumably to be accounted for in terms of reliability and the 'solidity' metaphor.) Thus, in order to avoid the risk of doing A an injustice, B must believe A. (That is, B must believe that A believes what he is saying. B need not, of course, believe that what A is saying is true.) But to believe that A is sincere is to risk believing a possible falsehood, namely, that A believes that X.

If we now consider the case where I indicate to you an intention to come to your party, but decline to promise to do so, then having declined to promise, you do me no injustice if you entertain doubts as to whether I will come. Since you are no longer required, on pain of doing me an injustice, to believe that I will come, if you do indeed come to hold this (ex hypothesis) false belief, you will not be able to hold me responsible unless I can be said to have deceived you. (If I have told you that I intend to come, when in fact I have no such intention, then I will have lied. In such a case the liar does make, or does attempt to make, a fool of the person lied to, as we have just seen.) Or perhaps we should say, since these matters are usually complex and inexact, that if I have only

indicated an intention, then I am less responsible for you having believed a falsehood (ie become a fool). I am less responsible because you have not been forced to choose between believing that I will come, and impugning my trustworthiness.

Finally, consider the case where A promises B that he will do X, but B does not believe that A will do X, and it is indeed the case that A would not do X. As I have said, if B does not believe that A will do X, then A will not debase B by not performing the action promised. Hence this reason for performing the promised action disappears. Are A and B open to criticism for such behaviour? A might be criticized for trying to make a fool of B. If there is reason not to make a fool of someone then there is reason not to attempt to do so. This criticism of A can be sustained only if it can be held that B might have believed that A would perform the promised action. If one can be sure one's promises will not be taken seriously, then there is no risk of debasing one's promisees. And, of course, a person who makes ridiculous promises is more likely to be regarded as foolish, ridiculous or amusing, than wicked.

Can B be criticized for having not believed that A would perform the promised action when A would not have performed the action? It is easy to think that B is vindicated, but perhaps this is not always so. Given the inherent uncertainty, by so believing, B has risked being unjust - and 'won'. We are naturally hesitant to criticize punters who win. But a winning gamble may very well

be open to criticism.

Let me now draw the discussion of promising to a conclusion. It will be recalled that I began our discussion of promising by suggesting that breaking a promise is not unjust. We do not call such an action unjust. Those who were willing to accept this point have now been given an account of why this should be so: promise-breaking leads to the degradation (of both parties), but it does not involve mistreatment (in the narrow sense of anyone being treated as less than they are). The reason, or reasons, for action which arise out of the very nature of a promise are not reasons of the type which (I have suggested) are associated with unjust actions. To break a promise is not, ipso facto, to treat some being as less than they are, but to make them less than they were, and would have been. 'Ordinary usage' respects this distinction, and eschews talk of promise-breaking being unjust. We have, then, seen that there is an underlying rationale for that eschewal.

Those readers who were unimpressed by the facts I have alleged regarding 'ordinary usage' have been provided with an argument recommending that they adopt a new practice: that of ceasing to call failing to keep a promise unjust. The argument for this is contained not only in the present chapter, but in this thesis as a whole: the argument just given assumes, of course, that justice is a fitness concept. Those who decline to accept this recommendation owe an argument as to why we should depart from ordinary language, as well as a plausible account of justice and

the reason for keeping a promise.

It will also be recalled that I hoped to persuade the reader that the account of reasons for action provided in Chapter Three would prove useful and illuminating. It is for the reader to judge whether this has been achieved.

6.4. Requests and Political Obligation

In this final section I should like to examine the question of whether a request, by its very nature, gives rise to a reason for action. If I ask you to do something - scratch my back, say - do you have a reason to act which you would not have had, had I not made the request, and, indeed, a reason which arises by the very nature of a request? This topic may, at first sight, appear to be a radical departure from what we have been discussing in the present chapter. But I hope to be able to show that this is not so.

