

## *The Three Rs of Republican Sentencing*

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### *Introduction: sentencing in republican theory*

In "Desert and the Three Rs", Andrew Ashworth and Andrew von Hirsch join issue with our paper "Not Just Deserts, Even in Sentencing".<sup>1</sup> We try to respond in this comment to the various criticisms they mention. Before describing their charges, and presenting our responses, it may be useful to summarise the relevant points in the position that we defended in that article: a position that we presented as a development of the republican theory of criminal justice outlined in our book *Not Just Deserts*.<sup>2</sup>

1. The aim of promoting dominion which republicans ascribe to the criminal justice system would not legitimate a "licence-to-optimize" strategy of sentencing: a strategy that would allow the courts to neglect issues of identity and desert and to sentence with a view only to best aggregative results.
2. On the contrary, the aim of promoting dominion would require the courts to impose sentences that rectify, so far as possible, the damage that the crime inflicted on the victim's dominion and on the dispensation of dominion within the community at large: this, subject, of course, to the constraint that the rectificatory measures pursued do not do more harm than good to the overall enjoyment of dominion.
3. Dominion is the social status enjoyed by an individual who is objectively and publicly assured against interference and the damage done to dominion by a crime means that *ideally* a convicted offender should be required:
  - (i) to manifest a *recognition* of the victim as indeed possessed of dominion;
  - (ii) to give the victim *recompense* for the material harm he inflicted; and
  - (iii) to initiate or undergo measures sufficient to provide both the victim and the community with *reassurance*: sufficient, that is, to make up for the damage done by his crime — and only by his crime — to their subjective sense of enjoying dominion.
4. What the three Rs require in practice is a matter for detailed policy-making investigation by criminologists and the courts but we made a number of observations about these matters, including the following points: that recognition is not a matter of verbal assurance only — words are cheap — but that it should ideally involve reconciliation with the victim; that recompense may mean restitution in exact kind, compensation in some alternative currency or, most weakly, reparation of a kind fit to express repentance; and that reassurance is not likely to be well served, in the republican's books, by a resort to hard treatment, though escalation towards harder treatment may be required with repeat, especially dangerous, offenders.

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1 Ashworth, A and von Hirsch, A, "Desert and the Three Rs" (1993) 5/1 *Curr Iss Crim Just* at 9–12; Pettit, P with Braithwaite, J, "Not Just Deserts, Even in Sentencing" (1993) 4/3 *Curr Iss Crim Just* at 225–39.

2 *Not Just Deserts: A Republican Theory of Criminal Justice* (1990).

5. The emphasis on rectification means that republican theory requires the treatment of offenders as equals: in every case the courts should try, without favour, to rectify the damage to dominion. But the treatment of offenders as equals in this sense does not necessarily mean equal treatment for acts in the same offence-type, since circumstances may affect what rectification requires; circumstances may call for a less demanding sentence in some cases, though never a breach of the upper limits on which republicans insist: see below. Here there is a powerful contrast with just deserts theory: this theory would require equal treatment — equal hard treatment — for offences of the same type, more or less regardless of circumstances.

Here now are the various points of criticism that we discern in the Ashworth and von Hirsch article, together with our responses to them.

### *First charge: reassurance an inappropriate goal*

The possibility of escalating responses as an offender displays more and more intransigence about offending against others is dangerous, according to Ashworth and von Hirsch. “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”.<sup>3</sup> The responses required “may, among other things, threaten the dominion of offenders and potential offenders”.<sup>4</sup> This worry would be exacerbated by Ashworth and von Hirsch’s (false, we think) assumption that increased penalties are a good way of increasing reassurance.

