

Fall 1982

Desert and White-Collar Criminality: A Response to Dr. Braithwaite

Andrew Von Hirsch

Follow this and additional works at: <https://scholarlycommons.law.northwestern.edu/jclc>

 Part of the [Criminal Law Commons](#), [Criminology Commons](#), and the [Criminology and Criminal Justice Commons](#)

Recommended Citation

Andrew Von Hirsch, Desert and White-Collar Criminality: A Response to Dr. Braithwaite, 73 *J. Crim. L. & Criminology* 1164 (1982)

This Criminal Law is brought to you for free and open access by Northwestern University School of Law Scholarly Commons. It has been accepted for inclusion in *Journal of Criminal Law and Criminology* by an authorized editor of Northwestern University School of Law Scholarly Commons.

DESERT AND WHITE-COLLAR CRIMINALITY: A RESPONSE TO DR. BRAITHWAITE

ANDREW VON HIRSCH*

In his article in the summer issue of the *Journal of Criminal Law and Criminology*,¹ Dr. John Braithwaite argued that desert is unworkable as a rationale for sentencing convicted white-collar criminals and that only a "utilitarian" rationale (as he defines it) can be practicable. I have difficulties both with his critique of desert theory and with his proposed solutions.

I. BRAITHWAITE'S INTERPRETATION OF DESERT

Dr. Braithwaite uses my account of desert theory in *Doing Justice*² as the target of his attack.³ It is therefore essential to his argument that he describe that account accurately and fairly. In important respects, he has not done so, thereby vitiating his more dramatic claims about the unworkability of desert.

A. WHAT IS TO BE EXPECTED FROM A THEORY?

The sentencing rationale outlined in *Doing Justice* is just that: a rationale or theory. It identifies the blameworthiness of criminal conduct as the proper determinant of the severity of punishments. By doing so, it directs policymakers to consider the reprehensibility of an offender's criminal conduct rather than the likelihood of recurrence of the conduct. The theory suggests that questions of sentencing policy—for example, the relevance of previous convictions to the quantum of deserved punishment—should be analyzed in terms of this basic conception of blame.⁴ Any such analysis will inevitably call for the exercise of judg-

* Professor, School of Criminal Justice, Rutgers University. LL.B., Harvard University, 1960; A.B., Harvard University, 1956.

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

² A. VON HIRSCH, *DOING JUSTICE: THE CHOICE OF PUNISHMENTS* (1976).

³ Braithwaite, *supra* note 1, at 724.

⁴ See von Hirsch, *Desert and Previous Convictions in Sentencing*, 65 MINN. L. REV. 591 (1981).

ment—that is, for the use of practical and moral common sense.

Dr. Braithwaite treats the desert rationale not as a theory in this sense, but as a purported formula or recipe for deciding punishments. The rationale, in his view, is defective unless it automatically disgorges answers to all specific sentencing issues. He takes the theory to task, for example, for failing to provide pat answers to the question whether a corporation or its employees are to be punished for corporate misdeeds.⁵ But desert theory is not meant to provide such answers. What it does supply is a key concept—that of blaming; it directs policymakers to judge specifics in terms of whether, and how much, blame is due. To answer Dr. Braithwaite's criticism, one would have to make a judgment of when the employees alone may be held to blame, and when the corporation itself deserves censure. That determination, in turn, would depend on the corporation's rules, procedures, and practice.

B. MIXING UP LEVELS OF EXPLANATION

Any reasonably sophisticated theory will supply different principles for dealing with problems at different levels. In his famous *Prolegomenon to the Principles of Punishment*,⁶ for example, H.L.A. Hart reminded us that the explanation for the *existence* of the criminal sanction might well have to differ from the rationale for deciding the *allocation* of punishments among persons.

Elaborating on Hart, I distinguish three major issue levels in *Doing Justice*, and offer different principles for dealing with each. From the more particular to the more general, these are:

(1) *The internal structure of penalty scale.* This issue concerns the relative severity of punishments for criminals convicted of different offenses: the *ordinal* ranking of severity. Here, I suggest the sole criterion should be the degree of blameworthiness of the conduct. An offender convicted of crime *A* should be punished more or less than, or the same as, one convicted of crime *B*, depending only on whether the seriousness of crime *A* is more or less than, or the same as, that of crime *B*.⁷ The offender's likelihood of recidivism and the deterrent impact of his penalty upon others should not be considered at all.

