

Can Moral Desert Qualify or Justify Human Rights?¹

Zofia Stemplowska (Worcester College, Oxford)

zofia.stemplowska@politics.ox.ac.uk

CSSJ Working Papers Series, SJ027
August 2014

Centre for the Study of Social Justice
Department of Politics and International Relations
University of Oxford
Manor Road, Oxford OX1 3UQ
United Kingdom
Tel: +44 1865 278703 Fax: +44 1865 278725
<http://social-justice.politics.ox.ac.uk>

¹ I am grateful for comments to Matthew Clayton, Ben Jackson, Matthew Liao and Andrea Sangiovanni as well as to the participants of the Warwick-Oxford joint seminar on human rights, May 2013.

1. Introduction

A person is morally deserving of some treatment when this is the morally fitting response to her desert basis. The thought here is that such a ‘fitting’ response is intrinsically valuable and it is impersonally valuable - i.e. it is valuable even if it does not benefit anyone.² Thus a world in which everyone is treated as they deserve would be in one respect better than a world in which the same people were all better off undeservedly. The idea of moral desert requires that only the features that can form the basis for moral appraisal qualify as desert bases. Typical candidates, all embraced by Nickel, include a person’s actions, attitudes and character. For example, we may think that a wrongdoer who commits a crime deserves to be imprisoned while an honest lawyer deserves to be rewarded for her work.³

Can personal moral desert, as Nickel argues, qualify the scope of (some) human rights and play a role in justifying (some) human rights? That is, can the treatment that a person deserves amount to the withdrawal of a human right or conferring of reward as a matter of human right? A right is *qualified* when there are restrictions based on personal features regarding who can hold it. As Nickel puts it, ‘[q]ualifications use personal characteristics to make a universal right available to only part of the human population’ (10). So if desert affects who is entitled to a given human right X, then this human right is qualified in a way that excludes some people from the domain of holders of X even if they are still in need of the protection that the right is meant to deliver.⁴ The worry with qualifying human rights is that it might stop them from being *human* rights -- i.e. universal and crucial rights that humans are entitled to simply in virtue of being human (or, to avoid speciecism, persons are entitled to simply in virtue of being persons).⁵ As Nickel puts it, desert based qualifications might conflict with or diminish ‘the universality and egalitarian character of human rights’ (1).

² More would need to be said to distinguish responses that are appropriate in terms of desert from those that are appropriate in terms of, say, fairness, but I hope an intuitive understanding of the former will suffice to highlight my disagreement with Nickel.

³ Nickel adds ‘harmful wrongs suffered’ (3) as a desert basis. Later in the text, he offers an example: ‘If Bernard takes Hilda’s savings into his fraudulent “investment fund”...Hilda deserves repayment’ (13). But clearly Hilda is entitled to repayment simply because the money was hers; she is entitled to it even if she does not deserve it because, say, she knew what Bernard was doing all along (even though she did not consent to it). This shows that desert is not necessary for Hilda’s right to repayment; I do not think it is sufficient either (see section 3). Nickel also adds ‘innocence’ as a desert basis, arguing that even in those who ‘lack the ability to generate desert bases through their actions’ (4) it is a ‘passive’ desert base. I do not see how being wronged, suffering or innocence can count as moral desert bases. Rather, I agree with David Miller that desert is ‘on the basis of an activity or performance’ that is ‘in the relevant sense’ the agent’s - i.e. she is responsible for it (David Miller, *Principles of Social Justice*, Harvard University Press, 1999, 133). Miller’s own focus is not merely on moral desert, which affects how he understands ‘performance’ but I side-step this debate here; my focus throughout, like Nickel’s, is on moral desert.

⁴ I am a supporter of the interest theory of rights and think of human rights as protecting the fundamental (basic, essential) interests that humans have; a protection that they qualify for simply in virtue of being human. But rights grant protections even on the will and status theories of rights and what I say here applies beyond the interest account.

⁵ In what follows I understand human rights as rights that persons enjoy in virtue of being persons (whatever account of personhood we may wish to adopt), i.e. they don’t need to be earned by them. I add that the rights be crucial since

Nickel acknowledges this worry about desert-based qualifications, but defends them nonetheless. He thinks that they arise when we move from ‘abstract ideas to particular rights’ (8) and observes that ‘[a] number of human rights in international treaties seem to have only qualified universality [on various grounds: need, consent, vulnerability, ability]’ (11). Therefore, he suggests, adding desert to the list of grounds for qualification does not make much difference: ‘we cannot say that putting desert-based qualifications on human rights would so undermine their universality as to make them farcical unless we are prepared to say that the qualifications that we already accept for many international, human rights on grounds other than desert also make those rights farcical’ (11).