As against this, a first point to make is that if the responses do indeed threaten the dominion of offenders in the manner alleged, then that suggests that they may not be succeeding in the promotion of dominion overall and should be rejected by republican theory. It should be remembered that the promotion of dominion is the master aim of a republican criminal justice system and that it ultimately dictates both what acts should be criminalised and what sorts of sentences should be pursued. If the only thing the criminal justice system could do in response to certain types of dominion-reducing acts was itself more inimical to overall dominion than those acts themselves, then it should do nothing: the acts should be decriminalised, though only with care about not suggesting that the acts enjoy official approval.<sup>5</sup>

A second point is that reassurance means, at best, returning victim and community to the level of assurance previously enjoyed, not the maximisation of assurance overall; principled restraints are built into the aim of furthering reassurance, therefore, by the very conception of what that aim involves. This second point is particularly important, since Ashworth and von Hirsch seem to think that on our theory — contrary to the line of argument in our article — the courts are given the aggregative goal, in imposing sentences, of raising as far as possible the level of assurance in the community: “the old aggregative stuff is there, barely concealed”.<sup>6</sup> They write as if we wanted in this regard to give the courts what we ourselves disparagingly described as a licence-to-optimize. Our words make clear that we did not envisage this. “In sentencing the convicted criminal, it appears

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3 At 9.

4 At 11.

5 Id at 92–100.

6 At 9.

that the courts ought to seek ... reassurance to the community *of a kind that may undo the negative impact of the crime on their enjoyment of dominion*".<sup>7</sup>

### *Second charge: upper limits unsupported*

We do not think that Ashworth and von Hirsch are much deserving of charity in interpretation: see our final comments below. But still, let us be charitable and suppose that while recognising our intentions about reassurance, they mean to press a different charge: that the spirit of our approach is inimical to the imposition of limits on the extent to which the courts may seek community assurance; that it is inimical, more generally, to the imposition of upper limits on the sentences that the courts may pass down. They do speak of those limits as "nebulous"<sup>8</sup> and "vague",<sup>9</sup> so the charge is certainly worth considering.

In discussing this charge, we must return to the arguments given in our article (and elaborated in our book) about upper limits. Ashworth and von Hirsch say nothing in criticism of the general argument against harsh forms of treatment:<sup>10</sup> viz, that parsimonious punishment would detract less from the dominion of offenders while promising the best that we can hope to get by way of deterrence. On the contrary, they give countenance to that argument, arguing (as we did in *Not Just Deserts*) that "increases in sanction severity often have few traceable preventive effects, as research on deterrence and 'selective incapacitation' indicates".<sup>11</sup>

Ashworth and von Hirsch do advert, however, to a more specific argument for having some strict upper limits on the sentences that courts may impose. We wrote in our article as follows of what the absence of such limits would entail.

It would mean that citizens at large would have to recognise that in the event of coming before a court that found them guilty of some crime, perhaps mistakenly found them so guilty, they would then be at the mercy of the courts, in particular at the mercy of individual judges and, later, prison or other authorities. This would involve a substantial breach of people's dominion generally. It would mean that there was one serious sort of eventuality under which their status would be little better than that of the slave: they would be reduced to a condition of utter vulnerability.<sup>12</sup>

Ashworth and von Hirsch respond to this argument by pointing out that for many citizens, the subjective probability of being found guilty of a crime, and being subjected to horrible punishment, is so small that it would be outweighed by the increase in subjective assurance provided by the introduction of such punishments: "even if tougher policies do not actually make citizens safer, they may make them *feel* safer".<sup>13</sup> Thus they may be taken to suggest that the spirit of the republican approach would argue for open-ended levels of sentencing, in the cause of promoting the community's sense of assurance.

In order to see why this charge does not tell against us, we need to remark on an important feature of dominion. As we stressed in our book, and indeed elsewhere,<sup>14</sup> republican freedom

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7 At 232, emphasis added.

8 At 10.

9 At 12.

10 At 235.

11 At 10.

12 At 235.

13 At 10.

14 See, for example, Pettit, P, "Negative Liberty, Liberal and Republican" (1993) 1 *Europ J Phil* at 15–38.

involves a status that stands in opposition to slavery: in opposition to the status of objective powerlessness, and subjective debasement, associated with slavery. The powerlessness of the slave consists in the fact that he may be obstructed and coerced, as in the interference to which even liberal liberty is opposed, but also in the fact that even if he is not actually obstructed or coerced, the position he is in means that if his master wished — if he took a fancy — then he could interfere with impunity. As the opposite of such powerlessness, republican freedom — dominion — requires not just the absence of interference, but security against interference: it requires that for any position that a person occupies — or could realistically occupy<sup>15</sup> — he is never at the mercy of another. Such security would offer the agent power of a kind that no slave could have and, given that it is realised by public means, it would guard against the associated debasement: it would mean that the person can look others in the eye, without fear or deference.

