

## *Republican Theory and Crime Control*

JOHN BRAITHWAITE\*

INTEGRATING NORMATIVE AND EXPLANATORY THEORY

**C**RIMINOLOGY is a dangerous discipline because its disciples alternate between taking the law for granted (by contributing to a statist project of crime control) and being critical criminologists who deconstruct crime. Most in fact slide back and forth between legal positivism and critical moral relativism. While criminologists take explanatory theory increasingly seriously, they do not take normative theory seriously at all. Explanatory theories are ordered sets of propositions about the way the world is; normative theories, ordered sets of propositions about the way the world ought to be.

The meta-theoretical message of this paper is that one cannot be serious about normative theory without rejecting both a moral relativism that might find rape and murder okay and a legal positivism that finds high imprisonment rates morally acceptable. I will show that normative theory of the sort that moral philosophers and jurists tend to advocate is dangerous because its prescriptions relate to possible worlds rather than to worlds which explanatory theory and evidence lead us to conclude do exist or may come to exist. Conversely, explanatory theory that appears to be silent on norms carelessly builds in unexamined norms, which are typically legal positivist or liberal. This paper argues for examinable republican norms as superior to legal positivism and liberalism. And it argues for an integration of explanatory and normative theory. That has been my own meta-theoretical project. The categories in my predominantly normative theory books have been shaped by the categories in prior explanatory theory books, and vice versa. However bad the execution, attempting integration seems better than a status quo where moral philosophers do normative theory with some sloppy remarks in their final paragraph about the relevance of their work to the real world and social scientists have some throw away remarks in their final paragraph about the “policy relevance” of their explanatory theory.

\* Paper to International Institute for the Sociology of Law, Onati, 23–24 October 1997, *Social Dynamics and the Regulatory Order in Modern Societies—New Theoretical Perspectives on the Causes of Crime and Social Control*. My thanks to Christine Parker, Philip Pettit, the editors and participants at the Onati workshop for helpful comments on earlier drafts of this paper

An attraction of the republican normative theory of criminal justice is that the key concepts about to be outlined—freedom, equality, parsimony, checking of power, reprobation and reintegration—map nicely onto key concepts of complementary explanatory theories (Braithwaite 1979, 1989, 1997, 1999)—concepts of freedom, equality, restorative justice as an alternative to punitive justice, separations of powers and reintegrative shaming. A chapter like this is part of an ongoing process of “iterated adjustment” (Parker 1999) of the categories in explanatory and normative theories, shuttling back and forth “between facts and norms” as Habermas (1996) puts it. This is desirable because powerful explanatory theories of criminal justice risk tyranny when unconstrained by normative theory (witness the justifications of deterrence and theories of selective incapacitation for morally unacceptable levels of incarceration). Obversely, a normative theory like just deserts can be a coherent theory in some possible world but not in any existing or sociologically possible world (and hence needs to be constrained by explanatory theory) (Braithwaite and Pettit 1990, Ch. 9).

#### THREE ATTRACTIONS OF REPUBLICAN THEORY

A republican theory of criminal justice has three appeals compared with the most influential alternative theories such as retributivism and deterrence theory. First, it provides attractive answers to the key normative questions of criminal justice, such as what should be deterred, how should trials be conducted, what should be shamed, and how? Second, those answers are informed by a wider social democratic programme for the transformation of contemporary societies into something more decent. Without a broader social and political agenda, it is hard to see how to build a society with less crime and what place, if any, criminal law has in such a project. I will argue that the key elements of that republican political program are about liberty, equality and community:

- continually strengthening freedom as non-domination
- continually struggling to increase equality
- continually improving the quality of deliberation in communities
- continuous improvement of justice
- continually reinvigorating separations of powers, the checks and balances in the polity.

These are not the only phenomena republicans should want continuously to improve. They should also want, for example, continuously to improve environmental stewardship—replenishing our obligations to the land and the living things that depend on it (Pettit 1997, pp. 135–8). One of the reasons for focusing on the above list of key elements of the republican political program, however, is their relationship to the crime problem.

The third attraction is that republican theory hypothesises that implementing these key elements of its political program will substantially reduce crime.

### **Three Attractions of Republican Theory**

- (1) a normative ideal for criminal justice policy;
- (2) that it is part of a broader political programme that inspires societal transformation;
- (3) that it might reduce crime.

These three attractions of republican theory organise the essay. First, freedom as non-domination is explained as the ideal at the foundation of republicanism that can guide criminal justice policy. The next section explains how freedom as non-domination motivates the key elements of the political programme outlined by the above set of bullet points. Finally, the chapter explains why such a programme might reduce crime in the conditions of many contemporary societies.

