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corporations thus holds out the promise that serious corporate offenses will be punished stringently with high fines but masks the inegalitarian reality that courts will find themselves constrained to impose relatively low fines even in serious cases.

Providing additional forms of sanction against corporations—for example, equity fines, probation and punitive injunctions, adverse publicity, and community service—would hardly be enough in itself to ensure that the law treated serious corporate offenses seriously. However, these additional forms of sanction would not be subject to the same kind of political false promise as that of “efficient” fines. As contended earlier, punitive injunctions, or one or more of the other possible alternatives canvassed, would usually be capable of delivering a stiff punitive impact even where the inability of the company to pay, or the risk of causing unacceptable overspills, precluded the imposition of a heavy fine.

Conclusion

A number of influential attempts have been made to reduce the problem of effectively punishing corporate wrongdoing to a quest for economic efficiency through the use of fines or monetary penalties. The argument of this paper has been that this approach is unsatisfactory, partly because it neglects the limitations of fines or monetary penalties, and partly because it has troubling inegalitarian tendencies. An alternative approach, commended here, is to pin down the reasons why fines and monetary penalties against corporations have been criticized in the past, and to explore the potential of various alternative sanctions for overcoming the weaknesses of monetary punishment. The possibilities explored—equity fines (stock dilution), probation and punitive injunctions, adverse publicity, and community service—seem promising in different ways. Conceivably these possibilities could be developed so as to provide a flexible and potent array of sanctions. If so, we would not necessarily achieve economic efficiency but we might equip the law with punishments to fit major as well as minor corporate crime.

Retributivism, Punishment and Privilege

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“**J**ust deserts” as a rationale for punishing criminals means that offenders ought be punished not for the sake of crime prevention, but because they deserve it, for the sake of retribution (e.g. von Hirsch, 1976; Singer, 1979). The quantum of their punishment should be in proportion to the seriousness of their offense, not according to any assessment of whether they are rehabilitated or any estimation of the need for deterrence.

Just deserts has proved an attractive philosophy in part because it is seen by many of its followers as involving no tragic choices. Because the most serious offenses, those deserving most punishment, are also those where the need for deterrence and incapacitation of dangerous offenders is greatest, the demands of just deserts and protection of the community seem to be in step.

At the same time, however, it can be argued that in a large proportion of cases, punishment of known offenders does more harm than good. This can be particularly so with young offenders, for whom prison can be a “school for crime” where professional skills in, for example, safe cracking, are imparted, where reference groups are adopted which provide social support for criminality, where resentments can be enhanced by acts of violence

†Thanks to Philip Pettit for perceptive criticisms of an earlier draft of this chapter.

and degradation directed against the offender, and where opportunities for earning income legitimately are interrupted. Even without incarceration, the labelling that goes with other punishments might enhance criminal self-conceptions (Lemert, 1951; Becker, 1963; West and Farrington, 1977). On balance, most defenders of just deserts are not overly troubled by these arguments. While conceding that they may have some merit, retributivists tend to be reluctant to believe that there are many cases where imposing the deserved punishment puts the community at greater risk. Mostly, they suspect, the counterproductive effects of imposing deserved punishments are outweighed by the benefits of deterrence and incapacitation.

Just Deserts as Inconsistent with Protecting the Community from White-Collar Crime

In this article, I will argue that with white-collar crime there are some special reasons why punishment can be counterproductive. These pose more starkly the possibility that the lives of citizens are poorly protected by an enforcement policy which puts retribution ahead of prevention. White-collar crime is defined, according to the conventional definition of Sutherland (1949:2), as "a crime committed by a person of respectability and high social status in the course of his [or her] occupation." For the purposes of this article, common crime means all crime which is not white-collar.

Blunderbus Punishment and Business Compliance

A literature is accumulating in the field of business regulatory enforcement which suggests the sensitivity with which punishment must be used as a method of social control (Bardach and Kagan, 1982; Braithwaite, 1985; Cranston, 1979; Hawkins, 1984; Shover et al., 1983; Hawkins and Thomas, 1984). Business regulatory agencies can sap the will of business to comply with the law by remorselessly punishing them whenever they slip up by breaching health and safety, consumer protection, pollution, antitrust, and other laws.

