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Criminalization, decriminalization and republican theory [1]

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We developed elsewhere a republican theory of criminal justice that incorporates a strong normative position on what should be criminalized and what should be decriminalized (Braithwaite and Pettit, 1990). This paper draws heavily on that book. [2] Unfashionably, the theory is more general in its scope than all of the competing theories apart from utilitarianism. Retributivism or just deserts comprises perhaps the most influential competing theory. But the theories of leading desert scholars such as Andrew von Hirsch have nothing to say on what should be criminalized, on when police should decline to arrest and when prosecutors should decline to proceed against conduct that satisfies the definition of crime. At best, desert theorists can tell you who should get the greater punishment among a number of offenders who have engaged in conduct which *does* meet the definition of crime, who *have* been arrested and who *have* been convicted. Even in the limited domain of sentencing, there is nothing *in the theory* of just deserts that provides an answer to the question of whether imprisonment is or is not a morally acceptable form of punishment (on sentencing see Pettit with Braithwaite, 1993).

Republican theory, in contrast, sets out to offer guidance on all the key questions of criminal justice policy. We will explain how it has things to say about what should be criminalized and about when we should decline to treat conduct as crime even though it fits the definition of crime.

We were motivated in developing the republican theory of criminal justice by what we saw as the need for a radical shift of theoretical direction to lift criminology out of the hopelessness and cynicism of the "nothing works", "give 'em what they deserve" era. Ultimately, the theory enables us to see that: (1) the most serious crime problems in contemporary societies are precisely the crime problems we are in the best position to reduce; and (2) the changes

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(1) This paper was presented at the 11th International Congress on Criminology, Budapest, 1993.

(2) The paper also draws heavily on a paper Braithwaite presented at Queens University in 1992 (Braithwaite, 1992).

needed to effect these reductions have gathered significant momentum in Western societies such as Australia during the past two decades (Braithwaite, 1993). In this paper, however, we restrict ourselves to some more foundational claims about republican theory, simply bearing in mind that where it is all supposed to lead is to a decisively changed way of thinking about the crime problem and its tractability.

WHAT IS REPUBLICAN THEORY ?

Republicanism really was the dominant political theory for several centuries up to and including the 18th century. But in the nineteenth century republicanism was supplanted by the dominant 19th century theories of liberalism, Marxism and utilitarianism. It has been the continued hegemony of these 19th century doctrines within 20th century criminology that has caused the discipline to be such a dismal failure in its own terms. In advocating a return to a pre-industrial, pre-capitalist intellectual foundation, we don't want to be interpreted as advocating the creation of Montesquieu's or Machiavelli's or Jefferson's republics in 21st century Budapest. The intellectual challenge before us is to construct models of contemporary urban republics and practical strategies for injecting republican elements into liberal urban life.

When one argues from the republican premises we will present below, one ends up with a political theory package quite distinct from those that are currently dominant. Republicans cannot be sympathetic to the libertarian view that the state should be kept weak because it poses a threat to individual freedom. Republicans walk away from Marxist views that the market order should be weakened because it is exploitative or that the rule of law should be rejected because law is a tool of ruling class interests. Republicans are unsympathetic to the view, held by some liberals, that associational orders (unions, industry associations, for example) should be kept weak because they threaten individualism with a range of communitarian pathologies—vigilantism, disrespect for privacy, intolerance of diversity, oligarchy. Republicans equally are unsympathetic to neo-corporatist views that direct community participation in the democratic life of the nation should be discouraged in favour of democratic participation that is funneled only through privileged associations such as trade unions. Republicans of our stripe believe in strong individuals, a strong state, strong markets, a strong associational order, strong community, and a strong judiciary enforcing the rule of law. The republican ideal is of a separation of powers where each source of power is strong: strong foundational institutions exert countervailing power, each checking the abuse of power by others. Republicans believe this because they think that freedom is at risk in societies where individuals are weak, where the state is too weak to control

vested interests, where consumers are forced to take whatever monopolies dish up to them, where trade unions are not strong and free, where community participation is muted, and where the rule of law is something a strong state or powerful corporations can ignore.

Cass Sunstein (1988) advances four commitments as basic to republicanism:

(1) deliberation in governance which shapes as well as balances interests (as opposed to simply doing deals between pre-political interests);

(2) political equality;

(3) universality, or debate to reconcile competing views, as a regulative ideal;

and

(4) citizenship, community participation in public life.

We think that the elements mentioned by Sunstein are important parts of the republican approach. But we see them as deriving from a more fundamental commitment to the value and importance of freedom, where freedom is understood in a characteristic way. We describe the republican notion of freedom as dominion.