(2) *The magnitude and anchoring points of a penalty scale.* This issue concerns the scale's *cardinal* or *absolute* dimensions: how severe the severest penalty should be, how lenient the mildest, and where the dividing line should be between conduct serious enough to deserve a sanction as se-

⁵ Braithwaite, *supra* note 1, at 725-27.

⁶ H.L.A. HART, PUNISHMENT AND RESPONSIBILITY (1968), ch. 1.

⁷ A. VON HIRSCH, *supra* note 2, at 66-76. This assumes no previous convictions. Otherwise, see my analysis in von Hirsch, *supra* note 4.

vere as imprisonment and conduct which warrants milder penalties. Here, I suggest the concept of blaming can provide considerable guidance, but not a unique solution. To the extent that blaming notions leave leeway, other concepts (possibly including even deterrence) could be considered.⁸

(3) *The existence of the criminal sanction.* This issue concerns the justifications for the very existence of the legal institution of punishment. Here, I argue that *both* desert and crime prevention are needed to justify the existence of punishment. My account in *Doing Justice* of desert at this level became more complex. To explain the condemnatory aspects of punishment, I used the notion of blame; but to account for the infliction of painful consequences, I also relied in *Doing Justice* on the Kantian notion of "restoring the equilibrium" between the benefits and burdens of wrongdoing.⁹ As it happens, I now have become convinced that this "benefits and burdens" notion, with its manifest obscurities, is not needed; ideas of blaming and crime-prevention suffice to explain why a criminal sanction should exist.¹⁰

When a theory uses different levels of explanation, one way to attack it, though plainly a spurious way, is to mix up the levels. An explanation addressed to problems at one level is treated as though it were addressed to those at another—whereupon the critic triumphantly discovers that (at the latter level) the explanation doesn't work. Of course it doesn't; it was never meant to!

Dr. Braithwaite makes liberal use of this kind of argument. When discussing how much to punish corporations, he seizes on my use of Kantian notions of equalizing benefits and burdens, and announces that this will not solve the problem.¹¹ This should not be surprising, since my "benefits and burdens" discussion in *Doing Justice* concerned only the question of the existence of the criminal sanction.¹² The question of how much to punish corporations concerns not the existence of punishment, but the *quantum* of punishment, for which I never claimed that such Kantian notions were apposite. Similarly, Dr. Braithwaite announces, as though it were a discovery, that ideas of blaming fail to provide a unique solution to questions of the overall magnitude of a penalty scale.¹³ I never suggested they do.¹⁴

⁸ I shall not elaborate the details of this argument here, as they are set forth in Chapter 11 of A. VON HIRSCH, *supra* note 2, at 91-94.

⁹ *Id.* at 45-55.

¹⁰ von Hirsch, "Neoclassicism", *Proportionality and the Rationale for Punishment: Thoughts on the Scandinavian Debate*, 29 *Crime & Delinq.* (forthcoming, 1983).

¹¹ Braithwaite, *supra* note 1, at 729-31.

¹² A. VON HIRSCH, *supra* note 2, at 45-55.

¹³ Braithwaite, *supra* note 1, at 756-57.

¹⁴ See *supra* note 8 and accompanying text.

C. CONFUSION ABOUT "SERIOUSNESS" OF CRIMES

In *Doing Justice*, I did not take the analysis of "seriousness" very far, but did offer a number of preliminary definitions and distinctions.¹⁵ Seriousness, I suggested, has two major components: harm and culpability. Briefly, harm refers to the injury done or risked by the act. The assessment of harm thus depends in part on empirical judgments of what the consequences and risks of the conduct are, and in part on normative judgments of the importance of the interests that have been adversely affected through those consequences and risks. Culpability refers to the factors of intent, motive, and circumstance that bear on the ascription of blame to the actor for the act's consequences and risks.¹⁶ The two factors interact; ordinarily, an actor should be held to blame only for the foreseen (or foreseeable)¹⁷ injury wrought by the actor's own conduct. The harm wrought by others over whom the actor has no control, or the unforeseeable damage wrought by the actor himself, should not be taken into account, as those are not consequences for which he may fairly be held accountable.¹⁸

Dr. Braithwaite confuses these distinctions in his discussion of the seriousness of white-collar crimes. His most striking claim—that using a desert theory would necessitate a huge and unmanageable shift in criminal justice resources toward punishing white-collar criminals—stems largely from those confusions.

