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Criminalization in Republican Theory

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There are many issues that call for discussion in the theory of criminal justice but some of the most important revolve around the idea of criminalization. Why should society resort to criminalization rather than regulation of some other kind? What acts, on the face of it, call to be criminalized? And how ought society to criminalize: what penalties should it impose, what procedures should it follow?

I believe that addressing these questions properly requires reliance on an overall theory of the purpose of government and law. If we are to avoid trading ad hoc intuitions and judgments in discussion of these questions, then we must put up a general, broadly plausible theory and show how it generates answers that prove persuasive on reflective consideration, even if the responses initially challenge received views. The best test of a theory, indeed, will be its capacity to support such answers, achieving what John Rawls describes as a reflective equilibrium with our considered judgments.¹

In this chapter I try to sketch out some responses to the questions raised by criminalization, drawing on the republican theory of government and law.² I think

¹ John Rawls, *A Theory of Justice* (Oxford: Oxford University Press, 1971). For an insightful account of the contingencies in the historical development of the criminal law, particularly in Great Britain, see N. Lacey, 'What Constitutes Criminal Law?', in R. A. Duff, L. Farmer, S. E. Marshall, M. Renzo, and V. Tadros (eds.), *The Constitution of the Criminal Law* (Oxford: Oxford University Press, 2013). A philosophical reconstruction of the system of criminalization, such as that which is sketched here, necessarily involves looking for a pattern—a pattern under which the system would be justifiable—that may at best have been only loosely adumbrated in the history of the system.

² The recent movement, as I think of it, began from the historical work of Quentin Skinner, *The Foundations of Modern Political Thought* (Cambridge: Cambridge University Press, 1978), on the medieval foundations of modern political thought, and from his subsequent articles in the 1980s on figures like Machiavelli who wrote within the republican tradition identified by John Pocock, *The Machiavellian Moment: Florentine Political Theory and the Atlantic Republican Tradition* (Princeton: Princeton University Press, 1975). An up-to-date list of English works in contemporary republican thinking should include these books: P. Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford: Oxford University Press, 1997); Q. Skinner, *Liberty before Liberalism* (Cambridge: Cambridge University Press, 1998); W. Brugger, *Republican Theory in Political Thought: Virtuous or Virtual* (New York: Macmillan, 1999); M. Viroli, *Republicanism* (New York: Hill and Wang, 2002); J. Maynor, *Republicanism in the Modern World* (Cambridge: Polity Press, 2003); B. Pettit and B. Western, 'Mass Imprisonment and the Life Course: Race Class Inequality in U.S. Incarceration', *American Sociological Review*, 69 (2004), 151–69; I. Honohan and J. Jennings (eds.),

of this theory as a research programme rather than an ideology and part of the point of the chapter is to see how well it fares in structuring our thought about certain issues of criminal justice. The lines I take derive in good part from work done elsewhere, in particular work with John Braithwaite, but inevitably the focus on criminalization introduces some rethinking and pushes me into positions I haven't explicitly defended before.³

The chapter is in five sections. In the first section I give an account of criminalization that ought to be acceptable, I think, from the point of view of different theories. In the second section I outline the republican theory of government and law. In Sections III–V I use this theory to generate answers to the three crucial questions as to why we ought to criminalize any acts; what acts we ought to criminalize; and how we ought to pursue the project of criminalization. The chapter ends with a brief Conclusion in which I note some limitations on the scope of the discussion.

I. Criminalization

The first thing to say about criminalization is that it involves the sanction-based regulation of acts.⁴ Criminalization is regulatory insofar as it is designed to reduce the incidence of the sorts of acts it targets; this is something on which we can all agree, even as we disagree on why such reduction is valuable. It employs sanctions for the purpose of regulating acts rather than relying on other devices: say, preventive measures that would screen out access to those acts.⁵ Preventive measures will have a place in any criminal justice system—think about the role of security checks and surveillance cameras—but they are not criminalizing. Finally, criminalization is primarily designed to regulate acts rather than anything else, its particular focus being the *actus reus* or guilty deed. If criminalization targets dispositions, for