On the liberal understanding, freedom involves nothing over and above the absence, however fragile and fortuitous, of interference by others. Thus freedom is something that the entirely isolated individual—say, the atomistic individual living alone in a state of nature—can enjoy. More than that, indeed, it is something that the social isolate is going to enjoy more fully than the citizen of a society: after all, the citizen suffers at least the interference of a coercive law. On the republican understanding of freedom, however, it involves not just the absence, but the secured absence, of interference by others. In particular, it involves the absence of interference that is secured in a public way by the social, cultural, institutional and legal resources whereby someone is protected: the measures that make it a matter of common knowledge that others are deterred from interfering, will be opposed if they try to interfere, and will face the need to rectify any offence if they do succeed. Freedom in this sense is the freedom of a city: it involves the full status of the citizen who is so empowered vis-a-vis her fellows that she need not fear them or defer to them; she has the objective and subjective assurance that enables her to walk tall (Pettit, 1993a).

If the citizens of a society are each to enjoy this sort of subjective and objective assurance against interference—this individual dominion, as we call it—then it is more or less essential that Sunstein's conditions are fulfilled. So

at least we believe. And so we think that republicans have generally assumed (Pettit, 1993b). They have seen open governance and the deliberative reconciliation of interests as the best means of sustaining the assurance required for the enjoyment of dominion; they have naturally seen freedom as involving political equality; and they have viewed active citizenship as an essential if people are not to allow sectional interests to compromise the conditions for their individual dominion.

In approaching issues of criminal justice from the republican standpoint, we argued in *Not Just Deserts* that the criminal justice system should be designed so that dominion is maximised in the society at large. The promotion of dominion is likely to require interventionist state policies in a variety of areas: in the social-security and medical-care areas, for example, as well as in the provision of legal aid, educational opportunity, openness of information, and so on. But we argued in our book that the promotion of dominion requires very different policies in the area of criminal justice: policies of parsimony under which the presumption is that the state should do nothing, unless the burden of proof clearly favours intervention.

The principle of parsimony that we favour would motivate a decrementalist strategy of reducing levels of punishment as far as we can, at least until clear evidence emerges that the reduction is beginning to increase criminal activity. But what would the principle imply on the question of what activity to designate as criminal? Would it argue for the criminalization of any conduct that is currently not criminal or for the decriminalisation of any currently criminal behaviour?

WHAT CONDUCT SHOULD BE CRIMINALIZED ?

The classical liberal position on this question is that no activity ought to be criminalized unless it causes harm to others. The best-known statement of that position is found in John Stuart Mill:

> The only purpose for which power can be rightfully exercised over any member of a civilized community against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it would be better for him to do so, because it will make him happier, because, in the opinion of others, to do so would be wise or even right. (Mill 1910 edn.: 72–3).

The two major attacks on the liberal position come from legal moralism and legal paternalism respectively. Legal moralism would allow that an activity may be criminalized just because it is immoral or is at least regarded as immoral in the community at large. Legal paternalism would allow that an activity may be criminalized because it is likely to cause harm to the agent herself. The legal moralist questions the harm restriction in the harm-to-others constraint; the legal paternalist questions the restriction to others.

Where would the republican stance place us in relation to the liberal, legal moralist, and legal paternalist positions? It would replace the liberal concern with harm by a concern with activities that diminish dominion. And it would reject the legal moralist claim that the mere fact that an activity is immoral or is thought to be immoral constitutes a distinct reason why it should be criminalized. But it can, at least in principle, accept the legal paternalist claim that activities which undermine a person's own dominion are matters of concern as well as activities which diminish the dominion of others.

This bold statement may cause anxiety on two fronts. First, our theory may appear ominous, in so far as it broadens the target of concern from harm to the diminution of dominion. And second, it may seem ominous in allowing the criminal justice system to be directed against activities which damage only the agent's own dominion. But neither worry, we believe, ought to be taken very seriously. The reason is that the presumption in favour of parsimony ought to act as a severe constraint on what acts are criminalized. Thus, while dominion might be threatened by someone spreading false rumours about imprisonment without trial, parsimony suggests that the danger ought to be met by a public information campaign, or by a civil remedy under defamation law, not by criminalizing such an act. Again, while someone might be likely to undermine her dominion through taking a certain drug, parsimony suggests that the best way of coping with that problem might be to criminalize sale of the drug without a prescription rather than criminalizing its use.

We tend to believe, for the record, that on a republican theory only those activities would tend to be criminalized which threaten the persons, property, or province of other citizens. In other words, we think that the republican commitments would direct the criminal justice system towards the minimal type of institution which the liberal applauds. Still, this is not very radical, since most of our present criminal laws would remain. We would still want to criminalize offences against the person such as homicide, assault, and intentional or reckless endangering of life through lack of occupational safety; offences against property like robbery, burglary, theft, and fraud; and offences against people's province such as kidnapping, slavery, arbitrary arrest, and detention without trial. Equally, we would continue to countenance what Feinberg (1986: 19–22)

calls derivative crimes. These are crimes which are not threats to dominion as such but which endanger the system whereby dominion is protected. Examples are carrying an unregistered hand-gun, escape from prison, tax evasion, practising medicine without a licence, and contempt of court.

