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PUNISHMENT: DESERT AND CRIME CONTROL

*Ernest van den Haag**

PAST OR FUTURE CRIMES: DESERVEDNESS AND DANGEROUSNESS IN THE SENTENCING OF CRIMINALS. By *Andrew von Hirsch*. New Brunswick, N.J.: Rutgers University Press. 1985. Pp. xiv, 220. \$25.

REDISCOVERING RETRIBUTION

Andrew von Hirsch has had a major role in making the part retribution plays in doing justice respectable once more,¹ after it had been relegated to near oblivion in favor of rehabilitation.² He has helped matters along by rechristening retribution "just deserts." And why not? It is a catchy name (although pleonastic: "unjust deserts" would be oxymoronic). The reacceptance of retribution was helped when it was revealed, at long last, that rehabilitation by means other than age was far too rare to warrant sentences tailored to so unlikely a prospect.³

In *Past or Future Crimes* Professor von Hirsch discusses rehabilitation briefly and deterrence occasionally to focus on the most recent sentencing theory: "selective incapacitation." Rehabilitation, deterrence, and selective incapacitation propose sentences primarily meant to control crime through sanctions based on the predicted future behavior of convicts (or, in the case of deterrence, of prospective offenders). Wherefore Professor von Hirsch rejects them. He wants sentences to be determined by past behavior — by what is deserved for the crime already committed. Sentences must be morally just, regardless of future effects on convicts or others. In the Kantian tradition, punishment is not treated as a means of crime control, but primarily as a deontological moral act, an end (if not a good) in itself.⁴ Laws must prescribe and courts must impose the sentences crimes deserve.

Professor von Hirsch makes his points in workmanlike, if not ele-

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1. See A. VON HIRSCH, *DOING JUSTICE: THE CHOICE OF PUNISHMENTS* (1976).

2. In *Williams v. New York*, 337 U.S. 241, 248 (1949), Justice Black expressed a common contemporary view: "Retribution is no longer the dominant objective of the criminal law."

3. See D. LIPTON, R. MARTINSON & W. WILKS, *THE EFFECTIVENESS OF CORRECTIONAL TREATMENT* (1975).

4. Unlike Professor von Hirsch, Kant did not always ignore deterrence. In his *Lectures on Ethics* Kant wrote: "Ruling authorities do not punish because a crime has been committed, but in order that crimes should not be committed." I. KANT, *LECTURES ON ETHICS* 56 (Methuen Library Reprints 1979).

gant prose. Cryptic phrases, such as “[s]elective incapacitation necessarily invalues such infringement” (p. 171), stand out because fortunately rare. Throughout, he reproaches — or, as he writes, reprobates — those interested in crime control for neglecting what is deserved. He asserts, although he does not much argue, the absolute priority of justice (retribution). It sounds good. Is he right? A satisfactory punishment certainly must be perceived to do justice. Yet it must serve to control crime as well. If either of these two purposes of the criminal justice system is dropped, or neglected in favor of the other, we get a tidy, but not very helpful theory. Such is the case with *Past or Future Crimes*, despite Professor von Hirsch’s occasional gestures toward crime control. They make his “just deserts” theory less tidy, but not more helpful.

By threatening future crimes the criminal law means to deter (control) them. (Threats always are meant to deter.) By punishing those who were not deterred (criminals), we carry out legal threats and make them credible. Further, by punishing offenders as threatened by law, we do justice. Professor von Hirsch insists that to do justice criminals must be punished according to what is deserved by the seriousness of their crimes. Fine. However, he implies, or at times asserts, that he has succeeded in establishing a nonarbitrary relationship between crime, desert, and appropriate punishment. I don’t think he, or anyone, has.

