

# *Desert: Reconsideration of Some Received Wisdom*

FRED FELDMAN

According to an ancient and plausible view, the *justice* of an arrangement is the extent to which receipt of goods and evils corresponds to desert in that arrangement. John Hospers apparently had precisely this in mind when he said that “justice is getting what one deserves. What could be simpler?” (1961, p. 433). Mill said that “... it is universally considered just that each person should obtain that (whether good or evil) which he *deserves* ...” (1957, p. 55).<sup>1</sup> Others have rejected this view as too simplistic (Feinberg 1963, p. 90, Sher 1987, p. 49, Slote 1973, p. 333, etc.) but have nevertheless maintained that there is an important conceptual link between justice and desert. Since justice is important, so is desert.

## *1. Desert requires a base*

It is natural to suppose that whenever a person deserves something, there is some answer to the question “Why does he deserve this?”. For example, suppose a certain man deserves ten years in the penitentiary. There must be some explanation for this fact. Perhaps it is that he has been found guilty of a serious crime, and the most appropriate or fitting penalty would be ten years. Suppose another person deserves a reward. Perhaps she deserves it because she risked her life to save a drowning child. Whether we speak of desert in connection with prizes or grades, rewards or punishments, praise or blame, reparation or liability, it seems necessary that if a person deserves something, there is some “desert base”<sup>2</sup>: some fact to which we can appeal in order to explain this person’s desert of this good or evil.

In his recent book on desert, Wojciech Sadurski affirms two general theses about desert and desert bases. Neither thesis is new. Each has been affirmed countless times by writers on desert. I think it is fair to say that they are part of the received wisdom about desert. Yet it also seems to me that each of these theses is false.

<sup>1</sup> Nicholas Rescher (1966, p.83) says a similar thing, as does Sidgwick (1962, p. 280).

<sup>2</sup> I believe that Feinberg (1963) introduced the term.

In this paper I first state the two doctrines about desert and say a few words about their popularity. I then explain why I think that each is false. I conclude with some speculations about the popularity of these views. I seek an explanation for the fact that they have been so widely believed.

## 2. A thesis about desert and responsibility

The first thesis links the concept of desert to the concept of responsibility. Sadurski states the thesis in this passage:

When we are pronouncing judgments of desert we are inevitably making judgments about persons whom we hold responsible for their actions. It makes no sense to attribute desert, positive or negative, to persons for actions or facts over which they have no control. In particular, as people have no control over their natural assets ... it would be unjust to consider those assets *per se* as relevant to any considerations of desert. (Sadurski 1985, p. 117)

Sadurski's point seems to be that a person cannot deserve anything in virtue of an action or fact unless she is responsible for that action or fact.

James Rachels affirms the same thesis. He puts it this way:

The concept of desert serves to signify the ways of treating people that are appropriate responses to them, *given that* they are responsible for those actions or states of affairs. That is the role played by desert in our moral vocabulary. (Rachels 1978, p. 157)

Similar remarks could be culled from the writings of many other philosophers<sup>3</sup>. It is part of the received wisdom about desert. Roughly, the idea is this:

DR: If *S* deserves *x* in virtue of the fact that *S* did or suffered *y*, then *S* is responsible for doing or suffering *y*.

There are very many positive instances of DR. Consider a typical case in which someone deserves punishment. Suppose a thug attacks a figure-skater. As a result of the attack, the figure-skater is unable to compete in the national championships. It would be quite natural for us to think that the thug deserves punishment in virtue of the fact that he attacked the figure-skater. But we would all retract this claim about desert if we

<sup>3</sup> In a widely cited passage Rawls (1971, p. 104) discusses the notion that people with "greater natural endowments" deserve the superior character that those assets make possible. Rawls says that the view is "surely incorrect". He explains his position by pointing out that such a person's "... character depends in large part upon fortunate family and social circumstances for which he can claim no credit". Rawls's view seems to be that no one deserves his character because no one is responsible for ("can claim credit for") something upon which his character depends. This is at least quite similar to DR.

learned that the thug bore no responsibility for the attack. Suppose, for example, that he had been hypnotized at the time, or that he had been coerced, or that he suffered from some mental impairment that made it impossible for him to control his actions. In any of these cases, the thug would not have been responsible for his action. If we thought he was not responsible for the attack, we would no longer think he deserved punishment for having done it. (Of course, under some of these imagined circumstances, we might continue to think it would be a good idea to lock him up. However, in such cases we would want him locked up for *treatment* or to put him out of circulation, not because he deserves *punishment*.)