This is because, at its worst, an uncompromising punitive strategy can lead to what Bardach and Kagan call an "organized culture of resistance"—a culture that facilitates the sharing of knowledge about the methods of legal resistance and counterattack. As an example, Bardach and Kagan cite the advice of one legal expert to appeal all Occupational Health and Safety Administration (OSHA) citations, not just those to which companies object

strongly, so that they can "settle a case by giving up on some items in exchange for dismissal by OSHA of others. Those who leave certain things uncontested are needlessly giving up this possibility" (1983: 114).

Dissipating the motivation of business to strive for compliance with the law is a disastrous consequence because the punitive law enforcement alternative can never fill the gaps left by the failure of persuasion and education as compliance strategies. With all complex areas of business regulation one can never write rules to protect people against all the unsafe or exploitative practices that can occur. Since building consensus to write new rules is a difficult and time-consuming process, since rule writing does not keep up with rapidly changing technology, and since every business poses unique problems, government regulations never cover the field. The British, who have achieved the safest coal mines in the world, make the point that, if their inspectors enforced strict compliance with the Mines and Quarries Act 1954 and the regulations arising therefrom, they would enforce a far lower standard of safety practice than they in fact do. It is persuasion, heeded by responsible managers, which achieves the higher standards.

Achieving better than the minimum standards set down in law is imperative, but inspectors will not succeed if punishment has been used with so little finesse that they lose their capacity to persuade. Perhaps one reason that the United States has such a shocking coal mine fatality rate is that trust and respect between inspectors and managers has been lost by blunderbus punishment policies. As the chief executive of the Bituminous Coal Operators' Association said when I interviewed him in 1982:

Lives are lost because of inspectors with the paper syndrome and companies with the "How do we minimize the violations?" syndrome.

Government inspectors achieve more by adopting a diagnostic and catalytic role than they can by focusing excessively on punishment. Bardach and Kagan underlined this point by quoting the safety director of a large corporation on what he thought OSHA inspectors should do:

OSHA inspectors have the right to talk to employees. They'll go up to a machine operator and ask if everything is OK. What they really mean is, "Is there a violation I can write up?" If the man points out a broken electrical cord or plug, the OSHA guy will just write it up and put it on the list of citations.

What they should do is this: He should ask the employee, "How long has it been that way? Did you tell your foreman about

it?" He should call over the foreman and ask why it was still that way. Maybe the foreman will say, "I've told him three times ... you're supposed to go to Supply and get a new cord." Then why didn't he? Maybe his job is set up so he can't. Maybe the inspector will find out there's no procedure for checking cords, or that there is, but that the employees don't know it well (1982:148-9).

What the Offender Deserves or What the Victim Deserves?

For white-collar crimes against the person—the very crimes about which the data show greatest community punitiveness—the case for selective enforcement is strongest. This is because the offense so often poses a continuing danger to the community. "Just deserts" must at times be sacrificed for protection of the public. Regulatory agencies often resist the urge to prosecute guilty parties when the cooperation of those parties is needed to safeguard the public health. If a drug company has criminally negligent quality control procedures which are putting the community at risk, an injunction to close down the plant followed by a criminal prosecution can set company lawyers to work on very effective delaying tactics (Braithwaite, 1984). Justice delayed is profits retained. The public interest will often be better served by an approach to the company offering immunity from prosecution if it will cooperate in a package of measures which might include a voluntary recall of certain batches of impure drugs from the market, dismissal of certain irresponsible quality control staff, revision of standard operating procedures to improve product quality, and compensation to victims of the impure drugs. In a haphazard fashion, such negotiated settlements foster deterrence, often more so than a paltry fine which might be handed down by a court. But more importantly, they do so while minimizing the risk to consumers. A voluntary recall of drugs already on the market is almost invariably more rapid and efficient (in the sense of maximizing the proportion of the batch which is located) than a court-ordered seizure (Hutt, 1973). Only the company knows where all of its product has gone. A seizure which is resisted by the company faces considerable practical difficulties.

A classic illustration of the dilemmas in choosing between retribution against alleged white-collar criminals and the wider public interest was the aftermath of the thalidomide drug disaster (Knightley et al., 1979: 122-36).

Nine executives of Chemie Grunenthal, the manufacturer of thalidomide, were indicted in Germany on charges of intent to commit bodily harm and involuntary manslaughter. After the complex legal proceedings had dragged on for five years, including over two years in court, the charges were dropped as part of a deal in which Grunenthal agreed to pay \$31 million in compensation to the German thalidomide children. The press cried "justice for sale." But the German government had to consider the ongoing misery of the thalidomide families who up to that point had struggled for nine years rearing their deformed and limbless children without any financial assistance. Would retribution against Grunenthal and its executives have justified perhaps another nine years of waiting and deprivation for the victims?