But while such derivative criminal laws will often pass the republican test, it is important to note that they require careful definition. Thus the law of contempt of court is important in protecting the right to a fair trial and in ensuring a dimension of dominion. If people disrupt trials, improperly influence a jury, or subject the defendant to adverse publicity during the trial, then the right to a fair trial is put in jeopardy. It is proper that the law of contempt of court should criminalize such activities. As things stand, however, the law of contempt is often invoked, not just against such activities, but against protests by the defendant, as when she makes voluble remarks at the trial or calls the judge a fool. This use of the law is not designed to protect the right to a free trial, but to protect the sensibilities of those who inflict punishment and to maintain order in the courtroom. Neither of these goals justifies the application of the criminal law. On the important matter of securing order in the courtroom, we believe that this can be achieved by other, less invasive means than criminalization; a perfectly adequate remedy would seem to be restraint or removal from the courtroom until the defendant is willing to undertake not to interrupt.

Our commitment to criminalizing certain offences may be questioned on the following lines. It may be said that as consequentialists we should want to codify no offences at all, simply giving the state unbounded discretion to prosecute, try, and punish agents for acts of suitably serious intentional harm. But we hope it is clear that on our theory, not only should appropriate crimes be codified in law, they should also be defined as precisely as possible. If the criminal justice authorities are not bound by precise criminal laws, then their power is relatively unchecked and there is a threat to the subjective component of dominion. It is well known, for example, how the arbitrary use of the charge of unseemly language to victimize Australian Aborigines has generated insecurity within Aboriginal communities in their dealings with the police (Wilson 1978). Furthermore, if criminal laws are not precisely defined, then the pursuit of reprobation will be ill-served. To the extent that laws are vague, citizens will not pick up a clear understanding of just what it is that warrants reprobation.

We turn now to some difficult issues. We will look at three areas where criminalization is controversial: crimes of offence, consensual crimes, and strict liability crimes. We do this, not in order to defend a detailed set of proposals, but in order to give a sense of the impact which a republican theory is liable to have on some of the controversial matters that come up under this first question.

Crimes of Offence

Making unseemly or offensive language criminal is a clear threat to freedom of speech, providing a weapon for those who wish to use the power of the state to trample upon the dominion of others. Similarly, criminalizing blasphemy is an unjustifiable threat to religious freedom, criminalizing 'sedition' and offences against the flag a threat to political freedom. So too, criminalizing public drunkenness, vagrancy, or gambling might be conceived as unreasonable threats to social freedom, and criminalizing obscenity or public indecency a threat to sexual freedom.

Issues of public indecency throw up what might seem a more difficult challenge. Suppose two young people engage in intimate sexual activities opposite a minister of religion on a bus; for argument's sake, imagine they are a homosexual couple. You might say that the dominion of the minister is assaulted by the behaviour, but this would be to adopt a much looser conception of dominion than we have advanced. The loss of dominion can only be that which forces the minister to close his eyes or move to another seat. But surely, you may counter, life would be unpleasant for most of us if this kind of behaviour were allowed to go in public and that we are entitled to protection from such an intrusion on our feelings. Not wanting to dismiss this concern out of hand, our response would be that there are better ways of dealing with the problem.

Being parsimonious and systemic in our thinking, we would prefer to move the solution to the policing part of the criminal justice system. The police have a role of maintaining public order and might be called in by the minister to ask the couple to desist from causing offence. Alternatively, the police might suggest that the minister move to another seat. In the unlikely event that both suggestions were ignored, the conflict would undoubtedly escalate. Ultimately, the police might have no option but to secure order by removing the offensive persons from the bus. The police have a concern with public order as well as with law enforcement and we would have no objection in principle to their being able to remove those giving offence from the bus in order to avoid an outbreak of public disorder. Maintaining public order and thereby preventing crimes from occurring can be an important means of promoting dominion.[3]

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(3) The public order function of the police is totally a dominion-protecting function, mainly justified by preventing crime before it occurs. The police officer pulls two drunks apart who are abusing each other not because a crime has occurred but to prevent violence; she keeps a crowd from milling too close to a head of state for the same reason. When public order policing loses sight of dominion, as when it arrests the man who heckles the head of state, it becomes dangerous.

The irony is that the very offences against morality which seem to pose the most troubling challenge to decriminalization, such as the example above, are those least likely to require social control by the criminal sanction. Intimate sexual activity on buses is not a widespread problem in our society, and this is so in the absence of effective criminal enforcement against the practice. The more offensive the behaviour is to large sections of the populace the more redundant the criminal justice system is. The minister in our example can easily spoil the couple's experience by audibly expressing objection. The more offensive the conduct, the greater the power of informal social control and the more susceptible is criminalization to rejection on grounds of parsimony. The less offensive the conduct, on the other hand, the more persuasive is the argument that criminalization is needed if the conduct is to be stopped; but in that case, of course, it ceases to be clear why the promotion of dominion requires that the conduct cease.