#### THE REPUBLICAN IDEAL AS A GUIDE TO CRIMINAL JUSTICE POLICY

My republican ideal is shared with Philip Pettit (1997; Braithwaite and Pettit 1990) and Christine Parker (1999; Braithwaite and Parker, 1998) as the pursuit of freedom as non-domination (or dominion). In this work, the core of the liberal tradition is seen to be freedom as non-interference, while freedom as non-domination is the mark of the good society in the republican tradition (Spitz 1995). This civic republican tradition spreads from Rome to the early modern Northern Italian republics to Dutch and English republican writing in the 17th century, Montesquieu, Paine, Madison and Jefferson.

The republicans wanted more than liberty in the impoverished sense favoured by the liberals who increasingly dominated Western political discourse through the nineteenth century. Republican freedom required more than the accident of managing to escape interference; it required the assurance of not even being exposed to the possibility of arbitrary interference by an uncontrolled power. Formal assurance against domination was especially important for minorities who suffer repression by states, communities and markets. In practice republicans equated being free with living under a rule of democratic law and civic norms that would make everyone secure against interference without giving anyone cause for complaint that they were not being treated as equals.

The free individual was an equal member of a free community so that there was a solid basis for the connection the French made in 1789 between liberty, equality and fraternity (or community). Or sorority (Wollstonecraft 1995). Traditional republicans were excessively narrow in their conception of who could be citizens; they limited the citizenry to propertied, mainstream males.

Contemporary republicans see women, the propertyless and most pointedly, criminals, as citizens with an equal claim on our consideration for their freedom. This normative commitment means that we cannot take away the freedom of criminals unless we are confident that doing so will more profoundly enhance the freedom of others. Indeed, we cannot define something as a crime unless so defining it will increase freedom as non-domination. The freedom of criminals counts for no less simply because they are criminals. Republicans are consequentialist about maximizing freedom as non-domination. Braithwaite and Pettit (1990) have derived from this republican premise presumptions in favour of parsimony (if in doubt, punish less), checking of power, reprobation and reintegration. These presumptions guide the answers Braithwaite and Pettit (1990) provide to key questions of criminal justice policy such as what should be a crime, when and how should such laws be enforced, what should be the upper limits on punishment, why there should be no lower limits (mercy as just) and so on. Parsimony is a particularly important principle because it motivates incremental downward movement (decrementalism) in the extent to which punishment is used until such time as sufficiently clear evidence emerges that crime has notably increased.

#### PETTIT'S ELABORATION OF THIS REPUBLICAN IDEAL

Philip Pettit's (1997) *Republicanism: A Theory of Freedom and Government* has recently delivered to us a systematic attempt at building a political programme from the republican foundation of the pursuit of freedom as non-domination. I will not here seek to summarize this in all its sweep; it touches everything from defence policy to the welfare state. Rather, my comments will be restricted to those key elements of the programme which I will argue are relevant to reducing crime.

#### Equality

Pettit argues that citizens cannot enjoy freedom as non-domination in conditions of poverty. The slum-dwellers of our cities live under the tyranny of slum landlords; they suffer discriminatory treatment by the legal system because they cannot afford to pay for legal advice. In such a condition, freedom is impossible, all choice is subject to the daily dominations poverty engenders. Hence, Pettit argues that republicans must support a strong welfare state that assures citizens of a safety net that will prevent them from falling into poverty. This rather than the maximisation of equality is Pettit's ideal. Pettit, along with other prominent republicans like Cass Sunstein (1988), believes that equality of results (as opposed to equality of opportunity) is an unachievable ideal and therefore one lacking practical political appeal. So long as equality before the law ensures

that no citizens are systematically accorded truncated opportunities for economic advancement, so long as the welfare system assures all citizens enough economic security that they can make undominated choices, then the fact that some become much richer than others is not a concern for Pettit.

While he is right that absolute equality is both unattainable and unjust, we cannot sweep under the carpet the fact that accumulations of wealth and power increase prospects of domination. The more wealth is concentrated, the more domination there is, the less freedom as non-domination there is. Money talks; it talks in the courtroom where the billionaire with up-town lawyers will always be advantaged in a contest with a middle class person; it talks in the boardroom, in the media and in contests for political favours. So it seems to me that the greater the inequality of wealth and power in a society, the lesser will be the freedom as non-domination in that society (and that this is a monotonic, though not a linear relationship). While there are possible worlds where excessive equality is unjust toward those who work harder, in sociologically existing worlds, injustice favours the strong overwhelmingly more than the weak.

The reality for social democrats is constant struggle for greater equality, knowing that concentrations of power will always fight back to reinstitute inequality. The fightbacks of the powerful against egalitarian reform are such a constant of history that we can never hope to attain a world where the poorest will enjoy even a tenth of the riches cornered by its wealthiest. The dangers, injustices and political liabilities of absolute equality are not things the social democrat need worry about in any sociologically possible world. The social democrat's objective is not absolute equality, nor is it to settle for equality of opportunity; it is to struggle against the odds for the greatest improvement in equality of results as can be accomplished. In the contemporary conditions of global capitalism this mostly means doing one's political best to stem increases in inequality rather than accomplishing permanent actual reductions of inequality. Moreover, the greatest disservice one can do to the republican objective of equality of opportunity is to fail to resist inequality of results.

