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## Reply to Dr. Ernest Van Den Haag

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## REPLY TO DR. ERNEST VAN DEN HAAG

JOHN BRAITHWAITE

Van den Haag correctly points out that my position on punishment cannot be justified by appeal to community attitudes. I would not want to justify it this way. My utilitarian judgment that capital punishment is wrong is not troubled by a majority community opinion in favor of capital punishment.<sup>1</sup> Public opinion is only relevant to my argument insofar as it is one of the two fundamental ways of putting the principle of desert into practice (the other being objective harm). My only contention is that if desert is operationalized by either public opinion or objective harm, there will be more white-collar than common criminals in our prisons.

Van den Haag does not say what he thinks of operationalizing desert by objective harm, but I suspect we are in agreement that there can be no satisfactory way of implementing desert. I certainly concur with van den Haag that surveys which elicit opinions from the public on what punishment should be given, or how serious a particular offense is, do not necessarily reflect perceptions of desert because respondents may be making utilitarian judgments rather than retributivist ones. I make this same point under the heading, "The Pitfalls of Measuring Desert by Surveys."

Fundamentally, however, public opinion and objective harm are the only practical ways of operationalizing desert—van den Haag and I might agree that they are silly ways, but they are the only ways. Van den Haag concludes that just deserts is a theory which can have no practice. My conclusion is that the only practice which is possible defeats its own purposes. That is, for those who think it sensible to use an imperfect yardstick of desert, my analysis shows that because of the empirical realities of existing societies, just deserts in practice punishes most where desert is least. Just deserts would produce more injustice than is achiev-

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<sup>1</sup> A theory of democracy does not require government by referendum; it simply requires that the people have the right to throw out a government they do not like. The people will do that when a government flouts public opinion once too often. But sometimes politicians also lose votes because they are populists who never take a stand on principle, and very often governments are thrown out for drifting with the tide and failing to take unpopular measures when they are needed to keep a firm rudder on the ship of state. There is no need to apologize for lobbying democratic governments to resist popular opinion.

able under policies which do not set out with justice as their goal (e.g., parsimony).

A basic difference with van den Haag is that I am willing to risk bringing the level of punishment of common criminals down to that of white-collar criminals (after punishment of the latter has been raised), but van den Haag is not. The only reason for this difference is that van den Haag is firmly convinced that such a policy would reduce deterrence and increase common crime while I am doubtful that it would make much difference (we are both doubtful about rehabilitation and incapacitation).<sup>2</sup> I am not going to bore readers with my interpretation of the voluminous literature on deterrence which leads me to have doubts about how far the doctrine should be carried. In any case I would not want to argue strongly for a position of which I am unsure and on which better data is needed. The burden of proof should always be on those who want to spend more of the taxpayer's money (be it on prisons or pollution control), not on those who are doubtful about whether it is worth spending it.

There are problems with the last paragraph of van den Haag's critique. It is dangerous so glibly to take for granted the interests embodied in laws. One wonders how van den Haag would apply his equanimity about the structural implications of the legal status quo to the laws of apartheid, for example. Nevertheless, I am not a disciple of the doctrine that the law is written to reflect ruling class interests, though it very often happens that the law in action burdens the ruling class less than the poor.<sup>3</sup> My reference to Anatole France was not to suggest that the law is a tool of the ruling class but to show how a Kantian concern over reciprocity, an "equilibrium of benefits and burdens," is a nonsense because rich and poor, individual and corporation, have different benefits and burdens. One reason for this is that there are some respects in which powerful corporations have greater burdens than the poor (e.g., compliance with antitrust laws). My article is not about the injustice inherent in the way the law is written but about injustice in the way it is enforced.

