

ASKING THE DOMINATION QUESTION ABOUT JUSTICE

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Many meanings of justice

Justice means many different things to different people. That is fine, even good, for the purposes of this project. That purpose is to argue that there is sufficient immanent holism about many different conceptions of justice for conversations among ordinary citizens to reach workable agreements about just outcomes that are broadly acceptable quite a bit of the time. Yet that is not so easy to accomplish without serious conversations among judges in appellate courts, among jurors or participants in restorative justice. The holism arises from both explanatory and normative accounts of how and why justice comes to pass and comes to matter.

It is argued that domination reduction can be an inspiring light on the hill for justice. The ambition of the chapter is limited. It is simply to suggest that a valuable question to ask when pondering what is just is whether an action will reduce or increase the amount of domination in the world. By no means do I suggest that this is the only question to ask, just that it is an instructive question in the way it opens up explanatory and normative insights about justice impacts. One reason domination reduction is an appealing organizing idea is that domination captures what is bad about crime (it goes to the normative core of crime). And domination tends to increase crime, as argued by feminist criminologists, corporate criminologists, students of poverty and crime and war crime (it goes to the explanatory core of crime: Braithwaite (2003)). We can have an undominated dialogue about what to do about some criminal behaviour and come to practical agreement on what to do that none of us think perfect, but that most of us can agree is a practical and just way of making things better, putting things right, even if for philosophically contradictory reasons (Sunstein 1995). 'Incompletely theorized agreement' on what to do is often easier than philosophical agreement about what is the right way to think about what is just to do.

Perhaps the most widespread understandings of justice throughout history and across the world's cultures have been divine commands about what is fair and right that comes from deities. In these religious conceptions of justice, god is often seen as merciful, forgiving; 'he' sends us limits on how severely we ought to respond to injustice inflicted on us. An example is the divine proscription that grounds the proportionality principle in contemporary legal

systems: when someone knocks out an eye or tooth, we must not knock out two in response. Natural rights theories conceive laws of justice as laws of nature that define what is right in ways akin to the operation of scientific laws that define the nature of the universe. For natural rights thinkers like John Locke (2014), justice is a system of consequences that naturally derives from any action or choice.

Perhaps the most generally accepted meaning of justice is of a legal or social philosophy for how to administer fairness. Many conceptions of justice conceived in this broad way embrace social justice which goes to the administration of a fair distribution of resources. Social contract theories hold that people's obligations depend on agreement among them to form the society in which they live. Socrates used a form of social contract argument to explain to Crito why he must remain in prison and accept the death penalty (Greenberg 1965). Mostly, however, social contract conceptions of justice are a modern antithesis of religious or natural rights theories. The social contract found expression in the writing of Thomas Hobbes (1651) and Jean-Jacques Rousseau (1987) and in the 20th-century thinking of John Rawls (1971). Social contract conceptions have been excoriated by many critical thinkers such as Carole Pateman (1988), who argues that the social contract is underpinned by a sexual contract.

Hobbes is not the only social contract thinker for whom a sovereign is imperative. Sovereignty has proved a useful idea for mass societies where the danger of civil wars and coups is much higher without sovereignty over the monopolization of armed force (Braithwaite and D'Costa 2018). Yet obviously human history is full of non-state societies that have justice beliefs and rituals for administering justice without state laws, and societies that embrace the sharing of territory rather than establishing monopolies of sovereignty. Many of these have survived quite well this way for much longer than any Westphalian sovereign state. I spent some time in 2017 in the tents of nomadic herding peoples who weave their way across land controlled by Iran, Iraq, Syria, across Kurdish territory betwixt those three 'sovereign' states and land claimed by the Caliphate of Islamic State. One cannot avoid being struck by the thought that they are doing rather better than any of the contestants for those sovereignties by peacefully weaving their way among them.

It is the rituals and administrative principles of justice that I am wanting to conceive in this chapter as immanently holistic without attempting to traverse or settle the justifications for the many modalities of divine, natural or social contract justice to be found in the history of human societies.