### **Deliberation in communities**

A crucial feature of a republic for Pettit (1997) is that it be a deliberative democracy, a "contestatory democracy", in which reasons for decisions must be discussed, evaluated. Social movements such as the women's movement, the environmental movement, the labour movement, the consumer movement, movements for indigenous rights, and the like, are central to republican governance. Freedom from domination requires that arbitrary power be vulnerable to contest. It does not require that everyone participate in political deliberation, nor that participation be maximized. Rather it depends simply on enough citizens participating to ensure that decisions are contested from diverse perspectives. All this seems sensible.

Yet there is a parallel to our analysis of continuous struggle for *greater* equality, as opposed to valuing *absolute* equality. Most citizens of contemporary democracies are totally alienated from political life, beyond perhaps casting their vote at election time. While political decisions that are media events attract more than adequate contestation, governments daily issue hundreds of policy decisions that are not adequately contested. A public hearing of an industry commission is called on the protection of the cotton industry; only cotton farmers turn up—no one contests the proposal as a representative of consumers. A new standard concerning the safety of car tail lights is issued after the only contestation has come from the motor vehicle industry.

At lower levels of governance, the challenges of securing enough participation to deliver the contestatory ideal are even more profound: the meeting of the workplace health and safety committee is called and no workers turn up, or white male workers only. The more disadvantaged constituencies are, the more profound are contestation deficits. Even at the level of the World Trade Organization—the most powerful level of governance in the world system—in my research with Peter Drahos we were told of a meeting on the trade needs of Least Developed Economies to which no representatives of Least Developed Economies turned up. The small number of representatives of these nations were simply overloaded with demands to participate in other Geneva meetings.

Hence, republics need constantly to nurture interest in participation, feelings of obligation to participate where one can and resources for participation by the resource-poor. Not an obligation of citizens to participate in every committee that makes decisions affecting their interests, but an obligation to do their bit as a participating citizen. Even this is not a sufficiently demanding standard of republican participation. At the lowest levels of governance—the governance of families, of our immediate work groups, particularly the governance of more junior work colleagues who depend on us for decent work practices—freedom as non-domination depends on an obligation to listen and deliberate thoughtfully. Fathers who have nothing to do with their children, bosses who do not bother to engage in discussion of work practices, are the most common destroyers of freedom as non-domination.

These are the reasons why a republic should mean a struggle for continuous improvement in the quality and diversity of deliberation and in the proportion of the population that feels an obligation to participate. Diversity in a contestatory republic argues for getting more citizens to participate somewhere rather than a few conscientious citizens to participate relentlessly.

## Justice

In his republican writing, as opposed to his earlier work, Pettit has remarkably little to say about where justice fits in as a republican desideratum, a neglect remedied by work Christine Parker (1999) has done building on Pettit's work.

Following Campbell (1988, pp. 3–4), Parker (1999, pp. 45–7) makes a Rawlsian distinction between the concept and the conception of justice in her republic of justice. Parker’s concept of justice is: “those arrangements by which people can (successfully) make claims against individuals and institutions in order to advance shared ideals of social and political life” (Parker 1999, 46). A *concept* of justice thus conceived as means, formal and informal, by which people seek to secure social and individual relations they think are right will yield different views (*conceptions*) of rightness. Parker’s (1999) republican conception of substantive justice is of freedom as non-domination (following Skinner 1984; Pettit 1993, 1997). The just society then institutionalises processes of disputing that will maximize freedom as non-domination. So Parker (1999, p. 49) integrates concept and conception in a definition of justice that I will adapt only slightly here: Justice is “that set of arrangements that allow people to make claims against other individuals and institutions in order to secure freedom against the possibility of domination”.

Access to justice is mostly not accomplished through courts of law. There are simply too many serious daily injustices in the world, not to mention myriads of more minor ones, for courtroom justice to be affordable beyond a small minority of cases. Consumer protection agencies, for example, never approach litigating even one per cent of the complaints they receive (Grabosky and Braithwaite 1986). Worse, nor do they informally deliver justice for the majority of their complainants.