Let me note at the outset that, as usual, I am concerned only with the question of whether a request (by its nature) gives rise to a reason. I am not concerned with the strength of the reason (if any) nor with the circumstances in which the reason might be thought to be a conclusive reason. Let us note also that a person may consider a request (that is, not ignore the request), but decide not to comply, judging that there were stronger reasons for not complying, than complying.

If we ask why we should act in accordance with a request, we are likely to think first of arguments which make reference to the wishes of the requestor. It is, of course, often the case that a requestor wishes the requestee to act in accordance with the request, and a purpose and effect of making a request may be to communicate the wishes of the requestor to the requestee. Often, perhaps, though not always. The requestee may already know (and

the requestor may know that the requestee already knows) the wishes of the requestor on the matter. And, of course, there are occasions when we would not assume that, merely because we are being requested to perform some action, the requestor wished us to perform the action. It is, for example, possible to request someone to perform an action, not because one wishes them to perform the requested action, but only because one wishes them to think that one wishes them to perform the action. (Given the appropriate circumstances, requesting a person to perform an action which one does not wish them to perform may be a reasonable way to lead them not to perform the action.) It may be that the mere fact that a person wishes an act to be performed gives rise to a reason for action, though this is, I think, less than obvious. But it is, at any rate, not unreasonable to suppose that we do have reason to act in accordance with the wishes of others. There is the standard utilitarian view that, given the interest people take in themselves, there is a good chance that they are better judges of their own interests than others are. And there are other lines of argument which might be developed: the avoidance of possible insult by paternalistic treatment, the avoidance of possible resentment at treatment thought callous, the avoidance of frustration if what is desired is not obtained, and so on.

My present inquiry is concerned with the question of whether any reason for action (in accordance with the request) arises out of the very nature of a request. I take it that we may ignore,

therefore, reasons which would have existed even if the request had not been made. A reason for action which arises as a result of a wish will exist if that wish exists, and whether or not there has been a request. Such reasons are not generated by the (very nature of a) request. For our purposes we may set such considerations aside.

We may also set aside those reasons which, although they would not have existed had there been no request, arise only contingently as a result of the request. Thus, for example, if we think people who make requests are usually pushy and demanding, and we want to rid ourselves of such people and consider the best way to do this will be to comply with their request, then we have a reason for action arising as a result of the request. Or, of course, we might think such people should be 'taught a lesson'. But clearly such reasons for action are only contingently related to requesting, and cannot be said to arise out of the very nature of a request.

I have said that requests are usually thought to indicate wishes. They also serve to indicate that 'interference' in the affairs of the requestor is being permitted. (We may tell someone that we have not asked for their help - thereby implying that they should 'mind their own business'.) But it will not, of course, do to say that the whole point of requesting lies in this removal of barriers which might otherwise be thought to exist. Such a suggestion overlooks the positive character of requesting; a request has to do with seeking, as the etymology of requests

suggests. I may tell you that your help would be welcome, without requesting your aid. And I may request you to stop torturing your cat - which can hardly be regarded as removing a barrier to your interfering in my affairs.

Let us now tackle our problem. Do we have a reason to act in accordance with a request - a reason which arises out of the very nature of requesting? How could there be such a reason? Having come upon a section on requesting in a chapter which has been largely concerned with promising, the reader will, no doubt, have anticipated that requesting is going to be compared with promising. And indeed it is.

Requesting and promising are both 'things we do with words'; 'I request', like 'I promise', is a performative utterance. To say 'I promise' is not to report that one is promising, and to say 'I request' is not to report that one is requesting. (8)

A promise is, as we have seen, closely related to the indication of an intention, though these two 'activities' are different, and we can indicate an intention without making a promise. A request is closely related to the indication of a wish, though again they are different, and we can indicate a wish without making a request. (I may say: "As a matter of fact I wish you would scratch my back - but I am not asking you to.") We often make

(8) Cf. SEARLE (1969), pp66-9.

promises by saying "I will..."; we often make requests by saying "I wish...". A promise made by a person who does not intend to keep it is said to be a 'lying promise'; such a promise may deceive the promisee as regards the intentions of the promisor. A request made by a person who does not wish the requestee to comply with the request might be said to be a 'lying request' (9); such a request may deceive the requestee as regards the wishes of the requestor.