Republicanism in Theory and Practice (London: Routledge, 2006); C. Laborde, *Critical Republicanism: The Hijab Controversy and Political Philosophy* (Oxford: Oxford University Press, 2008); F. Lovett, *Justice as Non-domination* (Oxford: Oxford University Press, 2010); J. L. Marti and P. Pettit, *A Political Philosophy in Public Life: Civic Republicanism in Zapatero's Spain* (Princeton: Princeton University Press, 2010); E. MacGilvray, *The Invention of Market Freedom* (Cambridge: Cambridge University Press, 2011); P. Pettit, *On the People's Terms: A Republican Theory and Model of Democracy* (Cambridge: Cambridge University Press, 2012); P. Pettit, *Just Freedom: A Moral Compass for a Complex World* (New York: W. W. Norton and Co., 2014); as well as the collections of papers that focus on republican theory or that put republican ideas to work, as in J. Braithwaite and P. Pettit, *Not Just Deserts: A Republican Theory of Criminal Justice* (Oxford: Oxford University Press, 1990), on criminal justice. For an overview see F. Lovett and P. Pettit, 'Neo-Republicanism: A Normative and Institutional Research Program', *Annual Review of Political Science*, 12 (2009), 18–29.

³ The works on which I mainly draw are Braithwaite and Pettit, *Not Just Deserts*; P. Pettit, 'Republican Theory and Criminal Punishment', *Utilitas*, 9 (1997), 59–79; P. Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford: Oxford University Press, 1997); P. Pettit, *On the People's Terms: A Republican Theory and Model of Democracy* (Cambridge: Cambridge University Press, 2012).

⁴ N. Lacey, 'Criminalization as Regulation: The Role of Criminal Law', in C. Parker, C. Scott, N. Lacey, and J. Braithwaite (eds.), *Regulating Law* (Oxford: Oxford University Press, 2004), 144–67.

⁵ P. Pettit, 'Institutional Design and Rational Choice', in R. E. Goodin, *The Theory of Institutional Design* (Cambridge: Cambridge University Press, 1996).

example, that will only be to the extent that the dispositions are manifested in acts. And if it targets relationships that will only be to the extent that they are conspiratorial relationships formed for planning or executing criminal acts.

But there are many sanction-based ways in which the legal or political system might seek to regulate the acts of members—broadly, adult, able-minded members—which would not count by anyone's lights as instances of criminalization. The two modes of sanction-based regulation that stand in clearest contrast are what I shall describe as opportunity-cost regulation and admission-cost regulation.

Opportunity-cost regulation, as the name suggests, involves regulating against a certain type of action by raising the relative but not the absolute costs of taking it; that is, by offering rewards for taking an alternative, thereby imposing the loss of an enhanced opportunity on anyone who sticks with the action. Opportunity-cost regulation would involve rewarding people for not committing crimes rather than punishing them for offending. It might render offences less probable but it would not render them any the less accessible to potential offenders: it would not make them into impossible options, of course, but neither would it even make them so unattractive in themselves as to be ineligible. Clearly, no one would think of such an attempt to regulate crime as an instance of criminalization and I put aside this candidate without further argument.

Admission-cost regulation, to go to the next candidate, involves imposing absolute rather than just relative costs on criminal acts: penalizing the acts rather than rewarding the choice of an alternative. The penalties imposed are absolute costs in the sense that they reduce the utility of resorting to such an act, regardless of the alternatives. Let them be high enough and they may make the offence into an option that is effectively ineligible for most people. I describe the penalties as admission costs on the grounds that strictly they are consistent with allowing people to offend provided that they are willing to pay the costs in the event of detection. However severe the penalties imposed may be, regulating acts on the basis of the deterrent effect of such associated costs, and on that basis only, fails to distinguish it from a regime that would allow the relevant acts to be performed, on the proviso that the offender is willing to cover the price of admission.

Those associated with the law-and-economics tradition, insisting that deterrence is the main point of criminalization, often cast criminalization as an instance of admission-cost regulation. Thus adherents would treat it in the manner in which, according to anecdote, some people treat parking fines—as costs to be paid for parking illegally. The expected cost of parking on this approach would be the fine attached, discounted by the probability of detection. Those who treat the cost as a price, not as a penalty, presumably think that the price is low enough to make parking illegally into a commercially attractive deal.