The example involving the figure-skater concerns desert, according to the law, of punishment. But not all cases focus narrowly on desert of punishment. Consider desert of grades. Suppose a student submits an excellent paper. You think she deserves an A, and you think she deserves it in virtue of the fact that she wrote a paper that contains clear, accurate, and well-reasoned discussion of interesting arguments. Now you learn that the student did not write the paper; she paid a friend to write it for her. The student is not responsible for the content of the paper. Accordingly, you change your mind about her deserts. You no longer think she deserves an A. This is connected with the fact that you no longer think she is responsible for the clear and interesting arguments contained in the paper.<sup>4</sup> According to DR, it is always this way: if a person deserves something in virtue of some fact, then that person must be responsible for that fact.

### *3. A thesis about desert and time*

Sadurski states a second thesis about desert. According to this thesis, desert base and desert necessarily stand in a certain temporal relation. Specifically, desert base must always precede desert. Sadurski puts it this way: "... desert considerations are always past oriented. When talking about desert, we are evaluating certain actions which have already happened. That is why it is a confusion to base desert upon utilitarian grounds ..." (1985, p. 117).

Again, the doctrine is part of the received wisdom about desert. Many philosophers have affirmed the same view. Rachels (1978, p. 154)

<sup>4</sup> When you discover that the paper was written by a hired hand, you may begin to think that your student deserves something else—expulsion. And you may think she deserves this in virtue of the fact that she paid someone else to write her paper. If you think this, you will probably also think that she is responsible for paying someone to write her paper.

expresses an extreme version of the principle when he says: "... the basis of all desert is a person's own *past* actions". According to this version of the thesis, desert bases are always actions, and they always precede the fact of desert. Joel Feinberg defends a somewhat weaker version: "If a person is deserving of some sort of treatment he must, necessarily, be so *in virtue of* some characteristic or *prior* activity" (1963, p. 72). Apparently, Feinberg would say that where a desert base involves activity, that activity must precede the fact of desert. John Kleinig endorses a similar view.<sup>5</sup> He says "Desert can be ascribed to something or someone only on the basis of characteristics possessed or things done by that thing or person. That is, desert is never simply forward-looking" (Kleinig 1971, p. 73).

In his article on "Rectificatory Justice" John Cottingham says this:

The essentially backward-looking nature of justice-as-rectification seems hard to deny. Verbs like "to rectify" and "to correct" share with many other verbs (including "to punish", "to blame", "to thank", "to regret", "to renounce"), what we might call an inherently "retrospective" logic: we cannot understand such verbs without grasping that their use involves an intrinsic and automatic reference back to some past event or state of affairs. (Cottingham 1992, p. 662)

Cottingham seems to be saying that an injustice can be rectified only *after the fact*. We cannot rectify an injustice prior to its occurrence. He apparently means to claim that this is an essential feature of the "logic" of justice as rectification.<sup>6</sup> If this is in fact what Cottingham means to say, then his view is quite similar to Sadurski's view about desert and time. Where compensatory justice is involved, Cottingham presumably would say that

<sup>5</sup> Brian Barry seems to commit himself to the same doctrine. He says, "Desert looks to the past—or at most to the present—whereas incentive and deterrence are forward looking notions..." (Barry 1965, p. 111). David Miller apparently means to defend precisely the same principle: "Desert judgements are justified on the basis of *past* and *present* facts about individuals, never on the basis of states of affairs to be created in the future. Desert is a 'backward-looking' concept ..." (Miller 1976, p. 93).