Learning to Prevent Crime by Withholding Punishment

There are many reasons for not prosecuting even some violations which endanger human life. It is usually not good inspectorial practice to recommend a prosecution when the company comes forward and admits a violation. Thus, for example, airlines must be encouraged to report near disasters, however culpable they may be in relation to them, so that real disasters can be prevented not only with the airline concerned, but for all others around the world. It would be the height of irresponsibility to allow policy in relation to such matters to be driven by considerations of retribution rather than protection of the community.

Informal Social Control—the Only Affordable Policy?

Although there are many more compelling reasons for not consistently prosecuting white-collar offenders, cost is undoubtedly the most influential reason in practice. Philip Schrag's (1971) gripping account of what happened when he took over the enforcement division of the New York City Department of Consumer Affairs underlines the inevitability of a retreat from commitment to consistent and equitable enforcement of the law when dealing with white-collar crime. When Schrag began in the job he adopted a prosecutorial stance. In response, however, to a variety of frustrations, especially the use of delaying tactics by company lawyers, a "direct action" model was eventually substituted for the "judicial" model. Non-litigious methods of achieving restitution, deterrence, and incapacitation were increasingly used. These included threats and use of adverse publicity, revocation of license, writing directly to consumers to warn them of company practices, and ex-

erting pressure on reputable financial institutions and suppliers to withdraw support for the targeted company.

Whether we approve of the retreat from the justice model with white-collar crime, it must be conceded that, given the legal system we have inherited, the public gets most of its protection from extra-legal muscle-flexing by regulators which persuades companies to change their ways. We might shudder at the cavalier disregard of due process by the inspector who says, "fix that up or I'll be back once a month looking for things to nab you on." But to the extent that white-collar crime is prevented in modern societies, such muscle-flexing is the most important way it happens. Moreover, I suspect that most companies would prefer to live with a little of such coercion every now and then than with the legal costs of a more litigious relationship with government agencies.

Consistent administration of justice becomes impossible in the face of the costs of litigating complex white-collar cases. Prosecutors must confront complexity in the accounts (Briloff, 1972; Sutton and Wild, 1979), complexity of the law (Sutton and Wild, 1978), complexity of organizational realities (Stone, 1975; Ermann and Lundman, 1978; Schrager and Short, 1978), complexity of scientific dispute (Braithwaite, 1984), and jurisdictional complexities in crimes which transcend national boundaries (Blum, 1984). All types of complexity are exploited by the talented counsel which white-collar defendants can usually afford to retain, and also by the defendants themselves. For example, books of account are confusing because the white-collar criminal wants them that way. A potentially simple transaction is intentionally concealed by a round robin or daisy chain arrangement through a series of intermediary transactions. The inherent and contrived complexity of white-collar crime makes proof of guilt beyond reasonable doubt an onerous burden indeed.

At the same time, most regulatory agencies are cognizant of the need for a degree of formal and public punishment to maintain the habit-forming value of law and to foster deterrence. These ends can be achieved by highly selective white-collar crime enforcement policies in which only occasional offenders are made an example of. The offenders chosen are usually those for whom none of the aforementioned arguments against prosecution apply. They are chosen not because they are the most deserving of punishment, but because their case would be less costly than others, because their cooperation is not required to retrieve dangerous drugs from the market, and so on.

Summary

In summary, two things are being suggested. First, to allow retribution to take precedence over protection of the community in regulating businesses such as airlines, food and drug manufacture, coal mining, and many others, is to make justice a more important societal goal than protection of human life. Second, the reality of enforcing the law against business violations which are vast in number, complex in nature, and formidably defended, is that there is no society, and never will be a society, that will allow the dispensation of deserved punishment to be the principle which guides efforts to secure business compliance with the law. A just deserts model of business regulatory enforcement is neither desirable nor remotely obtainable in practice.

Just Deserts for the Poor, Gentle Persuasion for the Rich?

For the just deserts theorist who is moved by the argument thus far, we now consider the solution of rejecting just deserts as a principle to guide business regulatory enforcement and retaining it with enforcement against common crime. It will be concluded that this is a morally untenable choice, because, if one believes in desert, it is with white-collar crime where desert is greatest.