Rights are *justified* with reference to desert when desert considerations ‘support’ (11) the granting of the right or its shape. Here I take ‘supporting’ to mean more than just that considerations of desert point in the same direction as some other considerations - e.g. fairness - that actually give rise to a right of a given shape; rather desert justifies the right when the considerations support the right by actually bearing on the presence and shape of the right. Again, as Nickel puts it, ‘Personal moral deserts often help determine whether people should receive wages and other rewards, whether or not people should be punished with fines or imprisonment, and whether people are appropriately esteemed or despised’ (8). He argues that deserts help determine that we should get these things as a matter of right.

But although, for Nickel, desert plays both the qualifying and justifying roles, he adds that it is, nonetheless, only a ‘middleweight’ consideration (15). That is, although desert provides a ‘significant justificatory support for some human rights’ (15), he adds that he is ‘...inclined to the view’ that considerations of desert ‘are simply not in the same league’ as norms such as the right to life ‘...they seem to play a large role in government and policy only when running in tandem with and imposing only mild limits on stronger norms such as security and welfare’ (15).

In what follows, I will challenge both of the suggestions advanced by Nickel regarding desert’s role in the geography of human rights - that it can qualify and that it can justify them. In sections 2 and 3 I will attempt to offer alternative explanations for the examples that Nickel uses to bolster his intuitive case. In the concluding section 4, I will outline a more general reason why we might be skeptical of desert bearing on any aspect of human rights.

Unless otherwise indicated, for simplicity, whenever I refer to rights I will mean human rights. Nickel’s focus in his paper is on human rights that, by and large, are both legal and moral. Here I consider

I think debates over crucial rights of persons matter the most. This move will become significant in the final section of the paper. For a criticism of the whole category of human rights see Victor Tadros’s essay in this volume.

only the relationship between desert and moral human rights, leaving aside the complication of when moral rights should be legalized.⁶

2. Can desert qualify human rights?

So which rights are meant to be qualified by desert? The main example offered by Nickel is that of political human rights such as the right to free movement, to freely associate, to stand for office. As he explains, ‘the place where we find the most desert-based restrictions to human rights is in rights to fundamental freedoms and to political participation’ (8). For example, according to Nickel, those engaging in criminal activity punishable by prison are not deserving of the right to free movement and the right to run for office. He explicitly states that the reason the right to run for office is withdrawn is not merely logistical: while it is hard to discharge the duties of one’s office while one is in prison it is not impossible to arrange prison in such a way as to make it easier (9).

I will look at the two key rights - to run for office and to free movement - in turn. But first, to make progress, let me distinguish between a direct and indirect role that desert could, in principle, play in qualifying human rights. A right is qualified by desert directly when withholding or granting of the right is the object of the deserved treatment. For example, desert’s role is direct when the reason we withhold the right to run for office from you is because your action makes you undeserving of it. By contrast, a right is qualified by desert indirectly when the desert basis gives rise to some treatment/property Y that in turn affects one’s holding of the right but it is Y that gives rise to changes in the person’s standing vis-à-vis the right. For example, desert’s role is indirect when the reason we withhold the right to run for office from you is because you are in prison, and it would therefore be impossible for you to perform the job properly, but we do not withhold the right because you do not deserve it (even if we put you in prison on account of what you deserve). I take it that only the direct role for desert should count as a genuinely desert based qualification on human rights.

The Right to Run for Office

Nickel’s example of losing the right to stand for political office appears to be a case of desert’s direct role in shaping human rights. But this appearance is misleading. After all, we do not say that a person cannot run for political office simply because she is undeserving (e.g. vicious people or people who acted viciously but non-criminally, can do so even though they clearly do not deserve the chance). Rather, a

⁶ I put aside Nickel’s discussion of how to respond to epistemic and practical worries that arise should desert turn out to play the roles Nickel identifies for it. That said, I am of the view that should desert really matter in the way Nickel suggests, then the difficulties in ascertaining and administering desert should lead us far less readily than he suggests to abandon it. That is, if desert really matters then the fact that, say, it’s hard to know who deserves what, does not make it a neutral position to not pay any attention to it.

person cannot run for office because she has a criminal conviction. Even a person who clearly deserves the chance to run for office might justifiably lose the right to do so if she had a criminal conviction. Think here, for example, of a person who commits a victimless crime in order to bring about an unambiguously good outcome. For example, a woman might engage in illegal prostitution to stop her underage sister from needing to do so. We may think, in such a case, that although she still deserves the chance to run for office, she is not entitled to it because only those who observe the law are.