Again, therefore, the reality is that access to justice for all is an impossible ideal. Continuous improvement in access to justice is an attainable objective, however. Christine Parker (1999) has worked through the republican reforms required for continuous improvement in access to justice. She suggests, for example, that all organisations above a certain size have access to justice plans that, through consultation with stakeholders: (1) identify the various types of injustices (to consumers, workers, minorities, creditors, etc) that are common consequences of its activities; (2) set up restorative justice fora to correct these injustices when they arise; and (3) deploy preventive law measures to ensure compliance with the law and remove blockages to access to justice. Performance indicators would be required under these plans to demonstrate improved access to justice this year compared to last year (continuous improvement). The results of independent audits against these performance indicators would be made public. Responsively regulated access to restorative justice plans in the large organisation sector then frees up more finite legal aid resources for injustices inflicted in small organisations like families and by individuals.

### **Separations of powers**

Republicans believe in a variety of separations of powers as central to accomplishing a contestatory democracy (Pettit 1997). The best known is

Montesquieu's separation of legislature, executive and judiciary. An absolutely strict separation of powers, however, would pose profound risks of abuse of power. This is because we want separated powers to overlap sufficiently so that they can contest each other's power. No point in having a judiciary so independent of the legislature that the legislature cannot write new laws to overturn case law written by the courts. No point having a legislature so independent of the judiciary that courts cannot strike down unconstitutional laws. The ideal is of enough independence for one branch of private or public governance to be able to make its best contribution to advancing republican freedom without being prevented from doing so by the domination of some other branch. The ideal is also of enough interdependence for many branches to be able to check the power of one branch from dominating others.

Constitutional designs for robust separations of powers tend to crumble over time. Tyrants relish dominating the weak, but are more likely to opt for peaceful coexistence with other powerful actors. Checks and balances deteriorate into truces whereby you stay in your backyard and I mine. Hence, separations of powers within and between both the private and public sectors need to be regularly reinvigorated to ensure that they deliver checks and balances. In another paper I have discussed in some detail the institutional nuts and bolts of how this might be done (Braithwaite 1997).

#### A SOCIAL DEMOCRATIC PROGRAMME?

Pettit does not really present his political programme as a social democratic one, though he explicitly connects the republican tradition to the socialist tradition of the dignity of labour, freeing workers from conditions of wage slavery. On questions such as equality, perhaps he and others in the tradition like Sunstein (1988), who is explicit in stating "political equality" rather than economic equality as one of his four republican objectives, want to bring a non-social-democratic liberal audience along with them.

This seems a mistake. It is just not possible to achieve equal treatment—equality before the law, equality of opportunity—by making equal treatment your objective. Given the way economic and political power works in practice, the best way to pursue equal treatment is through democratic struggle to equalise wealth and power as far as one can persuade the electorate to support it.

Pettit persuasively makes a republican connection to feminism via the republican writings of Mary Wollstonecraft (1995) and others. But the agenda of progressively reducing inequalities between men and women should have more political appeal to feminists than the pursuit of equal treatment in patriarchal societies where this usually means men take the spoils. You can allocate prizes of land by applying the rules of jousting with scrupulous equality between a knight and a peasant woman; but the woman will end up skewered on a lance.



In most spheres of inequality, the more that unequal contestants are granted equal treatment, the wider the gap between the haves and have nots becomes (Galanter 1974). Equal treatment does not go far enough to inspire confidence among social democrats, feminists, or social movements of oppressed ethnic minorities. Absolute equality goes too far. A credible programme of institutional reform to deliver continuous improvement in freedom as non-domination, equality, community, justice and separations of powers is a good start toward an inspiring social democratic platform. But of course it is not enough. Equal rights to pollute up to a limit has little appeal to the green political constituency, just as zero tolerance of environmental harm goes too far (being an impossibilist programme). Credible commitment to continuously and substantially reducing environmental impacts by major industrial polluters and households alike, independently audited and publicly reported, is a programme that can and will inspire reform that might save the planet. The gradual closing of the Ozone hole is its light on the hill.

#### CAN THIS REPUBLICAN PROGRAMME REDUCE CRIME?

##### **Reducing inequality**

For the first decade or so of my life as a criminologist I worked on the relationship between inequality and crime (Braithwaite 1979; Braithwaite 1991). I found then the evidence to be reasonably strong that inequality in economic outcomes, not just the number who were poor, but inequality between the poor and the average income earner, between the rich and the poor, is associated with higher crime rates. And I read the evidence for this association as growing stronger in recent times with the addition of new kinds of evidence such as that of Wright and Decker (1994, 1997) on the importance of a “need for cash” as a motivation of burglars and armed robbers. The most recent evidence on unemployment and crime (Weatherburn and Lind forthcoming) makes a republican case for labour market programmes in Western economies that completely abolish *long-term* unemployment (Braithwaite and Chappell 1994).