Consensual Crimes

A different kind of difficulty arises with behaviour that clearly does harm, but where the harm is freely accepted by the victim. The prostitute who provides a spanking requested by a masochist does harm, at least in one ordinary sense. But because the spanking is done with the consent of the victim and has no further effects on the victim's liberty-prospects, it does not reduce his dominion. Thus we certainly would not want to criminalize it.

The case of the drug dealer who supplies heroin requested by an addict raises different issues, however. In the long term, addiction will reduce the dominion of the consensual victim. Ultimately, it may give her no choice but to run every aspect of her life to service the habit; it may leave her with no resources to resist the manipulations of dealers who use her money, or pimps who use her body. This means that there is a case to consider in favour of criminalizing heroin use.

But our theory is very unlikely to support the criminalization of using heroin, given the presumption of parsimony. Criminalizing the use of that substance is an invasion of dominion and the alleged benefits are doubtful. Besides, criminalizing use of substances like heroin is likely to create an illicit market, an underground organization of racketeers, and the potential for great corruption.

We think that republican theory supports a policy of decriminalizing drug use but requiring that substances like heroin be available only on prescription, within the doctor-patient-pharmacist framework. We think that selling any

potent pharmaceuticals without a prescription should be a criminal offence because there are so many thousands of them on the market, with such a diversity of side-effects unknown to the lay person, that the state cannot be assured that dominion is secure unless the transaction occurs within that framework. But while wanting to decriminalize drug use, we would be appropriately conservative about the methods and time-frame for implementing a decriminalization policy. The damage of criminalization having been done, the state must be very cautious in educating the community that decriminalization of drug use is not intended to indicate that it no longer views such activity as a serious problem. Decriminalization can only responsibly be undertaken after a community education campaign that reaches every group in the community, that communicates to families and schools and peer groups that it is their job to dissuade their members from drug abuse, not the job of the criminal law.

The open-system quality of the theory is clearly illustrated here. The theory requires us to ask whether the problem is better dealt with by informal social control outside the criminal justice system—via family socialization, doctor–patient interaction, and so on. But in recommending that the drugs problem be moved outside of the criminal justice system, the theory does not allow the system to ignore the problem completely; after all, selling without a prescription remains a crime. If the criminal law did not require a prescription, pharmacists and doctors would not have the authority to apply their professional skills in controlling drug use. This example should clarify how one of the challenges for an open systems approach is to co-ordinate interactions between the criminal justice system and other systems. Lawyers are familiar with this challenge with regard to harmonizing the criminal and civil law systems; but we can see that it is a problem of much wider import.

While we find it hard to think that criminalization would protect the dominion of drug users, legislators who pressed this line would be required to do a great deal of work under the strictures of republican theory. Systemic analysis demands attention not only to the dominion of drug users but also to the cost to dominion at the surveillance, investigation, and enforcement stages. The republican legislators would ask for an analysis of the dollar costs of criminalization in all these sub-systems; they would want to know how much could be achieved for the dominion of drug users by spending these sums on drug education programmes; they would want to know what proportion of murders are associated with the black economy in illicit drugs, what proportion of property crimes are associated with the need for addicts to fund their habits. In the absence of such knowledge, republican legislators should opt for the rest-position of minimal criminal justice intervention.

Strict Liability Crimes

A third area of difficulty in considering what to criminalize is strict liability crime. We naturally assume, given our theory, that only persons who are morally culpable for a prescribed encroachment upon the dominion of others should be convicted: those who engage in harmful acts should be protected from punishment which fails to take account of whether their behaviour was intentional, reckless, negligent, or just accidental. The criminal law is a decidedly unparsimonious way of dealing with harmful conduct that involves no fault, for if remaining blameless is insufficient to protect us from being punished, the subjective element of our dominion is under threat. Thus, the theory clearly forbids crimes of absolute liability where the offender is in no way blameworthy for the offence. However, the theory may permit what are often called crimes of strict liability, wherein the offender did not intend to commit the offence, but is nevertheless blameworthy at some lower standard of culpability.

Gross (1979: 342-740) provides an account of some forms of strict liability (offences of 'minimum culpability') which would be acceptable under the terms of his theory and ours. We can reasonably hold a manufacturer strictly liable for unintentionally selling contaminated food or drugs when two basic requirements are met. First, it must be possible as a practical matter for the risk of harm inherent in what was done to be appreciated by the person doing it. Persons involved in the drug industry know in advance that much higher than usual standards of care are required in their industry. Second, the person held criminally responsible must have been in a position to prevent the harm and it must have been part of her agreed responsibility to be watchful for this harm.