Professor von Hirsch is right in rejecting sentences addressed primarily to the future behavior of offenders. Sentences based on prospects for rehabilitation, or on the need for incapacitation, would make justice irrelevant by dealing with criminality as a disease requiring treatment, or as a condition requiring isolation — as though the criminal were not a morally responsible person who deserves blame and punishment in some proportion to his crime, just as others may deserve praise and reward for their achievements.⁵

Diseases do not deserve blame; and treatments are neither just nor unjust, only effective or ineffective. Criminal behavior obviously lacks the characteristics usually associated with disease, such as involuntariness and undesiredness. Further, disease, unlike criminality, shortens life, or is painful, or disabling. Finally, the criminal “disease” is voluntary while the “treatment” is not — the reverse of what ordinarily characterizes diseases. Thus, the idea of criminality as illness (and of treatment instead of punishment) is quite unpersuasive. It gained currency only because in the nineteenth century blame, as part of an extrascientific morality, was unacceptable to emancipated social scientists. The disestablishment of rehabilitation as a sentencing crite-

5. Barbara Wootton in *Crime and the Criminal Law* was explicit in arguing that “the formal distinction between prison and hospital [should be] . . . obliterated altogether.” B. WOOTTON, *CRIME AND THE CRIMINAL LAW* 79-80 (1963).

tion, however, does not establish Professor von Hirsch's claims for just deserts. Neither does the unjustifiability of "selective incapacitation."

Selective incapacitation shares some of the crucial weaknesses of rehabilitation as a sentencing criterion, although it drops the over-optimistic prospect of "cure" and the inappropriate medical model. Selective incapacitation proposes to incarcerate for as long as possible — ideally until they are no longer dangerous — the convicts predicted to recidivate frequently. While incapacitated they could not commit (extramural) crimes; this is expected to reduce the crime rate. Convicts thought unlikely to recidivate would be incarcerated for a shorter time, even though they had committed the same crime and had a similar conviction record. Professor von Hirsch objects convincingly that the predictability of recidivism is insufficient for the proposed selection. He argues further that it would lead to unequal sentences for the same crime and, for offenders predicted to recidivate often, to sentences disproportionate to the crimes so far committed. He is right. Sentences would be determined by predictions as precarious as they are irrelevant to what is deserved for the crimes already committed.

Professor von Hirsch compromises retributionist theory somewhat. Although rejecting selective incapacitation he favors "categorical incapacitation," which also would require longer imprisonment for categories of offenders predicted to be more dangerous than other categories. The length of incapacitation, however, would depend on the recidivism associated with the category into which the crime committed falls, rather than on the predicted recidivism of the individual. Thus, the sentence for all those who have committed the same crime would be the same. Professor von Hirsch hopes to make sure that the categorically incapacitative sentences are proportionate to the seriousness of the crimes. But it is hard to reconcile sentences according to desert with sentences according to categorically (and precariously) predicted recidivism. To the extent to which a sentence is based on predicted recidivism, the sentence may not be what the crime deserves, if desert refers to the past, as it must.

Yet Professor von Hirsch need not have worried about how to reconcile prolonged incapacitation based on predictions of dangerousness with punishment according to desert. Convicts could be punished according to desert as he proposes. Those deemed dangerous, by categorical or selective prediction, still could be confined until no longer dangerous. Such additional confinement need be regarded as punishment no more than the confinement of the insane need be morally deserved. We confine some of the insane against their will not because they are blameworthy, nor even because they are insane, but because they are dangerous. We may similarly incapacitate offenders certain to endanger us in the proximate future. Incapacitation here is not a

punishment but a means of social protection. Although we cannot punish him for what he has not, as yet, done, we can incapacitate someone we know to be about to commit a murder. I do not see the philosophical difficulty which Professor von Hirsch strives so mightily to overcome. He creates it by unnecessarily conflating incapacitation with punishment. Actually, punishment is only one of several possible purposes of incapacitation, which can be imposed independently, as is done with the insane. The real difficulty is empirical and suffices to discard preemptive incapacitation of offenders beyond the punishment deserved: We are unable to predict with enough accuracy the dangerousness of individuals. Unlike Professor von Hirsch, I do not think our ability to predict the dangerousness of categories is adequate either.

Professor von Hirsch compromises "just deserts" not only by reluctantly favoring categorical incapacitation, but also by enthusiastically asking courts to consider the availability of prison space in sentencing, as though judges were real estate agents. Surely it is for legislators, not for sentencers, to consider the availability of prison space and either to build more prisons as needed, or to reduce prison terms if preferred. It is hard to see why crowding of prisons (or vacancies) could decrease (or increase) the just deserts of convicts.