The idea that criminalization is nothing more than admission-cost regulation is hardly any more fetching than the idea that it is equivalent to opportunity-cost regulation.⁶ Imagine appearing as an offender in a criminal court and explaining

⁶ J. Feinberg, 'The Expressive Function of Punishment', *The Monist*, 49 (1965), 397–423; T. M. Scanlon, *What We Owe to Each Other* (Cambridge, Mass.: Harvard University Press, 1998), 266.

to the judge that you are perfectly happy to accept the standard penalty, since you understand that you were only entitled to do what you did, provided you were willing to pay the associated costs. Imagine representing yourself, in other words, as entirely free of remorse or regret. You suggest that the assault or burglary or fraud, like the parking in our earlier example, was worth it: if not worth the actual cost to be imposed, at least worth the expected cost involved. Were you to deliberate and represent yourself in such a manner, it would be clear to all involved that for whatever reason, whether of stupidity or cynicism, you just did not understand what criminalization entails.

Criminalization certainly involves imposing penalties on the acts it targets, and may also have the effect of rewarding conformity to the law, but it has an important aspect that is entirely missing in such forms of regulation. Where opportunity-cost regulation may channel people away from criminal acts and admission-cost regulation constrain their criminal acts, criminalization serves the further role of condemning the performance of such acts.⁷ The element of condemnation or reprobation is evident in the fact that no court would be impressed with a defendant's readiness to bear the costs of a crime, short of this disposition counting as a sign of remorse and a token of the defendant's determination not to offend again.

It is not surprising that criminalization should have this condemnatory aspect. In indicting at least paradigm offences—murder, assault, and theft, for example—the criminal laws regulate against negative patterns of behaviour such that, absent excuse or justification, almost everyone is manifestly disposed to blame perpetrators.⁸ These laws promote positive patterns of behaviour such that almost everyone in the society, as a matter of common awareness, must be expected to approve of conformity on the part of others and to disapprove of deviance. The regularities that criminal laws support in paradigm cases, therefore, will attract general approval, and offences general disapproval, and the desire for approval and the fear of disapproval may help independently to support conformity.⁹ If criminal laws are supported in that way—supported, in effect, by approbatively grounded norms—then the act of criminalization will impose penalties on the indicted acts that serve not only to deter but also to signal the presence of general disapproval or reprobation.

The considerations rehearsed in this discussion ought to be available from within any theoretical viewpoint and I hope that the account of criminalization that they support is one that can be endorsed on all sides. To criminalize an act is to impose absolute rather than just relative costs as sanctions and, at least in paradigm cases, it is to impose those costs on the manifest assumption that the acts penalized attract disapproval within the community. Thus it is at once to penalize and to reprove. Given this understanding of criminalization we are in a position

⁷ R. A. Duff, *Punishment, Communication, and Community* (Oxford: Oxford University Press, 2001).

⁸ J. Gardner, *Offences and Defences: Selected Essays in the Philosophy of Criminal Law* (Oxford: Oxford University Press, 2007).

⁹ G. Brennan and P. Pettit, *The Economy of Esteem: An Essay on Civil and Political Society* (Oxford: Oxford University Press, 2004); K. A. Appiah, *The Honor Code: How Moral Revolutions Happen* (New York: Notrons, 2010).

to address the questions as to why we should criminalize, what we should criminalize, and how we should pursue criminalization. But in order to deal with those issues, as I do in Sections III–V, we need to sketch out a theoretical standpoint from which to approach them and I attempt to do this in the Section II.

II. Republican Theory

Republican theory has a long history, going back at least to the period of the Roman republic. As a theory of the role of the state in relation to citizens, it was developed by Roman thinkers like Polybius, Cicero, and Livy. It was applied to their own societies by the burghers of the medieval and Renaissance cities of northern Italy—and further developed by writers like Niccolò Machiavelli in his *Discourses on Livy*. And it served a crucial role in the establishment of modern regimes like the Dutch Republic, the English republic, and, perhaps most saliently, the American Republic.