Promising and requesting are both concerned with the future. This point manifests itself in the way in which we may make promises and requests by the use of locutions which may also be used to make statements and ask questions about the future. "I will do the shopping" may be a promise, or only a prediction; "Will you take your holiday in the autumn?" may be a request, or it may be (only) a question about the future of the person asked.

Compare who is able to promise and be promised, with who is able to make a request and be requested. I want to suggest that (peculiar circumstances apart, at least) all and only beings capable of making promises and being promised, are able to make requests and be requested. Earlier I suggested that a machine may have an intention indicated to it, but it can neither promise nor be promised. Similarly machines can neither be requested nor make requests - notwithstanding attempts to make them 'user-friendly' (sic) - though they may have wishes indicated to them,

(9) Ibid, p66.

and are able to indicate wants. (A car with a petrol indicator is able to indicate its lack or want of petrol.) Machines can give and receive information, ask and be asked questions. But the business of promising and requesting is beyond them. Beliefs about the capacities of animals are, perhaps, more controversial. But it seems plausible to suppose that, here again, requesting and promising go together; either one holds that an animal can do both, or neither, or that they are equally problematic. As I have suggested I am inclined to think that a necessary condition for being able to engage in promising and requesting is that the being be rational and possess free will. This is as one would expect if it were indeed the case that a promise and a request, by their very nature, give rise to a reason for action.

I have suggested that the utilitarian may have a problem with the distinction between promising and indicating an intention. (If we do not give ourselves an additional reason to act by making a promise, why should we draw a distinction between promising and indicating intentions, as, of course, we do?) Now I suggest the utilitarian is going to have similar problems with the distinction between making a request and indicating a wish. If we do not give others an additional reason for action by making a request, why should we draw a distinction between requesting and indicating wishes, as, of course, we do? But if we do give others an additional reason for action, what is it? It is very difficult to see how the utilitarian could concede that there is an additional reason here - and hence very difficult to see how he could make sense of the distinction.

It is interesting, I think, to note that the rationality of prayer to an omniscient God might be thought to depend upon there being an additional reason for action generated by a request, or in this case, a prayer. There is, of course, no need to indicate wishes to an omniscient being. Needless to say, it is not difficult to imagine some functionalist type explanation of why people pray to a being they consider to be omniscient. But we should do people the honour of trying (very hard) to understand their actions as rational, before we go in for merely trying to account for those actions. If we do not, we are likely to perpetrate some pretty gross injustices. (At least, they will be injustices if we regard rationality as conferring worthiness - as, of course, we do.)

To make a promise is, it is said, to place oneself under an obligation, to bind oneself, and to bestow upon the promisee a right to have the promised action performed. Is requesting, then, the action by which one may place someone else under an obligation, to bind others, and to bestow upon oneself the right that the requested action be performed? If not, why not? Of course, one may not like the idea of being liable to be placed under an obligation by anyone who takes a fancy to making a request. But likes and dislikes are beside the point. The reader may like to be assured that there can be good reasons not to fulfil one's obligations. There can be good reasons for not complying with a request, just as there can be good reasons for

not keeping promises. And, to repeat, I make no claims as to the relative importance of the various reasons for actions: I use the term 'obligation' here, not to indicate importance, but because, as in the case of a promise, a request (I will argue) gives rise to a reason for action through an act of will - in the case of a request, the will being that of the requestor.

Now in modern Western society, at least, it is not, I think, generally held that people can be put under an obligation simply by being requested. One writer, for the purposes of illustration, tells us:

As I drive up to London in my comfortable car, you may feel and tell me that (out of beneficence) I ought to stop and give a lift to the inoffensive-looking person standing hopefully, thumb suitably protruded, at the side of the road; and I might agree with that; but I would not, I think, agree that I have, or am under, an obligation to do so.