Asking the domination question

A surprising thing about criminology is the way it plays only at the margins of the question of what should be a crime. The most influential example is Norval Morris and Gordon Hawkins' (1969) best-selling liberal tract *An Honest Politician's Guide to Crime Control* that so shaped the thinking of many criminologists of my generation. It argued that something like homosexuality or vagrancy should not be a crime because the conduct did no harm to others. This said something useful and liberal about what should not be a crime. But it said little that was affirmative about what should be a crime. Lying, shouting abuse at a person, infidelity in the context of a sworn commitment to monogamy cause harm. Should these be crimes? John Braithwaite and Philip Pettit (1990) attempted an answer to this question in *Not Just Deserts: A Republican Theory of Criminal Justice*. They argued that crime control is a dangerous game. At many points in space and time across human history, adultery, vagrancy and LGBTI sexuality

has been criminalized. At these points the criminal law has been a major source of domination of the poor, of indigenous peoples, women and transgender people, among others.

Hence Braithwaite and Pettit identified domination as the harm done when criminal law is abused, even when it is abused in the unjust defence of just laws, as when the alleged rapist is bashed by the police or imprisoned on the basis of fabricated evidence. Equally, we were attracted to specifying domination reduction as a crucial benefit when criminal law serves the community with justice. Stealing the property rightfully belonging to another or physically assaulting the bodily integrity of another should be a crime, we argued, because that is an act of domination against another person. One of the struggles in the terms of our republican theory, a rather humanistic theory, was to do what we wanted to do in justifying environmental crime as a crime of unjust domination of nature. Pettit and Braithwaite concluded that the criminal law can be a progressive force in human society when it adopts an anti-domination frame.

An attractive feature of conceiving domination as the harm the criminal does, and domination as the harm to the criminal of imprisonment, is the way it forces us to weigh which domination is worse. It closes off to us the smug judgement that there is no need to weigh them because the decision to imprison is deontological; we simply are required to do it when it is mandated as the proportionately just punishment. If you have a moral philosophy that it is good to minimize domination, how could it be morally acceptable to imprison someone when that involves deeper domination than not imprisoning them? It could not when the crime this would prevent would involve rather low levels of domination compared to the high levels of domination involved in imprisonment.

The essence of the republican theory of criminal justice is that we should define behaviour as crime when doing so would reduce the amount of domination in the world. Then in deciding whether to arrest, prosecute, imprison, use restorative justice, sanction in some other way, deploy this versus that rehabilitative or preventive remedy, we should choose the remedy that will do best by reducing the amount of domination in the world. Under this republican test, it is an easy call to conclude that assault should be a crime. But it is a difficult judgement to put in the balance any deterrent or incapacitative benefit from sentencing the assailant to prison that might reduce future domination of future victims. That must especially be balanced against the domination the offender experiences through imprisonment when there is structural domination of offenders from minorities who are oppressed through the way the law against assault is enforced, or where a poor family might experience domination if a homemaker or breadwinner is thrust into prison. Braithwaite and Pettit argue that this should be a difficult and complex judgement. It is something societies should agonize over. They argue for a principle of parsimony in response to this complexity: if in doubt, do not criminalize, do not imprison; do not imprison if there is some less dominating path available to prevent further domination.

Restorative justice for this reason plays a large role in republican criminology. Restorative justice thinkers of a republican ilk want to give justice stakeholders universal access to restorative justice, however serious the crime, even for genocide, as well as universal access to the justice of the courts. And they seek to develop mutually enabling relationships between restorative justice and the justice of the courts: legal justice that empowers informalism, and informal justice that enables formalism. Massively expanded availability of restorative justice could at the same time soften the domination of the criminal justice system while actually increasing the effectiveness of deterrence and incapacitation in crime prevention. One reason for this is the evidence from the Canberra restorative justice experiments that

when offenders were randomly assigned to restorative justice, they reported increased worry about the consequences of a future criminal conviction. Yet when offenders were randomly assigned to court in the normal way this reduced their fear of a future conviction (Sherman and Strang 1997; Sherman et al. 1998). Restorative justice sharpened the Sword of Damocles while reducing domination; prosecution blunted the Sword of Damocles. The power of punitive criminal law to prevent crime erodes most when it is blunted through overuse. This means that parsimony is a principle grounded in both an explanatory theory and a normative theory of crime.

Why reduce domination?

So what is domination? If policy judgement in the justice system should be made in terms of which policy choice will better reduce the amount of domination in the world, how should domination be defined? For Pettit (1997), non-domination means freedom in a republican sense. This is a freedom of not being under the domination, the arbitrary power, of another. Capricious power is what makes us unfree and insecure according to this ancient tradition of thought about freedom. To be free is not so much to be the liberal subject who has access to a maximum number of choices, but the freedom of not being a slave; not being ruled by the arbitrary power of another.

