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# Punishing Criminals: Concerning a Very Old and Painful Question

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## BOOK REVIEW

PUNISHING CRIMINALS: CONCERNING A VERY OLD AND PAINFUL QUESTION by Ernest van den Haag. New York: Basic Books, Inc. Footnotes, index. 1975. Pp. xii + 283. \$11.50.

*Richard J. Fitzgerald\**

An initial reading of Ernest van den Haag's book, *Punishing Criminals*, leads to the conclusion that, despite his thorough research into the problems of criminal sentencing, he has failed to offer any new or startling information. In fact, practitioners, whether judges or lawyers, may suspect that this academic discussion of sentencing has no practical application. However, a closer inspection reveals that van den Haag has identified some subtle relationships in the criminal justice system which force the reader to consider old problems in a new light. In particular, the book may provide a judge with a broader perspective in his or her sentencing philosophy and a better understanding of the sociological factors involved in dispensing punishment.

In analyzing sentencing problems, van den Haag, a psychologist and social critic, considers the defendant's background and the impact a punishment will have on society. He starts with the presumption that a poor person usually has more to gain from crime and probably has fewer legitimate avenues to obtain material possessions than a wealthy person. Despite this basic inequality, he contends that disparities in social status or opportunity must not be a major factor in sentencing decisions. Van den Haag rejects the theory of general determinism. This theory asserts that a criminal is conditioned by his genetic background and his environment. Therefore, he should not be punished for his crimes any more than one should be punished for contracting a disease. Van den Haag disagrees with the underlying premise of determinism: that a criminal never, but a non-criminal always, has freedom of will. Consequently, the author maintains that inequality of condition should not be a barrier to an equal application of the law

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or the imposition of punishment, even though it may be difficult for an individual to act lawfully.

The major thrust of the book, and the premise most actively espoused, is that the paramount consideration in sentencing must be the impact a punishment will have on society at large. In developing this theory, van den Haag discusses the traditional utilitarian functions of punishment: (1) deterrence of others from commission of the same or similar offenses; (2) reformation of offenders either through intimidation or rehabilitation; and (3) incapacitation of offenders.

The deterrence viewpoint is illustrated in the author's observation that "men are not hanged for stealing horses, but that horses may not be stolen." Deterrence is not directed at the individual offender, although this may be a by-product of any sentence. Its principal impact falls on others in the community; it stands as a warning of the consequences which may befall those who violate the law. Van den Haag questions whether sentencing actually deters conduct. He points to the inconclusive statistics about the effectiveness of the death penalty. Further, he notes that because so many criminals come from lower income brackets of society the potential gain from crime far outweighs the loss. For many criminals, who lack both an education and marketable skills, no legitimate job could offer the financial rewards and freedom of action which realistically are provided by such criminal conduct as burglaries or narcotics trafficking.

The two other utilitarian functions of punishment, reform and incapacitation, are directed solely at the individual. The rehabilitative goal of a prison sentence seems to be of declining importance today. To facilitate that goal, courts had been inclined to impose indeterminate sentences. One who behaved well in prison and participated in vocational programs could often look forward to an earlier release. Parole under an indeterminate sentence would permit the state to control the individual because the threat of revocation could be used to make rehabilitation more attractive. Van den Haag is reluctant to concede that either incapacitation or rehabilitation has worked to reduce the crime rate. His view is bolstered by the move in some states, such as Califor-

nia,<sup>1</sup> and probably Illinois,<sup>2</sup> to dispense with indeterminate sentencing. The prevailing view among many critics today is that rehabilitation is virtually impossible and that, therefore, determinate sentences are more appropriate.<sup>3</sup>

Van den Haag concludes that the traditional functions of deterrence, rehabilitation, and incapacitation are no longer useful considerations in sentencing decisions. Therefore, he turns to an analysis of the remaining reason for punishment, justice. Justice is achieved by meting out punishment in proportion to the crime committed, according to the law. The background and environmental influences working on the defendant are irrelevant as are considerations of rehabilitation, incapacitation or deterrence, because none of these factors make punishment just. The imposition of punishment is an act of retributive justice, and, in all cases, imposed only because the individual before the court has committed a crime. Van den Haag believes that society demands that punishments be prescribed according to the gravity of the offense, not as a means of ameliorating an individual's future behavior.

A system of laws reflects society's desire for justice and for retribution. Penal laws establish the perimeters of justice. They are meant to articulate, sustain, and develop the social order by prohibiting certain acts. The stability of a society is achieved by a set of rules which are designed to minimize violence by restricting each person's actions for the sake of others. To be effective, criminal laws must do justice to offenders and non-offenders alike. Ultimately, justice should satisfy the victim, punish the offender, and maintain community order.

In his treatment of the requirements of order and justice, van den Haag reiterates his argument that the law must be applied equally regardless of the offender's social status. He recognizes that living conditions and environmental influences give rise to

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1. See CAL. CRIM. CODE §1168 (West Supp. 1977).

2. At this writing, the Illinois House of Representatives is considering passage of the Determinate Sentencing Bill, H.B. 1500, which would permit flat sentencing. Flat sentencing means that a defendant convicted of a crime would be sentenced to five years in prison, for example, rather than one to five years, which is permissible under our current indeterminate sentencing laws.

3. See generally J. MITFORD, *KIND AND USUAL PUNISHMENT* (1973); and J. WILSON, *THINKING ABOUT CRIME* (1975).

different temptations and opportunities for crime. The degree of temptation cannot justify or excuse the commission of crime. He suggests that the only way to consider sociological influences is to temper justice with mercy. Justice cannot be replaced by mercy, but it can be modified by charitable application of the law. The principles of order, justice, and charity are, in van den Haag's opinion, the keystones of punishment. Although they often conflict, each must be considered in rendering any sentence.

The final section of van den Haag's book discusses alternatives to incarceration. For instance, he views fines as a reasonable punishment for those who need not be incapacitated to protect the community. To insure equity in application, fines would not be imposed as flat sums of money, but rather on the basis of days of income from all sources. This would eliminate the unequal burden imposed on the poor. He also favors restitution, based on the defendant's ability to pay, rather than on the basis of a flat sum. Again, this is designed to achieve equality in treatment. Exile and banishment are alternatives to imprisonment. Banishment would mean forbidding a defendant to return to an area in which the temptation and the opportunity to commit crime are high. By forbidding a person from frequenting some areas, the state would not be obligated to support the defendant. A check on the defendant's activities would be possible during a specified period. This kind of supervision would be similar to that now employed with paroled defendants. Exile would entail the transportation of the defendant to another distant community. However, van den Haag recognizes that this probably would require the government to support the defendant and would run the risk of leaving the defendant without an opportunity to find employment.

Although these alternatives to imprisonment are novel, some are impractical and may well infringe on the constitutional rights of defendants. Perhaps a better alternative is a residential program in which the offender lives with others in a supervised dormitory setting within a city, works during the day, and is supervised during the rest of his free time. Counseling could be provided informally. The resident would have to pay for his clothing, rent, and entertainment from his salary. This would cost less than imprisonment and, unlike banishment or exile, would leave the offender with a skill and a place in the community after his time in the program.

In conclusion, van den Haag's book gives a broad perspective of both the criminal and society. He offers a philosophical analysis of the reasons for punishment as well as his views on the effectiveness of current methods of punishment. His views are more of an academic exercise than a practical judicial guide to sentencing. Nevertheless, the book may assist one in understanding the problems inherent in sentencing. It is a thoughtful and interesting discussion of one of man's oldest, most perplexing problems.