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COMMENT ON "CHALLENGING JUST DESERTS: PUNISHING WHITE- COLLAR CRIMINALS"

ERNEST VAN DEN HAAG

In *Punishing Criminals*,¹ I argued that the threats which attend the prohibitions of the criminal law can be justified only by the deterrent effect they are meant to have, whereas punishment itself is justified because threatened: without it, threats of punishment would become untrue and incredible. However, I thought that the distribution of punishments to individual offenders must be justified by being deserved. I resorted to a retributionist theory to explain the distribution of punishments because I believed that the standard arguments against exclusively deterrence theories of punishment were correct (e.g., that deterrence would justify the punishment of innocents who are made to appear guilty). On reflection, I found these standard arguments not to be correct.² Therefore, I now find a pure deterrence theory sufficient to justify threats, punishments and their distribution. The notion of "just deserts" (retributionism) remains useful to satisfy important emotional needs, but unnecessary to justify the size or distribution of punishments.

Since I do not hold it, I must leave the defense of the "just deserts" theory to others. However, I think that the arguments used against it by Braithwaite are misleading. Let me summarize them before suggesting why they are.

Braithwaite points out that according to surveys white-collar crimes are popularly regarded to be at least as serious as violent or common crimes. White collar crimes are also more harmful. Therefore, Braithwaite argues, a just deserts theory must require that white-collar crimes be far more severely punished than they are now. They must be punished as severely as violent crimes. However, Braithwaite points out, this would not be practicable. Therefore, retributionism must be thrown out and replaced by a brand of utilitarianism which would per-

¹ E. VAN DEN HAAG, *PUNISHING CRIMINALS: CONCERNING A VERY OLD AND PAINFUL QUESTION* (1975).

² See van den Haag, *Punishment As A Device For Controlling The Crime Rate*, 33 *RUTGERS L. REV.* 706 (1981).

mit milder punishment of white-collar crimes than deserved—though harsher than currently practiced—as well as less severe punishment of violent crimes: “since utilitarian goals are not being achieved by putting common criminals in prison [they] can [be] set free.” Indeed, “most criminals” should be given “community treatment” instead of prison. This would bring about “convergence toward an egalitarian situation where both rich and poor are punished less than they deserve.” The greater equality between punishments for the two types of crime would produce more justice and more utility.

(1) Braithwaite seems aware that what he describes as “just deserts” theory, and attributes with some justice to Andrew von Hirsch, is actually a popular consensus theory. However, he ignores this in his argument. With minor qualifications according to Braithwaite, the theory he calls “just deserts” suggests that punishment should be determined by popular surveys corrected for consistency. Quite possibly, this is what retributionism amounts to in practice. Indeed, all theories of punishment may be unlikely to avoid such a practical outcome in a democracy. But neither retributionist theory nor any other would justify such an outcome. And the purpose of all theories of punishment is to justify it independently of popular consensus. Even utilitarian theories rely on utility rather than on popular consensus. Retributionist theories want justice done and do not confuse it with popular consensus.

Braithwaite himself means to justify and prescribe basing himself on popular consensus and egalitarianism. But I see no utilitarian basis for his prescription although he does. Even if one discounts all theoretical pretensions and simply interprets Braithwaite’s argument to mean that white-collar criminals ought to be punished more severely because people want them to be, his further conclusion does not follow. For as Braithwaite realizes, it is impracticable to increase the severity of punishment to the levels people thought appropriate in surveys. Yet decreasing the severity of the punishment of common criminals, as Braithwaite proposes, is certainly not what the majority of people want, according to the very surveys he cites. Hence, his proposal cannot be justified by consensus or utilitarian theory any more than by just deserts theory.

One may attack retributionism for not being helpful in telling us what justice actually does require; but one cannot attack it on the ground Braithwaite chooses, that it should follow popular preference and that to do so would be impracticable. There is nothing in retributionist theory to require it to follow popular perceptions of desert.

(2) The surveys Braithwaite discusses are not concerned with popular perceptions of what the just desert for any crime may be. None of the questions and answers quoted indicate inquiries about just deserts.

For all we know, every survey respondent may have thought of the seriousness of the crimes and the appropriate punishments about which he was questioned entirely in terms of deterrence. In that case the surveys would tell us something about the popular perception of the need for deterrence and not for retributive punishment. The surveys would reveal nothing even about the popular perception of just deserts.

Now, in fact we do not know what criteria were used by which proportion of respondents. They tell about the punishments they feel desirable. We don't know whether they think these punishments desirable because deserved, or deterrent, or rehabilitative. It follows that the respondents' evaluation of white-collar crimes would not be binding on retributionist theory—even if that theory were based on popular perceptions.