Thus, when the quality control manager is convicted for releasing an impure batch of drugs, it will not do for her to be able to plead successfully that she did not intend the people to die and that she exercised the usual degree of care to prevent a catastrophe. The usual degree of care is not good enough. She entered into her responsibilities knowing that society required her to take whatever measures were necessary to obtain the special degree of care essential for her industry. A condition of reaping the benefits of selling dangerous products is that the company must spend the extra time and money in deploying whatever extraordinary measures are required to protect the public. This is not to deny the quality control director an 'impossibility' defence (nothing could have been done) or a scapegoating defence (it was not truly she who was responsible and in a position to prevent the harm) (see also Sadurski 1985: 242–3). But it is to insist that dominion may be best promoted overall if releasing impure drugs is made a crime of strict liability.

We have seen in this section that republicanism conduces to the kind of minimalist policy on criminalization also favoured by liberals. Yet the strict liability case illustrates that where the threats to dominion are sufficiently profound the parsimony presumption can be overriden in a way that puts the republican on the side of criminalization. In practice, the republican legislator would have to embark on a programme of rather widespread decriminalization in most Western societies we know, and the only areas where there would very likely be a need for significant new criminalization would be where changing technology and changing economic institutions pose completely new threats to dominion.

TAKING CRIME SERIOUSLY

Where criminalization will increase dominion, republicans therefore want to take crime seriously. But what do republicans have to say to deconstructionists who insist that what is a crime is an arbitrary and historically contingent matter, reflecting perhaps the momentary perspective of those who hold the reins of political power? Republicans should not be dismissive of the deconstructionist's observation. But we think they should point out that the world would be a worse place (in terms of dominion) if we abandoned the concept of crime in contemporary societies. Good consequences are achieved by describing spouse assault or occupational health and safety breaches as crimes. Braithwaite's experience as an Australian government business regulator negotiating agreements with companies is that it is an empowering moment when one is dealing with resistant or chain-dragging executives to say: "Gentlemen [they always are!] what we are talking about here is criminal conduct by your company." The concept of crime has deep traditional meanings in all Western societies which the consequentialist should want to put to good use. This, of course, is as true of consequentialists who want to destroy freedom (by calling flag-burning a crime) as it is of republicans who wish to defend it. But it is in our view an historically contingent fact that criminalization increases liberty for most of the types of conduct that are criminalized in contemporary Western societies.

Liberty, on the other hand, is poorly served by the way Western societies *enforce* the law against the conduct it criminalizes. A great deal of the conduct that we respond to as crime would be better responded to in the ways advocated by abolitionists—as troubles, problems of living, conflicts, and the like. So we do not have to choose between feminists who want to criminalize rape on the one side and deconstructionists or abolitionists on the other. We can, and should, have our cake and eat it on this issue. That is, we can *define* conduct of a certain type crime, while preferring not to *label* it as crime or punish

it as crime in most of the cases where the conduct is detected. There is absolutely no tension between participating in struggles to inject clarity into the criminal law while problematizing particular instances of conduct that might fit the definition. In the first enterprise, the deconstructionist will be foe; in the second, friend.

Like left realists, therefore, we think that republicans should take crime seriously as a politically progressive concept. There is a progressive effect in writing a book called *Corporate Crime in the Pharmaceutical Industry* that upsets people in the industry because they do not think of the conduct described as criminal. At the same time, the republican must struggle against retributivists who want to treat crime as a master category: "If the conduct fits the definition of crime, it must be treated as a crime". As we have shown in the book, this essentialism must be resisted because it has bad consequences for dominion (Braithwaite and Pettit, 1990).

Nurturing Dialogue as an Alternative to the Criminal Process

Republicans believe in dialogue, reasoning with wrongdoers, seeking to effect change by persuading criminals that the harm they are doing to others should stop and be compensated. Partly this is about the belief that voluntary change and internalization of moral commitment delivers superior protection to the community (when it can be obtained) than coerced change. But it is also about the value of dialogic, participatory social control itself within a meaningful community. This is where liberals think republicans are utopian. Liberals think the communities do not exist in contemporary societies to make dialogic social control a possibility. In this, the liberal is both myopic and politically mischievous—myopic because liberals do not look beyond geographical neighbourhoods in their search for community, mischievous because liberal ideology has been the major destroyer of community during the past two centuries.

