John Braithwaite

Regulation, Crime, Freedom

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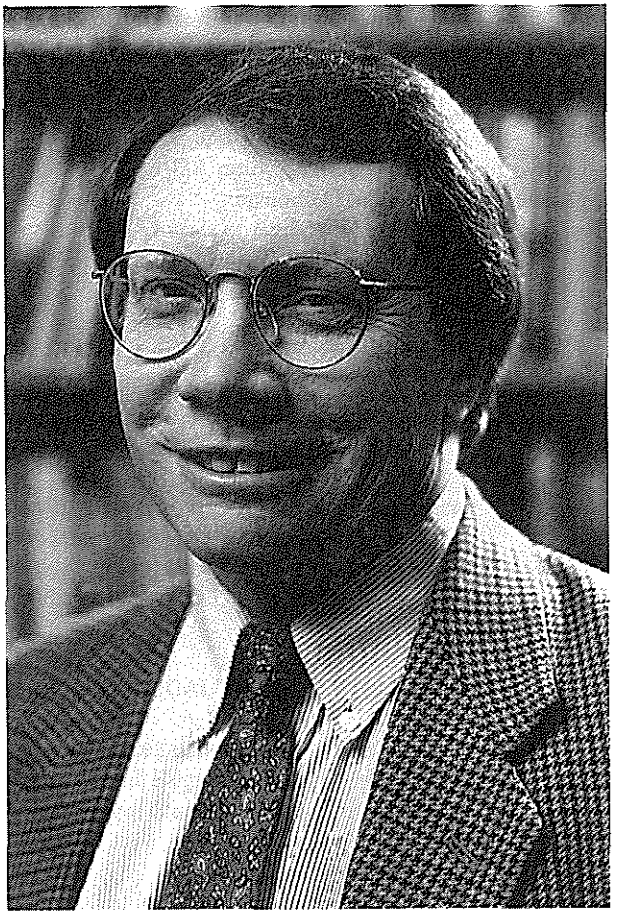

John Braithwaite is a Professor in the Research School of Social Sciences, Australian National University. He has been Head of Law there and coordinated interdisciplinary networks – Reshaping Australian Institutions (1992–96) and the Regulatory Institutions Network (RegNet). He has been active in social movement politics, representing community groups on the Economic Planning Advisory Council Chaired by the Prime Minister of Australia between 1983–87. Between 1985 and 1995 he was a part-time Commissioner with the Trade Practices Commission.

Series Editor's Preface

Collected Essays in Law makes available some of the most important work of scholars who have made a major contribution to the study of law. Each volume brings together a selection of writings by a leading authority on a particular subject. The series gives authors an opportunity to present and comment on what they regard as their most important work in a specific area. Within their chosen subject area, the collections aim to give a comprehensive coverage of the authors' research. Care is taken to include essays and articles which are less readily accessible and to give the reader a picture of the development of the authors' work and an indication of research in progress.

The initial volumes in the series include collections by Professors Frederick Schauer (Harvard), *Constitutional Interpretation*, John Braithwaite (ANU), *Regulation, Crime and Freedom*, Tom Morawetz, *Law's Premises, Law's Promise*, Robert Summers (Cornell), *Law's Form and Substance*, and Larry Alexander (San Diego), *Legal Rules and Legal Reasoning*. These collections set a high standard for future volumes in the series and I am most grateful to all of these distinguished authors for being in at the start of what it is hoped will become a rich and varied repository of the achievements of contemporary legal scholarship

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My thanks to Tom Campbell, editor of the Dartmouth series of Collected Essays in Law for the encouragement to put together this collection and to Alison Pilger for practical help to make it happen. Particular thanks are due to my partner in all things, Valerie Braithwaite, and my friends, Brent Fisse and Stephen Mugford, for permission to reprint works co-authored with them. Indeed, I owe a huge debt to all my co-authors. I doubt if many scholars have learnt as much from co-authors. In my writing I have enjoyed straying beyond my competence, but only after being emboldened by co-authors who were extraordinarily competent in the fields I invaded. A similar debt is owed to my PhD students who have brought competencies to our various shared enterprises that were lacking in me. Acknowledgment is also due to the publishers listed in the Table of Contents for their permissions to reprint.