IS RETRIBUTIONIST THEORY SUFFICIENT?

If desert is as necessary a criterion of punishment as Professor von Hirsch claims, is it as sufficient as he claims? In its pure form retributionist theory proposes punishment according to desert, regardless of effects on the criminal — such as rehabilitation, or incapacitation — and regardless of deterrent effects. Retributionists do not deny such effects. After all, most punishments will incapacitate offenders at least temporarily, thereby reducing their ability to commit crimes. Further, the anticipation of retribution is likely to deter some future offenders. However, retributionists resolutely disregard these effects as sentencing criteria, since they are irrelevant to the moral desert which retributionists see as the only justification for punishment. Perhaps it is. Certainly moral desert is the only moral justification for punishment; but we cannot really know what punishment crimes deserve; wherefore the just desert principle is not sufficient to determine a punishment scale.

According to just deserts theory, the seriousness of the crime alone should determine the punishment deserved. Seriousness, in turn, depends on the harm done and on the culpability of the offender. Surely both are relevant. But since harm is always a consequence and often a contingent one, from Professor von Hirsch's deontological (certainly nonconsequentialist) standpoint the wickedness of the intent alone might be expected to count. However, this would make the just

deserts criterion quite impractical. Professor von Hirsch, therefore, remains wisely silent on culpability versus harm. We are not told whether more punishment is deserved by an offender who is very culpable (his crime was premeditated) but does little harm (he did not succeed in poisoning his wife: by accident he gave her sugar instead of strychnine) or by one who does great harm but was merely negligent. Which crime is more "serious"?

Professor von Hirsch further appears to believe that the comparative seriousness of crimes can be determined in all cases. Not so. Comparative seriousness can be determined only for some crimes, and it does not fully determine the comparative punishment deserved. If rape is a crime and murder is a crime, rape-murder must be more serious than either. Does rape-murder deserve the sum of the punishments meted out for rape and for murder? More? Less? Even when crimes are nearly homogeneous, assigning seriousness is arbitrary: Is rape more serious than assault with a deadly weapon? Is burglary more serious than fraud when fraud does more harm? What about mishandling toxic waste? Ordinal determinations of seriousness become altogether arbitrary when the seriousness of heterogeneous crimes must be compared. The law somehow settles these matters. But just deserts theory offers no rational criterion of comparative seriousness, no guide to legislators.

Once we have decided that crime *A* is more serious than crime *B*, we still have to decide how much more, if we want to decide how much more punishment is deserved. However, ordinal criteria tell us, at best, that *A* is more serious than *B*, not how much more. Hence, our decision on how much more punishment *A* deserves is arbitrary. Professor von Hirsch offers us no principle on which to base it. He discusses "cardinal proportionality" as if it somehow could tell how much more serious *A* is than *B*. It does not. It merely labels the problem without solving it. Possibly his "cardinal proportionality" also refers to the relationship between the seriousness of the crime and what is deserved for it. However, "cardinal proportionality" neither justifies the degree of seriousness assigned to crimes nor the punishment deserved for that degree.

Just deserts fails even more fundamentally to tell us what is deserved for any crime. Suppose we agree that murder is a serious crime and burglary a less serious one. Thus murder deserves more punishment than burglary, though nothing tells us how much more. But what does murder deserve in the first place? Execution? Life in prison? Twenty years? Ten? Just deserts theory cannot tell. Professor von Hirsch appears to deal with the problem under the heading of "anchoring the penalty scale"; but he does not really address it. Thus, contrary to what he appears to believe, there is no way of determining whether any penalty scale is "inflated or deflated" in terms of what is

deserved. The just deserts criterion does not justify his opinion that murder deserves X any more than it justifies mine that murder deserves $2X$. Just deserts seems to be a question masquerading as the answer. The question seems quite justified. Unfortunately no answer can be.

