DESERT AND THE THREE Rs

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In the preceding issue of this journal, Philip Pettit (with John Braithwaite) replied to a recent critical review article of ours[1] about their book *Not Just Deserts: a Republican Theory of Criminal Justice*. Pettit's reply attempts to spell out their republican theory more fully. The application of the theory to sentencing, he asserts, should be based on three main ideas — recognition, recompense and reassurance. The three Rs do not, however, reassure us.

The book by Braithwaite and Pettit relied explicitly on aggregating concerns, particularly deterrence and incapacitation. Deterrence sets the lower limit of the "decremental strategy". Incapacitation is authorised within (vaguely defined) upper limits. Now Pettit comes with (to quote Monty Python) something completely different: a purported restorative theory embodied in his three Rs. But the old aggregative stuff is there, barely concealed, in his discussion of reassurance. To reassure the community, he says, the courts may look to the likelihood of the offender's offending again, and also to the prevalence of the offence in the community.[2] The leeway allowed for incapacitative responses is particularly noteworthy: "crucial to the promotion of community reassurance", Pettit asserts, is the power to "escalate responses" as "an offender displays more and more intransigence about offending against others".[3] No principled restraints are provided on the extent to which penalties may thus be increased, in order to provide the requisite reassurance to the community. Within the wide discretion beneath the nebulous "upper limits" there remains considerable freedom to optimise.

In our earlier critique of *Not Just Deserts*, we argued that the Braithwaite-Pettit goal of maximising dominion does not of itself yield adequate fairness constraints. Pettit's article does not solve that difficulty, but only makes it worse. The problem resides in the conflict between the potential victim's dominion interest and that of the potential offender. If dominion consists, as Pettit says, of not merely avoiding victimisation but also being

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1 "Not Not Just Deserts: a Response to Braithwaite and Pettit""(1992) 12 *Oxf JLS* 83.

2 Pettit, J with Braithwaite, J, "Not Just Deserts, Even in Sentencing" 4/3 *Curr Iss Crim Just* 225–239 at 237.

3 Id at 235.

given the sense of assurance of safety, this might be best achieved by aggressive crime control strategies. The more drastic the penalties and the more attractive their enforcement, the more confident members of the public might be that they will not be disturbed. The trouble is, of course, that such strategies may be unfair in various ways, notably in their disproportionate severity. Such responses may, among other things, threaten the dominion of offenders and potential offenders.

If such a conflict exists, how might it be resolved? If the solution resides in maximising dominion, we have the problem of aggregation of which we wrote in our review article. And since there are likely to be more victims than offenders, an aggregative solution would point to favouring potential victims through tough penal strategies.

How does Pettit deal with this conflict? He merely denies that it exists. Everyone, he says, is a potential convict as well as a potential victim. But that surely is too easy. One might suggest that citizens have a moral obligation to feel empathy with offenders, and to put themselves in offenders' shoes. But such a demand for empathy needs some moral base other than maximising dominion. If one were to lower the standards of proof required at criminal trials, this might be regarded as threatening to citizens because it would make them fear unwarranted convictions. But suppose that standards of proof remain unchanged, and that tougher sanctions are imposed on those who are convicted — primarily on recidivists, or on sexual and violent offenders. Would ordinary citizens have any particular reason to fear such punishments? Would they see themselves as potential offenders in these categories? No: it is much more likely that they would feel their security against crime (ie their dominion) enhanced. Thus the emphasis on citizens' sense of security and vulnerability is worrisome. Increases in sanction severity often have few traceable preventive effects, as research on deterrence and "selective incapacitation" indicates. But even if tougher policies do not actually make citizens safer, they may make them *feel* safer. To the extent that tougher policies have this placebo effect on "fear of crime", they would be warranted under Pettit's notion of reassurance.

The other two Rs — recognition and recompense — are no less problematic. Some victims may be forgiving and others vindictive, for example. Pettit accepts[4] that "with variations in these matters, there will obviously be variations in what may be thought to be required by way of securing recognition, or something close to recognition, for the victim". If this would allow sentences to vary according to the disposition of the individual victim, it is surely objectionable.[5] It seems not to incorporate the important principles that the sentence should be proportionate and not degrading. Later, however, Pettit relinquishes victim-oriented terminology and states that courts "should seek to identify measures which, pursued against the offender, are at least likely to bring him to understand the gravity of what he has done",[6] for example "exposure to the results of similar offences committed by others". This suggests a different approach, not dependent on the disposition of the victim, although again there is no mention of limiting principles. Indeed, when Pettit states that "two sentences that represent formally equivalent attempts

4 At 234.
5 See the references above n1 and below n8.
6 At 236.

at rectification may differ materially — and quite dramatically — from one another", he acknowledges that fairness among defendants is not a relevant factor. Yet when we are dealing with deprivations of liberty and restrictions on liberty imposed by the state, is it right that similarly situated offenders who commit like offences should be subjected to different sentences, simply because of the victim's disposition or because of the court's opinion of the best route to rectification?