##### **Improving the quality of deliberation in communities**

Republicans tend to work with a productively loose conception of community. I would conceive a community as any aggregation of people that share some common bonds or identities. Republicans can have no truck with a kind of communitarianism that privileges a national society. Nor is a nostalgic longing for a lost village community of previous centuries attractive. Privileging either of these forms of community is in fact a threat to freedom as non-domination. Republican freedom is most likely to be nourished in a world of cross-cutting

communities: where one's professional community might act as a check and an alternative to the dominations of one's village, one's church a check on the dominations of one's family, one's network of friends with a common recreational interest a check on the dominations of one's church, and so on. Republicans should not believe in a strong community, but in strong communities.

The most important communities to enhancing freedom in contemporary democracies are communities of social movement activists. I have argued elsewhere that social movement politics is more important to the control of crime than criminal justice policies because, for example, the shamefulness of crimes against women is primarily advanced by the women's movement, the shamefulness of environmental crimes by the environment movement (Braithwaite 1995). The very crimes that social movements mobilise around are those that are out of control because powerful interests want to render their shamefulness muted and ambivalent.

Social bonds and dialogue within communities are important for preventing crime at all levels. The most impressive body of empirical evidence to support this claim are at the level of the micro-community of the family, but the evidence at more intermediate levels of community between family and nation is also strong (Cullen 1994). A new generation of scholars are coming up with new ways of measuring the strength of community, such as Chamlin and Cochran's (1997) discovery of an association between the level of contributions to charity and property and violent crime rates across cities.

At the most aggregated levels, community is important to the prevention of crime. The international community is important to the prevention of war crimes. I have a PhD student, Eliza Kaczynska-Nay, working on the mechanisms of social disapproval within the international community that has delivered the surprisingly high level of participation in and compliance with the nuclear non-proliferation regime, in defiance of President Kennedy's prediction 35 years ago that within twenty years there would be twenty nuclear powers. On the safety as well as the non-proliferation side of nuclear regulation there is a global community. Joe Rees (1994) says it is a community of shared fate. They help one another to operate much more safely than they used to because they know that another Three Mile Island or Chernobyl could bring them all down. So, for example, the self-regulatory programmes of the World Association of Nuclear Operators pairs all nuclear power plants in Russia mostly with sister plants in Germany who help them to upgrade to international standards. Like Joe Rees, I read the evidence as rather compelling that this kind of communitarian regulation has improved safety. For example, scrams (automatic emergency shutdowns) declined in the US from over 7 per unit in 1980 to 1 in 1993.

Of course, as I argue in *Crime, Shame and Reintegration* (Braithwaite 1989), strong community is a double-edged sword; it keeps the burglary rate down in Japan at the same time as it is a resource for the Yakusa and circles of corruption in the Diet. The theoretical claim in that book, nevertheless, is that for those kinds of crime that are viewed by overwhelming majorities of citizens as

harmful, the crime preventive effects of strong community controls exceed the crime inducing effects of strong criminal subcultures. A controversial theoretical position no doubt, and a controversy not pursued here.

Durkheim notwithstanding, I take retributive criminal justice practices to be destroyers of community, and restorative justice, *The Politics of Redress* as Willem de Haan (1990) puts it, as restoring community. Moreover, the evidence is beginning to look encouraging, though it is far from compelling in these early days of research on restorative justice, that this form of communitarian justice might outperform courtroom justice in reducing subsequent crime (Braithwaite 1999).

### Continuous improvement of justice

One of the most interesting things about Jack Katz's (1988) empirical work in *The Seductions of Crime* is the way it shows that so much crime is lived with a sense of injustice. Far from viewing himself as a perpetrator of evil, at least at the moment of committing an assault or a murder, the criminal often views himself as an agent of justice, the victim as someone deserving retribution. While just deserts theorists see their agents as dispassionate judges, their world view, artfully promulgated by Hollywood, may have enrolled much larger numbers of men with clenched fists and guns who in little private encounters see themselves as the true agents of just deserts. Then there is John Hagan and Bill McCarthy's (1997) recent work connecting the injustice of being a victim of physical or sexual abuse to subsequent increased crime among homeless youth. This is not a new notion, dating at least from Donald Black's (1984) "Crime as Social Control".

The theme of Tom Tyler's (1990) *Why People Obey the Law* is that people comply when they view the regulatory order at issue as procedurally just. Some of the data coming out of my own research group supports the US evidence that Tyler has accumulated in support of an association between procedural injustice and crime (Makkai and Braithwaite 1996). One reason we think restorative justice conferences will do better than court in preventing crime is that the evidence from the first 548 offenders randomly assigned to court versus conference in Canberra is of notably higher perceptions of procedural justice among those assigned to conference (Sherman and Barnes 1997).

This is why within my research group we are inclined to think that crime might be reduced by a republican regulatory transformation that, among things, mandates access to justice plans which secure continuous improvement in access to justice.