The English authors who shaped the tradition included figures like James Harrington, John Milton, and Algernon Sidney in the seventeenth century and various successors who held onto the main republican ideas in the eighteenth century, arguing that they could be reconciled with the new constitutional form of monarchy. These eighteenth-century figures included radicals like the authors of *Cato's Letters* in the early part of the century,¹⁰ and various supporters of the American—and often the French—revolution like the chemist Joseph Priestley and his mathematician friend Richard Price.¹¹

The republican approach is characterized by three ideas, which were all present in the figures I mention, though often differently interpreted and weighted. The ideas are that the citizens of a society—these were often identified with propertied, mainstream males—should each enjoy the status of freemen, as they were called, not being subject to the dominating power of others in their personal choices; that the state which guards citizens against private domination should also guard against their public domination, accepting the constraints—the checks and balances—imposed in a ‘mixed constitution’; and that in order to ensure the reliable functioning of such a mixed constitution, the citizenry should be ever vigilant of public power and be ready to contest and challenge it at the slightest suspicion or sign of abuse.

All of these ideas are relevant for thinking about the criminal justice system but the most crucial idea for a theory of criminalization is that of equal freedom as non-domination. If you are to enjoy freedom as non-domination in certain choices, so the idea went, you must not be subject to the will of others in how you make those choices; you must not suffer *dominatio* in the word established in

¹⁰ J. Trenchard and T. Gordon, *Cato's Letters* (New York: Da Capo, 1971).

¹¹ J. Priestley, *Political Writings* (Cambridge: Cambridge University Press, 1993); R. Price, *Political Writings* (Cambridge: Cambridge University Press, 1991).

Roman republican usage.¹² Thus it is not enough for freedom that you manage to enjoy non-interference. Freedom requires that you not be exposed to a power of interference on the part of any others, even others who are disinclined to use that power against you. The mere fact that I can interfere at little cost in your choices—the mere fact that I can track those choices and intervene when I like—means that you depend for your ability to choose as you wish on my will remaining a goodwill. You are not *sui juris*—not your own person—in the expression from Roman law. You are unfree, as Richard Price explained,¹³ because your access to the options will depend on an ‘indulgence’ or an ‘accidental mildness’ on my part. To quote from a seventeenth-century republican, Algernon Sidney, freedom in this tradition requires ‘independency upon the will of another’—an ‘exemption from dominion’ in relations with others.¹⁴ In an equivalent slogan from *Cato’s Letters*, ‘Liberty is, to live upon one’s own terms; slavery is, to live at the mere mercy of another.’¹⁵

In arguing that the state should be concerned in the first place with the equal freedom of its citizens, republicans held that citizens should each be assured of enjoying non-domination in a sphere of choice that came to be described as that of the fundamental or basic liberties.¹⁶ This might be identified, in contemporary terms, with the sphere of choice required for being able to function in the local society.¹⁷ The basic liberties are those personally significant choices that everyone can exercise at the same time as everyone else and do so with satisfaction: their exercise by others does not take away from the value of your exercising them in your own case.

While each society will have to identify the exact liberties to be available for its citizens, setting down conventions to define rights of movement or association or ownership, for example, those liberties will certainly comprise choices in traditional categories like the following.

- The freedom to think what you like
- The freedom to express what you think
- The freedom to practise the religion of your choice
- The freedom to associate with those willing to associate with you
- The freedom to own certain goods and to trade in their exchange
- The freedom to change occupation and employment
- The freedom to travel within the society and settle where you will
- The freedom to use your leisure time as you wish.

¹² F. Lovett, *Justice as Non-domination* (Oxford: Oxford University Press, 2010), appendix.

¹³ Price, *Political Writings*, 26.

¹⁴ A. Sidney, *Discourses Concerning Government* (Indianapolis: Liberty Classics, 1990), 27, 340.

¹⁵ Trenchard and Gordon, *Cato’s Letters*, ii, 249–50.

¹⁶ J. Lilburne, *The Legal Fundamental Liberties of the People of England, asserted, revived, and vindicated* (London, 1646).