Given this understanding of dominion, it should be clear why the promotion of dominion in a society requires that the officials of the courts should not be given a *carte blanche* in what they are allowed to impose on convicted offenders by way of sentence. As we stressed in our article, every citizen is a potential convict and if the convict position involves the utter vulnerability that the lack of upper sentencing limits would involve, then this means that in this regard no one enjoys what dominion requires. We put the point as follows in our article.

The fact that the courts could impose a penalty of any degree of severity on a convicted offender — the fact that they could imprison him indefinitely, force him to live in servitude indefinitely to his victim, compel him to pay a substantial proportion of his income to the victim for the rest of his life — would undermine the dominion enjoyed by everyone. It would put in place the sort of vulnerability which it is the business of a republic to try to eliminate.<sup>16</sup>

It is beside the point to observe, as Ashworth and von Hirsch do, that most people will think themselves unlikely to be convicted, rightly or wrongly, by the courts. As republicans insist that the presence even of a benign dictator deprives people of their dominion — however unlikely he is to interfere, the power of the dictator means that people do not have the public security necessary for non-debasement — so they will insist that the possibility of unlimited sentencing diminishes people's dominion: and this, however unlikely it is that that possibility will materialise for most of those individuals.

### *Third charge: no fairness in sentencing*

The third main charge in the piece by Ashworth and von Hirsch is that our line would involve unfairness in sentencing since, depending on circumstances, the perpetrators of the same type of offence can receive different treatment: this, because the difference of circumstance means that the rectification of the offence involves different requirements in the two cases. In a cunning pun — more below — they even go so far as to suggest that we “acknowledge[s] that fairness among defendants is not a relevant factor”.<sup>17</sup> They do not advert to the fact that we discussed the issue of fairness in our own article, defended ourselves on this score and indeed pressed again a point made in *Not Just Deserts*: that the

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15 This line is clearly implied in our book. It means that we accept, at least within limits, the point mentioned in footnote 22 at 36 of Pettit, above n14.

16 At 236.

17 At 11.

strict application of just deserts means an enormous unfairness in a society where we are lucky to be able to apprehend and convict even ten per cent of criminal offenders.

It is commonly recognised among political philosophers that while the treatment of people as equals is normatively compelling — it is a requirement of fairness — it does not always involve their equal treatment.<sup>18</sup> We argue in an analogous way that the demand for equal rectification of crimes of the same type is normatively persuasive but that this need not support a demand for the equal treatment — say, the equal hard treatment envisaged by just deserts theorists — of the offenders. The offenders or the victims or the circumstances of the offence may differ in such a way that rectification has different requirements. One offender may have been disabled in the course of the crime, for example, so that reassurance is not an issue in his case. Or one offender may be extraordinarily rich, so that financial compensation is no problem and symbolic measures may be correspondingly more important. Or the victim in one case may be a close friend of the offender and it may be clear that a reconciliation has already occurred, so that securing recognition may not be as important as it would otherwise be.

The variations possible are endless and we think that they have to be taken into account by the courts in determining what rectification requires in a given case. Subject to upper limits in sentencing, the courts must exercise discretion though, as we said, “at any time the courts ought to be directed by some general principles: ideally, by some general principles that command a high degree of assent in the community at large”.<sup>19</sup> We do not envisage a regime of “unfettered discretion and lawless sentencing”<sup>20</sup> that Ashworth and von Hirsch discern in our proposals.

There is a difference of moral intuition between republicans like us and retributivists like Ashworth and von Hirsch about what fairness in sentencing requires. We think of the demand for fairness operating at an abstract level of characterisation — at the level where sentencing is characterised as rectification — and we think of it as a demand that needs careful interpretative handling by the courts when they determine concrete responses to convicted offenders. They think of the demand for fairness as making its impact, more or less mechanically — certainly without much regard for interpretative difficulties — at the concrete level of how much hard treatment is to be handed out to convicted offenders. This is not the place to explore fully the resolution of this difference between us in our understanding of fairness. But it is certainly a suitable place for registering a protest, even a degree of dismay, at the charge that we do not see fairness among defendants as a relevant factor.

