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## Punishment and Desert: A Reply to Dolinko\*

*John Martin Fischer*

In “Some Thoughts about Retributivism,” David Dolinko explores (among other issues) the thesis he calls “modest retributivism,” “the claim that, although our goal in punishing—our rational justification—may well be the deterrence of potential lawbreakers or the protection of law-abiding citizens, what morally justifies punishing wrongdoers [lawbreakers] is that they deserve the treatment we mete out to them.”<sup>1</sup> Dolinko finds modest retributivism implausible, saying:

The claim is that punishment—which involves doing to wrongdoers things that we ordinarily think of as violating people’s rights, like incarcerating them against their will for years—is morally permissible because it is what wrongdoers deserve. Yet we do not, in general, believe that treating a person in a way that would otherwise violate his rights is automatically permissible simply because the person deserves this kind of treatment.<sup>2</sup>

Dolinko’s argument relies on an example, which it will be useful to have before us:

Consider, for example, Lear, a rich man with two sons, Jeremy and Howard. Jeremy truly loves Lear and has always treated him with affection and respect, even caring for him (at great personal sacrifice) during Lear’s final illness. Howard, on the other hand, is a reprobate who has spent his time drinking, gambling, and chasing

\* I am very grateful to insightful comments by Paul Hoffman, David Copp, Gerald Dworkin, John Deigh, and two anonymous referees for *Ethics*. I have also benefited from a correspondence about these matters with David Dolinko; I greatly appreciate his gracious help.

1. David Dolinko, “Some Thoughts about Retributivism,” *Ethics* 101 (1991): 537–59, 543.

2. *Ibid.*, 543–44.

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women, neglecting his father (for whom, in truth, he feels little regard) almost completely. Perversely, however, Lear has always felt a sneaking admiration for Howard while secretly despising Jeremy as a priggish, unimaginative, overly repressed bore. (This is grossly inaccurate, and unfair to Jeremy, but Lear at some level always wished he himself could have boldly defied the constraints of propriety and convention, as he believes Howard has.) Lear's will leaves Jeremy a comparative pittance and bequeaths the bulk of the estate to Howard. Surely we might well agree that Jeremy deserved to inherit the estate while Howard deserved to be cut out of the will. Yet the state, acting through its judiciary, will not on that account set aside Lear's will and hand over to Jeremy that which he, rather than Howard, deserves. To do so would violate Howard's *right* to the estate, a right he possesses despite deserving to inherit nothing. As Joel Feinberg has noted, "a person's desert of X is always a reason for giving X to him, but not always a conclusive reason," because "considerations irrelevant to his desert can have overriding cogency in establishing how he ought to be treated on balance."<sup>3</sup>

Dolinko concludes from this sort of example that there is a gap between "X deserves punishment" and "punishing X is morally justified." He critically evaluates various attempts to bridge the gap offered by Herbert Morris, George Sher, Jean Hampton, and Michael Moore.<sup>4</sup> In this brief article, I will not discuss Dolinko's insightful critiques of these attempts. Rather, I intend to suggest a way of thinking about the structure of the retributive view of the justification of punishment; on this view, Dolinko's example is irrelevant, and thus his critique—helpful as it is in evaluating certain forms of retributivism—misses the mark.

I certainly agree with Dolinko that it does not follow from someone's morally deserving to be in a certain condition that it would be permissible for someone else, or the state, to cause him to be in that condition. Examples such as Dolinko's Lear case illustrate this point nicely. But I think it is helpful to distinguish different questions about punishment. One question is about what Feinberg called "the moral limits of the criminal law": it is a question about when exactly—under what circumstances—the government may permissibly interfere with personal liberty.<sup>5</sup> This question asks when a state may legitimately make certain behavior illegal; a closely related question (and I shall assimilate

3. *Ibid.*, 544. The Joel Feinberg quotation is from "Justice and Personal Desert," in his *Doing and Deserving* (Princeton, NJ: Princeton University Press, 1970), 60.

4. Dolinko, "Some Thoughts about Retributivism," 545–59.

5. Joel Feinberg presents a compendious analysis in his four-volume work, *The Moral Limits of the Criminal Law: Harm to Others* (New York: Oxford University Press, 1984), *Offense to Others* (New York: Oxford University Press, 1985), *Harm to Self* (New York: Oxford University Press, 1986), and *Harmless Wrongdoing* (New York: Oxford University Press, 1988).

it to the first) asks when a state is morally justified in applying sanctions against certain behavior.

There are of course various well-known approaches to providing an answer to this first question. One such approach takes its cue from John Stuart Mill's "Harm Principle," according to which a state has a good (although not necessarily decisive) reason to prohibit (and punish) behavior likely to cause harm to others.<sup>6</sup> The Harm Principle can be supplemented by some sort of Offense Principle.<sup>7</sup> There are various other principles that purport to specify under what circumstances it is permissible for the state to consider the prohibition and punishment of behavior.<sup>8</sup>

It is important to note that the various "Liberty-Limiting Principles" specify good reasons for the state to prohibit and punish but that these reasons need to be put on the scales with countervailing reasons (reasons against state regulation) in a standard sort of "balancing test."<sup>9</sup> Thus, combining the Harm and Offense Principles can give an answer to the first question only when supplemented by a further analysis; that is, this combination can specify a (putatively) good reason for state intervention, which would need to be balanced against other considerations. Additionally, a Liberty-Limiting Principle, or combination of such principles, can rule out certain behavior as subject to legitimate state regulation. So the Harm Principle (for example) sets limits to the actions that may be considered for social regulation. Actions that fall into the self-regarding sphere are immediately removed from such consideration, whereas actions that fall into the other-regarding sphere, that is, actions that invade the interests of others, are open to being considered for regulation. But it may still be the case that society is not justified, all things considered, in regulating and punishing such actions. For John Stuart Mill, what determines whether society is justified in regulating behavior is a standard balance of interests test (or utilitarian calculation) of whether the interests served in making them criminal

6. John Stuart Mill, *On Liberty* (London: Longman, Roberts & Green, 1869); Feinberg puts the Harm Principle as follows: "It is always a good reason in support of penal legislation that it would probably be effective in preventing (eliminating, reducing) harm to persons other than the actor (the one prohibited from acting) and there is probably no other means that is equally effective at no greater cost to other values" (*Harm to Others*, 26).

7. Feinberg puts the Offense Principle as follows: "It is always a good reason in support of a proposed criminal prohibition that it is probably necessary to prevent serious offense to persons other than the actor and would probably be an effective means to that end if enacted" (*Harm to Others*, 26; for a detailed discussion, see Feinberg, *Offense to Others*).

8. For a helpful summary, see Feinberg, *Harm to Others*, 26–27; these principles are discussed at length in Feinberg's *The Moral Limits of the Criminal Law*.

9. This is clearly the approach taken by Feinberg. I am indebted to both John Deigh and Gerald Dworkin for helpfully highlighting the importance of this point.

outweigh the interests served in letting people perform them without threat of legal punishment.<sup>10</sup>

Suppose one develops some sort of answer to the first question; this gives one's view about the moral limits of the criminal law. Now notice that one can ask about the moral justification of this answer—one can ask why it is morally permissible for the state to inflict punishment in those circumstances specified in the answer to the first question. Let's say (just for simplicity's sake) that the answer to the first question includes some sort of combination of the Harm and Offense Principles (supplemented by other considerations in a suitable balancing test, as specified above). We can now ask what justifies the state in punishing those actions that run afoul of this combination of the Harm and Offense Principles (as supplemented by the balancing test); that is, we can ask why it is that it is morally permissible for the state to punish those who violate these principles, so understood. Of course, just as there are various possible answers to the first question, there are various possible answers to the second question. One answer would be some sort of consequentialism. Another answer would posit an ineliminable residual retributivism. It would claim that someone who has, say, harmed another—and thus violated another's rights—in circumstances in which the balancing test yields the judgment that social regulation is justified deserves to be punished.

It is important to see that the two questions are distinct (although obviously related). The first question could be called the "when question," whereas the second question could be called the "why question." I contend that it is a mistake to conflate the two or to suppose that the when question's answers are mere eliminable intermediate principles that are perhaps useful rules of thumb that help us find the answer to the why question. It would be a mistake to suppose that we adopt, say, the Harm Principle (suitably supplemented) as an answer to the question of what the moral limits of the criminal law are as a means to accomplishing the more basic goal of bringing it about that individuals get what they deserve.

Rather, the idea is that when someone, say, fails to act in accordance with the Harm Principle (as supplemented by the balancing test), he thereby violates someone's rights (or, alternatively, invades or thwarts someone's interests). When an individual violates someone's rights in

10. Consequently, there could be other-regarding actions that deserved to be punished but that society was nonetheless not justified in making criminal because, on balance, the interests served by doing so were outweighed by the interests served by not doing so. An example might be adultery in which the offending spouse did not have his wife's or her husband's consent to break their vows. For this way of formulating the point as well as the example, I am (again) grateful to John Deigh.

this (or related ways—specified by one’s answer to the first question), then in virtue of so behaving he deserves to be treated in certain ways (to be punished). On this approach to the structure of the argument, it is not supposed that whenever someone deserves to be in a certain condition or to be treated in a certain way, it is permissible for someone else or the state to bring about that he is in that condition or is treated in that way. Rather, the view is that, when someone violates another’s rights of a certain sort, then in virtue of this he deserves to be treated in ways which would otherwise violate his rights. And it is obvious that Dolinko’s Lear example is quite irrelevant to this view (and thus to retributivism, so construed).

Consider Dolinko’s example of Lear. Whereas it is true that Jeremy deserves the inheritance, it is impermissible for the state to intervene to ensure that Jeremy gets what he deserves. This is quite compatible with it being the case that someone who violates certain specific rights of others deserves to be punished by the state—and with it being the fact that he deserves to be punished that is at least part of the answer to the question of why the state is morally justified in punishing him. Similarly, consider the following examples presented by Dolinko:

Imagine, for example, a wealthy and callous individual whose inherited fortune allows him to lead a life of leisure and who dismisses poor people as lazy good-for-nothings whose poverty is their own fault. Surely one might believe that this fellow *deserves* to lose his money and learn first-hand what poverty is like and how hard it is to escape it—*without* necessarily believing that it would be morally permissible to bring about this result by theft or confiscation. Likewise, imagine a knowing apologist for a brutally oppressive regime; I may believe she *deserves* to experience firsthand the suffering she so blandly condones, yet *not* believe it would be morally permissible to torture her.<sup>11</sup>

As above, these cases would present problems for a view according to which our answer to the first question was some sort of rule of thumb designed to facilitate in the general project of the state’s ensuring that people get whatever they morally deserve. But once the two questions are distinguished and the structure of the retributive view is highlighted, we can see that the examples are quite irrelevant to retributivism, construed as I have suggested. After all, the individuals described have not violated others’ rights not to be harmed or offended in the ways that indicate the moral limits of the criminal law, and thus it would not have been thought that they deserve punishment for so behaving. Note that, even though the combination of the Harm and Offense Principles in

11. David Dolinko, “Three Mistakes of Retributivism,” *UCLA Law Review* 39 (1992): 1624–57, 1629.

itself only gives a good reason for state intervention (which needs to be supplemented by a balancing test, as discussed above), it can rule out state intrusion into what is deemed the self-regarding sphere (morally unattractive as it may be).

Return to the various principles that purport to specify an answer to the first question. One such principle is the principle of Legal Moralism. Feinberg defines “Legal Moralism” (in the broad sense) as follows: “It can be morally legitimate for the state to prohibit certain types of action that cause neither harm nor offense to anyone, on the grounds that such actions constitute or cause evils of other (‘free-floating’) kinds.”<sup>12</sup> Of course, as in our discussion of the Harm and Offense Principles, the Legal Moralist believes that the fact that some action would be morally evil is a good reason for state intervention, but not necessarily a decisive reason. If one were to adopt Legal Moralism as an answer to the first question (or part of such an answer), then presumably one might respond to all of Dolinko’s cases differently. Presumably, a Legal Moralist could indeed think that the state’s role in all of these cases is precisely to ensure that people get what they deserve (given that the balancing test is met). But note that most of us would reject the principle of Legal Moralism as an answer to the first question. Indeed, it may be that the force of Dolinko’s examples comes from our tendency to reject Legal Moralism as an answer to the first question rather than from a rejection of retributivism as such (construed as an answer to the second question).