Finally, I thank the institutions where I worked as these pieces were written for the many ways they sustained me and nurtured my intellectual citizenship. I am glad I worked at every one of them. In 1969 I started as an undergraduate at the University of Queensland. John Western and Paul Wilson, in particular stuck by me even though my academic record was not impressive; among other things, I failed to obtain a pass in first year sociology and in mathematics honours and obtained only a second class honours in anthropology and sociology. I finished up at the University of Queensland in 1978 after periods as a research assistant, PhD student and lecturer. The subsequent employers I wish to thank are Griffith University (1975–77), the Australian Institute of Criminology (1978–82), the University of California, Irvine (1979), the Australian Federation of Consumer Organizations (1982–84), the American Bar Foundation (1988, 1990) and the Australian National University (since 1984). While the debts I owe to all of them are genuinely deep, the deepest is to the Australian National University and the wonderful group of colleagues and support staff of the Research School of Social Sciences.

Introduction

Regulation, Communities and Freedom

Substantively, there have been two main foci of my work – crime and business regulation. An early interest in corporate crime led to a broader concern with strategies of business regulation. This in turn fed back to the study of regulatory approaches to preventing crime. It is hard to study these phenomena without questioning what should be regulated, what should be criminalized, and how? So my work has always been explicit in its commitment to integrating explanatory and normative theory.

Its ambition has been to contribute toward a vision of how to regulate more justly. Its audience is only secondarily policy makers in the state and business. Beyond the academy, its audience has been much more centrally the social movements in which I have been active – the consumer, environment, development and labour movements and the social movement for restorative justice – and those with which I have been a sympathizer and fellow traveller – the women's, human rights, indigenous peoples', older person's, gay and lesbian, peace, disabilities, and animal welfare movements. We will see that this vision of how to regulate more justly is about liberty, equality, fraternity and sorority, about how to give concrete institutional meaning to republican ideals that are informed by an empirical understanding of how the world actually works.

Inequality was the early concern as an explanation of non-compliance with the law and as something to struggle against. A second concern was freedom. In a number of papers freedom is found to be important to the explanation of crime. An analysis of homicide rates in 31 nations found the Freedom House Political Freedom Index to be the strongest predictor of homicide in the study (Chapter 2). Freer societies and more egalitarian societies had lower homicide rates. Another essay sets out to explain how a republican separation of powers is a central idea of institutional design because it simultaneously advances freedom and prevents crimes of the powerful (Chapter 12). Chapter 4 conceives of unfreedom as one dimension

of inequality – a society where some dominate and others lose their freedom by having their choices dominated – an inequality that contributes to crime. In *Crime, Shame and Reintegration* (Braithwaite, 1989) I argued that a low crime society will be strong on rights and strong on responsibilities, and especially strong on responsibilities to disapprove when the rights of others are crushed. In these senses, a low crime society is characterised by active community engagement with defending the institutions of freedom. Freedom, equality and community thus end up as both the key explanatory variables and the central normative ideals.

Republican Freedom

A turning point in my career was the collaboration with Philip Pettit that produced *Not Just Deserts: A Republican Theory of Criminal Justice* (Braithwaite and Pettit, 1990). This integrated normative concerns with freedom and equality. In that book we argued for a republican conception of freedom, which we called dominion. Pettit (1997) subsequently called this freedom as non-domination, which I also prefer to dominion. Republican freedom on this view requires more than the good fortune of averting interference with one's choices. It requires guarantees that one will not even be exposed to the possibility of arbitrary interference by an unregulated power. Such assurance is not possible without strong communities that mobilize disapproval against those who trample the rights of others and without a high degree of structural equality. So republican freedom requires liberty, equality and plural communities. Because the poor are bound to have their choices dominated, freedom as non-domination will not be secured in a society with high levels of structural inequality. Concentrations of power tend to fight back to reinstitute domination (Braithwaite, 1999). The greater the inequality of wealth and power in a society , the lesser will be the freedom as non-domination in that society. Hence, freedom as non-domination requires ceaseless social democratic struggle for greater equality of outcomes. Equality before the law and equality of opportunity are important but utterly insufficient.

Criminal justice systems and other regulatory institutions, according to Braithwaite and Pettit (1990), ought to be designed to maximize freedom as non-domination. The loss of freedom as non-domination when a felon is locked up must be balanced against what is delivered to crime victims (and the community generally) in enhanced freedom as non-domination. From this framework we derive the need for upper constraints on how much punishment the state or community can impose for a particular kind of crime and the need to abolish all lower constraints that require minimum levels of punishment. We argue for iteratively winding back levels of punishment until clear evidence emerges of increased crime or other threats to freedom as a result of the decline in the level of punishment.