Similar difficulties occur with recompense. On the one hand Pettit castigates desert theorists for regarding compensation as a matter only for the civil courts: in fact desert theorists can and do accept that criminal courts should be able to make compensation orders in favour of victims, and they may also go further and discuss questions of priority when desert and compensation conflict[7] — a point neglected by Pettit in relation to recompense and reassurance. On the other hand, Pettit refers sweepingly to the republican's contentment to "see compensation and other tort considerations involved equally in the criminal law", whilst stating elsewhere that the amount to be paid by the offender to the victim will depend on the offender's wealth — a consideration well-established in criminal sentencing but unknown to the law of tort. Del Vecchio and some other restorative theorists argue that offenders should be made to labour in order to pay their victims in full, which has the merit of following logically from their premises.[8] How far Pettit goes down this road remains unclear.

Another unresolved problem arising from Pettit's gesture towards restorative theory is that the requirements of recompense and of reassurance may conflict. A sentence which achieves reassurance might preclude the rendering of recompense, and vice versa. It is a familiar weakness of restorative theories that they assert the need to ensure both compensation for the victim and some form of reparation to society at large, and yet fail to specify what the latter consists of and how it differs from punishment according to desert, the pursuit of a deterrent strategy or whatever.[9] In addition to the difficulties (noted earlier) with the notion of reassurance, nothing is said about the differing demands of recompense and reassurance. On these issues, Pettit's article does not even "illustrate the direction in which republican theory is likely to go."

We have suggested that the mnemonic attractiveness of the three Rs is not matched by the persuasiveness of the theory on which they are based. What about their application in a practical situation? Consider two offenders, one of whom (X) commits a minor crime and the other (Y) a more serious one. Suppose, however, that Y is quick to acknowledge the wrongfulness of his action (or at least to seem to do so), has a victim willing to be reconciled, has ample funds with which to pay compensation, and appears to have a low risk of future offending. X has a defiant attitude, has a vindictive victim, has few means with which to pay compensation, and presents a poor risk of future law-abidance. All three Rs would point to a much harsher response to X than to Y — even though X's

7 For discussion, see Ashworth, A, *Sentencing and Criminal Justice* (1992) at 68–72, 249–252.

8 For brief discussion of the theories of Giorgio del Vecchio and others, see Ashworth, A, "Punishment and Compensation: Offenders, Victims and the State" (1986) 6 *Oxf JLS* 86.

9 For a brief exchange, see van Ness, D, "Restorative Justice: New Wine in Old Wineskins" and Ashworth, A, "Some Doubts about Restorative Justice", both forthcoming in (1993) *Crim LF*.

original offence was much less serious. This seems to trample on elementary notions of fairness. Not only that, but Pettit's article suggests that the court would receive little guidance on how different cases might be dealt with — everything would turn on what seems likely to provide recognition, recompense and reassurance in the particular case. The unfettered discretion and lawless sentencing of the rehabilitative era would be reintroduced, only now in the name of dominion and rectification. This would be a step backwards, not forwards.

We should add that the discussion of desert theory at the end of Pettit's article betrays an unfamiliarity with the literature on the subject. Desert theorists such as ourselves (1) do not think that punishment should "repay" the offender, (2) do not think it should or can restore a balance,[10] (3) do think it should express blame, but (4) do not merely assert this last point, but try to argue why so. Maybe our arguments are mistaken, but that is different from saying that we give none. Nor do desert theorists wish to punish the offence "in abstraction". Variations in the degree of foreseeable harmfulness and of culpability of the conduct should be taken into account.[11]

A penal theory should provide principled and fair guidance on the ordering of criminal penalties. Desert theory, we think, provides such guidance, however imperfectly. The dominion theory of Braithwaite and Pettit — with or without the three Rs — does not. It appears that almost any ordering of penalties might conceivably be defended as promoting dominion or achieving rectification, especially when the notion of reassurance is so open-ended, and the still vague upper limits seem unlikely to provide much restraint. Pettit refers to the upper limits as the "guarantee against being punished beyond a certain level",[12] but far too little is said in the book or the article about the notion of fairness that underpins the guarantee, how it can be translated into fair maxima, and why it has not been assigned a more central role. The wide discretion and vague parameters of their new notion of rectification make these enquiries all the more important.

10 For discussion, see von Hirsch, A, "Proportionality in the Philosophy of Punishment" (1990) 1 *Crim LF* 259, to appear in slightly revised form as Chapter 2 of von Hirsch, A, *Censure and Sanctions* (OUP, forthcoming 1993).

11 For elaboration, see eg von Hirsch, A and Ashworth, A (eds), *Principled Sentencing* (Northeastern UP 1992; Edinburgh UP 1993), ch 4.

12 Above n2 at 239.