¹⁷ A. Sen, *Commodities and Capabilities* (Amsterdam: North-Holland, 1985); M. Nussbaum, *Frontiers of Justice* (Cambridge, Mass.: Harvard University Press, 2006).

But how is the state to provide protection against domination in those choices for each of its citizens: that is, in a contemporary version of the approach, for each adult, able-minded, more or less permanent resident? The natural lead to this question is given by the image of the free citizen—the *liber* or freeman, in received usage—that is at the core of the tradition. In this image, free persons can walk tall, and look others in the eye. They do not depend on anyone's grace or favour for being able to choose their mode of life. And they relate to one another in a shared, mutually reinforcing consciousness of enjoying this independence. Thus, in the established terms of republican denigration, they do not have to bow or scrape, toady or kowtow, fawn or flatter; they do not have to placate any others with beguiling smiles or mincing steps. In short, they do not have to live on their wits, whether out of fear or deference. They are their own men and women and however deeply they bind themselves to one another, as in love or friendship or trust, they do so freely, reaching out to one another from positions of relatively equal strength.

The status required for being a free person under the received, republican image imposes two sets of requirements, objective and subjective. On the one side it requires that you should be objectively secure against the intrusions of others, including the intrusions of the very government that protects you against others, in the enjoyment of the basic liberties. Being secure against intrusion in such activities means, in the ideal, that you are safeguarded against any agent or agency that might take against you, regardless of the improbability of such hostility. You are proof against the vagaries of alien wills, however unlikely such vagaries might be.

But the status of the free person, as encoded in the traditional image, has an intersubjective as well as an objective side. Not only does it require you to be securely safeguarded against others; it also requires this safeguarding to be registered as a matter of common awareness. Everyone, yourself included, must be aware that you are safeguarded; everyone must be aware that this is a matter of general awareness; and so on. Your safeguarded status must be manifest and salient to all. Only if this is so, can you hope to achieve the relationship with others that the image encodes. Only then can you walk tall among your fellows, conscious of sharing in the general recognition that no one can push you around with an expectation of impunity.

The idea that the objective status of republican citizenship might have an intersubjective register played an important role in the traditional model of the free citizen. The reason is that as Thomas Hobbes noted in another context, the 'reputation of power is power'.¹⁸ The fact that potential offenders recognize that you have entrenched rights means that the protection you enjoy is thereby reinforced; their recognition of the protection provided is bound to inhibit and help to damp any temptation to offend against you.

How are you going to achieve the objective and intersubjective status associated with being a free person in this sense? The republican tradition has always insisted that such a status is only going to be available under a public rule of law

¹⁸ T. Hobbes, *Leviathan*, ed. E. Curley (Indianapolis: Hackett, 1994), 10.5.

in which each is treated as an equal, being offered the same resources of choice, and protection against intrusion, as others. But the general idea has also been that an effectively supportive law will inevitably be reinforced by corresponding norms or morals. Machiavelli remarks in *Discourses* 1.18 on the importance of such norm-based support for the law when he says that ‘just as good morals, if they are to be maintained, have need of the laws, so the laws, if they are to be observed, have need of good morals’.¹⁹

The laws and corresponding norms that are required will come in various forms. The law of property and contract will serve to define basic liberties, making clear to all citizens the limits on these fronts within which they are protected. The law of torts will serve a similar function, allowing the courts to determine the limits beyond which people are not entitled to impose risks on others. Family law and employment law will play a vital role in defining and protecting important liberties within the context of asymmetrical and potentially troublesome relationships. And criminal law will serve to establish the protections that each can expect to enjoy against particularly egregious forms of dominating interference that any others may seek to practise against them.

How much protection should the law provide against domination? Building on the intersubjective aspect of the free-citizen ideal, republican theory offers a natural workable criterion. This criterion, which I describe as the eyeball test, requires that people should be so resourced and protected in the basic liberties that by local standards they can look others in the eye without reason for fear or deference. They do not depend for their security on the indulgence and condescension of others. They can walk tall and assume the status of an equal with the most powerful in the land. Or at least they can do so, provided that by local standards—even the most charitable, local standards—they do not count as excessively timid or paranoid.