Of course, this would only show that being deserving of the right to run for office is neither sufficient nor necessary to have the right; it does not show that being *undeserving* might not bear on losing the right. But here again we do not need to appeal to considerations of desert to account for the judgment that criminals lose the right to run for office. For example, criminals may be thought to lack the necessary competences for serving others in accordance with the rule of law: after all, they failed to uphold it.⁷ Or we may think that although some criminals do not lack such competences, it is too hard to tell which of them do and which do not. Notice that this would be a future oriented judgment about likely competences of the office holders and so it would not be a desert judgment.⁸ Given the existence of such alternative explanations for our intuitions about the right, Nickel does not say enough to show that the qualification on the human right to run for office is desert based.

The above discussion presupposes that some qualifications on the right to run for office are acceptable, even if I disagree with Nickel regarding its grounds. This brings us back to the more general question of whether any qualifications on human rights are acceptable or whether they amount to an unacceptable attack on the universalism of human rights.

One possible way of explaining why some qualifications are acceptable in the case of criminal conduct is to appeal to the fact that criminal conduct is avoidable. The right to run for office then is only lost if you perform an avoidable action. This means that the loss of the right is a matter of voluntary (even if not deliberate) choice. After all, we do not think that people lack the right to run for office if they have first to fill in a simple form indicating intent, especially if help is available with the form filling. Those who do not submit the form, would forfeit the right to run, but it would be inaccurate to describe the right as qualified in a way that genuinely excluded them from its scope.

This answer might be too quick. As a matter of horrible fact, not everyone is reasonably able to avoid criminal conduct. As *Oliver Twist* and the Australian movie *Animal Kingdom* illustrate, sometimes there may be no clear way out. Similarly, in a society with high illiteracy rates or without a common language, the requirement to fill in a form in the single official language of the state in order to be able to

⁷ Of course, so do the very selfish or the very stupid, but the criteria for determining who falls into these latter categories may be too controversial or too hard to apply.

⁸ Miller, *Principles of Social Justice*.

run for office may be rightly seen as a qualification on the human right to run for office. Suppose, then, that we accept that the qualification is, in some cases, genuinely exclusionary. Qualifying the right to run for office may still, as Nickel suggest, be justified given some instances of criminal conduct. Unlike Nickel, however, I think that what justifies it are not backward-looking desert considerations. Rather, in the specific case of the right to run for office, we need to balance the interest to be able to run for office that normally gives rise to the right with the interest to live in a society governed by the rule of law dedicated to protecting everyone's essential interests. If so, then what justifies the qualification are forward-looking reasons relating to the balancing of the above mentioned interests. That is, once everyone's interests are taken into account we may be justified in qualifying the right to run for office.

Ultimately, there are alternative explanations of the qualification of the right to run for office. I hope to have shown that desert is not necessary to qualify the right. I did not establish that it is also insufficient but I think that the idea of qualifications grounded in forward-looking reasons that balance everyone's interests fits better with the idea of universal human rights than the idea that human rights are qualified by backward-looking desert considerations.

The Right to Free Movement

Let me then turn to another of Nickel's examples of what he believes is a desert-qualified human right. He argues that desert qualifies the right to free movement/the right not to be imprisoned (in what follows, I won't distinguish between these two formulations of the right, even though there are contexts in which such a distinction would matter). Is this right qualified due to desert?

