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REPLY TO DR. JOHN BRAITHWAITE

ERNEST VAN DEN HAAG

There are some misunderstandings but also some actual disagreements between John Braithwaite and me.

Even if rehabilitation has not yet been shown to be successful, Braithwaite thinks that I ought to share his faith in it. Fair enough. In my *Could Successful Rehabilitation Reduce the Crime Rate?*,¹ however, I point out that, even if it were 100% successful, rehabilitation could not significantly reduce the crime rate. Therefore, rehabilitation, unlike deterrence, is not relevant to reducing the crime rate, the topic I was discussing.

Braithwaite also suggests that I have the burden of proving that there is deterrence. I don't think I do (though I will gladly refer him to my *Punishment as a Device for Controlling the Crime Rate*²). Since the only purpose of the criminal law is to deter people from the acts it threatens with punishment, if Braithwaite really argued that there is no such thing as deterrence—that the price we risk paying does not influence what we do—he would have to tell us why we have criminal laws—and how he would replace them since he feels they are ineffective. Braithwaite does, however, argue about what penalties the law should threaten. Hence, he seems worried only about the amount of deterrence specific threats will produce. This is a legitimate question, but I did not concern myself with it in the article on which Braithwaite comments and see no reason for doing so now. I was concerned about the relation of deterrence to the predictability of punishment and have nothing to add on the question Braithwaite raises.

According to Braithwaite, “[d]eterrence is conceived [by me] as a proxy for desert.” I do not know how I produced that impression. I did not mean to. In my opinion, the punishments demanded by deterrence and by retributionist theories coincide more often than is realized. But neither theory is a proxy for the other and the punishments may differ since, as Braithwaite and I agree, punishments required by retributionism are arbitrary in the sense I specified in my article.

¹ 73 J. CRIM. L. & C. (forthcoming issue).

² Van den Haag, *Punishment as a Device for Controlling the Crime Rate*, 33 RUTGERS L. REV. 706 (1981).

Braithwaite goes on to suggest that I am inconsistent because I reject "community consensus" as determinant of retributionist punishment and accept it as determinant of "needed deterrence" (I wrote "demand for deterrence" because I wouldn't know what "need" is). But I did not reject "community consensus" as determinant of retribution. Retributionists do. They must, because "community consensus" cannot be relevant for retributionist theory (which I do not hold) or indeed to the decision of any moral questions, in deontological theory. I do accept the demand for deterrence as decisive, not of what is just, but as a measure of the deterrence demanded—which seems rather appropriate.

Deterrence theory does not rest on anything metaphysical such as justice. Retributionism does. Deterrence theory suggests that punishments are justified by reducing the crime rate and should be determined by the amount of deterrence people are willing to pay for in money (for police, judiciary, prisons, etc.) and in the cost ("moral" and financial) paid by the persons punished. Braithwaite is right in pointing out—as I did—that there are problems in finding out what the community wants and whether the best way to gratify its demand is to increase apprehension rates, or conviction rates, or severity of punishment. But these empirical problems arise only after one accepts deterrence as a criterion for punishment and seem quite solvable to me.

Braithwaite charges that my views would imply "whole categories of crime being punished above the deserved level." This charge strikes me as odd since Braithwaite seems to agree that there is no such thing as a "deserved level." At any rate, deterrence theory makes no assumption about deserved levels of punishment.³

Braithwaite wonders in the end "if the results of the Japanese system show that it is a superior model for crime control." Perhaps. But what accounts for the Japanese performance? Could it be that

1. there are only 10,000 lawyers in Japan?
2. apprehension and conviction rates are extremely high—about ninety percent?
3. Japanese history is different from ours?
4. Japanese modal personality is different from the American one?
5. Japanese culture is different from American culture?
6. the Japanese population is more homogenous, conforming and cohesive than ours?

I could go on almost ad infinitum. Why Braithwaite picks "the desirability of uncertainty, of giving offenders a second and a third

³ As I have pointed out, the "level" demanded for the sake of deterrence is unlikely to exceed that required by the desert criteria actually used in positive law. *Id.*

chance, of keeping people out of prison” as making for the difference, I don’t know. Actually, these are among the features the American system has in common with the Japanese. They do not seem to have decreased the American crime rate.