This means that the view of equality is very different from that of liberal just deserts theorists. Equal punishment for equal wrongs is not important for its own sake from this republican perspective. If a policy of equal punishment for equal wrongs reduces freedom as non-domination in the society, and Braithwaite and Pettit (1990) argue that it does, then this is a bad kind of equality. Equal justice for victims and equal justice in the punishment of offenders are fundamentally incompatible goals. Equal consideration for victims requires that a victim be heeded if they wish to heal themselves through the grace of granting mercy to an offender, as they often do in restorative justice processes. Restorative justice processes come up with a practical way of balancing the justice claims of offenders and victims that can be defended in terms of freedom as non-domination. Both victims and offenders are guaranteed a certain level of security against domination. Victims are assured that their wishes will be heard and debated and that offers will be made to repair the harm they have suffered insofar as it is possible to do so. Offenders are guaranteed that they cannot be punished above a statutory maximum level of punishment for a given offence.

My work therefore involves an iterated adjustment of concepts like inequality, freedom and shame from explanatory theory and normative theories of the same concepts as they can be applied in real-world praxis (Parker, 1999). So we have an explanatory account of how inequality increases crime, a normative account of equality as a republican ideal and a sociologically possible practice for realising a certain kind of equality – restorative justice as an alternative to retributive justice, equitable tax policies. Over time the explanatory and normative accounts of inequality that can be realised in practice are mutually adjusted. An integrated normative-explanatory theory of crime then becomes possible. This is my project with concepts like inequality, freedom, shame and the separation of powers. It is motivated by the view that pursuing normative theories that are disconnected from testable explanatory theories has barren consequences. The result is prescriptions that can only be realised in some sociologically impossible world. Equal punishment for equal wrongs is a good example of an impossibilist normative theory that has disastrous consequences in a world where it is always possible to punish the poor and the powerless but rarely the rich and powerful.

The republican vision therefore clarifies our perception of how crime hurts and how justice might heal. Empirically, its research program shows that punishment adds extra hurt into a world with deeply structured inequity. Normatively, it illuminates an ideal of justice about healing as an alternative to hurting.

Dimensions of Inequality

The first essay in this collection was written while I was a student. It

conceives schools as having destructive features because they are 'the mouse race that prepares us for the rat race'. Schools vary in the depths to which they sink in structuring inequality into their outcomes. Ipswich Central Boys' State School, which I attended, ranked students from the top at the left back row to the bottom at the right front row ('where it is easier to reach you with my ruler' as some teachers were fond of saying). This was affirming for those who sat in the back but degrading for the dunces in the front row. Better schools motivate children to strive to improve on their own past performance more than compete against others (though to a certain degree the latter is inevitable). What Knight (1985: 266–70) later called 'redemptive schooling' is the egalitarian ideal explored in this essay – schooling that emphasises learning through strengths, where every child is assumed to have strengths, where 'everyone can be someone'.

'The Effect of Income Inequality and Social Democracy on Homicide' (co-authored with Valerie Braithwaite) explored the suspicion that decent social democratic government – giving priority to freedom and equality – was likely to deliver lower crime rates. Among 31 nations, we did indeed find that less equal societies suffered more homicide, societies with stronger social democratic representation in their legislatures and greater political freedoms suffered less homicide. Many subsequent studies controlled for more variables than we did in this early effort and affirmed the homicide-inequality association cross-nationally and across cities within nations. The effect of freedom and social democracy on homicide unfortunately was ignored in this subsequent research.

Corporate crime is a natural topic for an egalitarian social democrat. One book on safety in coal mines was directly motivated by my involvement in the labour movement in Ipswich, then a coal mining town. One disaster took the lives of mates I loved and I resolved to write an angry book on the need to deter unsafe practices in mines. It turned out not to be a punitive book (Braithwaite, 1985) because I came to the view from my empirical studies that punitiveness is often a counterproductive regulatory strategy. By 1985 pursuit of punishment for corporate criminals commensurate to the punishment meted out to blue collar criminals seemed to me a strategy contrary to the interests of blue collar victims of corporate crime.

'Inegalitarian Consequences of Egalitarian Reforms to Control Corporate Crime' (Chapter 3) was a first step toward this realisation. It was also a step toward seeing the problem as one of transnational rather than national regulation. The argument was that as reform governments enacted more laws to crack down on corporate crime (as they had been doing in the 1970s) the law became more complex, thereby favouring more formal and rational organizations. The increased complexity increases costs of investigation and conviction to the point where action can only be taken against the gravest injustices. Transnational corporations responded by shifting their gravest injustices to the Third World. Injustice increased both

nationally and internationally as a result of playing legal cat and mouse with corporate power.