Van den Haag and I have different conceptions of justice which are manifest in our attitudes to the following two unjust situations:

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<sup>2</sup> Van den Haag's doubts about rehabilitation and incapacitation are, however, more severe than mine. While not rejecting deterrence, rehabilitation, and incapacitation as goals of punishment, my doubts about their efficacy for reducing common crime are sufficient for me to favor diminishing punishment at least down to the point where it becomes clear that these utilitarian goals are no longer being achieved as they once were. In contrast, I find the evidence persuasive that, at the current level of punishment for white-collar crime, increases in punitiveness can reduce crime. Braithwaite & Geis, *On Theory and Action for Corporate Crime Control*, 28 CRIME & DELINQ. (forthcoming issue, 1982).

<sup>3</sup> See J. BRAITHWAITE, *INEQUALITY, CRIME AND PUBLIC POLICY* 10-13 (1979).

- A. The poor get the punishment they deserve, but the rich get punishments less than they deserve.
- B. The poor and the rich equally get punishments less than they deserve.

Van den Haag finds A more acceptable; I prefer B. One reason is that, as a non-retributivist, I find punishing people "less than they deserve" to be neither particularly meaningful nor troubling. I simply don't have a way of deciding if a person has received a less-than-deserved punishment, so why should I worry when some people say that he has? Even if we could somehow know when such people were right, mercy and compassion are not necessarily evils. Moreover, giving people what they deserve is simply not my reason for punishing them.

Situation A, on the other hand, is profoundly disturbing because it is a structural injustice between rich and poor. It is disturbing irrespective of whether injustice is conceived as meaning unfairness or inequality. Why should structural injustices—between rich and poor, black and white, men and women—be more troubling than other kinds of injustice? Elsewhere, a more detailed answer has been provided,<sup>4</sup> but a summary answer at least is required here.

Structural injustice is of particular concern when it is based on one group having more power than another. Public policy rightly tolerates many injustices which are not based on power. Imagine that according to some reasoning, Tom is the person who most "deserves" a particular job for which he has written an application. If Tom fails to get the job because his wife forgets to post the letter of application, because he can't start work soon enough, or because the personnel officer failed to notice Tom's virtues, then Tom has suffered a kind of injustice. Through no fault of his own, Tom missed out on something he "deserved." While people sympathize over Tom's "bad luck," no one feels that public policy ought to do anything to correct the injustice. If, on the other hand, Tom missed out on the job because he was black, the injustice is seen as something demanding a remedy. Why? Because it is so blatantly a structural injustice based on power. Public policy is not very concerned to correct the injustices of bad luck because it is assumed that while misfortune will frown on us with respect to some chance injustices, good luck will smile on us with others. Not so with injustice based on power. The fact that one is a victim because of powerlessness increases the probability that one will be a victim in many other kinds of ways. Powerlessness begets victimization begets powerlessness begets more victimization. This is what is meant by "self-perpetuating poverty" or "cy-

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<sup>4</sup> Braithwaite, *Paradoxes of Class Bias in Criminal Justice*, in *BREAKING THE CRIMINOLOGICAL MOLD: NEW PROMISES, NEW DIRECTIONS* (H. Pepinski ed., in press).

cles of disadvantage.”<sup>5</sup> Public policy therefore rightly has a greater concern with rooting out structural injustice based on power in all its insidious forms than with removing other kinds of injustice.

An additional reason for this is that it is structural injustices which tend to generate the greatest resentment and undermine respect for the societal institutions concerned; in the case of unequal punishment of rich and poor, it is respect for the law and the criminal justice system which is eroded. While one hears people express disgust at a criminal justice system which punishes people less than they deserve, that disgust rarely leads to rationalizing violations of “rich man’s law” or “white man’s law,” a sentiment commonly enough the product of structural injustice.

I suspect that a fundamental source of difference is that van den Haag wants to weigh structural and non-structural injustices as if they were equal, whereas structural injustices weigh more heavily for me. Just deserts and determinate punishment are not so bad if you have no special concerns about a society which blinks at the abuses of the rich while bludgeoning those of the poor.

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<sup>5</sup> M. RUTTER & N. MADGE, *CYCLES OF DISADVANTAGE* (1976).