The difference between white-collar crime enforcement against business and enforcement against common crime is that, whatever one thinks of the desirability of just deserts with common crime, it is certainly attainable in practice in a way that it is not with white-collar crime. While there is no business regulatory bureaucracy in the world which gives higher priority to desert than to prevention, there are many bureaucracies for dealing with common crime which have the dispensation of deserved punishment as their primary goal. In my own research on business regulatory agencies, I have studied over 100 agencies on four continents without discovering one for which just deserts was a significant priority or even a subsidiary goal. The day the literature reports a regulatory agency driven by desert, it will be akin to a zoologist announcing the discovery of a new species.

Just deserts is a feasible principle for organizing bureaucracies which deal with common crime; it is infeasible for business crime. What is wrong then with a society which allows desert to be the principle which guides common criminal law, while protection of the community guides food and drug, antitrust and similar laws? Pandemic class injustice is what's wrong. Such a position means that it is acceptable to fail to give deserved punishment

to known ruling class criminals, but unacceptable for known common criminals. Just deserts would then be a rationalization for ruling class justice. An escape route from this dilemma for defenders of desert is to assert that business offenders do not often deserve to be punished because an offense against say the environment is not a "real" crime, that business offenses rarely tend to be so serious as to deserve punishment.

White-Collar Crime as "Deserving" of More Punishment than Common Crime

I have reviewed evidence relevant to the foregoing escape route at length elsewhere. First, if the legislature determines that a business regulatory offense is a crime, it is hard for retributivists who believe in the legitimacy of the legislature to make such determinations to suggest that they did not know what they were doing or that they did not intend them to be "real crimes."

Second, if objective harm (property lost, numbers of persons seriously injured or killed) is a central determinant of desert, as most retributivists insist, I have shown that the evidence is overwhelming that business offenses cause much more objective harm than common crimes (Braithwaite, 1982a: 742-7). Sutherland (1949: 121-22) was the first to collect together sufficient white-collar crimes to show that "the financial cost of white-collar crime is probably several times as great as the financial cost of all the crimes which are customarily regarded as the 'crime problem'," though at the end of the last century Barrett (1895) showed that banks lost more from fraud and embezzlement than from bank robberies. Similarly, if one counts up the lives lost through offenses against consumer product safety, occupational health and safety and environmental laws, even in a society with a homicide rate as extraordinary as the United States, it is the former which cost more lives.

Third, I have shown from a review of a large number of public opinion surveys that if community perceptions of the seriousness of different crimes is the criterion of desert, then white-collar crimes deserve massively more severe punishment than they are receiving at the moment:

...the community perceives many forms of white-collar crime as more serious, and deserving of more severe punishment, than most forms of common crime. There are exceptions to this pattern. Tax offenses and false advertising in most studies are not

viewed as serious crimes. Most types of individual homicide are perceived as more serious than all types of white-collar crime. Nevertheless, white-collar crimes which cause severe harm to persons are generally rated as more serious than all other types of crime and even some types of individual homicide (Braithwaite, 1982a: 738).

Fourth, I have shown that, if we exclude traffic or victimless offenses, the sheer volume of white-collar crime is so enormous as to vastly outnumber common offenses in the community (Braithwaite, 1982a: 745-7). To use one minor illustration, the Mine Safety and Health Administration imposes fines for some 140,000 corporate coal mine safety violations every year.

Admittedly, many of these offenses are not intentional, and therefore lack the *mens rea* which is the hallmark of serious crime. But many are—so many that I concluded in the earlier review that:

...among that subset of crime which is intentional, white-collar crimes are greater in number and in harm (measured either objectively [dollars or lives lost] or subjectively [community ratings of seriousness or deserved punishment]). Therefore, it is reasonable to assert that just deserts, whether based on a subjective or objective calculus, implies that there should be more white-collar criminals sent to prison than common criminals. (Braithwaite, 1982a: 750)

Where Desert is Greatest, Punishment will be Least

We have seen that transforming our prisons to primarily custodians of white-collar offenders is neither desirable nor possible, notwithstanding the fact that this is implied by policies systematically to operationalize community perceptions of desert. When an agency like California OSHA prosecuted and fined only 5 of over 200,000 offenses detected in one year (Mendeloff, 1979: 83-85), we can certainly say this is not enough to achieve deterrence, but to say that all of these offenses which the community believes are deserving of severe punishment should be so punished, or all of those offenses which involve both *mens rea* and objective harm should be punished in proportion to the harm, is to advocate a redeployment of criminal justice resources of unimaginable proportions. It can and should never happen. And similarly

with other areas of white-collar crime enforcement. As Norval Morris says of tax violations: "Not every tax felon need be imprisoned, only a number sufficient to keep the law's promises and to encourage the rest of us to honesty in our tax returns." (Morris, 1974:9).