Politicians may be guided by the answers people actually give when asked what punishments are deserved for various crimes. These answers indicate what is desired and acceptable. However, they mainly reflect the customary scale of punishments and cannot be the basis for a "correct" scale. The people, no more than the philosophers, can give any reason for believing that burglary deserves five years in prison and murder fifteen, rather than three and nine, or three and six. To be sure, no system in need of public support can afford penalties that greatly deviate from popular opinion. Still, that opinion about what is right, or just, is no more than an opinion. A theory of punishment which, in effect, simply tells us that whatever punishments are popularly accepted are ipso facto just, or right, scarcely deserves to be called a theory. A theory is meant to shape opinion according to justifiable rational principles, rather than merely to follow it.

Theories which propose punishments according to expected rehabilitative, incapacitative, or deterrent effects may be morally faulty and empirically unfounded. Yet they are superior to just deserts theory in that they offer, in principle (though not necessarily in practice), a test for the appropriateness of punishments: the punishment that rehabilitates, or incapacitates the dangerous, or deters prospective offenders is the appropriate punishment. Just deserts theory insists that punishment be what is deserved by the seriousness of the crime. But we are not told how to measure seriousness or how to relate it to punishment. For this reason I think Professor von Hirsch's "impatience" with "attempts to treat justice as anything but central" (p. 172) is misplaced. Retribution must play a role, but scarcely a central one, since it cannot tell us how to punish crimes.

Professor von Hirsch's "impatience" is wrongheaded for another reason as well. He appears to be concerned about justice to convicts, who, he thinks, may be victimized by excessive punishment (punishment beyond what he thinks is deserved). But even if disproportionate to the crime — whatever that means — punishment is not unjust to the criminal. Society does have an interest in avoiding unwise or excessive punishments, but not because such punishments are unjust to convicts. A punishment cannot be unjust to the convict, who has volunteered to commit a crime and, thereby, to assume the risk of suffering the legally prescribed punishment. He could have avoided the risk. If what he volunteered to risk does occur, he suffers an injustice no more than a man who risked his fortune gambling does when he loses it. The convict, or the gambler, suffered a misfortune which may

kindle our compassion; but neither suffered an injustice. There is no injustice in suffering what one volunteered to take the risk of suffering. Justice does not protect against risks, however exorbitant, one volunteers to assume. The punishment prescribed by law may be less or more than the crime deserved by some reckoning. The punishment may be, as it were, unjust (disproportionate) to the crime. But the punishment cannot be unjust to the criminal, since he volunteered to assume the risk of suffering it. Professor von Hirsch is mistaken in conflating punishment disproportionate to the seriousness of the crime with injustice to the criminal.

We must try to mete out sentences according to what is felt to be deserved by the crime, because the criminal justice system needs general support which is predicated on a popular feeling that the system does justice according to desert. But, contrary to Professor von Hirsch's claim, the just deserts principle does not prescribe a scale of penalties, or enable us to do so, beyond suggesting that punishments must be felt to be deserved, that is, felt somehow to retribute (pay back) for the moral and material injuries crimes cause. The *lex talionis*, which originally limited private vengeance, cannot determine public retribution which is meant to vindicate the law. Therefore we do not limit the time for which we confine a kidnapper to the time for which he confined his victim. Neither do we torture torturers. There need not be an equivalence of suffering. Retribution is circumscribed, albeit vaguely, only by our sense of proportion.

COULD INCAPACITATION HELP?

The "just deserts" theory tries to answer a moral question: What punishments are morally deserved? Since the theory does not ask the consequentialist question — what punishments will control crime? — it cannot be expected to answer it. However, Professor von Hirsch hopes that "categorical incapacitation" will help control the crime rate because the incapacitation of likely recidivists will reduce crime. Most criminologists accept this idea in some form; so do most prosecutors. Yet incapacitation of likely recidivists is irrelevant to controlling most crime.

Criminologists traditionally want to know why some people commit crimes occasionally, others frequently, and still others not at all. Few concern themselves with a question which seems far more relevant to crime control: Why is the crime rate what it is — why is it neither higher nor lower? The answer suggests that incapacitation of future career criminals per se (*i.e.*, independent of deterrent effects) cannot be effective in controlling most crimes. Even incapacitation of all convicted offenders would not be.

If we incapacitated the dentists who currently see most patients, or the most active prostitutes, or if we incapacitated all practicing den-

tists or prostitutes, the rate of dentistry, or prostitution, would be reduced — but only temporarily. It would return within a short time to what it was. Because demand would not be affected while the supply of these services would be reduced, the price would rise and attract newcomers until as many persons would render dental or sexual services as before, whereupon the price would fall back to the old level. To be sure, not everybody is capable of becoming a dentist, or a prostitute, and many are unwilling at any price. Normally, however, there are enough capable persons willing to replace incapacitated practitioners if the price is right. The price that attracted the previous number of practitioners will do so again. The effect of incapacitation on the rate at which most crimes are committed does not differ from the effect of incapacitation on the rate of dentistry or prostitution. Incapacitation would have some short-term but no long-term effect on most crimes.

Many crimes are market-dependent: they become profitable only as the proceeds (or, in the case of prostitution, the services themselves) are sold. That is why prices play so important a role. Theft, car theft, truck hijacking, and burglary are market-dependent. Incapacitation *per se* (apart from deterrence) has only short-term effects on the rate at which market-dependent crimes occur. They become more lucrative (prices rise) as practitioners are incapacitated. This attracts more newcomers until the price of stolen goods (or unlawful services) falls to the original level. Thus the rate (say of car theft) would not change in the end. Incapacitation causes different, but not fewer persons to engage in criminal activity.

Other crimes such as rape, or the taking of money, do not depend on a market since there is no market for rape and no need to sell money. Therefore, rape does not become more lucrative, or attractive, through incapacitation of convicted rapists. While deactivating some rapists, incapacitation would not attract newcomers and might reduce the rate at which rape is committed by repeat offenders. (The incapacitation of one-time offenders would make no difference.)⁶

Most criminals, however, do not specialize. The burglar is a rapist as well, dependent on opportunity. It follows that incapacitation of rapists may accomplish little, even with respect to rape, since it would not reduce the rate of burglary and incidental rape. Further, although there certainly are high- and low-rate offenders, the notion of career criminals — persons who remain high-rate offenders when others taper off owing to advancing age — is questionable. It seems likely that both high- and low-rate offenders reach their peak by age eighteen

6. As more rapists, or robbers, are incapacitated, however, the unused opportunities for rape and robbery would increase. As better opportunities become available the net gain from these crimes would rise, making them more attractive and thereby enticing more newcomers. This may or may not offset the reduction of these crimes by incapacitation of repeat offenders.

and begin to taper off in their twenties. Thus, unless they are incapacitated between the ages of fourteen and twenty, incapacitation would lock the door after the period of maximal criminal activity of those incapacitated has passed.⁷

DETERRENCE DETERMINES CRIME RATES

The rate at which crimes are committed generally depends on the net advantage they are expected to yield compared to the alternatives available to criminals. The comparative net advantage of crime consists of the material or psychological benefit expected less the expected cost to the criminal. The main cost to the criminal is punishment — the threatened punishment discounted by the improbability of suffering it. (The threatened legal punishment itself is only the list price which no criminal expects to pay.)

The gross benefit of crime to the criminal is hard to change by any governmental policy. The cost to the criminal, which codetermines the net benefit, however, depends on the probability and severity of punishment. Given the severity of punishment, society can manipulate, to some extent, the probability of suffering it; and society can readily determine severity. Either way, the cost of crime to the criminal can be changed and therewith the net benefit to him.⁸ Thus the crime rate, *ceteris paribus*, depends on the punishment society is willing to impose on criminals. Prospective criminals react to incentives and disincentives as do most people. They react to changes in incentives and disincentives more sensitively than persons already committed to crime. Incentives and disincentives influence the formation of habits, criminal or not, more than they affect habits already formed. In this respect, criminals react as other groups do: changes in the wages of miners will influence prospective miners more than those who are already in the pits.⁹

A caveat may be apposite. No conscious calculation of costs and benefits by prospective criminals is implied. They do not consciously calculate any more than prospective dentists or purchasers (or nonpurchasers) of Rolls Royces do. People usually adapt their behavior to incentives and disincentives without explicit or conscious calculations. Only those who wish to predict the effects of incentives and disincentives must calculate. Those to whom the incentives or disincentives are offered need not. The rats to whom experimenters offer

7. On this matter see Gottfredson & Hirschi, *The True Value of Lambda Would Appear to be Zero*, 24 *CRIMINOLOGY* 213 (1986).