<sup>6</sup> Cottingham seems to be asserting that I cannot thank or blame you for doing something unless you have already done it. He seems also to be saying that I cannot regret doing something unless I have already done it. These claims seem to me to be clearly false. If you assure me that you will take care of my children after I am gone, I can thank you for this kindness that you will perform. If, as a result of your failure to drain the pipes, there is going to be damage to the plumbing later tonight when the temperature drops, I can blame you for the damage that is going to occur. If I know that I will not be able to attend your party next week, I can already regret that I will not be able to attend. Indeed, if I am courteous, I will send you a note saying that I regret that I will not be able to attend. In all these cases, the thing for which I thank or blame you, or the thing that I regret, is still the future at the time of thanks, blame or regret. If Cottingham's remarks about "inherently retrospective logic" mean what I have taken them to mean, then they are false.

a person is deserving of compensation only if he or she has already suffered some loss.

The second bit of received wisdom is this:

DT: If at  $t$   $S$  deserves  $x$  in virtue of the fact that  $S$  did or suffered something at  $t'$ , then  $t'$  cannot be later than  $t$ .

Many relatively clear-cut cases of desert conform to DT. Consider, for example, cases in which someone deserves some *prize*. In his discussion of prizes, Feinberg says that the prize "... is deserved by the contestant who has demonstrably satisfied the condition of victory..." (1963, p. 77). This may seem right. Certainly it would seem strange to say that one of the contestants already deserves the prize *before* the contest, in virtue of the fact that he will *later* perform so well. In such cases, desert arises only after the desert base has taken place.

Desert of *rewards and punishments* seems similarly rooted in the past. In the typical case, a person deserves a reward in virtue of the fact that he has performed some meritorious service, such as saving a life, or preventing an injury. Similarly, when a person deserves punishment, we naturally think it is because he has done some wrong. In the legal context, most of us would be outraged by the suggestion that someone deserves punishment today for the crimes that he will commit tomorrow (see Feinberg 1963, pp. 80–5).

The desert associated with *compensation and reparation* seems firmly rooted in the past, too. Commentators have pointed out that it hardly makes sense to say that someone already deserves "reparations" for the injuries he will suffer later. How can we "repair" that which is not already broken? If the point of such activities is "to restore the moral equilibrium" then it is no wonder that the desert base must precede the desert. One cannot "restore" an equilibrium that has not yet been upset. Equally, there is a puzzle about the notion that a person might already deserve compensation for work that she will perform tomorrow. (Of course, it might be generous or helpful or nice to pay someone in advance; and in some cases a worker might deserve the money before the work. But in these cases the desert base would most naturally be taken to be need, or prior injury, or some past injustice. The mere fact that I will work tomorrow seems not to justify the claim that I already deserve my paycheck.)

In some cases we say that someone deserves good fortune simply because he has suffered so much bad fortune. Again, bad luck in the past provides a basis for saying that I deserve better luck in the future.

In all these cases, and in many more like them, the desert base either precedes or is simultaneous with the fact of desert. In none of these cases is the desert base entirely in the future. Thus, the examples are consistent with DT.

#### 4. The refutation of DR

In spite of the fact that it seems to be part of the received wisdom about desert, DR is clearly false. There are countless perfectly ordinary cases in which we deserve things in virtue of facts for which we bear no responsibility. A familiar sort of case involves compensation for injury. Suppose, for example, that a fast food restaurant is careless with its hamburgers. Many customers become ill with food poisoning. Those customers deserve several things: an apology; some compensation for their illness; a refund of the money they spent on the bad hamburgers. The customers deserve these things in virtue of the fact that they are innocent victims of the restaurant's carelessness. Yet in any typical case the customers bear no responsibility for the fact that they were poisoned.