### Continually reinvigorating separations of powers

Separations of powers are designed to check abuse of power. This is as true of an auditor-general or a court publicly checking the power of a government Minister as it is true of an internal environmental auditor or a Board Ethics Committee privately checking the power of the CEO of a company. It has long been a theme in my writing that such separations of powers in the design of both private and public institutions actually work in reducing crime (Braithwaite 1979, 1997).

A more specific point here is that rich and robust separations of powers enable restorative justice to work more effectively in preventing crime. Let me begin to illustrate how with the story of Solomons Carpets, a tale from my experiences as a Commissioner with Australia's national antitrust and consumer protection agency, the Trade Practices Commission. Solomons ran advertisements claiming that certain carpets were on sale for up to \$40 per metre off the normal price. This representation was false. The Commission had difficulty deciding what action to take on this alleged breach of its Act. It was a less serious matter than others that were putting demands on its scarce litigation resources.

The Commission decided to convene a meeting with Solomons to negotiate an administrative settlement which would seek to include voluntary compensation for consumers in an amount exceeding the criminal fine that was likely should they be convicted. The facts of the matter made it fairly unlikely that any court would order compensation for consumers, but likely that a modest fine would be imposed. All the Commissioners felt that Solomons would reject the administrative settlement because it would be cheaper for them to face the consequences of litigation. Moreover, Solomons management at the early meetings were tough nuts, treating the Commission as if it were bluffing on the threat of criminal enforcement. The Commissioners (including me) turned out to be wrong in assuming that such decisions are necessarily made by companies according to a deterrence cost-benefit calculus. Unknown to the Commission at the time, there was also a soft target within the company, namely the Chairman of the Board, the retired patriarch of this family company. For him, as a responsible businessman, it made sense to accept the Commission's argument that resources should be spent on correcting the problem for the benefit of consumers rather than on litigation and fines.

During the restorative deliberation, the Chairman of the Board was dismayed at the prospect of allegations of criminality against his company, and was concerned for its reputation. He was also angry with his chief executive for allowing the situation to arise and for indulging in such a marketing practice. The CEO, like his underlings, had proved a hard target, determined to tough it out. The chairman sought the resignation of his chief executive and instructed the remaining senior management to co-operate with an administrative settlement that included the following seven requirements:

- (1) Compensation to consumers (legal advisers on both sides were of the opinion that the amount was considerably in excess of what was likely to be ordered by a court).
- (2) A voluntary investigation report to be conducted by a mutually agreed law firm to identify the persons and defective procedures that were responsible for the misleading advertising.
- (3) Discipline of these employees and remediation of those defective procedures.
- (4) A voluntary Trade Practices education and compliance programme within the firm and among its franchises directed at remedying the problems identified in the self-investigation report on an ongoing basis and at improving Trade Practices compliance more generally.
- (5) An industry-wide national Trade Practices education campaign funded by Solomons to get its competitors to also improve their compliance with regard to advertising of carpets.
- (6) Auditing and annual certification of completion of the agreed compliance programmes by an agreed outside law firm at Solomons' expense.
- (7) A press release from the Commission advising the community of all of the above and of the conduct by Solomons that initially triggered the investigation, (the press release attracted significant coverage in most major Australian newspapers.)

In addition, although it was not part of the deed of agreement, Solomons volunteered to conduct an evaluation study of the improvement (or absence thereof) in compliance with the Act by its competitors as a result of the industry-wide education campaign that it funded.

Solomons was a restorative justice watershed for the Commission. There were subsequent cases where executives were soft targets who came away from these encounters deeply ashamed of what their company had done. Many subsequent cases were handled through a process of working up the organization until a soft management target was found who would trigger a dialogic process of responsive reform among those below the soft target. Fisse and Braithwaite (1993) developed this strategy into an Accountability Model that seeks to mobilize corporate private justice systems to hold responsible all who are responsible (generally at sub-criminal levels of responsibility). While holding the axe of law enforcement over an organization's head, the company is required, generally with an independent law firm, to produce a self-investigation report identifying all the persons and procedures responsible for the wrongdoing, and proposing remedies. Again, the idea is that some of the persons identified as having a responsibility under this process will be soft targets who will initiate responsive processes of reform, recompense and prevention for the future.

The theory of crime prevention underlying the Accountability Model is that the causation of any crime in which organizations are involved is overdetermined, as the philosophers say, by the acts and omissions of many individuals, organizations and sub-units of organizations. While only a small number of

individuals may be involved in committing an organizational crime, Fisse and Braithwaite's empirical work shows that a much larger number usually have the power to prevent it. In any overdetermined criminal offence, some of those with a preventive capacity will be:

- (1) hard targets who cannot be deterred by maximum penalties provided in the law (like the Solomons CEO);
- (2) vulnerable targets who can be deterred by maximum penalties; and others will be
- (3) soft targets who can be deterred by shame, by the mere disclosure of the fact that they have failed to meet some responsibility they bear, even if that is not a matter of criminal responsibility (like Mr Solomon).