One of the virtues of reducing domination as an objective of the criminal justice system is that it is a 'satisfiable' objective. Braithwaite and Pettit argue that deterrence, crime prevention, just deserts, proportional punishment and harm reduction are all examples of insatiable objectives that are politically dangerous for that reason. In a policy context where deterrence is working in preventing crime or preventing harm, for example, why not keep increasing it? If cutting off the hands of thieves actually works in reducing theft, as it may have in the time of Taliban control of Afghanistan (Braithwaite and Wardak 2012; Wardak and Braithwaite 2012), why not sever the hands of as many thieves as can be apprehended? The philosophical rationale for why not is open and shut in this easy case and in many harder cases for the republican. You should never cut off the hands of a thief even when it is working as a deterrent because to do so would create a world with greater rather than lesser domination (Braithwaite and Pettit 1992). It is not the right thing to do, but also in doing the right thing we deliver a justice system with better long-run prospects of effectiveness because it commands legitimacy through being merciful justice and listening justice.

Just as any kind of harm prevention or crime prevention is a dangerously insatiable objective on its own, so is just deserts. If giving criminals their just deserts should be the goal of the criminal justice system, why not build a bigger and bigger police state that is capable of tracking down, prosecuting criminally and punishing proportionately every single person who cheats on their tax, who makes a false claim on their company's expense account, every professor who funds the data collection of her PhD student from a research grant awarded for a somewhat different purpose. Again the answer is very clear for the republican that such an insatiable police state would be a profound danger to freedom. It would be the dystopia, the unfreedom, the domination of George Orwell's (1949) Big Brother. The dangers of such a dystopia are clear also in the minds of voters in democracies. Republican political theory seeks to render this political intuition philosophically coherent. Even the most liberal of democracies, however, suffer higher imprisonment rates than can be defended by republican political theory, suffer criminal justice excess at the hands of enthusiasts for deterrence, incapacitation

or some other theory of crime prevention. All democracies suffer criminal justice excess by the lights of republican theory in the hands of judges who sentence many to prison for no better reason than the doctrine that this is deserved.

Of course there are many ways of tempering the excesses of these doctrines (Krygier 2018). Just deserts can do useful work in tempering the excesses of deterrence that is disproportionate to desert, and vice versa. But there remain countless cases where imprisonment would both fit the desert doctrine and enhance deterrence while increasing the amount of domination in the world. We see so many such tragedies in the prisons of the best democracies, often as a result of the penal populism to which democracy gives rise (Lacey 2008). We saw it more graphically after the Rwanda genocide where 126,000 were arrested, mostly on the principled liberal ground that there was credible evidence that they had participated in hacking other citizens to death during the genocide (Clark 2005). Sadly, the Rwandan criminal justice system could not resource 126,000 criminal trials for crimes of this level of seriousness. The vast majority of the 126,000 languished in prison for more than a decade, awaiting trials which, when they were conducted, were often presided over by second-year law students. Many died in prison from HIV/AIDS. By republican lights, those deaths were morally wrong acts of domination by the criminal justice system against those individuals and their families. Many of those who died in prison were children at the time of arrest who were raped in prison. Some of them committed the *actus reus* of the genocide – hacking other human beings to death. But had they gone to court they would have been acquitted because they were children who had seen other children, including siblings, themselves hacked to death when they refused to join in the mass murder. Their prison deaths were acts of mass domination by a newly liberalized criminal justice system trying to do the right thing by deterrence of genocide, and just deserts, by prosecuting all who deserve to be prosecuted. Fortunately, more than a decade on, many of the 126,000 were released to the sometimes more restorative form of traditional Rwandan justice of the Gaccacca (Clark 2005).

For Braithwaite and Pettit (1990), asking the domination question was therefore a better way to go than asking either or both the just deserts question or the crime prevention question. Perhaps because Pettit is a better philosopher than I a criminologist, philosophy journals took much more interest in these arguments than criminology journals. Top criminology journals did not publish reviews of Braithwaite and Pettit's (1990) book, but various top philosophy journals did. Philip Pettit went on to construct from a republican theory of criminal justice a very influential broader theory of republican governance. As embarrassed as I am by the want of humility in saying this, perhaps it did illustrate some promise of criminology as a contributor to a more interdisciplinary and transformative social science.

