

COMMENT ON "THE CRIMINAL LAW AS A THREAT SYSTEM"

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There are two very fundamental agreements between van den Haag's paper and mine: (1) "From the viewpoint of just deserts, the coordination of crimes and punishments . . . is . . . unavoidably arbitrary"; and (2) there is therefore little choice but to fall back onto utilitarian rationales.

Nevertheless, van den Haag's utilitarian regress is a myopic commitment to deterrence and a total rejection of other utilitarian goals of punishment. I do not want to quibble with van den Haag's demolition of rehabilitation and incapacitation, even though the arguments are often overstated, because essentially he is right about the enormous problems with these doctrines.

But why has deterrence been spared the same critical eye? We are told that "Deterrence is a matter of immediate observation (common sense)" and that the failure of social scientists to demonstrate the actuality of deterrence is not reason enough to stop trying to deter crime. Why not extend the same charity to rehabilitation? Just as we apply the "common sense" of deterrence to everyday activities like raising our children, so we apply the "common sense" of rehabilitation through reasoning, shaming, moralizing, etc.

The most unconvincing part of van den Haag's argument is his suggestion that the replacement of desert by deterrence as the yardstick of punishment in a sense can be justified retributively. Deterrence is conceived as a proxy for desert. The assumption is that what retributivists believe to be deserved for most punishments is very similar to what society believes necessary for deterrence. Empirical work is needed to test this assumption.¹

However, the deep problems with van den Haag's use of deterrence as a proxy for desert are logical rather than empirical. The use of

¹ This empirical work could consist of (a) interviewing various retributivists about what punishments they would impose for a list of crimes on retributive grounds, (b) interviewing sample members of society on the punishments necessary to deter the same list of crimes, and (c) correlating the two sets of scores.

surveys to establish community consensus over deserved punishments is rejected because "For the retributionist the moral question—what is justly deserved?—cannot be decided by what people believe [to be deserved]." But the alternative on which he ultimately settles suffers exactly the same defect of dependence on public opinion (this time of needed deterrence) rather than on "real" desert. The yardstick of punishment is to be the "socially demanded degree of deterrence": "[T]he social demand for deterrence can be quantified: it is equal to the frequency of any crime society is willing to tolerate rather than to increase the size of punishment or other costs." How can we quantify what society is willing to tolerate other than by asking its individual members? Van den Haag leaves us with a method of operationalizing desert which continues to jettison what is right in favor of what people believe to be right.

There are other problems with using "the frequency of any crime society is willing to tolerate" as the yardstick for punishment. First, it assumes that "society" understands how increases in punishment reduce the frequency of crime. Having earlier conceded that social scientists do not understand this connection, we are now asked to believe that "society" does. Second, might "society" be just as happy to achieve its "social demand for deterrence" by increasing police forces or by other means which change the certainty of apprehension rather than the severity of punishment?

Van den Haag might reply that in assessing the social demand for deterrence we can only take account of the existing level of apprehension. But this implies that the punishment in a jurisdiction with an understaffed and incompetent police force must be higher for the same crime than in a neighboring jurisdiction with an efficient force. The regress to utilitarianism is more total than van den Haag pretends. We cannot claim to be punishing people according to their deserts when what they get depends on how many other people have been apprehended for the same offense. Van den Haag's mandatory sentences may escape the injustice of individual judges imposing exemplary sentences for the sake of deterrence, but it opens up the more profound structural injustice of whole categories of crime being punished above the deserved level because of low apprehension rates for that category.

The utilitarian impurity of some people bearing a heavier punishment to make up for the unpunished sins of others is not the only difficulty. Consider the elasticity of behavior to deterrent threats. It is widely assumed, with some data to support the assumption, that while many common crimes, especially crimes of passion, are perpetrated by irrational actors, white-collar criminals are highly rational and calculat-

ing and therefore more susceptible to deterrent threats.² The problem in controlling most white-collar crime is not that the offenders are short on fear of punishment but that getting courts to convict them is so difficult. But in those areas where frequent punishment of white-collar criminals can be achieved, and there are some,³ is the retributivist willing to accept the imposition of sentences much lower than those "deserved" because the actions involved are so sensitive to stigma and deterrence? At the other extreme, are retributivists happy to punish domestic assailants more than they deserve because their type of criminality is so impassioned and impervious to deterrence? In short, by operationalizing desert through the social demand for deterrence, van den Haag happily shoulders most of the terrible moral problems that come with preferring the utilitarian path to the retributivist one.