#### *Fourth charge: failure of logic*

The remaining charges need not delay us much. A fourth is that while we want, in our own words, to “see compensation and other tort considerations involved equally in the criminal law”, we are not faithful to our premises in allowing that the amount to be paid by an offender to a victim may depend on the offender’s wealth.<sup>21</sup> The suggestion is that we should have followed Del Vecchio and others in requiring that poor offenders “should be made to labour in order to pay their victims in full”.<sup>22</sup>

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18 The phrases are particularly associated with Ronald Dworkin: see his *Taking Rights Seriously* (1977).

19 At 236.

20 At 12.

21 At 11.

22 At 11.

The context in which we made the point about the poor offender explains why this charge is misdirected. We argued that recompense is only perfect in the few cases where full restitution is possible and that reparation, and even compensation, are second-best measures. Still they may be important, so we said, as part of rectifying the offence to the victim's dominion: in particular, as a means whereby recognition and reassurance are made credible. We then added a more or less obvious corollary. "A poor person may be able to make reparation, offering credible token of repentance, by means of a payment that it would be derisory to impose on a rich individual or corporation".<sup>23</sup> This remark might be inconsistent with a mechanical view of the attractions and demands of recompense but it fits perfectly naturally within the framework of our own republican thought.

### *Fifth charge: conflicting principles*

The final charge made by Ashworth and von Hirsch is that "the requirements of recompense and of reassurance may conflict".<sup>24</sup> They do not document this charge and it may be motivated by the mistake that we discussed earlier: that of supposing that pursuing reassurance means maximising assurance, not trying to restore the victim and community to the level of assurance that prevailed before the crime. Demanding recompense is less likely to be inconsistent with securing reassurance in our sense than with maximising overall assurance.

But, again to exercise charity, Ashworth and von Hirsch may not be misled in this way and may just be adverting to the fact, for example, that the demand for recompense may be a source of such resentment to an offender that imposing it increases rather than decreases the chance of his offending again against that victim. So what do we say to this? What we say is that a possibility like this is precisely the sort of thing that a court ought to be able to take into account in devising means of recompense, and indeed of recognition. Is it a disadvantage in our theory that we would require the criminal justice system to be sensitive to such matters? We do not think so. After all, it is surely a telling point against just deserts theory, not a point in its favour, that it would require the courts to apply just deserts in a fashion that is mindless of the reduced community protection that resentment on the part of convicted offenders may generate.<sup>25</sup>

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23 At 237.

24 At 11.

25 There is a juxtaposition worth making here with the critique of our work in Peter de Graaff's article in the same issue of the journal: de Graaff, P, "The Poverty of Punishment" (1993) *5/1 Curr Iss Crim Just* at 13-28. While Ashworth and von Hirsch attribute to us the objective of maximising a certain kind of assurance, de Graaff attributes to us the objective of maximising shame (at 20). What we are consequentialist about maximising is dominion: when shame reduces dominion (as it often does) we must object to it under our theory. Where we have some common ground with de Graaff is in aspiring to establish criminal justice institutions that accommodate cultural plurality. If, by reason of a history of Aboriginal oppression, for example, a demand for recompense from an Aboriginal to a white Australian would fuel such resentment as to reduce dominion overall, then this means of pursuing recompense is not something the republican can support. It is a systematic problem for courts that seek to impose equal hard treatment according to a univocal desert model that they do fuel resentments among the oppressed as well as reduce dominion in other ways. This is one reason why we support radically reduced use of courts and sentencing to deal with problems of law-breaking. Our research program includes active work on developing dialogic forums more suitable than western courts for problem-solving in multicultural societies. Unlike de Graaff, we think that dialogue is possible between an Aboriginal who sees himself as a "warrior" on behalf of

### *Conclusion: the rhetoric of just deserts*

Republican theory is distinguished, among other things, for the support it gives to public debate and deliberation. We hope that we have been faithful to this republican principle in the sorts of points and arguments we have tried to make in our exchanges with opponents like Ashworth and von Hirsch. Certainly we have tried to do our best in this regard. But we do wish to lodge a complaint, in conclusion, about the rhetorical tactics of our opponents. We would like to call on the jury of unaffiliated criminologists to judge against our opponents in this regard, even if they find themselves less than fully persuaded by our republican vision.