Again, Nickel does not say enough to explain why we should think that it is desert in particular that qualifies the right. There are reasons, however, to be skeptical. First, we know that desert is not necessary to qualify the right to free movement since some people with severe mental disabilities lose it without deserving to. Second, it is not clear that considerations of desert are sufficient to do so. After all, even in cases where considerations of desert do point towards confinement, the right might be lost for non-desert reasons – e.g. due to forward-looking reasons (protection) or even due to backward-looking reasons that are not, however, reasons of desert: e.g. imprisonment might be a form of showing respect for the rights of those who had been victimized. Thus we may think that imprisonment is justified provided that people have had a good enough (even if imperfect) opportunity to avoid it and provided that it is needed to protect others from serious harms or costs.⁹ Consider an analogy. Suppose I have a right to be fed when I lack the resources to purchase food. We may accept this but still believe that such a right does not include the right to be fed when I deliberately and repeatedly burn the resources I am offered. In

⁹ T.M. Scanlon, *What We Owe to Each Other*, Harvard University Press, 1998, chapter 6.

this case, I do not deserve the money to buy food and yet it is not because of considerations of desert but due to considerations of avoidability plus fairness, given scarce resources, that lead us to curtail the right, not my desert.¹⁰ Suppose scarcity was absent and so the issue of fair distribution did not arise. If so, desert alone should not lead us to curtail the right. Similarly, we may think that the right to free movement is curtailed due to considerations of avoidability and fairness (towards the victims) rather than desert, even though the imprisonment also happens to be deserved.¹¹ Moreover, the mere fact that imprisonment tracks a blameworthy *action* (criminal wrongdoing), which is, in principle, a candidate desert base, does not mean that it is the action understood as a desert-base that qualifies the right against imprisonment. It may instead be the fact that the action constitutes wasteful or unfair conduct that makes a given response appropriate. If you burn your share of resources, you may not be entitled to compensation not because you do not deserve it (though you do not) but because we only need to provide you with one (or two or three) chances to fare well.¹²

The more general problem with Nickel's use of the right against imprisonment example is that it relies, without support, on a rather controversial theory of punishment. The theory, as far as it can be reconstructed from his article, resembles simple desert retributivism, the view that punishment (or, in this case, confinement) is justified when and because it is deserved. But, as McDermott, Tadros and others have shown, it is implausible to believe that we can imprison people - that people lose the right not to be imprisoned - simply because they deserve to be in prison.¹³ To name just two problems in passing, as Tadros has argued, if desert had such normative power, it would be hard to see why people could not accumulate positive desert that would protect them from imprisonment. Moreover, it would be hard to avoid the following problem: if I know you are about to be miserable (or falsely imprisoned), I have a reason to encourage you to commit a crime so that the suffering is more fitting.¹⁴ But it's unclear that we can make sense of such a reason.

Desert-based Qualifications

Finally, let me return to the more general worries about desert-based qualifications on human rights (I will revisit this problem once more in the final section). Specifically, consider one of Nickel's defences of

¹⁰Zofia Stemplowska, 'Responsibility and Respect', in Carl Knight and Zofia Stemplowska (eds.), *Responsibility and Distributive Justice*, Oxford University Press, 2011.

¹¹ Nickel acknowledges that we may think that 'these qualifications to fundamental freedoms are based not on desert but on what is necessary to protect people's security against crime' (9).

¹² The difference between desert and responsibility might also explain why in the example of an organ shortage used by Nickel (2), we would use prior conduct as a tie breaker regarding who should get the transplant. It need not be desert that matters.

¹³ Daniel McDermott, 'Desert, Rights and Justice', unpublished paper - henceforth page numbers in brackets refer to the pagination of the paper; Victor Tadros, *The Ends of Harm*, Oxford University Press, 2011.

¹⁴ Tadros, *The Ends of Harm*, 70-71.

the appropriateness of qualifying human rights on grounds of desert with reference to the claim that we already qualify human rights anyway. That is, Nickel sees desert-based qualifications as simply extending the list of other qualifications he identifies, namely those grounded in need, consent, vulnerability or ability. But all these qualifications are not equally problematic from the viewpoint of the universality of human rights. Consider the qualifications due to need and vulnerability first. They do not have the effect of excluding anyone from the protection that the right is meant to afford. Suppose that the human right to be fed when starving is qualified in the sense that it applies only to those who are starving and so in desperate need of food. Still, anyone who is starving, no matter who they are or what they did, is entitled to be fed. So if we think of human rights as offering protection to people, anyone in need of the protection continues to get it (or, rather, continues to be the holder of the right to get it).

Similarly, it is not clear that consent-based qualifications exclude anyone in an unacceptable way from the right since, here again, the protection is not simply withdrawn. Therefore, the person who fasts rather than starves or the person who alienates her human rights may still be seen as someone who had been given the exact same rights as everyone else and none have been withdrawn against her will.