We follow MacIntyre (1984: 500-501)—and indeed Rawls (1993)—in thinking that disagreement on basic ethical paradigms is frequently compatible with consensus on the moral status of specific practical questions. Our enterprise here is a case in point: it is easier to get large numbers of people to agree that dialogue is a good thing than it is to get any substantial number of people to agree with a republican or hermeneutical or fallibilist theory of dialogue. We see this in the decisions of our highest courts, where the justices agree a lot of the time, but rarely agree for reasons that are based in identical values or common abstract philosophies. This is why deconstructionists can play such havoc with their work. But if we take MacIntyre (1988: 364-5) seriously, nihil-

ism is not justified in the face of such deconstruction. This is because dialogue between incompatible traditions can see one tradition generate solutions for the second in terms that are coherent within the second tradition. After all the wooing and wondering among the justices, the supreme court decision, woven together from slender and contrary opinion, can knit a fabric of communal conviction that inspires civic purpose and practical problem solving. The outcome can generally be regarded as sensible, but for several philosophically incompatible reasons. In contrast, solitary criminal court judges who sentence without any communal wooing and wondering about their remedy are at maximum risk of dishing up tomorrow's poison as today's medicine.

Pursuing Empowerment

For Habermas (1984), dialogic processes can only facilitate communicative rationality to the extent that intersubjective reflective understanding is unconstrained by deception and domination. For most of us, Habermas's aspiration for uncoerced and undistorted dialogue among competent individuals is utterly utopian. Of course ideals can be useful as yardsticks for measuring progress even if they are never fully realisable. However, domination is such a recurrently intractable fact of life, the destruction of power such an impossible agenda [4], that republicans are advocates of the alternative strategy of checking power with countervailing power (Braithwaite and Pettit, 1990: 87-88). Ayres and Braithwaite (1992a) have argued for tripartism—fully empowering public interest groups as third players of the regulatory game with the state and the firm—as a strategy of checking of power. Tripartism is conceived as a strategy enabling the evolution of cooperation within negotiated regulation while preventing the evolution of capture and corruption. That is, tripartism is seen as a structural solution to the regulatory dilemma that the same conditions that make for win-win solutions through the evolution of cooperation also make for the evolution of capture and corruption.

Republicans believe in an enriched conception of citizenship. Freedom is constituted by an active citizenry. But because entrenched centers of power, particularly corporate power, often seek to crush active citizen groups, republicans must lobby for a republican state that proactively empowers and resources citizen groups. Because of the way freedom is defined for the republican, poor and powerless citizens cannot enjoy dominion in a world of great inequality of wealth and power. For this more fundamental reason, the politics

(4) Destroying domination is an especially dismal agenda with corporate crime where large corporate actors are by definition centers of power.

is central to the republican agenda.

Seeing Multiple Motivations and Contradictory Regulatory Effects

One reason republicans like to deal with problems through dialogue is that they have a preference for dealing with actors as responsible citizens. This extends to corporate actors, which the republican seeks to nurture as responsible corporate citizens. When we are dealing with responsible citizens, shame and pride are seen as having enormous regulatory power. Indeed, reintegrative shaming and the praise of virtue are seen as powerful in constituting responsible citizens (Braithwaite, 1989). The 18th century republicans were seen by their Hobbesian critics as naive in this regard. For Hobbes (1949) and Hume (1963), institutions could not be based on the hope that citizens would be responsible. Rather, they should be designed for knaves. Geoffrey Brennan and James Buchanan (1985: 59) argue in *The Reason of Rules* for institutions that economize on virtue. This they advocate because it is likely that the harm inflicted by those who behave worst will not be compensated for by the good of those who behave better than average. Against this, Ayres and Braithwaite (1992b), like Goodin (1980), argue that the trouble with institutions that assume people will not be virtuous is that often they destroy virtue. Braithwaite's own observations of business regulatory inspectors, as with police on the streets, is that if they treat people as knaves, knavery is often returned in full measure. Toni Makkai and Braithwaite, in an article called "The Dialectics of Corporate Deterrence," fail to find a general deterrence effect for compliance of nursing homes with the law. What they conclude lies behind this, based on their fieldwork, is a group of cases where deterrent threats improve compliance and another group of cases where it makes things worse.

Some of the most brutish and nasty business people will put their best self forward, their socially responsible self, if they are treated as responsible citizens. Street level law enforcement, with either common or corporate crime, seems to us about getting people who have multiple selves to put their best self forward. But what about when they don't? Debate over punishment versus persuasion for dealing with corporate criminals has proceeded on both sides from a much too static analysis. The argument is that punishment is better than persuasion, or vice versa. Alternatively, the argument is the optimistic vision that we can pick which are the right cases for medicine and which for poison. We reject all three types of argument in favor of a dynamic strategy. This is: first persuasion (try to get the regulated actor to put their responsible self forward);

third, when deterrence fails (as it often will for reasons detailed elsewhere: Ayres and Braithwaite, 1992b; Makkai and Braithwaite, 1992), shift to incapacitation (e.g. corporate capital punishment). We would think it terribly crude if debates about the international regulation of states were transacted in the discourse of the optimal level of military threats. We expect, and get, even from our most simple minded political leaders, more subtle dynamic strategizing about the circumstances in which one shifts from persuasion to deterrent threats to incapacitative strikes.