(1) Dr. Braithwaite begins by summarizing opinion survey studies on seriousness, in which members of the public are asked to rate the gravity of various types of crimes.¹⁹ The more sophisticated of the studies he cites show that a few types of white-collar offenses which foreseeably cause death or serious suffering among their victims are rated as serious as violent street crimes; but other, more common white-collar offenses (such as ordinary embezzlements) receive low or intermediate seriousness ratings.²⁰ Were such popular ratings used to judge seriousness, they would hardly support his claim that a desert model would

¹⁵ A. VON HIRSCH, *supra* note 2, at 77-83.

¹⁶ *Id.* at 79-80.

¹⁷ The question of foreseen vs. foreseeable consequences requires further exploration. To establish criminal liability for an intentional crime, the factual elements that constitute the offense usually must be known to the actor. Should this also be the standard for determining the gravity of such crimes at the sentencing stage, or should risks and consequences that *should* have been foreseen also be taken into account? Whatever answer is given to this question, it seems inappropriate to include unforeseeable consequences in the assessment of seriousness.

¹⁸ A. VON HIRSCH, *supra* note 2, at 80-81.

¹⁹ Braithwaite, *supra* note 1, at 731-42.

²⁰ See the unpublished studies by Frank Cullen and by Marvin Wolfgang, cited *id.* at 734 n.57, 735 n.64.

require white-collar offenses to be routinely treated as worse than other felonies.

To avoid this embarrassment, Dr. Braithwaite asserts that such surveys are altogether irrelevant because many of the respondents surveyed would not have subscribed to a desert rationale had they been asked their views on the aims of punishment.²¹ This, however, confuses two kinds of surveys: those that ask respondents *how serious* various crimes are, and those that ask them *how much punishment* persons convicted of those crimes should receive. Dr. Braithwaite lumps these two types together in his discussion. The latter, dealing with amounts of punishment, are indeed affected by respondents' sentencing theories, but the former are not necessarily so affected. The convinced rehabilitationist may be perfectly capable of judging that robbery is more serious than burglary, or that knowingly selling hazardous substances is more serious than common embezzlement or tax fraud, even if his rehabilitative views would lead him to punish most leniently those offenders who are treatable, irrespective of the gravity of their offenses.

(2) Having dismissed surveys, Dr. Braithwaite next examines the harm done by white-collar crimes. He cites dramatic statistics concerning the aggregate costs of such offenses, and concludes that the harm done is vast.²² Conceding that culpability has not yet been considered by this reckoning, he looks at the subset of white-collar crimes which involve intentional behavior, and concludes that their consequences are probably worse *in toto* than the social damage wrought by street crimes.²³ This leads him to the conclusion that "just deserts...implies that there should be more white-collar criminals sent to prison than common criminals."²⁴

Dr. Braithwaite's analysis of the gravity of white-collar crimes is inadequate because it deals in aggregates and fails to consider the quality and foreseeability of the harm involved as well as other more sophisticated culpability questions. Consider Dr. Braithwaite's statistics concerning automobile mileage meter frauds in Queensland.²⁵ Suppose that there were, in fact, more such frauds than robberies in that jurisdiction, and that the totality of financial loss were greater. This is still far from showing that it is more serious to turn back a car's mileage meter than to rob someone at gunpoint or burglarize his home. The greater total financial loss may simply be an artifact of a greater number of active used car dealers in Queensland than robbers or burglars. The

²¹ *Id.* at 739.

²² *Id.* at 742-45.

²³ *Id.* at 749-50.

²⁴ *Id.* at 750.

²⁵ *Id.* at 746, 749.

more relevant figure would be the loss typically stemming from a *single* actor's conduct, since he is responsible only for his own acts. Even then, the *quality* of the loss makes a great deal of difference. With odometer frauds the loss is typically financial (plus an added, relatively remote risk of personal injury, which can be counteracted through mandatory car inspections). With robbery, the loss includes terror and high risk of death or serious injury; and with burglary it includes invasion of privacy, as well as financial loss.