What of ability-based qualifications, that is the withholding of a right from those who lack certain abilities? Such qualifications do seem genuinely exclusionary, like the desert-based ones, and perhaps even more so since ability is more readily unavailable to some than appropriate desert bases, due to no choice of their own. But then the list of ability-qualified human rights seems rather short. We might think that even the most mentally disabled people are entitled to marry or have jobs just as long as they can formulate a coherent desire to do so. Where we do qualify their rights, we do it in order to balance their interests (indeed, sometimes in a paternalistic way to protect them) and the interests of others. Thus ability-based qualifications may in fact allow us to balance better all the essential interests at stake. The same rationale cannot be offered for desert-based qualifications since their point is to give people what they deserve rather than what best balances the interests of those involved. All in all, therefore, we could accept non-desert grounds for qualifying human rights without thereby being committed to welcoming desert-based qualifications.

3. Can desert justify human rights?

The second role Nickel identifies for desert is that of justifying human rights.¹⁵ In what follows I will assume that desert justifies a right when it either gives rise to it (the right to be paid for work) or gives it a specific shape (the right to be paid X for work X). Since, depending on how we individuate rights, the

¹⁵ Here his examples include the right of the innocent not to be punished. I do not see why we need to, or can, appeal to desert to assert this right so I put this aside. For an interesting discussion of innocence and desert see Tadros, *The Ends of Harm*, chapter 14.

second description can collapse into the first, in what follows I will refer to giving rise and shaping rights interchangeably.

Nickel offers a range of examples to support his claim, of which perhaps the most prominent is that of the right to be rewarded for one's contribution. I will argue that alternative desert unrelated reasons might account for the examples used by Nickel and that, since he does not explore them, we are left without a persuasive reason to believe that desert really plays the role Nickel suggests.

Consider then the following scenario. '...[S]uppose that a homeowner, Kevin, engages a day labourer, Leonidas, for a week of work in Kevin's rock garden. Leonidas works hard and well for the entire week and then asks for his wages. Kevin, knowing that Leonidas is undocumented and therefore unlikely to seek legal remedies, falsely says that his work was inadequate and pays him for only one day' (15).¹⁶

We can all agree that, given certain plausible background assumptions, Leonidas has been treated unjustly and his right to a just reward has been violated. The difficulty with the example, however, is that it cannot establish the importance of desert to this conclusion since the (explicit or implicit) promise of payment for the full week given to Leonidas by Kevin as he engages him is itself sufficient to generate the right to be paid for the full week rather than just one day. Since this example cannot establish that desert is operative in what does the work here, consider an alternative scenario. Suppose that Kevin mentions to Leonidas that he would like his rock garden resculpted but does not give an even implicit promise of paying for such work. Leonidas, nonetheless, works for a week to improve the garden, delivering beautiful results that please Kevin who concludes that Leonidas is certainly deserving of reward. Still, without a contract or an even implicit promise of employment, Leonidas' desert is insufficient to generate a right to be paid.¹⁷

It might be objected that we should not be too quick to generalize from this case to the conclusion that desert cannot justify the right to fitting reward for work: even if desert alone cannot generate the right to be paid, it could still give rise to the right to be paid the appropriate amount once the right to be paid arises in the first place on some other grounds. Thus, the argument would go, those employed through contract or promise cannot, on pain of rights violation, be paid exploitative wages or indeed wages that

¹⁶ Nickel offers one other case: '...[I]magine that Zelda agrees to mow Elmer's lawn for a fee. If Zelda shows up and mows the lawn we can say that she deserves payment for this work' (4).

¹⁷ Daniel Butt, in the context of a different debate, has come up with a more complicated case, which adapted for my purposes, might go as follows: suppose you had engaged someone else to sculpt your rock garden while your neighbor engaged Leonidas. However, following a mix up for which no one bears any responsibility, Leonidas did work at your garden, while the person you engaged worked at your neighbour's garden. I agree that in such a case, you may be required to pay Leonidas despite not even implicitly promising to do so. However, this is because of worries we may have about free-riding and advantage taking rather than because of Leonidas' desert. Cf. Daniel Butt, "A doctrine quite new and altogether untenable": defending the beneficiary pays principle", *Journal of Applied Philosophy*, forthcoming.