It's OK to prevent crime

The argument of our republican theory is that while it is good to ask how we should treat individual victims and offenders in order to prevent further crime, it is better to ask how we should minimize domination. Then our argument is that we need to enquire how the aggregated effect of many individual responses to crime will have social structural effects. Will they leave us a compassionless society? Will they leave our streets in such disorder that authoritarian politicians ranging from the Taliban to President Duterte of the Philippines will look attractive to many as providing a solution for marching into the justice system to restore order? Anomic vacuums do attract the most tyrannous of forces (Dahrendorf 1985).

So long as the definition of crime is reasonably aligned with domination prevention, crime prevention projects will do more good than harm when they succeed. The concept of crime does some very useful work in some of the worst circumstances of domination. There is a helpful legitimate authority in business regulators saying to banks that their conduct must stop because it is a crime. That can be more persuasive than saying there is a remote chance that you will cause millions of people to lose their jobs and lose their homes again in a financial crisis. This is one of many reasons why caution is warranted in the embrace of abolitionism.

Social justice and holistic justice

It is hard for legal justice to work fairly in a society that lacks social justice, and likewise with restorative justice or procedural justice. This is part of what is meant by justice being immanently holistic. Social justice requires restructuring the economy, confronting unemployment, land rights for indigenous peoples, equal employment opportunities for women and other categories of people subject to discrimination, more effective regulation of corporate power, a different kind of tax system that delivers tax justice, a fairer education system, and much more. Any kind of reform to the criminal justice system does not seem central to achieving these objectives. Actually it is moderately central. We know now that a criminal record is an important cause of unemployment (Hagan 1991). It is even more clear that the criminal justice system is a major part of the social injustice that black peoples suffer in nations like Australia and the United States. In the United States, the prison system is the most important labour market program for young black men – more of them are in it than in the higher education system, for example. In Australia, the prison system is a major cause of suicide in the Aboriginal community. It is also a major cause of rape and drug addiction as afflictions that disproportionately afflict the poor. Then there is HIV/AIDS and an epidemic of Hepatitis C in Australian prisons. In Russia, up to 50 per cent of the prison population have been infected with the tuberculosis bacillus for a long time – a legacy of overcrowding (Lee 1999). Ann Stringer (1999) showed imprisonment is also a major cause and effect of debt among poor people, white and black. Among 121 Queensland prisoners, 80 per cent had some debt when they went into prison, drug use rather than investment in housing being the most important cause of the debt; 49 per cent said that they had committed a crime to repay a debt. Imprisonment cut them off from a variety of means of sorting out these debts, leaving their families vulnerable to repossession and other assaults on their circumstances. Inequalities grounded in the indebtedness of poor families to finance companies are greatly worsened by imprisonment. With the growing financialization of capitalism, in which demand to keep capitalism ticking is sustained by increasing indebtedness rather than by decent wages, this becomes a more profound driver of injustice every decade.

Hence, one very useful way to reduce social injustice involves reducing the impact of imprisonment as a cause of the unequal burdens of unemployment, debt with extortionate interest burdens, suicide, rape, AIDS, Hepatitis C and multi-drug resistant tuberculosis. Thinking about legal justice as something the justice system does, and social justice something for the welfare or tax system, is not the best way of advancing either kind of justice. It can be helpful to alternate between thinking holistically about justice and disaggregating holistic justice to contemplate the value of seeing how different social justice is from other forms of justice, such as procedural justice, and in turn how different one facet of procedural justice is from another. Different facets of procedural justice might be positively correlated with each other and with

other types of justice (Lind and Tyler 1988), but it is analytically useful to distinguish one facet like appealability that does different work from voice or absence of bias/discrimination, or process control.

Conclusion

So I suspect that when there is a considerable degree of holism about justice, loose, sloppy, undefined talk about justice or social justice is mostly wholesome. We do need to stand ready to inject precision into our disaggregation of justice for specific analytic purposes. If we are embroiled in policy debates about rules of evidence in criminal trials, we should think more precisely in terms of a conception of procedural justice; if we debate Aboriginal deaths in custody, a conception of social justice is required that is attuned to indigenous rights; if we debate whether a victim should be granted their wish that their offender be forgiven rather than punished, then we are best to make use of a well-refined concept of restorative justice. For all that, it may help in grasping the holism of justice to name the light on justice's hill. For me, that light is justice as an assemblage of procedures and values that aim to reduce the amount of domination in the world. Yet justice is not so holistic that this umbrella ideal does not benefit from being challenged, pulled apart, sometimes even pulled down.

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