Even though we can and should do much to step up prosecutions of white-collar criminals, it will always be the case that only a tiny fraction of white-collar criminals will ever be prosecuted even after they become suspects. Paradoxically, the arguments for doing deals which include immunity from prosecution are typically most compelling in those types of cases which the public see as most deserving of punishment (crimes which threaten the lives of consumers). Second, the bigger the case, the more likely that it will be so complex as to render the costs of prosecution prohibitive. Third, the more ruthless and powerful the criminal, the greater the willingness and the capacity consciously to contrive complexity into the case. All this is part of a more general theorem of criminal justice: *Where desert is greatest, punishment will be least*. Empirical work on system capacity with respect to common crime suggests that those locations where crime is most widespread and serious are precisely the locations where the system resorts to leniency in order to keep cases moving and avert system overload (Pontell, 1978). In the rare cases where individual white-collar criminals are brought to justice, systematic forces make it unlikely that these will be the most blameworthy individuals. Whether they are junior scapegoats, or middle management "vice-presidents responsible for going to jail" such as some pharmaceutical companies have institutionalized to protect top management, these systematic forces push blame for white-collar crime downwards in the class structure (Braithwaite, 1982b).

It has been argued here that if just deserts were to work in practice, there would be many more white-collar criminals in prison than common criminals. Putting aside all the other factors which make this impossible, cost alone would prevent any government from processing all the complex cases which would be required to make the majority of our prisoners white-collar criminals. It is not simply that no matter how hard we try consistently to administer just deserts, we can only ever imperfectly achieve the goal. Rather, identifiable structural reasons will cause *any* attempt to administer just deserts to produce precisely the opposite effect: the locations in space, time, and in the class structure where desert is least become the locations where punishment is greatest. Just deserts can be implemented in a rough and ready way against common criminals; it cannot begin to be implemented against white-collar criminals. Desert is applied more or less successfully

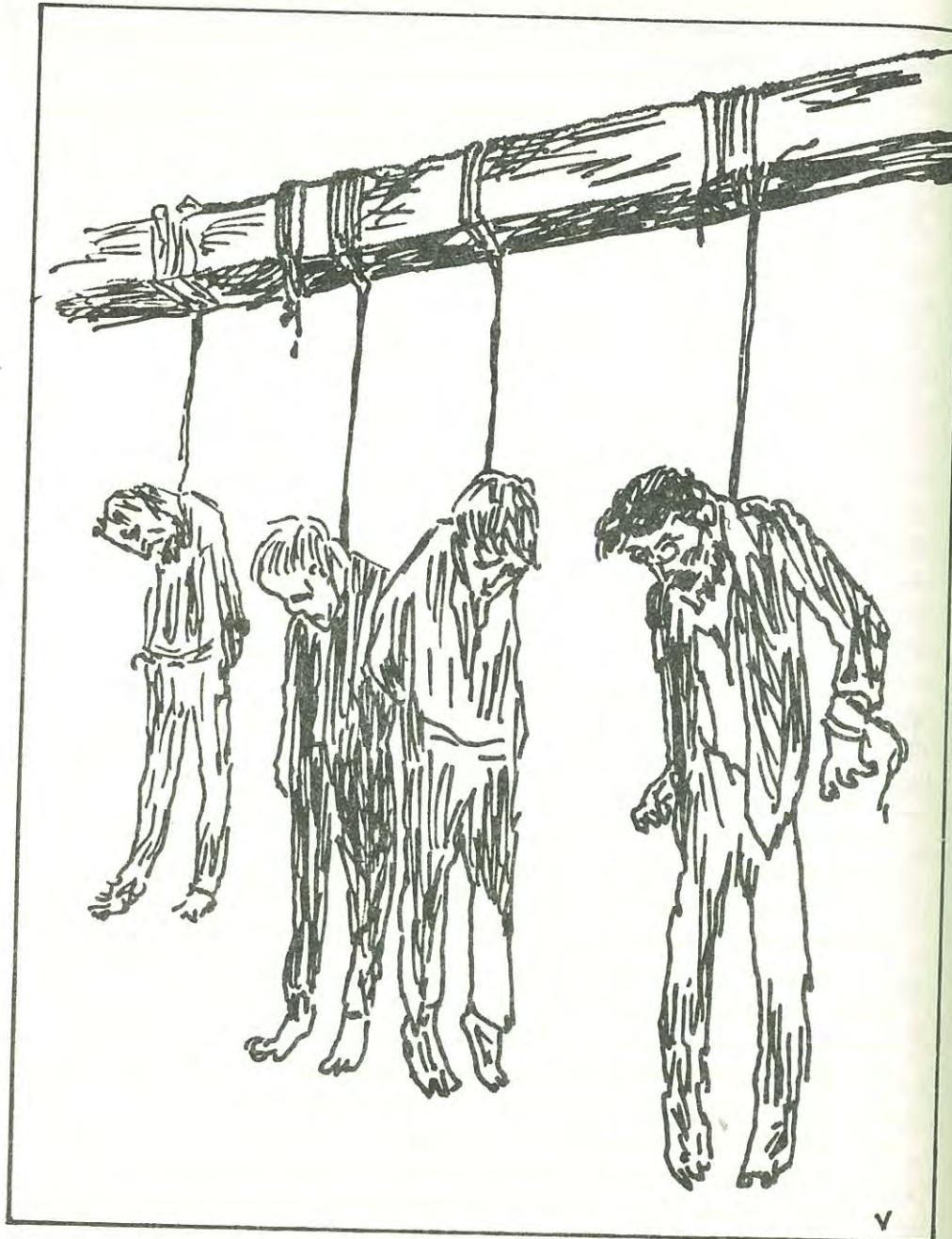
against the poor and unsuccessfully against the rich. Retributivism is therefore a philosophical theory which "may be formally correct (i.e., coherent, or true for some possible world) but materially incorrect (i.e., inapplicable to the actual world in which we live)." (Murphy, 1979: 103).