are not fitting with their desert. As Nickel explains, '[o]ne way to find areas where desert is at work is to look for areas where proportionality judgments are being made between something about a person and some treatment or state of affairs' (6).¹⁸

However, even the suggestion that desert generates a right to a proportionate wage seems implausible in light of other considerations that must be accommodated. It would, of course, be wrong of me, barring special circumstances, to employ you on wages that would be widely - or even narrowly - out of proportion with your stellar desert but, assuming these are the terms (that were consented to under fair conditions), your desert does not create an entitlement to a higher wage. Or, to adapt an example from Daniel McDermott, if suddenly everyone in a given factory becomes deserving of higher rewards - they work extremely hard while also, in their spare time, saving the factory from calamities not of their own making - it still does not follow that they thereby become entitled to them.¹⁹ The factory owner may have or can make other commitments for his/her resources, including serving her own interests, and changes in people's desert levels should not be allowed to wreak havoc with this.

There is a further problem with Nickel's specific linking of contribution (as a desert basis) to reward (as the deserved treatment) owed as a matter of right. First, it is not clear that 'contribution' as such, rather than effort or intelligent input in particular, can be a proper desert basis. What if I mowed the lawn while sleep-walking? I would have made a contribution, but I would not be morally deserving of reward. Similarly, what if my contribution was a fluke? For example, suppose you and I signed up to go looking for a missing cat. You dutifully check the back gardens, while I sneak off to a café and, to everyone's surprise, find the cat under the table.²⁰ Because my contribution again bypasses my moral agency (I did not even try to contribute), it does not seem like a good candidate for a moral desert basis.

However, even if Nickel were to respond by linking reward to effort, it would still be unclear that it is desert that drives our intuitions about the appropriateness of the rightful reward. An alternative explanation might be that of agent responsibility (or choice) where the reward is due to the person who is agent responsible for the outcome - i.e. she is the author of the action that foreseeably leads to the outcome. On this view, it is agent responsibility rather than desert that makes the reward appropriate as a matter of right. To see that agent responsibility is operative this way consider the following. Suppose that you work hard to finish a project because you reasonably believe that a completed project will lead to the destruction of the company (for example, you heard the arch enemy of the company promised to set fire to it on completion of the project). Because you completed the project, you are due the reward for the job

¹⁸ Though he admits that such a discovered statement of proportionality 'could also fail to be a desert statement' involving instead 'some other relation' (6).

¹⁹ McDermott, 'Desert, Rights and Justice'.

²⁰ This example is adapted from David Miller's discussion of market socialism, David Miller, 'G.A. Cohen and Our Unfinished Debate', *Politics Philosophy and Economics*, forthcoming.

even though it is unclear that you are also deserving of it (except, perhaps, in some narrow sense). It is also agent responsibility that in my view accounts for another of Nickel's example. He claims that '[b]eing at fault for an accident [and thus undeserving] can make it permissible for the faulty party to be required to pay the costs of the accident' (12). But more needs to be said to establish that it is desert and not responsibility that does the work. If I crash your car to avoid hitting a dog, I still owe you compensation, since I am responsible for the crash, but it is not clear that I did anything morally wrong and that desert has anything to do with my duty to compensate.

So far I have only suggested that alternative explanations might account for our intuitions in Nickel's examples. In the following, final section, I will outline a more general reason why we should be skeptical of desert's ability to justify human rights.

4. Desert and human rights

We can distinguish between the realm of rights and the realm of the good and, following McDermott, assign desert to the latter (15 and *passim*).²¹ Claims about desert can be understood as claims about what it is good for people to have. Claims about rights are about what we must give them. I will not be able to establish here in the remainder of this paper that this picture is correct but I hope to offer some reasons for finding it attractive.

Notice that this picture allows us to make sense of our reactions in the reward cases above, in which the deserving do not get the reward they deserve. We can consistently think that the lawn, rock garden and factory owners, barring countervailing considerations, ought to pay their workers what they deserve - in the sense that it would be good if they did and bad if they did not - but still believe that the workers do not have the human right that they be so paid.