An organization or a government that has rich and plural separations of powers has more soft targets. What a separation of powers creates is actors who have some capacity to prevent crimes from which they do not benefit (Braithwaite 1997). In organizations or governments with a weak separation of powers, in contrast, the only targets are likely to be hard targets; knowledge of the crime only passes to those who directly or indirectly (through patronage) share in the benefits of the crime. Separations of power create third party enforcement targets like auditors, other gatekeepers and directors with preventive capabilities. The richer and more diverse the separations, the more potential third-party targets for enforcement there will be and the greater the chances that some of them will be soft targets. In political systems with rich separations of power, dialogic regulation works through relying on the strength of weak sanctions. So when the police get a lead on an organisational crime at a low level of the organization, they can slowly work up the organisation with the investigation until they find a soft target who will spill the beans and cooperate in a restorative justice conference to repair the harm done and put in place policies and procedures to prevent recurrence of the crime. More formally, the conclusion here is that the more plural the separations of powers in an organization or a polity: "(a) the more overdetermined is the capacity to prevent abuse: and (b) the more cases there are of disjuncture between an interest in the abuse and a capacity to prevent it" (Braithwaite 1997, 38).

#### CONCLUSION

Republican theory guides crime control policy by the normative ideal of maximizing freedom as non-domination. This normative ideal connects to a wider programme of social democratic transformation toward societies with strong governments, strong markets, strong communities in civil society that constitute strong and diverse individuals (Braithwaite 1998). The idea here is about checks and balances: markets can be trusted to be strong only when governments and civil society are strong; governments can be trusted to be strong only when civil

society, individuals and markets are strong, and so on. According to the political programme this republicanism defines, republicans must engage in a dialogue with citizens to seek to persuade them to direct these plural strengths toward continuously expanding and securing freedoms, continuously struggling to increase equality, continuously improving access to justice and continuously reinvigorating the checks and balances in the polity.

This means that republicans have interest in working constructively with the business community and antitrust agencies to strengthen markets, with social movements, professions and community groups to strengthen civil society, with the three branches of government and particularly with social democratic parties and the significant numbers with republican values in liberal, conservative and green parties. Through institutions of state, market and society, republicans also seek to engage with international institutions such as the IMF and the World Trade Organization that have more profound impacts on liberty, equality and community than most states.

One of the attractions of such a programme, though hardly the main one, is that there are reasons for believing it would reduce crime. Republicanism therefore allows us to steer the criminological agenda away from punishment and confinement as its natural topics onto freedom, equality and community. Deterrence and incapacitation must continue to have a place in a republican regime, but a decentred one since most needed social control can be delivered through the strength of weak sanctions.

Overall, republicanism motivates a kind of scholarship that is hardly recognisable as “criminology”. Its ultimate focus is on maximizing freedom as non-domination, where criminalizing conduct can only be one of many contingently useful paths to that end. In the process of iterated adjustment of the categories of republican normative theory and complementary explanatory theories that are useful within the normative frame, crime always emerges as an important category of republican analysis. For the republican, criminology has its virtues in nurturing scholarly community and inculcating habits of rigor in empirical and theoretical analysis. But it is also a vice, a “discipline” that regiments young minds into myopic ways of seeing the world, a servant of tyranny, sometimes accepting definitions of crime that reduce freedom as non-domination, sometimes studying how to control it in the absence of a principled normative stance on when the control techniques are and are not morally acceptable threats to freedom. Criminology will become more virtuous when it devotes as much attention to habits of rigor in normative theory as it does to rigorous evaluation of explanatory theory, when it embraces integration of the two rather than their dangerous separation. Republicanism is just one developed position on how to accomplish that. A delightful irony is that republicanism requires there to be other robust integrations of normative and explanatory theory to vigorously contest republicanism. Republicans like to lose debates because there would be no republic in a society where republicans were not continually losing in contests over ideas and institutions.