8. Punishment is the only cost to the offender which the criminal justice system can influence directly. Other costs he may bear — *e.g.*, guilt feelings — are hard to influence by social measures. Still other factors such as age, genes, sex, family, income, religion, custom, and social structure also play a role. But they are not readily subject to social control.

9. Much research on deterrence only observes effects on criminal habits and not on habit formation.

incentives or disincentives do not calculate. Yet we observe that they are guided by the incentives and disincentives which become part of their environment.¹⁰

The disincentive effect of punishment threats can be calculated in principle: an increase in severity and/or probability of punishment will lead, *ceteris paribus*, to a decrease of crime. The extent depends on the elasticity of the supply of crime, which must be established by observation. Thus, a coherent and nonarbitrary scale of punishments which determines the cost of crimes to criminals (and thus the net gain) could be worked out.¹¹ It would not directly depend on "just deserts," but on the moral and material considerations which may (or may not) lead us to prefer more punishment to more crime. Crime can be deterred to the degree to which society is willing to bear the moral and material costs of the punishments needed to deter it.¹² In effect, for each kind of crime the question would be: Do we want to reduce it by X , if this means increasing the punishment for it by Y ?¹³ (Disincentives are never costless, although often likely to cost less than the crimes they deter.)

The arbitrary sanctions regarded as just deserts are not meant, nor are they likely, to control crime. Neither does incapacitation. But a deterrent scale of punishment will. Such a deterrent scale can be consistent with deserts, although independent of them, since the just deserts criterion does not actually determine, or exclude, any specific scale of punishments.

A rational scale of punishments controls crime by reducing the rate at which each crime is committed to the rate we are willing to

10. I use the word "environment" to stress that, contrary to factitious dichotomies, legal incentives and disincentives can be just as much a part of the environment as natural ones — a point that has been ignored ever since Enrico Ferri first ignored it in his seminal *CRIMINAL SOCIOLOGY* 76 (1896).

11. Punishments would almost entirely depend on their consequences, the crime rates they allow. Thus, punishments would be objectively determined, once the community, or its legislators, have made a value judgement to decide what crime rates to tolerate rather than bear the cost of altering them. The material cost and the material benefit of punishments are knowable, but a value judgement about the moral cost and the moral benefit still is required. This, however, would be the only value judgement needed to determine the size of punishments ordinally and cardinally. In contrast, any retributive scale of punishments requires value judgements about the seriousness of each crime, the punishment appropriate to that seriousness, and the size of the differences between crimes and between punishments. None of these judgements would be related to consequences. All punishments would be determined by deontic moral judgements based on intuition and tradition.

12. Philosophers often have objected that, to use punishments as a means to deter, is, impermissibly, to use convicts as mere means for social ends not their own. Since, however, the criminals (hoping to attain their own ends) have volunteered for the risk of being so used, this venerable objection lacks merit.

13. A minimal crime rate would remain, even if disincentives were maximized, because some persons do not respond to any disincentive. Moreover, as disincentives increased there would be diminishing reductions in the crime rate. (There is no indication that this point has been reached in the United States.) Finally, the greater availability of criminal opportunities, *see note 6 supra*, would encourage some newcomers.

tolerate rather than bear the moral and material cost of further reduction. This scale of punishments may also serve to satisfy the independently perceived demands of justice, for the punishment that reduces the crime as desired (in view of the cost of further reduction) may be the punishment the crime is perceived to deserve. Both the desire to deter and to exact retribution depend on the perceived seriousness of the crime.¹⁴

Professor von Hirsch's *Past and Future Crimes* takes "just deserts" theory just about as far as it will go — which is not quite far enough. Still, his book contains many stimulating observations and arguments and makes a major contribution to the exhaustion of possibilities.

14. The punishment needed to deter also depends on the attractiveness of a crime which may not coincide with its seriousness.