Here are our complaints about their tactics.

#### 1. *Misleading representation*

Without mentioning that this is not our view of things, they describe us as presenting in our article “something completely different”<sup>26</sup> from the book, drawing on nothing more than the argumentative support of a Monty Python reference. They then go on to characterise the theory we present in terms of the three Rs, without once mentioning the notion of rectification that is meant to unify and motivate the demands for recognition, recompense, and reassurance. By such means they try to pull off the old debater’s trick of making our view look like an untested hotch potch of different ideas.

#### 2. *Misleading insinuation*

When they make criticisms to which we tried to respond earlier, as in the charge of allowing unfair sentencing, they never mention the fact of our response, let alone try to reply; under normal conversational rules, the implicature is that we have nothing to say. And they frequently resort to formulations that are ambiguous and suggest an unflattering interpretation of what we said. As mentioned above, for example, they pun outrageously on “acknowledge” in claiming that “when Pettit states that ‘two sentences that represent formally equivalent attempts at rectification may differ materially — and quite dramatically — from one another’, he acknowledges that fairness among defendants is not a relevant factor”.<sup>27</sup> Most readers would take this to suggest that we explicitly acknowledge the irrelevance of fairness, quite contrary to our claims.

#### 3. *Misleading complaint*

They allege misrepresentation by us, without giving the reader the benefit of a quotation, and then are disingenuous in how they document the complaint. They write: “Desert theorists such as ourselves (1) do not think that punishment should ‘repay’ the offender, (2) do

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an oppressed people and white citizens who fear and disapprove of the violence this implies. More importantly, we suspect dialogue is possible between an Aboriginal “warrior” and Aboriginal citizens who believe that crime is not the best way to struggle against white oppression. We concede that Western courts committed to a univocal consistency are unlikely to be suitable forums for this to occur. A regrettable consequence of debating retributivists on their terms — in the limited domain of sentencing — is that readers tend to lose sight of the republican disposition to get out of the sentencing game altogether for many of the cases dealt with by sentencing in contemporary Western societies.

26 At 10.

27 At 10–11.

not think it should or can restore a balance, (3) do think it should express blame, but (4) do not merely assert this last point, but try to argue why so".<sup>28</sup> That makes it sound as if we said that desert theorists believe in repayment and in the restoring of balance but not in the expression of blame. Naughty us. But here, for the record, is what we actually wrote. "The retributivist will say that in passing sentence the courts ought to repay the offender for what he has done, express blame for what he has done, restore the balance that he has disturbed, or something of the kind".<sup>29</sup> We hope that the juxtaposition of passages may cause the reader some of the dismay that we felt on reading their comment.

The objective of these rhetorical devices, we believe, is to insinuate by stealth what the authors fail to establish by honest argument: that restorative paradigms like republican theory would increase the punitiveness of the criminal justice system. Among the considerations that Ashworth and von Hirsch have actually put on the table we find no good reason for believing that claim and we would welcome some rhetoric-independent attempts to establish the point. As it is, we rest secure in the conviction that while republican theory would motivate a radical rethinking of the criminal justice system, a dramatic reduction in its punitiveness, and the fixing of unbreachable upper limits on sentencing, just deserts theory would sustain the mesmerising fascination with punishment that is displayed by most existing systems.

It is a pity to end this piece on a sour note. But the article on which Ashworth and von Hirsch comment was itself a reply to an earlier piece by them and in that reply we consciously made no mention of the rhetorical ploys that they had exploited — if anything in greater measure — in the first piece.<sup>30</sup> We can only plead: twice bitten, now shy.

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28 At 12.

29 At 238.

30 Von Hirsch, A and Ashworth, A, "Not Not Just Deserts: A Response to Braithwaite and Pettit" (1992) 12 *Oxf J Leg Stud* at 83-98.