A system of law might serve people well in protecting them against private domination by others, of course, and yet fail to protect them in the public sphere against the very government that shapes and sustains the system. That is why republican theory emphasizes the need for a mixed constitution and a contestatory citizenry. The idea is that such institutional measures—such measures, ideally, of equally shared popular control—can ensure that while government interferes with its people in imposing laws, it does so in a way that is subject to their control and therefore not dominating; it does not expose them, as even a benevolent dictatorship would do, to the arbitrary or uncontrolled will of another.²⁰

I shall assume in the remainder of this chapter that the point of government, as republican theory describes it, is to secure people in the undominated enjoyment of their basic liberties, where this requires protection against both private and public domination. It is not enough on this account that government organizes things so that overall there is not much interference by some citizens in the basic liberties of others. That might be so because the weak are good at ingratiating themselves with the strong, keeping them sweet and well disposed, or because the weak are

¹⁹ N. Machiavelli, *The Complete Work and Others* (Durham, NC: Duke University Press, 1965).

²⁰ Pettit, *On the People's Terms*.

lucky enough to live in the presence of a powerful but benevolent elite: at the limit, a benevolent despot. What matters in republican theory is that no one has to depend on the goodwill of others for being able to exercise their basic liberties and, in particular, that they do not have to depend on the goodwill of others for avoiding the intrusive incursions that get to count in most countries as crimes. With this theory in place I turn in the remaining sections to the three questions I raised earlier.

III. Why Criminalize?

Assume for the moment that there is no issue about what acts to criminalize: I turn to that question in Section IV. With this assumption in place, the question that naturally arises is, why criminalize those acts? Why not rely on one of the other modes of regulation rather than having recourse to criminalization?

One alternative to criminalization would be a form of preventive regulation that screens out offensive acts, whether by means of the security device that makes it impossible for you to carry a gun on an airplane or by internment in the case where you are deemed to be a danger to others. Some preventive regulation clearly has a role in any criminal justice system—the security device is a good example—but any philosophy of government that puts a premium on freedom, especially freedom as non-domination, is bound to shrink from any widespread recourse to screening out offences as distinct from sanctioning them.²¹ Thus there is good reason to opt for criminalization rather than preventive internment in dealing with agents who are capable in the normal way of responding to sanctions and of benefiting from freedom; if there is room for internment, that can only be with those who are designated, under testing procedures, as dangerous to others and yet unresponsive to sanctions.

Does the cause of freedom argue for criminalizing relevant acts as distinct from regulating them by means of other sanctions, as in opportunity-cost or admission-cost regulation? Not, it should be noticed, on the standard, non-republican theory of freedom. On this theory, freedom requires the absence of interference or likely interference, however obtained, and not the public security against interference in which non-domination consists. And on such a theory of freedom as non-interference, it does not necessarily follow that any threats to freedom argue for criminalization. It is true that criminalizing a form of interference may make people less likely to interfere with others and thereby increase freedom as non-interference. But it is equally true that opportunity-cost regulation and admission-cost regulation may also make people less likely to interfere with one another. And so it does not follow from the fact that a certain sort of act infringes

²¹ Some criminal justice measures taken against ‘inchoate crimes’—that is, acts involved in preparing to commit crime—are better cast as preventive but still acceptable measures, according to some recent theorists. See e.g. K. K. Ferzan, ‘Inchoate Crimes at the Prevention/Punishment Divide’, *San Diego Law Review*, 48 (2011), 1273–97.

such freedom that it ought to be criminalized. Whether it should be regulated via criminalization or in some other way ought to turn on the contingent matter of which mode of regulation promises in the circumstances to be most effective.

Things look very different, however, from within a perspective under which freedom requires, not just the lack or unlikelihood of interference, but the public security against interference that can enable people to walk tall and assume the status of equals with the best in their society. People will not enjoy any form of security if they have to depend on the rewards offered to potential offenders being enough to persuade them. And they will not enjoy a public form of security if there is nothing held against offenders who are willing to pay the admission cost for offending, however high that may be, just for the sake of enjoying the interference they practise against others.