Consider again the case of the figure-skater and the thug (mentioned above in §2). The example was used to illustrate the fact that sometimes a person (the thug) deserves something (punishment) in virtue of something for which he was responsible (the attack). Yet the very same example also illustrates the fact that sometimes a person deserves something in virtue of something for which she bears no responsibility. For the figure-skater deserves an apology and some compensation in virtue of the fact that she was viciously attacked. Yet she bears no responsibility for the attack.<sup>7</sup>

Perhaps it will seem that I must have gotten the principle wrong. The counterexamples are so obvious that it may seem that no one could seriously believe DR. Perhaps the intended principle is really this:

DR': If *S* deserves *x* in virtue of the fact that *S* did or suffered *y*, then *somebody* is responsible for the fact that *S* did or suffered *y*.<sup>8</sup>

In the hamburger case cited above, the innocent diners are not responsible for getting poisoned, and that's why the example refutes DR. However, the staff of the fast food restaurant *are* responsible for selling the spoiled hamburgers. Thus, the example does not run counter to DR'. A corresponding point holds in the case of the figure-skater and the thug. The skater is not responsible for the attack, but the thug is. Perhaps DR' is a better formulation of the received wisdom in question.

<sup>7</sup> Klenig, Sher and others have endorsed the view that we can deserve such things as compensation and apology in virtue of harms innocently suffered. These philosophers have at least implicitly recognised that DR is false. Kleinig (1971, p.74) explicitly rejects it.

<sup>8</sup> Sadurski hints at this idea when he says "To say 'I didn't deserve such a tragedy to happen to me' would make sense only under the condition that someone can properly be held responsible for what actually happened" (1985, p. 118).

I think DR' is also false.<sup>9</sup> I think that there are familiar cases in which no one is responsible for a certain misfortune, and yet the person who suffers that misfortune deserves something in virtue of the fact that he has suffered. Consider, for example, a case in which a young child becomes ill with a painful disease. Suppose the child suffers for a while with this disease, and eventually dies. The parents are overwhelmed with grief. Surely no one bears any responsibility for their misfortune, and yet the grieving parents might deserve various things in virtue of enduring it. At the very minimum, they deserve some expression of sympathy from their friends and neighbours.

Many moral philosophers have endorsed the principle that each of us, merely in virtue of being a person, deserves a certain minimal amount of respect. If we do deserve anything in virtue of being persons, then we have further evidence for the independence of responsibility and desert. It is pretty clear that I am not responsible for the fact that I am a person. Although my parents may bear some responsibility for the fact that I exist, it is not clear that either they or anyone else is responsible for the fact that I am a person. If no one is responsible for this fact, and yet I deserve some respect in virtue of being a person, then desert is further severed from responsibility.

Let us now turn to the evaluation of DT.

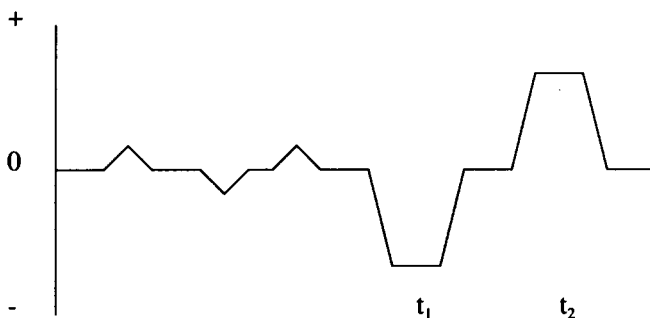
### *5. The refutation of DT*

We naturally say that if a person has been short-changed in the past, then she deserves some extra benefit now. Our talk of desert in such a case seems linked to the idea of "balance" or "fairness" or "appropriateness" in the allocation of good and evil. If this is so, then one wonders why it is not equally natural to say that if a person *will be* short-changed in the future, then she *already* deserves some extra benefit now. Future mis-allocations are surely as bad as past ones; present re-allocations surely serve to bring about balance and fairness just as much as future ones would; if desert in such cases is fundamentally a matter of achieving balance and fairness in allocations of good and evil, then it is hard to see how there can be any justification for insisting that harms be suffered before compensa-

<sup>9</sup> Kleinig seems to be committed to the rejection of DR' when he affirms that the Niagra Falls deserve to be so famous (1971, p.72). However, it is not clear that he takes such examples literally. In a footnote he says that it may be argued that the statement is true "only in a subsidiary sense". Furthermore, as Kleinig notes, the view is in conflict with his claim that deserved things must be pleasant or unpleasant for the one who deserves them.

tory benefits are distributed. Why wait? Why not say that those who will be harmed later already deserve their compensation today? What justifies the alleged temporal asymmetry of desert and its base?