(3) My own view, as stated in *Doing Justice* and elaborated subsequently,²⁶ is that a rulemaking body writing standards for sentencing should not rely chiefly on opinion surveys of seriousness. Instead, the rulemakers should undertake their own *considered* judgment of the harm and culpability involved in the conduct. They should discuss the consequences and risks of different kinds of conduct, the importance of the affected interests, the degree to which those consequences are foreseeable and stem from a particular actor's choice, the level of intent involved (whether purpose, knowledge, recklessness, or negligence), and so forth. Were such an analysis substituted for a mere lumping together of aggregates, I very much doubt it would rank the bulk of white-collar offenses as more serious than street felonies. Although diverging from the popular ratings on some specifics, the conclusion is therefore likely to be similar overall: a few, but by no means all, white-collar crimes should be given high seriousness ratings. There would be a limited class of white-collar offenses—involving drastic victim injury and high culpability—which would be classifiable as serious offenses comparable to crimes of actual or threatened violence. On a desert-oriented scheme analogous to Minnesota's sentencing guidelines,²⁷ these serious offenses should draw a presumptive prison term. The great remainder of professional and organizational crimes, involving less intrusion or less manifest culpability, would qualify for intermediate or lower seriousness ratings. These crimes, like their street offense counterparts, should normally draw penalties not involving imprisonment.²⁸ In short, white-collar

²⁶ A. VON HIRSCH, *supra* note 2, at 82n; von Hirsch, *Constructing Guidelines for Sentencing: The Critical Choices for the Minnesota Sentencing Guidelines Commission*, 5 *HAMLIN L. REV.* 164, 197-99 (1982).

²⁷ Minnesota's sentencing guidelines, promulgated in 1980 by the state's sentencing commission, are analyzed in von Hirsch, *supra* note 26, and their text is set forth at 395-437 of the same volume. The guidelines do not focus upon white-collar criminality. Rather they classify common crimes into ten gradations of seriousness, and prescribe presumptive terms of imprisonment for the more serious of those crimes (generally, those given a rating of "seven" or higher on the scale, which chiefly include crimes of violence). A systematic extension of Minnesota's approach to white-collar crimes would call for the inclusion of such offenses on the ten-point scale, and would result in the most serious of those offenses drawing a presumptive prison term.

²⁸ In Minnesota's sentencing guidelines, crimes given intermediate and lower seriousness

crimes would have a pyramidal structure of seriousness similar to that of ordinary crimes. Because only a low volume of possibly successful white-collar prosecutions is feasible in most jurisdictions, the impact on criminal justice resources (and particularly on prison capacities) would likely be modest.²⁹ Dr. Braithwaite's extravagant predictions that prisons have to be turned over to a predominantly white-collar clientele would not materialize.

II. ENSHRINING ADMINISTRATIVE CONVENIENCE: DR. BRAITHWAITE'S "UTILITARIAN" VIEW

The solution I have just proposed does not, however, satisfy Dr. Braithwaite. He objects to the imposition of deserved punishment even for the most admittedly heinous white-collar crimes. A presumption that imprisonment is the deserved sentence for such crimes would, in his view, interfere with administrative convenience and the "wider public interest." As an example, he cites a dramatic instance of corporate malfeasance: the thalidomide case. He cites with approval the German government's decision to drop the charges of involuntary manslaughter and intent to commit bodily harm against the executives of Chemie Grünenthal, the manufacturer, in exchange for payment by the corporation of \$31 million in damages to assist thalidomide victims. Insisting on a deserved punishment, he asserts, would have delayed help to these needy persons.³⁰ The Grünenthal case involved a prosecutorial decision to drop charges, rather than a sentencing decision. Nevertheless, the implication of Dr. Braithwaite's argument is that, had the company's executive been convicted, sharply scaled down sentences would have been appropriate in exchange for victim compensation.

Conversely, Dr. Braithwaite objects to the adoption of a presumption of modest sentences for non-serious corporate crimes, on the ground that such a rule at times might interfere with needed deterrence against future violations by the industry.³¹ Instead of desert, he proposes a "utilitarian" model which would allow penal authorities wide flexibility

ratings, including common burglaries and thefts, do not receive presumptive prison terms (except where the defendant's criminal record is very long). What I am suggesting is that white-collar crimes given comparable seriousness-ratings would also receive non-prison dispositions.