(3) Braithwaite argues as well that white-collar crimes deserve punishment according to retributionist theory because they do more harm than other crimes. Harm done is indeed an element in the retributionist theory of punishment, provided that individual guilt for it can be shown. But harm is no more decisive for retributionist than for utilitarian theory. Relying on harm, Braithwaite risks showing that it is utilitarian theory rather than the theory of just desert which demands an impracticably severe punishment for white-collar crime. In utilitarian theory the harm to be avoided by means of deterrence plays a large role in determining punishment; whereas just desert theory looks to harm done only, and only as an element which helps to determine the wickedness which deserves punishment.

(4) Many of the white-collar crimes Braithwaite discusses can be punished only by accepting a strict liability doctrine. Retributionism does not. It cannot therefore demand any punishment, let alone a severe one, for these acts although Braithwaite argues that it must. Not retributionist but deterrent theory may at times dispense with the showing of individual culpability.

(5) In many of the white-collar crimes Braithwaite discusses criminal remedies seem altogether inappropriate (not in all: there is no other remedy for bribery or other white-collar crimes which may not victimize specifiable individuals or groups. But in these, individual guilt usually can be shown). Tort remedies (which should be streamlined) seem more effective and more just, consistent with both utilitarian and retributionist theories. White-collar crimes are usually committed for the sake of money. They are most readily deterred and best punished by levying compensatory and punitive damages on those who would, or did, profit. Tort remedies would also do away with the most unattractive features of strict liability.

(6) As noted above, Braithwaite advocates milder punishment of common crimes for two reasons. First, he believes "that utilitarian goals are not being achieved by putting common criminals in prison." Since Braithwaite neither explains which utilitarian goals he has in mind—surely deterrence, incapacitation, or rehabilitation are achieved, or not achieved, to different degrees by incarceration—nor why he has reached his conclusion, I shall simply indicate my belief that appropriately severe, certain and predictable punishment does have deterrent effects sufficient to warrant it.³ Hence, I do not think that milder punishment for common crimes is justified. Further, the "community treatment" advocated by Braithwaite is likely to be even less discouraging than Braithwaite believes incarceration is. There is no evidence to indicate that community treatment is rehabilitative either. But if it were, it still would not be useful.⁴ Wherefore it could not be recommended on utilitarian grounds.

Braithwaite advocates milder punishment of common crimes for a second reason: the "convergence" of punishments for white-collar and other crimes brought about by milder punishment of the latter would be more equitable, "the only practical way of approaching equity." Indeed "just deserts for the powerless [common criminals] and comparative leniency for the powerful [white-collar criminals] is not just deserts at all . . . [but] a rationalization for ruling class justice."

It seems that Braithwaite here confuses justice with equality. If the present punishment of common crimes is deserved (or deterrent, or both) wherein does it become less deserved (or deterrent) if the punishment of white-collar crimes is less than deserved (or deterrent)? It is an odd moral (or legal?) theory that tells us that if A escapes punishment, or is punished mildly, B too should escape punishment or receive a punishment milder than deserved. It does not matter whether A and B are individuals or groups.

Surely unequal justice, though never as just as equal justice, is more just and therefore better than equal injustice. Is it not better to punish some criminals justly than none?⁵ To let some innocents go rather than none?

I disagree not only with Braithwaite's general argument but also with many specific ones; but I shall not take the space to list them.

³ See van den Haag, *supra* note 1; van den Haag, *The Criminal Law as a Threat System*, 73 J. CRIM. L. & C. 767 (1982).

⁴ See van den Haag, *Could Successful Rehabilitation Reduce the Crime Rate*, 73 J. CRIM. L. & C. (forthcoming issue, 1982).

⁵ My (charitable) interpretation of those Supreme Court decisions which strike penalties if discriminatorily imposed, is that the court hopes by these decisions to achieve more equal justice in the end, not that the court prefers equal injustice to unequal justice.

However, I do wish to advert to his “the law in its majestic equality forbids the rich as well as the poor . . . to steal bread” quoted from Anatole France. Unlike Braithwaite, I think that this all too ubiquitous sarcastic aphorism is quite silly. It tells us that the prohibitions of the law fall most heavily, or exclusively, on those who, by their circumstances, are tempted to violate it. What purpose could the criminal law have other than to restrain those tempted to violate it? Thus, the sumptuary prohibition laws burdened drinkers, not teetotalers. The laws against stealing bread burden those tempted, the poor, and not the rich. What else are they meant to do?