Van den Haag is a punitive closet utilitarian. He believes in maximizing deterrence by sentences which are mandated, determinate and flat ("punishment is the more deterrent the more automatic it is."). In arguing that determinate sentencing will reduce crime and do justice to future victims, van den Haag constantly forgets the problematic nature of the enormous body of relevant empirical evidence.⁴ Is it not possible that the Japanese model of criminal justice,⁵ based on the desirability of uncertainty, on giving offenders a second and a third chance, on keeping people out of prison,⁶ will prove more effective in protecting victims than the American preoccupation with predictability? A lot of us in the rest of the world are wondering if the results of the Japanese system show that it is a superior model for crime control.⁷

The arguments in my paper that mandatory punishment breeds injustice are as applicable to those who favor mandatory and certain punishment for utilitarian reasons as they are to those who do so on retributive grounds. I have argued that certain punishment of white-

² Evidence on the deterrability of white-collar crime is discussed in Braithwaite & Geis, *On Theory and Action for Corporate Crime Control*, 28 CRIME & DELINQ. (forthcoming issue, 1982).

³ Examples are the enforcement of safety or pollution violations in heavily regulated industries which are subjected to intensive inspection (e.g., coal mining, nuclear power, pharmaceuticals).

⁴ See references cited in Braithwaite, *Challenging Just Deserts: Punishing White-Collar Criminals*, 73 J. CRIM. L. & C. 723 n.1 (1982).

⁵ W. CLIFFORD, CRIME CONTROL IN JAPAN (1976); E. VOGEL, JAPAN AS NUMBER ONE: LESSONS FOR AMERICA 204-24 (1979).

⁶ The Japanese imprisonment rate is less than a fifth of that of the United States. As of October 1, 1981, it was 44.3 per 100,000 of population. D. BILES & M. JOHNSON, PRISON STATISTICS FOR ASIA AND THE PACIFIC, Q. SUMMARY NO. 7 (1982).

⁷ For a Japanese critic, the most objectionable aspect of van den Haag's paper would be its total rejection of any social model of man. Could it be that a large part of Japanese success (not only in crime control) is explicable in terms of the culture's refusal to build policies on the assumption that man is an isolated individual responding rationally to rewards and punishments?

collar criminals is neither remotely attainable nor desirable. It has been shown how any pretense at moving towards certain punishment could increase suffering from white-collar crime. Others have argued, for quite different reasons, that certain punishment of common crime would not reduce it but only succeed in victimizing taxpayers.⁸ And of course if van den Haag and his followers push for certain punishment on both fronts they will achieve substantial success in the slums while firing blanks in the boardrooms. Under the banner of fixed justice, American taxpayers will have spent a fortune on creating an even more unjust society.

Van den Haag's final sentence makes the following extravagant claim: "Deterrence theory is found to offer a basis for mandated, just, equal, and optimally deterrent sentences." Mandated sentences are not necessarily just, as in the case of a mandatory sentence being imposed on a person who is not entirely blameworthy, or in the case where the law was broken to achieve a higher social purpose (e.g., dangerous driving to get an injured person to the hospital), or where there are some other justly mitigating circumstances. Moreover, in my contributions to this exchange, it has been argued that just punishments are not necessarily equal, equal punishments are not necessarily optimally deterrent, and optimally deterrent punishments are not necessarily just. The world is too complicated for any unitary approach to punishment to make sense.

⁸ See references cited in D. BEYLEVELD, A BIBLIOGRAPHY ON GENERAL DETERRENCE 2-40 (1980) and in Biles, *Crime and Imprisonment: An Australian Time Series Analysis*, 15 AUSTL. & N.Z.J. CRIMINOLOGY (forthcoming issue, 1982).