Imagine a graph showing the good and bad fortunes that befall a person, *S*, throughout his life. Suppose the graph looks like this:



Suppose that the dip at  $t_1$  represents a serious misfortune that *S* then suffers, and the rise at  $t_2$  represents a compensating bit of good fortune that *S* enjoys at  $t_2$ . Since the size of the rise at  $t_2$  is equal to the size of dip at  $t_1$ , we may want to say that the  $t_2$  rise compensates for the  $t_1$  fall. *S* may complain that his life is pretty boring (only two dips; only three rises—and these pretty small) but (given obvious assumptions) it's hard to see how he can complain about unfairness. His misfortunes seem to have been compensated.

I have not told you the direction of time in the example. I did not say that  $t_1$  is earlier than  $t_2$ . One wonders why it should matter which way time is flowing. If *S* suffers a misfortune at  $t_1$ , and enjoys a bit of good fortune at  $t_2$ , then, from the “extra-temporal perspective”, the goods and bads of *S*'s life pretty nearly balance out. Thus, there is a question about the relevance of temporal priority in DT.

I am convinced that DT is not true. Furthermore I think that there are familiar examples that show that it is not true. One fairly clear example concerns the sometimes extraordinary benefits that are given to children who have contracted fatal diseases. Organizations such as the Make-a-Wish Foundation provide very generous benefits (such as visits to Disneyland) for such children. It seems to me that the rationale for such benefits is clear: since the children are quite innocent, and are going to suffer terrible harms, they deserve extraordinary benefits. Since it will be impossible to provide these benefits to the children after they suffer the harms, the Make-a-Wish Foundation gives them the benefits in advance.

A second example concerns soldiers who volunteer for suicidal missions. In some contexts these soldiers are thought to be deserving of great



honours. Celebrations may be held; they may be given medals or promotions. Then they go off to perform the actions in virtue of which they deserve to be so treated. Again, the desert base is rooted in the future, not the past.

If one wished to defend DT, one could of course try to force these examples into the requisite temporal shape. Thus, one could admit that the sick children deserve the benefits they receive from the Make-a-Wish Foundation, but could deny that they deserve these benefits in virtue of the harms they will later suffer. Rather, it could be insisted, such children are deserving in virtue of the fact that they *have contracted fatal diseases*, or the fact that they *have already suffered*. These are facts about the past, and are thus consistent with DT.<sup>10</sup>

In the case of the soldiers, one could say that they deserve their medals in virtue of the fact that they *volunteered (or were chosen) for their suicidal missions*. Again, it could be claimed that the desert base is “properly” in the past.

I reject these desperate manoeuvres. It seems clear to me that the sick children do deserve special consideration, not only because they have already suffered, but also in virtue of the fact that they are going to suffer. Perhaps this can be made more plausible by appeal to a thought-experiment. Suppose there are two sick children in the hospital. Suppose each has a painful disease. The first has suffered for several months, and has been quite miserable. Yet the doctors are perfectly certain that she will soon become well, and in a short time will be fully recovered with no lingering effects. The second has also suffered for several months, and has also been miserable. In his case, however, the prognosis is different. The doctors are perfectly certain that he will soon die. There is no cure for his fatal affliction. In this situation, the Make-a-Wish Foundation offers a special treat for exactly one sick child. Imagine that this is an all-expense-paid trip to Disneyland. The Foundation stipulates that the treat is to be given to the most deserving child in the hospital.

It seems clear to me that, in the absence of any unusual and so far unstated factors, the child with the fatal disease would be the more deserving, precisely because he is going to suffer the greater misfortune. Though his past sufferings are no greater than the other child’s, he is destined to suffer worse misfortunes in the future. This explains the fact that he is the more deserving of the two.

<sup>10</sup> One could insist that the children actually do not deserve any benefits; the Make-a-Wish Foundation gives them the benefits simply out of kindness and sympathy. I find this suggestion deeply implausible—perhaps even offensive.