Opportunity-cost regulation does not take away the option of interference from would-be offenders, concentrating as it does on rewarding alternatives. Thus, however successful it may be in steering potential offenders away from interference, it does not deny them the capacity to interfere. And so it will allow those with superior strength or wealth, connections or cunning, to retain a power of interfering at will in the affairs of others. Those others will depend on the goodwill of such superiors for being able to act as they wish within the domain of the basic liberties and will be saliently denied the freedom as non-domination of republican citizens.

Admission-cost regulation does replace the option of interference that would-be offenders may access by an option of interference-with-a-threat-of-penalty and it may thereby make interference into an option that is ineligible in the view of most. It may provide in that sense for a measure of objective security. But will this penalty be enough to enable potential victims to pass the eyeball test in relating to potential offenders? Will it be enough to provide them with the public, inter-subjective form of security—and with the associated enhancement of objective security—that that test requires?²² No, for two reasons. Admission-cost regulation deprives potential victims of any public security against those who are manifestly, even openly willing to run the risk of the penalty, thereby paying the expected cost, for the sake of the gains of interference. And besides, it gives lucky offenders who manage to escape detection or conviction no publicly endorsed reason for remorse about what they did; for all that admission-cost regulation involves, they will be entitled to think about the offence as a gamble that turned out, from their point of view, for the best.

People will be able to enjoy the public status of the free citizen only insofar as those who would offend against them in relevant ways face not only the absolute costs imposed on offences but also the reprobation of the community. Under such criminalization, potential victims will have a publicly affirmed security against those who are manifestly willing to run the expected cost of offending; they can

²² Apart from the considerations that I go on to mention, it is worth noting also that there is considerable evidence that what keeps most people from crime is not the fear of penal sanctions but rather the sense that criminal behavior is objectionable and unthinkable by received community standards. See T. R. Tyler, *Why People Obey the Law* (New Haven: Yale University Press, 1990).

invoke public condemnation against those who are so disposed to offend, claiming the protection of the community against them. And under such criminalization, potential offenders have to recognize that even if they succeed in avoiding detection or conviction for an offence, they are still subject to reprobation by community norms; let them accept those norms and they cannot just think of themselves as lucky gamblers, acknowledging no grounds for remorse.

These observations mean that on the republican theory of freedom, criminalization is the right response to various categories of interference, and the right response for more than contingent reasons. Criminalization is not suitable just because it happens as a contingency of circumstance to promise better results in republican terms than any alternative form of regulation. It is suitable because, unlike opportunity-cost or admission-cost regulation, it is capable of providing for the enjoyment of the distinctively public security in which republican freedom consists.

The public security that public condemnation can establish is not attractive just for the fact that it increases suitably the perceived safeguards that people enjoy against crime. It is attractive, more specifically, because of the way in which it increases those safeguards: viz., by making others aware of the grounds on which the law protects you or me. In condemning offences against us, the law makes clear to others that in the common perceptions that it articulates, we are sacred sites of agency: we are centres of rights that others invade, not just at their peril, but in defiance of community standards.

IV. What to Criminalize?

Given our understanding of what criminalization involves, and this republican account of why it makes sense to criminalize rather than regulate in other ways, we turn now to the question of what acts deserve to be criminalized. What acts are such that it makes sense for the state to impose absolute costs on their performance, communicating at the same time a high level of reprobation for resort to such acts?

As the executor of criminal justice the state assumes its most dangerous role. It has discretion over what offences are criminal, how offenders should be identified, whether they should be prosecuted, and how they should be tried and, if convicted, punished. Such power is dangerous in the extreme since, if abused, it holds out the prospect of a deeply intimidating form of public domination. That intimidation may derive, for example, from the propensity of legislators to criminalize and penalize with a view to political advantage, of police or prosecutors to be selective or discriminatory in the presumptive offenders they target, and of prison guards to take out their personal frustrations or prejudices in their treatment of inmates.