In international relations, as in business-government relations, the best possible world is one where actors see themselves as having profound responsibilities for peaceful problem solving. The republican must aspire to nurturing responsible citizenship in pursuit of such a better world. However, the obligation of the republican to be vigilant on behalf of the dominion of the powerless requires that clear signals be given to business of the willingness to escalate to tougher and tougher law enforcement should there be abuse of the trust we expect of responsible citizens. Displaying (rather than threatening) an enforcement pyramid with a capacity for escalation to awesome incapacitative measures motivates cooperative regulation at the base of this pyramid (Ayres and Braithwaite, 1992a: Chapter 2).

AN ACCOUNTABILITY MODEL FOR ORGANIZATIONAL CRIME

We were asked with this paper to give special emphasis to organizational and environmental problems. Brent Fisse and Braithwaite have developed an accountability model for organizational crimes (Fisse and Braithwaite, 1994), which can be strongly justified in the republican terms outlined above, though one does not have to be a republican to find value in the model. Among the problems that the accountability model seeks to solve are:

1. The slide away from individual responsibility for organizational crimes when it is so much easier and more efficient simply to prosecute the corporation.

2. The failure to do anything about the responsibility of individuals and collectivities for environmental and other harms where that responsibility falls short of legal standards of responsibility.

3. The tendency for prosecutors when they do charge individuals for organizational crimes to oversimplify in a way that artificially concentrates blame in one or two sets of hands. In this way, the traditional criminal process conduces to scapegoating, usually of more junior employees.

4. The tendency for large organizations to have private justice systems grounded in different conceptions of responsibility from those provided for in the criminal law, thus causing a clash between culture and law (and therefore injustice) when the public justice system takes over from the private justice system.

5. The failure of the criminal process to give proper weight to values that may be more important to dominion than punishment—compensation, management restructuring, industry restructuring, reform of industry self-regulation systems, reform of government regulations that failed to prevent the offence, preventive staff training, corporate compliance systems, industry-wide compliance education. Repeatedly, the criminal justice system punishes organizational crime without paying attention to what must be done to prevent recurrence.

It is hard to summarize a book in a page or two, but here is the essence of the Accountability Model for responding to these and a number of other problems. The guiding principle of the Accountability Model is that all who are responsible for a serious corporate offence should be held responsible, whether they be individuals, corporations, subunits of corporations, gatekeepers such as auditors, or government regulators. But the ideal of holding everyone responsible in proportion to their degree of responsibility does not mean holding them criminally responsible because very few of the responsible actors will be criminally culpable. Recklessness, negligence, laziness, dishonesty and weakness are among the many forms that sub-criminal responsibility can take. Moreover, for most of those who are criminally responsible, a parsimonious reluctance to invoke criminality will usually advance dominion.

Imagine we have a company that turns on a tap releasing substantial amounts of toxic waste into a river in the dead of night—a prima facie case of serious corporate criminality exists. What the accountability model proposes is a very short trial that simply proves the *actus reus* of the corporate offence—the waste came from the factory and the pollution resulted. No attempt is made to prove corporate intent or negligence; no attempt is made to identify the culpable individuals. Moreover, under the model, proving the *actus reus* of the corporate offence to a civil standard (on the balance of probabilities) is sufficient. Then the court invites the company to conduct (possibly with the assistance of outside counsel) a rigorous internal enquiry into why the pollution occurred. Who turned the tap? Who approved this action? Who turned a blind eye to it? Where did corporate compliance systems fall down? Where was employee training wanting? Was there something about the structure of the organization, or of the industry, that enabled the pollution to occur? Was there something that external gatekeepers (e.g. environmental auditors) or regulators

might have done to prevent the pollution? Was there a technology capable of being adapted to prevent such an incident?

Then the company would prepare a plan of action that was responsive to the problems diagnosed in the self-investigation report. Which executives of the company would be disciplined? Who would be retrained? What new compliance systems would be put in place? What compensation would be volunteered? Would new gatekeepers be installed? What kind of organizational restructuring would occur? What new corporate policies or new standard operating procedures would be put in place? What R and D investments would be made in environmental protection technology? What follow-up would be implemented to monitor whether all of these reforms effect change in the organization's environmental performance? Who would be responsible for the monitoring and the reporting back to the court or the regulatory agency on the results of the monitoring program?

A republican court receiving such a report can then make the following judgement. Can we do better by dominion by withdrawing the axe the court is holding over the corporate head, by allowing the company to get on with this program of corporate reform and internal discipline under its private justice system. Or is the report a white-wash, an insufficiently strong response to a deep problem? If so, is it better to send them back to do it again or to let the axe fall, to proceed with a fully fledged criminal trial against the corporation and perhaps several further criminal indictments against responsible individuals?