### 6. *Why DR has been believed*

It is hard to understand why so many philosophers have accepted DR. I have never seen an argument for it. My suspicion is that some may have accepted it simply as a result of failure to consider a sufficiently wide variety of examples. Perhaps these philosophers focused exclusively on a narrow range of cases involving desert of things like punishment and reward; perhaps in all these cases the one who deserves is also responsible for the desert base; perhaps these philosophers assumed without further reflection that all cases would be like these few. And yet, if we consider the class of cases involving desert of sympathy, condolence, and compensation for innocent suffering, we immediately see that there can be desert without responsibility.

Another possible explanation is that advocates of DR focused exclusively on cases in which the deserving person deserves in virtue of some action he or she performed. In such cases, the person is typically responsible for the action. Again, hasty generalization might be the culprit.

### 7. *Why DT has been believed*

DT seems rather more natural and plausible. Counterexamples are less common. But the counterexamples are fairly obvious. What accounts for the attractiveness of this principle?

For a time I thought that the plausibility of DT should be explained by appeal to a certain confusion. I thought that another principle was true, and that this other principle was easily confused with DT. I am no longer convinced by this explanation. Nevertheless, it may be useful to discuss it.

According to a popular view, ordinary facts about the past are entirely “settled”: from the perspective of the present, there is nothing we can do to prevent them, or “undo” them. Thus, if I have already suffered an injury, the fact that I have suffered this injury is settled; it is an unalterable fact.

Determinists may hold that all facts about the future are already settled. This is a controversial position. A more moderate view is that at least some facts about the future are in this sense settled. Thus, for example, consider the fact that the sun will rise tomorrow, and the fact that the seasons will change at approximately their appointed times, and the fact that each of us will eventually die. It is reasonable to suppose that facts such as these are settled—though in some cases the precise dates are not yet settled. They are like facts about the past, since there is nothing we can do

to prevent them. No matter what possible course of action we take, these things will happen.

However, certain other facts about the future seem still unsettled. Suppose a certain mugger is contemplating a mugging, and has not yet made up his mind whether he will mug me or whether he will mug another innocent victim. If this mugger's reflections have genuine point—if his choice of victim is really still “up to him”—then it is not yet settled that I will be injured by him in a mugging.

It might be thought that there is an important connection between desert and this sort of settledness. Specifically, it might be thought that this is true:

DS: If at  $t$   $S$  deserves  $x$  in virtue of the fact that  $S$  did or suffered something at  $t'$ , then the fact that  $S$  did or suffered that thing at  $t'$  is already settled at  $t$ .

Inspection will reveal, I think, that every example so far mentioned in connection with DT in fact conforms to DS. When the desert base is in the past it is already settled. All such cases conform to DS. Cases in which the desert base is in the future conflict with DT, but they may seem to conform to DS, since in all the cases so far discussed the desert base is settled at the time of desert. Consider, for example, the case involving the Make-a-Wish Foundation. I wanted to say that the child with the fatal disease deserved special treatment in virtue of the fact that he will later suffer a great misfortune. The example refuted DT. However, the example does not refute DS, since the child's suffering was described as inevitable, or settled, even though still in the future. DS (unlike DT) permits the child to be deserving in virtue of this future, but settled fact.

The account I formerly accepted goes like this: it is possible that the appeal of DT derives largely from its confusion with DS. DS is true; it's easy to confuse DS with DT. Perhaps some philosophers have confused DT with DS, and have for this reason erroneously thought that DT is true.

I am no longer quite so happy with this explanation, since I no longer think that DS is true. I think there are cases in which, at a certain time, someone deserves something in virtue of a certain fact but that fact is *not* settled at the time of desert. Consider this example: a customs inspector may realize that he is about to invade the privacy of a traveller. The traveller has done nothing wrong, and yet his bags are going to be searched. The inspector says “I'm sorry sir, but you will have to open all these bags, and allow us to search through them”. The inspector is apologizing for something that is about to happen. It is reasonable to suppose that the innocent traveller deserves the apology even before his privacy has been invaded.

