



Legitimacy, fairness and justice in the breach process: comparative perspectives

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Introduction

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- Focus is breach processes
 - Community sentences
 - Early release from prison

Breach and prison populations I

- Breach of community sentences/early release contributes to the growth of prison populations.
 - Directly - as a 'punishment' for the violation
 - Indirectly may...
 - Increase the likelihood of custodial remands
 - Lead to refusal of early release
 - Up-tariff individuals
 - Increase number and restrictiveness of conditions
 - Increase likelihood of prison sentences being imposed

Contribution to Prison Populations?

- How breach contributes to prison populations is difficult to gauge because of a lack of published data...
- England and Wales
 - 8% prison population (n=6554) are recalled prisoners (31/03/2017)
 - 3 month period Oct-Dec 2016 – 5278 recalls of which 43% involved alleged further offending.
- Netherlands
 - Revocation of community service orders accounts for close to 10 % of persons currently entering prison (Boone & Beckmann, forthcoming 2018).

Breach and prison populations II

- Anecdotally – courts often give further chances or change conditions of community sentences after breach rather than immediate imprisonment but this may result in an:
 - increased number and range of conditions
 - increased number and restrictiveness of conditions of bail and community sentences in the future (up-tariffing)
 - increased the likelihood of future breaches
 - increased likelihood of imprisonment and for longer
 - Up-tariffing
 - Breach record

Probation Supervision Flow of Exits 2015 (CoE, SPACE II (2015: 4.1))

Country	Exists per 100,000 pop.	Total no. of exists	Completion %	Revocation % (includes imprisonment)	Imprisonment % (new offence)	Other %
Austria	209.1	18,192	68.5	16.4	0.6	14.5
Belgium	335.5	37,872	65.2	18.8	-	16
Bulgaria	171.0	12,236	96.0	1.6	1.9	0.5
Croatia	89.6	3,756	92.6	0.4	4.8	2.3
Czech Rep.	149.7	15,803	31.6	17.4	-	63
Estonia	342.5	4,507	79.8	10.5	8.3	1.3
Finland	54.5	2,991	90.8	7.2	0.7	1.4
Germany	74.7	61,132	67.1	25.8	-	7.1
Greece	27.3	2,943	85.9	11.0	1.1	2
Ireland	98.0	4,567	87.7	7.1	4.5	4.1
Italy	88.7	53,796	82.7	5.8	-	11.5
Lithuania	416.1	12,019	68.6	8.3	2.7	20.3
Norway	127.0	6,624	91.9	9.2	-	0.4
Portugal	299.8	31,000	91.0	2.6	-	6.4
Spain (St.)	262.9	102,647	98.9	0.9	0.0	0.2
Spain (Cat)	100.5	7,437	94.9	3.7	0.6	0.9
Eng.& Wls	286.8	166,712	68.7	7.0	10.0	14.3
Scotland	374.8	20,077	69.6	11.5	12.5	6.4
Mean	151.2	-	78.7	8.4	3.0	14.1

Responsive rights-based breach process

- Aim of breach processes should be to maximise future compliance
 - Short- and long-term compliance
 - Normative rather than instrumental compliance
- Legitimate breach processes
 - Who and how decisions are made
 - Two elements of legitimate process
 - Responsiveness
 - Due process protections

Responsive breach processes I

- Dynamic module of compliance (Robinson and McNeill, 2008)
 - Formal and substantive compliance
- ‘Motivational postures’ (Braithwaite, 2013)
 - Commitment, Capitulation, Resistance, Disengagement, Game-playing
- Compliance ebbs and flows
- Flexible ways of dealing with breaches which allow the circumstances and underlying motivations to be considered

Model for measuring the responsiveness of breach processes

	Responsiveness		
	High	↔	Low
Ethos underlying breach processes	Rehabilitative/desistance	↔	Punishment/deterrence
Type of compliance promoted	Substantive	↔	Formal
Level of discretion in reacting to non-compliance.	High - expectation that non-compliance is not routinely reported/punished	↔	Low - automatic reporting and sanctioning of non-compliance
Opportunities for offenders' explanations	Clear and transparent	↔	None

Limits to responsiveness

- Outcomes matter
 - Instrumental compliance
 - Punishment is available as a last resort when persuasion and cooperation fail
 - Violation is so serious as to warrant immediate punishment
 - Credibility of the process in eyes of offenders, decision-makers and the public
- Assumption that probation practitioners/courts make fair and 'wise' decisions but questionable
- Differential treatment
 - High levels of discretionary decision-making

Due process and breach processes

- Due-process protections should be available in breach processes
- Currently less available in breach processes than during pre-trial phase but punishment may be severe.
- Rights:
 - Published law, policy and guidelines
 - Hearing by impartial authority
 - Public hearing
 - Proportionality
 - Presumption of innocence
 - Standards of proof
 - Right to a lawyer and interpreter
 - Right to appeal