'Poverty, Power, White-Collar Crime and the Paradoxes of Criminological Theory' (Chapter 4) weaves together a consideration of a number of different dimensions of inequality. It seeks to show that widening inequality increases both crimes of the powerless and crimes of the powerful, crime in the streets and crime in the suites. The final paper in Part I, 'Inequality and Republican Criminology' is as optimistic as 'Inegalitarian Consequences of Egalitarian Reforms' is pessimistic. It argues that our most serious crime problems are those we are in the best position to prevent. Social movements with egalitarian criminal justice agendas (like the women's movement) are the key actors with this preventive power. The fundamental reason is that patterns of shaming are structured by relations of power; yet these patterns are vulnerable to social movement politics. Shaming is one of the few potent tools available to the weak and it can be extremely potent.

Responsive Regulation

'Preventive Law and Managerial Auditing' (Chapter 6) sets out in practical terms what corporations must do if they want effective internal compliance systems. That piece was co-authored with Brent Fisse, who was the first of three co-authors who taught me new skills during the 1980s (see Fisse and Braithwaite, 1983, 1993). The others were Ian Ayres and Peter Grabosky. Grabosky and I came up with the label 'Benign Big Gun' to describe a number of Australian business regulatory agencies who managed to 'speak softly while carrying a big stick' (Grabosky and Braithwaite, 1986). Grabosky led me into the most systematic empirical study of business regulatory strategy in one country ever undertaken – involving the 96 most significant business regulatory agencies in Australia. 'Convergence in Models of Regulatory Strategy' (Chapter 7) was the first place where I developed the idea of the Benign Big Gun into a normative ideal – a move from explanatory to normative theory consummated with Ian Ayres in *Responsive Regulation* (Ayres and Braithwaite, 1992).

Responsive regulation was taken back into criminology in a piece called 'Beyond Positivism: Learning from Contextual Integrated Strategies' (Chapter 8). Reflexivity, systemic wisdom and enforcement strategy that is dynamic rather than passive were the key elements of this regulatory approach to crime prevention. By this point, crime had become just another regulatory problem for me: the regulation and criminal justice research agendas had collapsed into each other, relying on similar methods, normative theories and regulatory tactics. 'Transnational Regulation of the Pharmaceutical Industry' (Chapter 9) argued that the pharmaceutical industry has been characterized by high rates of corporate crime, low levels of

criminal enforcement, yet considerable improvement in safety and ethical standards. The improvements have been accomplished by a web of rather global controls, many of them informal – such as professional standards and social movement activism. Each strand in the web of controls is weak; yet the entire fabric of the web can be strong. Equal enforcement of national criminal laws thus comes to be seen as an antiquated remedy when what is needed to secure freedom as non-domination is global ratcheting up of regulatory standards. Tightening the knots that hold a web of controls together. And this might be achieved through the strength of weak (and informal) sanctions. My next book, *Global Business Regulation* (with Peter Drahos), develops this theme systematically and globally across the entire range of regulatory regimes that I studied in the national arena with Grabosky.

Republican Legal Institutions

The rule of law is central to republican normative theory. Without the rule of law, arbitrary power is unchecked, freedom as non-domination at risk. But what kind of rule of law? 'The Politics of Legalism: Rules Versus Standards in Nursing-Home Regulation' (Chapter 10) demonstrates a need to examine empirically our presumptions about the rule of law. It shows (and shows why) vague nursing home standards result in more consistent legal interpretation than precise rules. The analysis is a republican one because it finds the greater consistency of vague Australian standards to be about the quality of a regulatory dialogue in which there is empowerment of the voices of (normally silenced) stakeholders.

'Community Values and Australian Jurisprudence' (Chapter 11) tackles the question of strict legalism versus more purposive legal interpretation at the level of appellate courts, moving up from the street level enforcement considered in the previous essay. Legal interpretation is found to be impossible without reference to community standards that are often not codified in the law. At the same time arbitrary invocation of the attitudes of judges (often under cover of an appeal to community values) is a threat to the rule of law and therefore to republican freedom. A standard distinction from social psychology is made between attitudes and values. It is argued that judges should never argue from community attitudes when the law is silent. Reasoning from values inherent in the law itself and community values on which there is a strong consensus is found to be more acceptable. Better still to require judges to reason from a specific set of values and rights referred to in a Bill of Values and Rights when statute and common law are insufficient on their own to supply answers. In Australia, since this was written, the debate has been not on a Bill of Values and Rights, but on whether and how values should be written into the Preamble of a Constitution for a new Australian Republic. The final essay in this section

is on separations of private and public powers (Chapter 12). It involves a radical rethinking of the separation of powers doctrine for a world in which freedom is more under threat from the domination of private than public power. Along the way, it seeks to reframe deterrence theory for deterring the abuse of power.