The crucial fact about this example is that, at the time of the apology, the customs inspector may recognize that he is under no *compulsion* to inspect the bags; he may recognize that it is still fully in his power to refrain from inspecting them. Thus, while it is a fact that he is going to inspect the bags, it is not yet a settled fact. It is something that he is going to do, but freely. The example thus shows that DS is false. Therefore, we cannot explain the plausibility of DT by saying that it has been mistaken for DS, which is the truth in these matters. In order to make use of this line of explanation, we must suppose that philosophers have made *two* mistakes. First, they mistakenly supposed that DS is true. Second, they confused DT with DS.<sup>11</sup>

So we are left with our question: why have so many philosophers accepted DT?

Perhaps a different confusion explains this mistake. A fundamental constraint on our system of criminal justice is that no one shall be punished for a crime he has not yet committed. In some cases, our commitment to this constraint is almost fanatical. Even when we know that a certain person will commit a crime, we maintain that he is legally innocent until he commits the crime, and is proven guilty. The police insist that their hands are tied—the man does not deserve to be punished until he has actually done what we all know he intends to do.<sup>12</sup>

There are of course lots of good reasons for insisting upon this policy. One is epistemic. Even when we have quite good evidence, we rarely know precisely what the future will bring. There is always (or almost always) the chance that the person will not commit the crime. Thus, it is

<sup>11</sup> An interesting feature of the example involving the customs inspector is this: although the later invasion of the traveller's privacy is not *settled* at the time of desert, the inspector *knows for certain* that it is going to occur. This may suggest that the relevant fact is neither *being in the past* nor *being settled*, but is rather *being known for certain*. In other words:

DK If at *t* *S* deserves *x* in virtue of the fact that *S* did or suffered something at *t'*, then the fact that *S* did or suffered that thing at *t'* is already *known for certain* at *t*.

I am convinced that DK is false. I may deserve the prize for best essay in virtue of the fact that my essay was the best of those submitted. However, it may be that no one knows that my essay was the best of those submitted. I didn't read the other submissions; the judges were careless or inept—they didn't recognise that mine was best. If DK has any appeal, I suspect that it is due to a confusion of the fact that *S* deserves *x* with the fact that someone would be justified in claiming that *S* deserves *x*.

<sup>12</sup> Christopher New tries to show that there is no moral argument against "pre-punishment". He claims that "... there may be room in our moral thought for the notion of pre-punishment, and ... it may be only epistemic, rather than moral, constraints that prevent us from practising it" (New 1992, pp. 35). New's paper is the only one I have ever seen in which there is an explicit attack on anything like DT.

safer to adopt the general policy of always waiting to see what the future brings. If he commits the crime, we can immediately step in and set the wheels of justice grinding. If he does not commit the crime, we will have avoided a terrible injustice.

There is a second important factor in such cases. Consider a typical case in which it seems quite likely that a certain person will commit some crime. We think he will deserve the legally mandated punishment only if he will be responsible for the crime; and we think he will be responsible for the crime only if he will commit it “freely”; and we think that if he will commit it “freely”, then it cannot yet be quite certain that he will commit it. There must still be some possibility that he will decide not to commit it. So we insist upon a legal system that prohibits punishment-in-advance.

There is yet a third reason to avoid laws that permit punishment-in-advance. Suppose the law permitted punishment-in-advance. Surely there would be safeguards. Advance punishment would be permitted only in cases in which it is perfectly certain that the suspect is going to commit the crime. (That is, it is certain that he will commit the crime *unless the law steps in and prevents his doing so.*) But if we have such sure-fire knowledge that the suspect is going to commit the crime, it would make even better sense to step in and prevent that criminal behavior. However, if we lock the pre-criminal up, or otherwise prevent his crime, he will not commit the crime. In this case, he cannot possibly deserve punishment for committing it. Antecedent punishment, in such a case, would be deprived of its desert base. Thus, in order to be sure that those who are punished really deserve their punishment, we insist upon a system that permits punishment only after the crime has been committed.