...I am not bound, as the driver of a private car, to offer lifts to everyone, or even to anyone, who may solicit that service... (10)

A less parochial view is offered by Lemmon:

... obligations ... are typically incurred by previous committing actions. Of course, again what actions are committal will vary from society to society. To us, the most familiar committing actions are promising or giving one's word generally ... less clearly delineated cases of obligations, at least in our society, [include] ... the obligation to give money to a beggar having been .1s1

(10) WARNOCK (1971), p94, emphasis original.

asked for it. This ... case illustrates a concept which has relatively rare application for us - that of being put under an obligation to someone by their conduct rather than one's own. In certain societies, I believe, a knock on the door of one's house by a stranger at once puts one under an obligation of a firm kind to provide hospitality and, if necessary, a bed for the night. (11)

But, of course, we must not simply trade our intuitions on this matter. What we require are arguments. If we may put ourselves under an obligation, 'simply by doing so', (given that there is such a practice as promising) why may we not put others under an obligation 'simply by doing so' (given that there is such a practice as requesting)? Of course, we cannot just assume that one cannot be put under an obligation by another 'simply by his doing so' without begging the question against the claim that requests provide reasons for actions. Whether one can give rise to an obligation by, say, begging, hitchhiking or whatever is precisely what is at issue. The belief that one can only bind oneself, though no doubt widely held in certain societies, is not obvious. It requires argument.

Let me offer an argument in favour of the view that a request gives rise to a reason for action (and, thereby, to an obligation) by its very nature. In the light of the striking parallels between requesting and promising we uncovered earlier, might it not be the case that the obligation to act in accordance with a request arises in precisely the same manner as our

(11) LEMMON (1962), p141.

obligation to keep a promise? Let us investigate.

I have argued that a promisor has a reason to keep a promise when to fail to do so would be to make a fool of the promisee. Perhaps we should consider, then, whether the requestee has a reason to act in accordance with the request because to fail to do so would be to make a fool of the requestor. If to fail to regard a request as providing a reason for action is to make a fool of someone, then I take it, we have, in consequence, a reason to act in accordance with requests. (At least, we took this for granted in the case of promising.) But is to ignore a request, that is, to fail to regard having been requested as a reason for action, to make a fool of the requestor? And if so how? It is not, of course, enough that the requestor merely becomes a fool, that is, the person making the request merely comes to believe something which is false. What is required is that the requestee is, in some way, responsible for the requestor becoming a fool if he, the requestee, ignores the request. But how can this be?

Let us begin by reminding ourselves of the argument for keeping a promise. I have argued that the reason that we have to keep a promise, and which is generated by the very nature of a promise, arises in the following way. Suppose that A promises B. If A fails to regard the existence of the promise as generating a reason to perform the act promised, then he makes a fool of B, if B believes that A will regard the existence of the promise as

generating a reason to perform the promised action. A makes a fool of B because B must believe that A will regard the promise as generating a reason for action if B is to avoid the risk of doing A an injustice - viz, treating him as if he were untrustworthy when he is trustworthy.

Suppose, now, we try to develop a similar argument in the case of a request. Suppose B requests A. (I reverse the order since, in the case of a request, we are anticipating that the obligation falls on the requestee.) The argument would then need to proceed as follows. If A fails to regard the existence of the request as generating a reason to perform the act requested, then he makes a fool of B, if B believes that A will regard the existence of the request as generating a reason to perform the requested action. Why? A makes a fool of B because B must believe that A will regard the existence of the request as generating a reason for action if B is to avoid the risk of doing A an injustice.

But, we must ask, what is the injustice which B risks doing if he does not believe that A will regard B's request as providing him (A) with a reason for action? The injustice is, I suggest, that of treating A as uncaring or indifferent when he is actually caring and concerned. Can we deny that to be caring, like to be trustworthy, is a virtue? (To be caring and concerned is, perhaps, to be loving, in the sense that 'love' is used when we are enjoined to love our fellow men.)