Dolinko says, “Hampton believes that Morris’s version of retributivism goes astray because it fails ‘to link our condemnation of a wrongdoer to that which makes his conduct wrong.’”<sup>13</sup> I believe that this is an important point. On my view, the kernel of truth in the statement corresponds to the idea that the putatively deserved treatment is linked necessarily to the putative desert basis.<sup>14</sup> That is, on my approach, it is claimed that an individual deserves to be treated in a certain way by the state for behaving in a certain way, that is, for violating certain rights of others. People may well deserve to be caused to be in certain conditions or to be treated in certain ways—but it would not follow simply from this that they deserve to be so treated in virtue of violating certain rights of others, and thus it would not follow, on my approach, that the state could permissibly punish them. In contrast, it is as if Dolinko is

12. Feinberg, *Harm to Others*, 27.

13. Dolinko, “Some Thoughts about Retributivism,” 549; the quotation is from Jean Hampton, “The Retributive Idea,” in *Forgiveness and Mercy*, by Jeffrie Murphy and Jean Hampton (Cambridge: Cambridge University Press, 1988), 116–17.

14. For a helpful discussion of the relevant terminology, including “desert basis,” see Feinberg, “Justice and Personal Desert.”

imagining that the deserved treatment can be separated from the desert basis and that the retributivist must suppose that, even in the absence of the sort of behavior that constitutes the desert basis (as specified in the answer to the first question), it is permissible for the state to impose punishment. But the retributivist, as I imagine him, states that individuals deserve punishment in virtue of behaving in ways that transgress the boundaries established by one's answer to the first question; he need not contend that individuals deserve punishment merely for attitudes or thoughts, morally reprehensible as they may be.

That Dolinko is indeed prescinding from the desert basis in the way suggested can be seen in the following passage:

Question (1) simply asks for the circumstances under which we should punish, and question (2) asks why it is morally justified for us to inflict punishment in those circumstances that are picked out as the answer to question (1). [If this is correct], I don't see why my examples are not counterexamples to retributivism. The retributivist, on this construal, tells us that in such-and-such circumstances we should inflict punishment. We ask why we are morally permitted to do so—why inflicting the punishment does not count as violating this person's rights. The answer we get is that the person *deserves* to be punished. Well, but don't my examples show that "X deserves to be given treatment Z" does not ensure that it's morally permissible to give X that treatment? So we still haven't been told why it's morally permissible to give the criminal the punishment that we are told he deserves.<sup>15</sup>

But the retributivist, as I interpret him, does not say (as a general matter) that whenever anyone deserves a certain kind of treatment it is permissible to give that treatment to him. As I understand him, the retributivist claims that, when an individual behaves in a way that violates another's specific rights of a certain sort (e.g., harms him) in a context in which the balancing test has been employed properly, then the individual deserves to be treated in a certain way (punished) for so behaving. The retributivist thus links the deserved treatment to the desert basis. I contend that this is the most plausible way of adhering to Hampton's view that we must link our condemnation of a wrongdoer specifically to that which makes his behavior wrong (in the relevant way).

Crucial to my attempt to sketch a plausible retributivism that is not defeated by Dolinko's examples is the distinction between the two questions. Someone might however wonder how one could answer the first question of when we can intervene without first answering the second question of what could justify such intervention; that is, one might not see how we could have decided that it is permissible for the state to

15. David Dolinko, personal correspondence, November 2003.



prohibit behavior that runs afoul of some sort of combination of the Harm and Offense Principles (suitably supplemented with a standard balancing test) without having first answered the question of what morally justifies state intervention.

The issues here are delicate and subtle. I grant that in answering the first question one may well be giving an answer to one important question concerning when punishment is permissible and justified. One is laying out the conditions under which punishment is permissible—the “extension,” as it were, of permissible punishment. A theorist may well stop there and not be inclined to ask any further questions. Alternatively, a theorist might ask the additional question: why is it justified to present the “extension” of permissible punishment in this way? That is, one might ask for a justification of employing the (supplemented) combination of the Harm and Offense Principles in giving the conditions of permissible punishment. This does not seem to be an unreasonable question, and it appears to me to be genuinely distinct from the first question.