Restorative Justice

In Part IV republican normative theory and the explanatory theory of reintegrative shaming are used to lay foundations for restorative justice as an alternative to retributive justice. 'Shame and Modernity'(Chapter 13) confronts the worry that we live in a shameless society, that the theory of reintegrative shaming is relevant only to a world of Jeffersonian rural republicanism. 'Conditions of Successful Reintegration Ceremonies' (with Stephen Mugford) describes the nuts and bolts of how restorative justice conferences make it possible to move criminal justice practices away from stigmatization toward reintegration. 'Restorative Justice and a Better Future' (Chapter 15) articulates a culturally plural vision for restorative justice. It is about:

> Helping indigenous community justice to learn from the virtues of liberal statism – procedural fairness, rights, protecting the vulnerable from domination; and
>
> Helping liberal state justice to learn from indigenous community justice – learning the restorative community alternatives to individualism.

Summarizing the Themes

Ten points will suffice for summarizing the threads that are interwoven through the essays in this collection:

1. The categories of normative theory can be adjusted to accommodate concepts that have real world explanatory power; explanatory theory concepts can be adjusted so they connect to a vision for a more decent society. This contrasts with the statist temptations to which criminology has often succumbed – explaining that assists the creation of more perfect systems of domination. Normative and explanatory theory are both enriched by a principled commitment to mutual adjustment of their categories.

2. Domination explains crime. Freedom as non-domination is a richer conception of freedom as a normative ideal than freedom as non-interference. This republican freedom explains crime and redefines the kind of regulatory order we might want in contemporary societies.

3. Inequalities based on wealth, power, school failure, race, gender and on

freedom itself explain crime. Normatively, freedom as non-domination requires constant struggle to peg back all these forms of inequality.

4. The rule of law – not abolitionism or deregulation, but taking crime and regulatory law seriously – is necessary for crime prevention. The rule of law is also necessary for the preservation of freedom as non-domination on other fronts. It is therefore a central normative ideal.

5. The separation of powers is another central ideal because it is integral to business regulatory effectiveness, crime prevention and freedom as non-domination.

6. Shaming is a great evil when it is stigmatizing: it causes non-compliance with the law and degrades those it touches. Reintegrative shaming, disapproval of the act while showing love or respect for the actor, improves compliance with the law; it is a normative ideal only when reintegrative shaming enhances freedom as non-domination.

7. Social movement politics is fundamental to shaping the effectiveness of regulation, the character of freedom as non-domination and the possibilities for reintegrative shaming of wrongdoing.

8. Restorative justice is a superior path than retributive justice because it has the potential to be more procedurally fair, more protective of freedom as non-domination and build compliance with the law.

9. Restorative justice is emerging as a social movement that can transform the criminal justice system and our institutions of regulation generally. This is because citizens find they like putting the problem rather than the wrongdoer in the centre of a circle of stakeholders, they prefer the experience of healing over hurting, they connect to values of prevention, community caring, community participation, community learning, respectful dialogue, making amends, apology, and forgiveness. The more intractable the regulatory problem, the deeper the evil, the more true this becomes. Like St. Paul, those who engage with restorative justice learn that 'where sin abounded, grace did much more abound'. Aug San Suu Kyi, the Dalai Lama, Mandela, Tutu, Ghandi all manifest how the greater the evil of the crime, the greater the opportunity for grace to inspire a transformative will to resist tyranny with compassion.

10. A particularly attractive feature of restorative justice is its emphasis on deliberation as a regulative ideal. High quality deliberation not only enriches democracy; it also provides the safeguard of helping to reveal our mistakes, including the possibility that my points 1–9 are mistaken.

For the future, a marriage of rigorous, methodologically plural regulatory science to social movement politics seems more productive than the past of narrow, normatively muted, criminal science wed to the punitive state. The social movement for restorative justice is an exciting focus for that scholarship, one with an inspiring vision for a freer future. But so are older social movements such as the human rights, environment, womens' movement, and many others where law, social science and politics might be fused for a regulation that advances freedom as non-domination.

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