²⁹ Braithwaite, *supra* note 1, at 745-47, extensively quotes statistics about the high frequency of white-collar crimes, and seems to imply that a desert model would require prosecution of all or most such offenses. Of course, it does no such thing, any more than it calls for the prosecution of all or most known street crimes: no American criminal jurisdiction would have the resources to undertake such a task. What desert principles require is that *when* a case has been selected for prosecution and a conviction results, the sentence should be apportioned to the gravity of the crime.

³⁰ Braithwaite, *supra* note 1 at 752.

³¹ *Id.* at 757-58.

to consider crime prevention goals, the need for victim compensation, and other economic and social ends.

These recommendations, in my judgment, are unduly preoccupied with quick, convenient solutions, and wholly ignore the condemnatory implications of punishment. Wealthy defendants will always have the resources to make successful prosecution difficult and victim compensation (or the conferring of other public benefactions) feasible. Defendants without resources, on the other hand, are tempting targets for exemplary punishments, since they cannot offer the state any tangible benefits in exchange for moderation. The criminal sanction, however, has unavoidable overtones of blame; hence, punishing more or less severely will mean visiting more or less official censure on the defendant for his conduct. If the wealthy convicted defendant—whether a drug manufacturer or a rich individual who runs down a child—is permitted a reduced sentence provided he compensates his victim or victims, this amounts to a declaration by the state that such conduct is less reprehensible when committed by suitably affluent perpetrators. There is something morally topsy-turvy about a theory which treats such offenders leniently while cracking down on other, less serious offenders in the name of deterrence.

Plea bargaining, endemic to the American criminal justice system, will often be a necessity in white-collar cases. A variety of practical reasons—ranging from the defense's successful delaying tactics to the prosecution's need for evidence against seemingly more culpable violators—lead the prosecutor to settle for reduced charges. When are such concessions appropriate? The problem relates to the norms for exercising prosecutorial discretion,³² rather than the sentencing standards per se, but is one that desert theorists need to explore.³³ The desert conception, however, at least suggests a benchmark: if the crime is serious and the evidence for it is apparently adequate, then, *ceteris paribus*, a substantial punishment should be sought within the limitations of available resources; and as the crime's apparent gravity diminishes, so should the desired punishment. It suggests, more strongly, that once the defendant has been successfully *convicted* of a serious charge, the severity of his sentence should reflect its gravity. It says that deviations from this standard, even when compelled by the practical exigencies of litigation, involve some sacrifice of justice. The odd aspect of Dr. Braithwaite's theory is that it abandons this benchmark altogether. To him, imposing lenient punishments on perpetrators of heinous corporate crimes is not

³² von Hirsch & Hanrahan, *Determinate Penalty Systems in America: An Overview*, 27 CRIME & DELINQ. 289, 312-15 (1981).

³³ See, e.g., J. Hyman, *Just Deserts and Prosecutorial Discretion* (Aug. 1980) (unpublished paper, Rutgers University Law School, Newark).

an unhappy compromise compelled by circumstances; rather, it is the right thing whenever it is the expedient thing. Visiting harsh penalties on lesser corporate offenders likewise becomes right whenever it seems useful at the moment.

I have my doubts, moreover, whether what Dr. Braithwaite terms his "utilitarian" view even qualifies as such. A utilitarian theory of punishment worthy of the name identifies a crime prevention purpose—say, deterrence or incapacitation—and develops a rationale for punishment around it. An example is Jeremy Bentham's deterrence theory (now defended by Richard Posner³⁴ and Ernest van den Haag³⁵), which seeks to set punishment levels on the basis of their optimum deterrent effects. I have described my objections to this view elsewhere.³⁶ Nevertheless, it at least calls for *systematic* consideration of the preventive effects of proposed sentencing strategies, and is coherent enough to be implemented through explicit rules or guidelines. Such a theory is likely to lead to different conclusions than Dr. Braithwaite's. A deterrence strategy for white-collar crimes, as Ernest van den Haag points out,³⁷ would probably call for severe penalties for the more serious white-collar crimes, in view of the harm they inflict. Dr. Braithwaite's "utilitarian" conception, insofar as he explains it in his article,³⁸ strikes me as elastic in the extreme. Any penalty is appropriate, so long as one can identify *some* benefits to be derived from its use. If one wishes to penalize serious offenders mildly, one ignores not only desert but also the possible loss of deterrence or incapacitation, and focuses on the collateral, non-crime control benefits to victims or the community. If one wishes to penalize lesser offenders harshly, one rediscovers deterrence. It is difficult to see a consistent conceptual thread or to imagine a set of rules or standards based on his conception. As in the rehabilitative ethic of a decade ago, virtually anything goes.

III. THE FEASIBILITY OF SENTENCING WHITE-COLLAR CRIMINALS UNDER A DESERT RATIONALE

Can a desert rationale be applied to white-collar defendants? An answer would require a far fuller analysis than I possibly can undertake here. Allow me, however, to make a few tentative observations:

³⁴ R. Posner, *Economic Analysis of Law* 163-73 (2d ed. 1977).

³⁵ van den Haag, *Punishment as a Device for Controlling the Crime Rate*, 33 *RUTGERS L. REV.* 706 (1981).

³⁶ A. VON HIRSCH, *supra* note 2, 61-65. See also Goldman, *Beyond the Deterrence Theory: Comments on van den Haag's "Punishment as a Device for Controlling the Crime Rate"*, 33 *RUTGERS L. REV.* 721 (1981).

³⁷ van den Haag, *Comment on "Challenging Just Deserts: Punishing White-Collar Criminals"*, 73 *J. CRIM. L. & C.* 764, 766 (1982).

³⁸ Braithwaite, *supra* note 1, at 758-61. See also his examples, *id.* at 727, 750-52, 757-58.

(1) Punishing corporate criminals is inevitably more difficult than punishing private individuals. Obtaining evidence is more difficult. Identifying the chief malefactors within the organization is harder because, as Dr. Braithwaite points out, "it is always possible for every guilty individual to blame someone else in such a way as to create the impression that no individual is to blame."³⁹ These difficulties, however, are not unique to the desert model, but will plague other sentencing rationales as well; a deterrence or incapacitation strategy, no less than desert, will be difficult to pursue if the real perpetrators can evade detection or pass liability to colleagues or the corporation itself. Thus, if the firm has a "vice president responsible for going to jail," as Dr. Braithwaite says some pharmaceutical companies do,⁴⁰ punishing him will no more promote crime prevention than desert. Many of what Dr. Braithwaite asserts to be impediments to using a desert model are similarly applicable to other models.

(2) The desert model focuses on the *blaming* features of punishment. There are, of course, special problems involved in applying the concept of blame to organizational contexts where decisions are collectively made. In principle, however, such problems are no different from the problems of applying the *mens rea* requirements of the substantive criminal law to those contexts. It is admittedly not easy to judge what constitutes intentional, reckless, or negligent conduct in a situation of collective responsibility. Nevertheless, this does not show (notwithstanding Dr. Braithwaite's apparent belief to the contrary⁴¹) that we ought not to insist on satisfying the *mens rea* requirements before punishing white collar criminals. Strict liability may be more convenient, but it is nonetheless unjust because, among other reasons, it applies the condemnatory institution of the criminal sanction to situations in which no censure has been shown due.⁴² If one wishes to dispense with establishing criminal fault, the appropriate remedy is a civil one.⁴³

The same logic holds in the sentencing context. It may sometimes be more difficult, although it surely will not always be impossible, to make judgments of degree of blameworthiness in the context of wrongdoing by large organizations. This difficulty, however, does not by itself justify a model which ignores the seriousness of the criminal conduct and measures the sentence by whatever else may be at hand. The objection to so doing is much the same as the objection to ignoring *mens rea*: one is measuring the extent of a condemnatory sanction in a manner

³⁹ *Id.* at 754.

⁴⁰ *Id.* at 754-55.

⁴¹ *Id.* at 747-48.

⁴² Hart, *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401 (1958).

⁴³ On this point, see van den Haag, *supra* note 37, at 766.

that disregards the degree of reprehensibility of the conduct.⁴⁴

(3) Certain types of white-collar crimes will present special problems in rating their seriousness. An example is crimes not involving identifiable victims, such as bribery and corruption, where the harm is to the public at large. But even here it should not be impossible to make judgments: one will hardly be bereft of reasons why "Agnew-style" corruption by a high public official is worse than the "fixing" of tickets by a patrolman. Moreover, not all white-collar crimes fall into this category: in Dr. Braithwaite's example of the thalidomide case, readily identifiable victims were harmed in all-too-apparent ways. A rulemaking body trying to rate the gravity of white-collar crimes will find some harder to assess than others, but by discussing the character of those crimes and using common sense, it should be able to reach a reasoned consensus on ratings (albeit one that might be improved upon, as the theory on the concept of "seriousness" develops further).

(4) Dr. Braithwaite asserts that relying on desert will somehow yield less "equitable" results than would ignoring it. On a desert model, he says, serious white-collar criminals cannot be given their full punishment as readily as can serious street offenders because of their greater defense resources and the greater difficulty of proof in white-collar crime. When desert is disregarded, white-collar criminals can more readily be treated on a par with common criminals.⁴⁵ His claim seems plausible only because he is again dealing in aggregates; it withers when one considers *which* white-collar offenders would be punished more or less severely.

Let us imagine a system in which a desert rationale is adopted. The goal for white-collar cases would then be to administer proportionate, deserved punishment to the maximum extent feasible, taking into account problems of successfully prosecuting such crimes. Thus, priority would be given to imprisoning those offenders whose crimes were the most reprehensible. The thalidomide executives, and not some smaller-fry who might make useful examples to their industry, would become the prime targets for the tougher sanctions. Would this mean that *all* such malefactors will receive their full, merited penalty? In a system having limited resources, of course not. Serious offenders would, however, be at higher risk of receiving substantial punishment: it is they who would be more likely than other white-collar criminals to go to prison and to receive terms approaching (even if not always equalling) those received by violent street criminals. The more one disregards desert, as Dr. Braithwaite proposes, the less likely such a state of affairs

⁴⁴ A. von Hirsch, *supra* note 2, 71-74.

⁴⁵ Braithwaite, *supra* note 1, at 755-56, 759.

becomes. Instead, some lesser white-collar criminals would be in prison for one reason or another (perhaps sharing their cells with convicted robbers and assaulters), while thalidomide executives and their ilk would be on probation or doing community service together with common thieves. The total number of white-collar and common criminals, respectively, who have been imprisoned may be no different; but, in Dr. Braithwaite's scheme, the likelihood of being imprisoned *given the seriousness of one's offense* could be diminished further for white-collar as compared to common criminals.⁴⁶ There is no alchemy by which one can become more "just" through ignoring considerations of justice.

IV. CONCLUSION

Dr. Braithwaite has, in my judgment, failed to make his case. He has, however, performed an important service by raising the question of desert and white-collar criminality. The available desert literature has directed its attention chiefly to common crimes. Recent discussions of white-collar sentencing, such as those by Posner⁴⁷ and Coffee,⁴⁸ assume rationales largely or wholly concerned with deterrence or other utilitarian notions. Dr. Braithwaite's essay should compel adherents of the idea of proportionate punishment to think more seriously of how that idea applies to the complexities of corporate, professional, and public crimes.

⁴⁶ If we were to take the realities of criminal justice seriously, as Dr. Braithwaite urges us to do, then we would expect that a substantial proportion of convicted violent street criminals would be imprisoned, if for no other reason than that the public will no longer tolerate their release on probation. Thus, a street offender convicted of a serious crime would be fairly likely to be confined. If we then were to adopt Dr. Braithwaite's strategy for white-collar crimes and pay little attention to the seriousness of the crime in those cases, we would increase disparity between rich and poor, in the sense that state policy would make serious criminality a probable reason for imprisonment in the case of the poor but not the rich.

⁴⁷ Posner, *Optimal Sentences for White-Collar Criminals*, 17 AM. CRIM. L. REV. 409 (1980).

⁴⁸ Coffee, *Corporate Crime and Punishment: A Non-Chicago View of Economics of Criminal Sanctions*, 17 AM. CRIM. L. REV. 419 (1980).