In the case of promising I suggested that to fail to regard a promise as generating a reason for action is to render oneself untrustworthy. It is, that is, to degrade oneself. The parallel, in the case of a request, is the degradation which the requestee brings upon himself by ignoring the request; to ignore a request is to render oneself uncaring, unconcerned, unloving.

The reader may be suspicious. Is there not something obviously different between a promise and a request? In the case of a promise the initiator, as it were, the promisor, comes to have the obligation. In the case of a request (if my argument is accepted) it is not the initiator (the requestor) who comes to have the obligation. How can this be irrelevant? The facts referred to are, of course, to be accepted. But it must also be said that it is for those who believe that this difference is, in some way, relevant to show how it is relevant.

The difference is relevant, I am happy to agree, to the question of whether one should go making promises and requests. One should not promise if one is unwilling to incur an obligation. And one should not request if one should not put the other person under an obligation. But this is to concede that requesting does create an obligation - and that is my point. To say that (in certain circumstance) we should not make requests is not at all to say that if the request is made there is no obligation. Notice that a person who thinks of making a request but then declines to do so on the grounds that they believe the request would be ignored does not thereby avoid doing an injustice if the

prospective requestee would have regarded the request as a reason for action. Prospective requestees have a duty to trust that their requests will be thought to give rise to reasons for action. (Notice the use of trust here.) If someone declines to make a request of us we do (at least sometimes) feel hurt - though, of course, the fact that a prospective requestor declines to request does not necessarily give expression to a belief that the prospective requestee is uncaring and indifferent. (This is parallel to the point that to decline to rely upon a promise is not necessarily to give expression to a belief that the promisor is unreliable. As I have said, one may have a fetish for self-sufficiency.)

We often do not suppose that a request does, by its very nature, give rise to a reason for action. If the argument I have sketched above is sound, and there is indeed a reason for action generated by a request, this omission calls for some explanation. Why is it easy to overlook the reason for action generated by a request?

As I have said, there are usually utilitarian type reasons for action arising from the wishes people have, and with which requests are usually associated. (There may be other non-utilitarian type reasons too.) In other words, it is often the case that there are reasons to do what is requested which do not arise as a result of the request. And there is another point here: when there are no such reasons (ie no reasons to do what

is requested, independent of the request), there will usually be reasons for not doing what is requested, and it may well be clear that the action requested should not be performed. Thus I might ask you to perform some action which (perhaps) unbeknown to me, is against my interests. One of the reasons for not doing as one is requested to do is, of course, that it is usually a bother. Now if there is no reason for action independent of the request, it seems likely that the requestor is simply putting the requestee under an obligation to go to (what would have been, had there been no request) unnecessary trouble. And this might be thought to suggest a lack of concern, by the requestor for the requestee. In such a case, the requestee might be forgiven for wondering why he should not repay the requestor in the same coin. (I skate over an enormous issue here.)

It is, then, difficult to spot reasons for action which arise out of (the very nature of) a request. They will not often exist 'on their own', and when they do, there may be (stronger?) countervailing reasons why one might be at least forgiven for ignoring the request. Thus reasons for action generated by requests tend to exist only amongst other reasons for the same action, and become questionable when those other reasons are absent. It is these features of the situation which, I suggest, makes the existence of the reason for action which arises out of the nature of a request easy to overlook. But the fact that a reason is, perhaps, difficult to isolate is not a reason to suppose that it does not exist.

It would appear that - again in parallel with the case of promising - at least as far as the present account is concerned, this reason for action is not generated by a 'request' which the requestor believes will be ignored, for such a requestor will not be made a fool of if the request is ignored. It appears, therefore, that a motorist has no obligation to offer a ride to a hitchhiker who believes that the motorist will not regard the 'suitably protruded' thumb as giving rise to a reason for action.

If the foregoing account is correct, it would seem to follow that to ignore a request is not, in itself, unjust, though it is, ceteris paribus, wrong. At least this is so if we accept the justice as fitness account. The requestee makes a fool of the requestor, he does not treat him as a fool. I take it that this accords with what we would be inclined to say. But, on the justice as fitness account, it is unjust to refuse to make a request to a caring sympathetic person on the grounds that it will simply be ignored. And I suggest that we should indeed regard such treatment as unjust.

The reader may be wondering whether this topic deserves the attention I have given to it. Does it really matter very much whether a request, by its very nature, gives rise to a reason for action? I am inclined to think that the question of whether there is anything which might be termed 'political obligation' may turn upon precisely this question. It might be possible to offer what might be termed the 'Request Theory of Political

This thesis is not about political obligation or the nature of law. So let me simply make some crude assumptions for the purposes of exposition. Suppose that the law were viewed as the command of the state, and political obligation as an obligation to comply with those commands, that is, to obey the law. If a citizen is to have a political obligation then he must, of course, have reason to obey the law. (There are no obligations if there are no reasons.) Now, of course, citizens have many reasons to obey the law. But, I take it, if we say that citizens have a political obligation, what we mean is that they have an obligation to obey the law even when the reasons for compliance which arise from the (contingent) consequences of compliance are absent. Thus the question of whether there is such a thing as political obligation seems to depend upon whether there is a non-contingent reason to obey the law. The obligation might be said to arise from the very nature of the law itself.

If we accept this view then we will regard a utilitarian attempt to derive political obligation as simply wrong-headed. It is to attempt to ground what must be necessary upon what is only contingent. By contrast, the social contract theorists might be said to have started with more than they have: if there were a contract there would, perhaps, be no problem of political

(12) For an excellent analysis and critique of other theories of political obligation see SIMMONS (1979).

obligation. But the problem is to show that there is an obligation even if there is no contract.

It might be thought that the best way to begin to try to argue that there is such a thing as political obligation is to claim that the law (at least where there is political obligation) is to be regarded as a command issued with authority. But the problem with this approach lies in squaring it with the republican axiom that, 'in the beginning' no-one has authority over anyone else. It is difficult to avoid the suspicion that to attempt to derive political obligation within a system with such an axiom is to attempt to square the circle. Authority to command might give rise to political obligation, but authority to command is more than we may assume. Paradoxical as it might seem, then, the prospects for deriving political obligation might improve if we were to regard the law as a request. Those who balk at the claim that the state has a right to command, might be willing to concede that it may request. (We might be able to argue that everyone is allowed to make requests to everyone else.) It might be objected, I suppose, that laws do not look much like requests. This is, of course, true. Those who make them, those who enforce them, and those who obey and disobey them may very well not regard them as requests. But I am not endeavouring to defend the kinds of practice people engage in; I am concerned only with the manner in which members of a political community might be able to impose obligations upon each other, while at the same time recognizing each other as free and equal. The Request Theory of Political Obligation might suggest that the citizens of

a democratic state (whose laws could be regarded as the requests of more of its citizens than could the laws of a dictatorship) have more political obligation(s). If this be urged, I am delighted to live with such a result. I am inclined to the view that democratic practices do give rise to more 'political obligation' than do dictatorships and the like - and the present argument suggests reason for that view.

If we accept the Request Theory of Political Obligation, we might come to speak of the Hitchhiker State. Can the Hitchhiker State be justified in terms which even the libertarian anarchist must accept? I am inclined to think, as I have suggested, that a request, by its very nature, may give rise to a reason for action, and to an obligation. But as we have also seen, it seems not unreasonable to suppose that, at least on some occasions, requests should not be made. It might be interesting to examine the question of the circumstances in which requests should not be made with a view to determining what (some of) the laws that ought not to be passed might be - and, of course, for clues as to why they should not be passed. Anarchists, however, might take a leaf from the books of those shopkeepers who ask their customers not to ask for credit. They might get their (obligation creating?) request in first, and put up signs saying "Please do not pass laws as refusal to comply may cause offence".

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