There is a fourth reason. Suppose a person appears at the police station and offers to pay a fine for speeding. She says that she is going to speed later in the day, and wants to pay the fine in advance so as to avoid red tape and inconvenience. The police officer does not accept her check, and does not agree that she deserves the fine. Rather, he takes steps to ensure that she does not speed. To accept the money and agree that she deserves the fine would be to acknowledge that she is going to speed, and in effect to grant her permission to do so, and this the officer cannot do.

For all these reasons, and perhaps for others as well,<sup>13</sup> we are wholeheartedly committed to a judicial system that prohibits punishment-in-advance. Part of this commitment involves the principle that no judge or jury may determine that a certain person deserves punishment under the law at a time in virtue of the fact that he will later commit a certain crime.

<sup>13</sup> Saul Smilansky (1994, pp. 50–3) argues against New’s claim. His argument turns on his claim that pre-punishment violates certain Kantian views about respect for persons as autonomous agents, rather than as mere objects.

For the commission of a crime to serve as a desert base for punishment in a court of law, the crime must already have been committed.

I suppose it is possible that some philosophers may have confused this legal principle about desert of punishment with the much more general principle DT. It should be obvious that the truth of the legal principle (if it is true) implies nothing about the truth of DT.

## 8. Concluding remarks

It is widely assumed that desert is intimately linked to responsibility and time. Principles DR and DT express elements of the received wisdom about this alleged linkage. Yet it is clear upon reflection that neither principle is true. A person may deserve sympathy or even compensation for injuries received though neither he nor anyone else is responsible for those injuries. A person may deserve benefits for harms received even though she has not yet suffered those harms. If there is any connection between desert and responsibility, it is far more complex than the connections indicated by DR and DR'; if there is any connection between desert and time, it is far more complex than the connections indicated by DT and DS.<sup>14</sup>

*Department of Philosophy*  
*University of Massachusetts at Amherst*  
*Amherst, MA 01003*  
*USA*

FRED FELDMAN

## REFERENCES

- Barry, Brian 1965: *Political Argument*. London & New York: Routledge & Kegan Paul.
- Cottingham, John 1992: "Justice; Rectificatory", in Lawrence Becker, ed., *Encyclopedia of Ethics*. New York & London: Garland Publishing Co.
- Feinberg, Joel 1963: "Justice and Personal Desert", in C. J. Friedrich and J. W. Chapman, eds., *Nomos VI: Justice*. New York: Atherton Press.
- Hospers, John 1961: *Human Conduct*. New York: Harcourt, Brace & World, Inc.

<sup>14</sup> Earlier drafts of this paper were read and criticised by David Cowles, Richard Feldman, Ish Haji, Ned Markosian, Owen McLeod, Ted Sider, the Editor and referee for *Mind* and others. My thanks to all these friends and colleagues for their comments and suggestions. I am especially grateful to McLeod for extensive discussion and bibliographical assistance.

- Kleinig, John 1971: "The Concept of Desert". *American Philosophical Quarterly* 8, pp. 71–8.
- Mill, J. S. 1957: *Utilitarianism*. Indianapolis: Liberal Arts Press.
- Miller, David 1976: *Social Justice*. Oxford: The Clarendon Press.
- New, Christopher 1992: "Time and Punishment". *Analysis* 52, pp. 35–40.
- Rachels, James 1978: "What People Deserve", in *Justice and Economic Distribution* ed. John Arthur and William H. Shaw Englewood Cliffs: Prentice-Hall.
- Rawls, John 1971: *A Theory of Justice*. Cambridge: Harvard University Press.
- Rescher, Nicholas 1966: *Distributive Justice*. Indianapolis: Bobbs-Merrill.
- Sadurski, Wojciech 1985: *Giving Desert Its Due: Social Justice and Legal Theory*. Dordrecht: D. Reidel Publishing Co.
- Sher, George 1987: *Desert*. Princeton: Princeton University Press.
- Sidgwick, Henry 1962: *The Methods of Ethics*. London: Macmillan & Co.
- Slote, Michael 1973: "Desert, Consent, and Justice". *Philosophy and Public Affairs* 2, pp. 323–47.
- Smilansky, Saul 1994: "The Time to Punish". *Analysis* 54, pp. 50–3.