Responsiveness

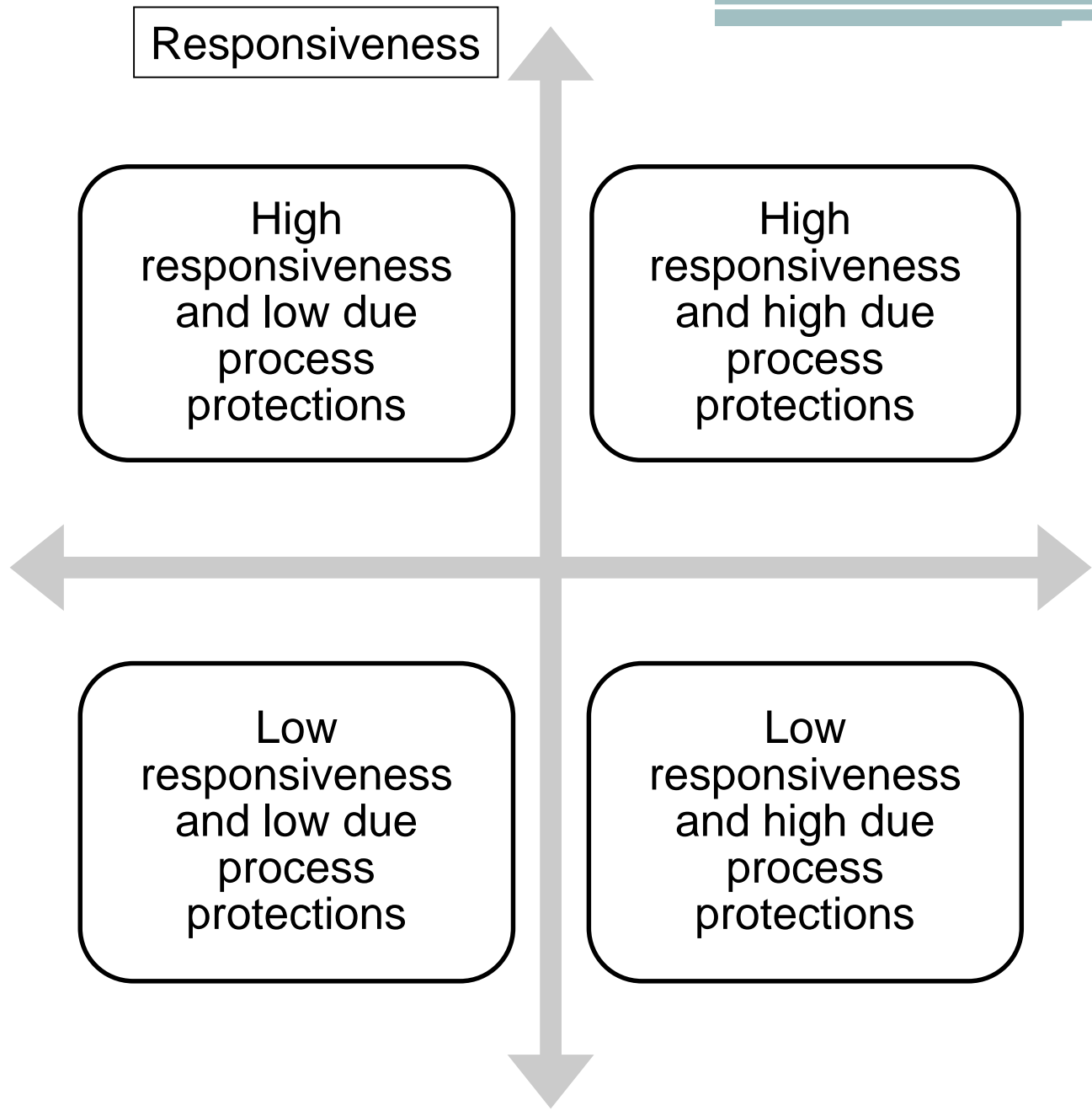
High
responsiveness
and low due
process
protections

High
responsiveness
and high due
process
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Low
responsiveness
and low due
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responsiveness
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Due
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Applying the model

- Model derived from a comparative analysis of non-representative sample of European jurisdictions
- Adherence to principles of responsive rights-based breach processes differs between:
 - jurisdictions;
 - community sentences and early release;
 - Due process protections more apparent for community sentences
 - Due process protections increase with sentence length
 - stages in the breach process
 - Responsiveness more apparent in early stages of the process but questions about the most appropriate fora for responsiveness to take place.
 - Due process protections are more likely to be found in latter stages of the process.
- Importance of differences between written law and policies and practices

Concluding comments

- New model which needs to be tested more thoroughly
- Comparative analysis based on limited information
- You can read more in:
- Boone, M.M. and Maguire, N. (eds.) (forthcoming 2018) *The Enforcement of Offender Supervision in Europe: Understanding Breach Processes*
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