The Alternative?

The solution, it seems to me, is to give up on the quest to impose desert even-handedly wherever it falls in the class structure. Instead, we should begin to think about how to apply the principle of *parsimony* even-handedly (Morris, 1974: 60-61). This principle tells us that we should resort to punishment only when there is no more constructive way of solving a social problem. It follows that in the face of limited evidence that deterrence (Beyleveld, 1980), incapacitation (Van Dine et al., 1979) and rehabilitation (Lipton, Martinson and Wilks, 1975) actually work in protecting the community from common crime, we should let most common criminals out of prison. One challenge for a unified consequentialist theory of criminal justice is to specify when to use what alternative remedies with the incarcerated. In collaboration with Philip Pettit, I intend to detail such a theory in a future publication.

While most white-collar crimes should also continue to be unpunished on grounds of parsimony, there is reason to believe that we are not solving problems such as occupational disease and pollution partly because of insufficient punishment (e.g. Clinard and Yeager, 1980; Braithwaite, 1985). The principle of parsimony gives us the latitude to move toward class justice by simultaneously decreasing the punishment of common criminals and increasing that of white-collar criminals.

Just deserts, in contrast, only gives us the option of imposing desert successfully against the poor and unsuccessfully against the rich. The irony is that under just deserts—the philosophy of punishment which sets out with justice as its primary goal—justice is sociologically impossible.



JUST DESERTS FOR THE POOR
Jan Veber in *L'Assiette au Beurre* 1901

Punishment, Privilege and Structured Choice

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In the previous chapter, John Braithwaite offered a rather disturbing formula for punishment. The formula was: *where desert is greatest, punishment will be least*. The reference was to white-collar criminals, and the implication was that once we take into consideration the relative seriousness of their offenses, persons convicted of these crimes deserve more punishment than they receive.

The intent of the present article is to reinforce this point, and central to our argument will be (1) an analysis of the extent to which social class determines patterns of criminality, and (2) the implications this has for issues such as freedom and moral responsibility. We wish to supplement Braithwaite's formula by amending it to read: *among those who commit crimes, punishment will be greatest where it is deserved the least*.

The theme for this formula is also implied in a passage taken from one of today's leading advocates of retributivism, Andrew von Hirsch. Towards the end of his very popular book entitled *Doing Justice*, von Hirsch (1976: 178) notes that: