



Restorative Justice

An International Journal

ISSN: 2050-4721 (Print) 2050-473X (Online) Journal homepage: <http://www.tandfonline.com/loi/rrej20>

Desert in a reparative frame: re-defining contemporary criminal justice

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To cite this article: Bas van Stokkom (2017) Desert in a reparative frame: re-defining contemporary criminal justice, *Restorative Justice*, 5:1, 141-144, DOI: [10.1080/20504721.2017.1294798](https://doi.org/10.1080/20504721.2017.1294798)

To link to this article: <http://dx.doi.org/10.1080/20504721.2017.1294798>



Published online: 28 Apr 2017.



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BOOK REVIEW

David J. Cornwell, *Desert in a reparative frame: re-defining contemporary criminal justice*, The Hague: Eleven International Publishing, 2016, 162 pp., ISBN 978-94-6236-644-2

Restorative justice thinkers have been criticising the idea of retribution for a long time. Classic retributive formulas, such as ‘the guilty deserve to suffer’, have met with sharp disapproval. In their study *Not just deserts*, Braithwaite and Pettit (1993) attacked the desert-based sentencing model which was developed by theorists such as Andrew von Hirsch, arguing that the idea of sentences proportionate to the gravity of offences is mistaken and that this model has contributed to an overreach of punitive policies. By giving priority to equality in suffering for ‘like-situated’ offenders, just deserts often demands the imposition of more severe punishments than are required. Braithwaite and Pettit (1993) argue that ‘parsimony’ should be the leading sentencing principle and that a ‘decremental strategy’ could reduce the use of punishment. Von Hirsch and related retributive theorists replied that we cannot simply get rid of desert. Deserve what you get is a robust moral intuition which is the core of doing justice; failing to take desert into account would lead to arbitrary sentences. Nevertheless, many have criticised just deserts for its ethical reductionism: the theory emphasises the standardised treatment of all offenders—in the name of sentencing consistency and predictability—and treats mercy, remorse and other personal mitigation factors as irrelevant. Moreover, there is no place for punishment in terms of repairing the harm.

In his book *Desert in a reparative frame* David Cornwell takes an alternative path, which is in a certain sense the opposite of *Not just deserts*. He tries to extend the reach of ‘desert’ within criminal punishment and give it positive meanings. Although he sympathises with utilitarian thinking and forward looking sentencing—as Braithwaite and Pettit do—Cornwell accentuates that justice and desert are inseparably linked with each other.

David Cornwell is a criminologist and former prison governor with much experience in correctional policies and practices in the UK. He is an engaged writer and thinker who published extensively on penal reform, civilising the criminal justice system, restorative justice and philosophical issues as compassion and mercy. His new study challenges the apparent simplicity of the retributive logic: those who transgress the law and cause harm deserve punishment. This logic ‘confines penal policymaking and judicial practices within a predominantly retrospective and increasingly punitive model of justice administration which is, in fact, significantly counter-productive in relation to crime reduction’ (7). Moreover, this logic does not recognise that other explanations of desert are possible, and may even be preferable to deliver justice. The purpose of his study is to re-define the concept of desert within criminal punishment, by focusing on all legitimate stakeholders and their respective desert-claims and to incorporate these claims in a reparative frame. He believes this re-definition has become ‘urgently

necessary' because the criminal justice process 'has become incapable of delivering crime reduction and reducing post-release recidivism to a critical extent' (129).

Cornwell views desert as core concept of the morality of punishment, and through developing a broader frame of desert he tries to enable a re-appraisal of the nature of desert and to achieve a 'shift' in penological thought. He considers justice as a social institution which should include the notion of desert within all its practices. In that respect, he agrees with retributivists: without desert, justice would become arbitrary 'and therefore immoral' (29).

Cornwell takes great pains to criticise the strict retributive logic that has become hegemonic in criminal justice handbooks: punishment should fit the crime. In the current 'just deserts' doctrine desert is related to an equivalence between the offence and the penalty. In Cornwell's terms: 'an offender deserves punishment by reason of the gravity of his crime' (38). In this axiomatic approach—the author also uses the term 'algebra'—desert is associated only with meting out punishment. 'Offenders became viewed as undeserving of anything other than punishment, largely regardless of any circumstances of social disadvantage or normlessness in which many of them evidently existed' (37). Nor is there a relationship between the penalty and the extent of distress caused to the victim. Thus, the retrospective perspective of mainstream 'just deserts' largely denies legitimate desert-claims of both victims and offenders and therefore presents only a limited and 'negative' interpretation of the importance of desert.

Subsequently, the author formulates a set of conceptions of 'positive' desert which should be included in criminal punishment (33–35):

- many offenders are in need of, and therefore deserve, substantial assistance and encouragement to become law-abiding;
- those offenders who demonstrate willingness to make amends for their conduct deserve the opportunity to make good (insofar as possible) the harm caused;
- victims of crime deserve reparation as a means of redressing the harm or distress caused to them.

Criminal punishment should include all reasonable and 'positive' desert-claims on the justice process of all the stakeholders involved: offenders, victims and communities. This is, Cornwell emphasises, an integral purpose of 'true justice' (131). We should also develop an alternative 'algebra', a different view of the desert equation. He concludes that the meanings of desert within criminal justice are 'infinitely more complex' than the narrow conception of retributive justice which focuses only on offence, guilt and punishment (63).

Other chapters in the book are devoted to what Cornwell calls a persistent 'penal crisis' and the 'malaise' of the present criminal justice system. The criminal justice process of England and Wales stands 'at the crossroads'. As the author also demonstrated in earlier work, we are in need of a profound penal reform. He presents four strategic aims of this reform: to reduce and restrict the prison

population, to remove short-term custodial sentencing, to maximise reparative sentencing measures in both the custodial and community settings, and to reserve the traditional mode of imprisonment for serious offenders who represent a significant risk. He also presents 'blueprints for action' such as a proposed structure for Community Justice Forums and Community Correctional Services, and the development of a National Mediation and Reparation Service as an agency within the Ministry of Justice.

The urgency of this reform programme is stressed in several of the book's chapters. The reform agenda is alternated with criminological explanations of the current penal crisis (including tables and figures about trends in imprisonment rates), philosophical reflections and historical clarifications. This makes the book somewhat incoherent. From time to time Cornwell's interpretations of retributivism and utilitarianism raise questions. The author is defining retribution and reparation as opposites: the first is backward looking and the second is forward looking. The author suggests that a forward-looking perspective is automatically utilitarian. This is often presumed but it is not always correct. Forward-looking aspects such as taking responsibility and restoring the moral status of the victim can be included in a retributive frame, as for example in Antony Duff's work.

Reparation and retribution have many commonalities. A core meaning of retribution is to 'pay back' to the victim and the community. Committing a wrong must be followed by doing good. For that reason Walgrave (2008) calls restorative justice 'an inverted constructive retributivism'. Cornwell seems to identify retributive theory with the absolute Kantian doctrine which says that it is always required to deliver offenders their deserved suffering. He seems to ignore theories of 'negative retribution' which state that it is permitted to punish guilty persons but that it is not required to do so per se. The severity of punishment may also be determined by factors such as repentance and social deprivation.

Occasionally Cornwell is criticising retributivism too harshly. He assumes that the retributive desert model and its outcomes have 'served to make the criminal justice system largely unfit for any other purpose than that of incarceration' (51). He seems to neglect that other philosophies, especially utilitarian principles (deterrence, incapacitation and the punishment of pre-crime activities), have contributed to the growth of incarceration and punitive regimes. Remarkably, Cornwell says that retrospective retributive responses may lead to forms of penal instrumentalism (8). This is correct with regard to the fetishism of imposed sanction guidelines, but generally this instrumentalism—using offenders as means—is connected with utilitarian ways of thinking.

One may question why Cornwell calls his approach 'utilitarian'. Although he opts for a crime reduction perspective, his aim to take into account all kinds of desert-meanings belongs more to a deontological perspective of moral duties. Perhaps Cornwell should have focused his book exclusively on this perspective. Mapping the conditions for crime reduction is a far more ambitious purpose that is lying beyond a redefined perspective on deserts. Moreover, it can be

questioned whether the criminal justice system is designed to facilitate crime reduction, as the author assumes (59).

Finally, Cornwell's alternative desert-theory is in need of further elaboration. One can doubt whether the list of desert-claims is complete. Plausibly, victims may claim 'deserved' support due to their psychological wounds, apart from 'deserved' compensation. More reflection is needed about the different ratios of 'positive' desert-claims. Deserving reparation is based on the gravity of the crime and the harm caused; deserving support and deserving 'a second chance' are generally based upon the motivation and personal behaviour of the offenders.

In spite of these shortcomings, the book offers convincing argumentations which go to the heart of the morality of punishment. Cornwell shows manifestly that the retrospective notion of deserved punishment is only one component of a much more comprehensive interpretation of desert. The book offers an attractive perspective to overcome the ethical reductionism of just deserts theory and it may function as starting-point for many reform-inspired theories in the future. It is remarkable that a comprehensive theory of desert has not been formulated earlier in the academic milieu. Perhaps criminologists are too eager to get rid of the 'dirty' concept of desert. Maybe criminal law scholars and 'armchair' philosophers are too much in love with justifying consistent and predictable sentences. It is above all David Cornwell's practical wisdom and intellectual independency which have enabled him to break through an ethically reductionist doctrine and to devise the beginnings of an overarching theory of positive deserts. As Lode Walgrave states in the foreword of the book: 'Calling him a truly "positive criminologist" is his just desert'.

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<http://dx.doi.org/10.1080/20504721.2017.1294798>