Readers will have many questions about the feasibility and desirability of effectively decriminalizing much law enforcement against serious corporate wrongdoing in this way. Brent Fisse and Braithwaite try systematically to address these concerns. Moreover, the concerns that people have about such a radical strategy are also being explored through praxis in Australian corporate regulation that is influenced by their model (see Braithwaite, 1992). All we hope to have attempted to illustrate in the brief treatment here is that with corporate regulation, there are many shades of decriminalization, including forms of decriminalization that result in more demanding control of organizational crime than the criminal law traditionally accomplishes. Preliminary Australian praxis with the model has delivered the dismissal of chief executive officers who always would have enjoyed protection from criminal prosecution, compensation payouts beyond what courts could have enforced and a panorama of creative organizational reforms, even to the point of substantial restructuring of one of Australia's largest industries (see Braithwaite, 1992). These are some of the senses in which declining to enforce the criminal law against conduct that is clearly criminal can serve dominion well.

Needless to say, such radical reform is troubling to retributivists who believe in equal punishment for equal wrongs. We seek to show in *Not Just Deserts* that there is an intriguing paradox of decriminalization here. This is that philosophies that give primacy to just deserts, because of certain sociological facts about the world, result in desert being dispensed where it is least deserved (on junior scapegoats, for example). Parsimonious republican punishment, we conclude, can result in more equitable punishment practices in the face of these sociological facts, even though it does not set out to achieve equal punishment as its primary objective.

CONCLUSION

Drawing on our previous work, in this paper we have described the foundation of a republican political theory as choosing to do that which will maximise dominion. Dominion is a republican conception of freedom that puts a premium on the public securing of objective and subjective assurance against interference. While republican theory supplies no algorithm for ascertaining what should be criminalized and decriminalized, it sets a framework for resolving these questions. Republicans put great store in dialogic institutions, including courts, so long as courts can be reformed to be more open, deprofessionalized, so that less constrained dialogue among citizens might be enabled. We argue within this framework that republicans should support fairly widespread decriminalization, while upholding criminalization in areas where new technologies and new economic institutions pose new threats to dominion. Republicans share with left realists a commitment to taking crime seriously; we are minimalists rather than abolitionists with regard to criminalization. The Accountability Model for corporate offenders is one of the modalities of dialogue that can constitute an alternative to the criminal process while putting more bite and effectiveness into law enforcement than has been achievable under the criminal trial paradigm.

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RESUME

L'une des questions centrales qu'une théorie républicaine de la justice pénale peut aider à affronter est le choix des conduites qu'il convient de criminaliser ou de décriminaliser. Une conduite ne devrait être criminalisée que si, ce faisant, le dominion, une conception républicaine de la liberté, est accru. Un tel raisonnement inspire au républicain une décriminalisation substantielle dans les sociétés occidentales. Prenant bien le crime au sérieux, les républicains estiment que pas mal de conduites que nous traitons comme des crimes recevraient une meilleure réponse s'ils étaient, dans la voie tracée par les aboli-

tionnistes, envisagés comme des troubles, des problèmes existentiels, des conflits appelant un dialogue. Il n'y a pas de contradiction à participer à des combats progressistes visant à clarifier la protection juridique de la femme contre le viol et celle de l'environnement contre sa spoliation, tout en déclinant la compétence du pénal à régir certaines catégories de conduites.

SUMMARY

Among the central questions that a republican theory of criminal justice shows how to answer is what conduct should be criminalized and decriminalized. Conduct should only be criminalized if criminalization increases dominion—a republican conception of liberty. This motivates the republican to support substantial decriminalization in Western societies. While republicans take crime seriously, they agree that a great deal of the conduct we respond to as crime would be better responded to in the ways advocated by abolitionists—as troubles, problems of living, conflicts, matters for dialogue. There is no conflict between participating in progressive struggles to inject clarity into laws that protect women from rape or the environment from despoilation while declining to treat as crime particular instances of conduct that might fit the definition.

RESUMEN

Una de las cuestiones centrales que pueden ser enfrentadas gracias a una teoría republicana de la justicia penal, es la de la elección de las conductas que conviene criminalizar. Una conducta debería ser criminalizada sólo si, al hacerlo, el *dominion*, una concepción republicana de la libertad, es acentuado. Un razonamiento de esa naturaleza inspira, en los republicanos, una discriminalización substancial en las sociedades occidentales. Considerando el crimen seriamente, los republicanos estiman que muchas conductas que son tratadas como crímenes recibirían una mejor respuesta si, siguiendo la via trazada por los abolicionistas, éstas fueran consideradas como transtornos, problemas existenciales, conflictos que llaman al diálogo.

Participar en combates progresistas que persiguen la protección jurídica de la mujer contra las violaciones y del medio ambiente contra su expoliación no es contradictorio con la competencia de la justicia penal para regir ciertas categorías de conductas.