In his classic treatment of punishment and responsibility, H. L. A. Hart not only emphasized that we should not necessarily expect there to be one answer to the question of the justification of punishment but also distinguished different questions.<sup>16</sup> Hart says that

it is likely that in our inherited ways of talking or thinking about punishment there is some persistent drive towards an over-simplification of multiple issues which require separate consideration. To counter this drive what is most needed is *not* the simple admission that instead of a single value or aim (Deterrence, Retribution, Reform or any other) a plurality of different values and aims should be given as a conjunctive answer to some *single* question concerning the justification of punishment. What is needed is the realization that different principles . . . are relevant at different points in any morally acceptable account of punishment. What we should look for are answers to a number of different questions such as: What justifies the general practice of punishment? To whom may punishment be applied? How severely may we punish?<sup>17</sup>

The distinction between the when and why questions is in the spirit of Hart’s analysis. On my view, however, an answer to the when question does not require providing anything as elaborate as a justification of the penal law. It just means delineating some criterion for when punishment is permissible. The answer to the why question, then, is that it is justifiable for the state to punish someone for conduct C because he

16. H. L. A. Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (New York: Oxford University Press, 1968).

17. *Ibid.*, 2–3.

deserves to be punished for having done C, which satisfies the criterion specified by the when question.

It might be conceded that a certain sort of retributivism involves a structure containing at least the two questions I have identified and also the linkage of deserved treatment with desert basis to which I have pointed. Nevertheless, someone might insist that there is still a gap between (i) "X deserves to be punished by the state for violating certain specific rights of others [as specified in the Harm/Offense Principles, as supplemented by a standard balancing test]" and (ii) "it is morally permissible for the state to give X what he deserves on the basis of violating these specific rights of others." That is, Dolinko has presumably shown that it is not always permissible for the state to give an individual what he deserves; so why suppose that it is morally permissible for the state to give someone what he deserves in virtue of his violating the specified rights?

I think the retributivist should admit the existence of this gap. It is one of the virtues of Dolinko's essay that he identifies and highlights this gap. A thoughtful and prudent retributivist will concede the existence of the gap and also his lack of an argument that bridges the gap but contend nevertheless that it is his view that i does indeed imply ii; after all, it is a lamentable fact that one cannot decisively establish every step in one's philosophical arguments! And once the appropriate linkage between deserved treatment and desert basis is secured, one can see that Dolinko's examples do not in themselves challenge this alleged implication. That is, none of Dolinko's examples are of the required form; none is a case in which someone has contravened the Harm or Offense Principles (suitably supplemented) and thereby violated the rights of others but nevertheless may not permissibly be punished by the state for so behaving.

Dolinko has helped us to see more clearly a gap in the retributivist's argument, and this is helpful. But of course a gap is not fatal to an argument, and a retributivist might point out that it is his considered judgment that this particular desert basis (violation of the relevant rights) justifies this particular sort of response (punishment by the state). In general, it is not unreasonable to suppose that different desert bases would call for different kinds of response (penalties, fees, or punishments), and, clearly, they might call for more or less severe responses within each kind. On the retributivist approach I have sketched, there is admittedly an argumentative or explanatory gap between the specific nature of the desert basis and the specific nature of the response, and it is helpful to see that the gap exists. However, examples in which someone is alleged to deserve certain treatment on the basis of one putative desert basis but in which it does not seem permissible for the state to give him what he deserves do not in themselves show that it

would be impermissible to give someone what he deserves on the basis of a quite distinct desert basis.

It emerges from this discussion that the relevant version of retributivism about punishment does not contend that it is generally the case that the state has the moral right to ensure that people get what they morally deserve (and, further, that punishment is a special instance of this general principle). Rather, the retributivist about punishment may have a more nuanced and intricate overall approach, according to which there are importantly different issues or questions that are structured in a certain way. The way to understand the approach then is to see that the specifically retributive component comes at the point at which one seeks a further or perhaps deeper understanding of the moral limits of the criminal law. It may be helpful to think of the desert-claim as a “metaclaim” or a “higher-order claim” about the “first-order” view about when punishment is justified. In saying that a person who violates others’ right, say, not to be harmed deserves to be punished, one is adhering to Hampton’s idea (endorsed by Dolinko) that we must link our condemnation of a wrongdoer to that which makes his conduct wrong.