Two other examples, adapted from Feinberg and McDermott, illustrate this bifurcation of rights and desert. Imagine that a father of two sons - one, a virtuous do-gooder, Good, and one, a vicious evil-doer, Bad - leaves his estate, in his will, to Bad. Suppose he does it while knowing that Good is good and Bad is bad. Barring other considerations, he certainly ought not to have done it. But it was his right to do it and Bad now has the right to the estate: Bad must get it. Had the father left the estate to Good, Good would have been entitled to it and it would also make the outcome better, since it would be deserved reward. But even then, clearly, desert would not have been the reason why Good must get the farm. It would not be the reason, even if the reason the father left the farm to Good was because Good was deserving. Similarly, in Feinberg's case of running for office, entitlement and desert can easily come

²¹ Joel Feinberg distinguishes between desert and rights as being part of a different 'ethical vocabulary' (Feinberg, 'Justice and Personal Desert' in his *Doing and Deserving*, Princeton University Press, 1970, p. 86; quoted in McDermott, 'Desert, Rights and Justice', 2).

apart. A candidate running the honest campaign deserves to win but the candidate who actually wins the vote, even if - short of criminal activity - he lied and manipulated, is the one who has the right to the office.

Why should we think of rights and desert as part of two different normative registers? For McDermott, we should think of desert as a consideration of the good rather than the right because of 'the liberal commitment to the moral equality of persons' (23). Rights capture this moral equality and for this reason should not be moulded to fit round desert considerations. Desert considerations force us to group people into deserving and undeserving, good and bad, and work at cross purposes with our commitment to moral equality.

Notice that even if we resist McDermott's conclusion that *all* rights should reflect our liberal commitment to the moral equality of persons, surely we should accept that this, at least, is the role of human rights.²² After all, there are two features in standard accounts of human rights. First, human rights are rights we all have in virtue of being human or in virtue of being persons (of course, this feature cannot be assumed since this is what is at stake in the debate over the role of desert). Second, they are rights that protect what is essential for those who qualify to be their recipients. Enjoying protection from lethal threats, avoiding malnutrition, having access to basic education, being paid the living wage, having a job, being able to rest, etc. are all essential interests for persons (and must be protected or even provided for subject to satisfying other essential interests). The more essential the interest, the more important it is that this interest is met equally for all (i.e. the more essential the interest at stake, the less acceptable it is if only some have it met, at least when such an uneven distribution is morally avoidable). This explains why we should resist desert based qualifications on human rights.

It may seem that we should also, therefore, reject ability-based qualifications. However, as I argued above, ability based qualifications may in fact allow us to meet better our other essential interests and, for this reason, I am prepared to accept the ability-based qualification on some political rights (and perhaps other human rights). The same rationale cannot be offered for desert-based qualifications. For example, the interest that we be given our just deserts in remuneration does not seem half as important as the interests that normally ground human rights and so we may be skeptical that human rights would be needed to protect it. Nickel may be thought to acknowledge this himself when he calls desert a middleweight consideration. In my view, this rules out desert as a good ground for justifying human rights.

²² This is compatible with the picture of human rights according to which human rights differ (implausibly) between different political communities; in such a case, their role is to assert the moral equality of those who belong to the same political community.

I conclude by briefly considering a challenge that arises because we are all familiar with entitlements that are deliberately designed to track desert. For example, medals and honours are to be given to the deserving and, given this, the deserving may have, for example, the right that the undeserving do not receive them. In response notice, first, that it is not clear that we should set up such entitlements in the first place. Would it be wrong to scrap honours? Second, even if we should set up such schemes, it is not the case that we must set them up. If the courageous in battle are never rewarded with medals, can they object that their rights have been violated? Finally, even if it were the case that some rewards for the deserving, or punishment for the undeserving, must be put in place, it is still unclear that we should see such requirements as a matter of human (in the sense of basic) rights.²³

I think that the intuitiveness of the examples offered by Nickel to support his case can be explained without invoking desert as a consideration that can qualify and justify human rights. We also have a more general reason to resist Nickel's suggestion that desert can do either: if human rights are to protect the essential interests we have as persons then they should protect them just as long as we remain persons with such interests. Allowing desert to qualify or justify human rights would weaken human rights and, given that alternative considerations can account for our intuitions about, for example, the rights of prisoners, it would not deliver anything essential to make sense of our moral landscape.

²³ McDermott, 'Desert, Rights and Justice' 49, fn 12. Cf. Samuel Scheffler, 'Justice and Desert in Liberal Theory' in his *Boundaries and Allegiances*, Oxford University Press, 2001 and 'Distributive Justice and Economic Desert' in Serena Olsaretti (ed.), *Desert and Justice*, Oxford University Press, 2003.