## REFERENCES

- Black, Donald, 1984, "Crime as Social Control" in *Toward a General Theory of Social Control* (D. Black (ed.), New York: Academic Press).
- Braithwaite, John, 1979, *Inequality, Crime and Public Policy* (London: Routledge and Kegan Paul).
- , 1989, *Crime, Shame and Reintegration* (Cambridge: Cambridge University Press).
- , 1991, "Poverty, Power, White-Collar Crime and the Paradoxes of Criminological Theory" 24 *Australian and New Zealand Journal of Criminology* 40–58.
- , 1995, "Inequality and Republican Criminology" in *Crime and Inequality* (J. Hagan and R. Peterson (eds), Palo Alto: Stanford University Press).
- , 1997, "On Speaking Softly and Carrying Sticks: Neglected Dimensions of Republican Separation of Powers" 47 *University of Toronto Law Journal* 1–57.
- , 1998, "Institutionalizing Distrust, Enculturating Trust" in *Trust and Democratic Governance* (V. Braithwaite and M. Levi (eds), New York, Russell Sage Foundation), 343–375.
- , 1999, "Restorative Justice: Assessing Optimistic and Pessimistic Accounts" in *Crime and Justice: A Review of Research Vol 25* (M. Tonry, ed., Chicago: University of Chicago Press).
- and Christine Parker, 1998, "Restorative Justice is Republican Justice" in *Restoring Juvenile Justice: An Exploration of the Restorative Justice Paradigm for Reforming Juvenile Justice* (Lode Walgrave and Gordon Bazemore (eds), Monsey, New York: Criminal Justice Press).
- and P. Pettit, 1990, *Not Just Deserts: A Republican Theory of Criminal Justice* (Oxford University Press).
- Campbell, T., 1988, *Justice* (Hampshire: MacMillan).
- Chamlin, Mitchell B. and John K. Cochran, 1997, "Social Altruism and Crime" 35 *Criminology* 203–227.
- Cullen, Francis T., 1994, "Social Support as an Organizing Concept for Criminology: Presidential Address to the Academy of Criminal Justice Sciences" 11(4) *Justice Quarterly* 527–559.
- De Haan, W., 1990, *The Politics of Redress: Crime, Punishment and Penal Abolition* (London: Unwin Hyman).
- Fisse, B. and J. Braithwaite, 1983, *The Impact of Publicity on Corporate Offenders* (Albany: State University of New York Press).
- Fisse, B. and J. Braithwaite, 1993, *Corporations, Crime and Accountability* (Cambridge: Cambridge University Press).
- Galanter, Marc, 1974, "Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change" 9 *Law and Society Review* 95–160.
- Grabosky, Peter and John Braithwaite, 1986, *Of Manners Gentle: Enforcement Strategies of Australian Business Regulatory Agencies* (Melbourne: Oxford University Press).
- Habermas, Jurgen, 1996, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (London: Polity Press).
- Hagan, John and Bill McCarthy, 1997, *Mean Streets: Youth Crime and Homelessness* (Cambridge: Cambridge University Press).
- Katz, Jack, 1988, *Seductions of Crime: Moral and Sensual Attractions of Doing Evil* (New York: Basic Books).



- Makkai, T. and J. Braithwaite, 1996, "Procedural Justice and Regulatory Compliance" 20(1) *Law and Human Behavior* 83–98.
- Parker, C., 1999, *Just Lawyers* (Oxford: Oxford University Press).
- Pettit, P., 1993, "Liberalism and Republicanism" 28 *Australian Journal of Political Science* 162–189.
- , 1997, *Republicanism: a Theory of Freedom and Government* (Oxford: Clarendon Press).
- Polk, Ken, 1994, "Family Conferencing: Theoretical and Evaluative Questions" in *Family Conferencing and Juvenile Justice* (Christine Alder and Joy Wundersitz (eds), Canberra: Australian Studies in Law, Crime and Justice, Australian Institute of Criminology).
- Putnam, Robert. D., 1993, *Making Democracy Work: Civic Traditions in Modern Italy* (Princeton, NJ: Princeton University Press).
- Rees, Joseph V., 1994, *Hostages of Each Other: The Transformation of Nuclear Safety Since Three Mile Island* (Chicago: University of Chicago Press).
- Sherman, L.W. and G. Barnes, 1997, *Restorative Justice and Offenders' Respect for the Law*, Paper 3, RISE Working Paper, Law Program (RSSS, ANU, Canberra).
- Skinner, Q., 1984, "The Idea of Negative Liberty: Philosophical and Historical Perspectives" in *Philosophy in History: Essays on the Historiography of Philosophy* (R. Rorty, J. Schneewind and Q. Skinner (eds), Cambridge: Cambridge University Press).
- Spitz, Jean-Fabien, 1994, *La Liberte Politique* (Paris: Presses Universitaires de France).
- Sunstein, Cass, 1988, "Beyond the Republican Revival" 97 *Yale Law Journal* 1539–1590.
- Tyler, Tom 1990, *Why People Obey the Law* (New Haven: Yale University Press).
- Weatherburn, Don and Bronwyn Lind, forthcoming, *The Economic and Social Antecedents of Delinquent-Prone Communities* (Cambridge: Cambridge University Press).
- Wollstonecraft, Mary, (S. Tomaselli (ed.)) 1995, *A Vindication of the Rights of Men and a Vindication of the Rights of Woman* (Cambridge: Cambridge University Press).
- Wright, Richard T. and Scott Decker, 1994, "Burglars on the Job" (Boston: Northeastern University Press).
- and —, 1997, *Armed Robbers in Action* (Boston: Northeastern University Press).