As we have seen, republican theory would argue for a mixed constitution and a contestatory citizenry—in effect, a multidimensional, popular democracy—to guard against abuses in any domain, including the criminal justice system. But the more restricted the criminal justice system is, the easier it will be to impose

such democratic controls on its operation. Hence the inquiry into what acts the system should criminalize—and as we shall see, into how criminalization should be pursued—must start from a presumption in favour of parsimony. The onus of proof in any arguments about what to criminalize should fall on those who defend criminalization rather than on those who oppose.

The presumption of parsimony is not just supported on the top-down side by the danger of excessive resort to criminalization. It is also supported from a bottom-up perspective by the fact that many offensive acts are likely to be containable, and perhaps even more effectively containable, without criminalization. It is true that all acts of interference in the basic liberties of others are offensive within a republican perspective, where we may take interference to involve removing one of the options, replacing the option with a penalized alternative, or misrepresenting the option in a deceptive or manipulative spirit. By acting in any of these ways, after all, I assume control of your choice or usurp your control in partial measure by imposing certain terms or limitations upon you. But it would make no sense to invoke the criminal justice system to oppose acts of interference that do little damage, such as the ordinary act of deception or promise breaking. The criminal justice cure might carry more dangers for freedom than the deception or promise breaking it was meant to restrict. And informal norms against deception and promise breaking, which rely on the pressure of communal condemnation on its own, might be more effective in restricting such offences. The presumption of parsimony argues for limiting criminalization to acts of interference in people's basic liberties which, unlike these offences, are incapable of being effectively restricted in the absence of criminal penalty and condemnation.

The most plausible examples of acts that ought to be criminalized are the offences that have traditionally counted among ordinary people as criminal and condemnable and that are often cast as belonging to the core of criminal law.²³ They include fatal offences, offences against the person, offences against property, and offences against public order, strictly understood. In the traditional phrase, they mostly count as *mala in se* rather than *mala prohibita*. These are acts that are bad in themselves, by regular criteria, not just acts that are bad by virtue of breaking rules that might well have taken a different form. They would include reckless driving, for example, but not breaking a speed limit of 30 miles per hour when the limit might well have been set at 45 miles per hour.²⁴

²³ Lacey, 'Criminalization as Regulation'; G. Fletcher, *Rethinking Criminal Law* (New York: Little Brown, 1978).

²⁴ This is a tricky distinction to draw and I ignore an important qualification. It might be a *malum prohibitum* to drive at 35 mph but that very same act could count as a *malum in se* insofar as it involves breaching the local speed limits, where it is assumed that there have to be some such limits. In the same way an act of theft might count as a *malum prohibitum* insofar as it is a breach of a contingent, variable set of property conventions and as a *malum in se* insofar as it is a breach of local property conventions where again, and this time even more plausibly, it is assumed that there have to be some such conventions. I also ignore another issue to which Chris Bennett has drawn my attention: that a *malum in se* might be thought to be an act that harms another or an act that for whatever reason—perhaps because it hurts another—is morally wrong.

Apart from such acts of interference with the basic liberties, the candidates for criminalization are generally taken to include secondary acts that facilitate or probabilify criminalized acts of interference, or that jeopardize the system for protecting against such acts. Acts of preparing for crime, say by collecting required resources or organizing for the perpetration of the crime might count in this category. So might acts of inciting others to crime, whether in one-to-one exchange or in publicly offensive hate-speech. And so of course might acts of hindering arrest or of undermining court proceedings by perjury. But in the case of these acts, as with crimes in the primary category, the presumption of parsimony argues strongly for not allowing secondary crimes of these kinds to proliferate.²⁵

There is a well-documented tendency in many legal systems to extend criminalization to a wider and wider range of activities, allowing both the category of primary crimes and the category of secondary crimes to expand.²⁶ This is unfortunate for a number of reasons. First, using the criminal justice system across a wider and wider bandwidth of acts can weaken its impact in more important ranges of the spectrum, undermining the condemnatory role of criminalization. Second, it runs the risk of doing more harm than good, putting in the hands of criminal justice authorities a power that may impact more deeply on prospects of non-domination than any of the offences against which it would protect. And finally, it can make conviction difficult in areas where it ought not to be difficult, extending the special protections appropriate only for those charged with serious criminal offences—see Section V—to those areas.

I do not have the expertise to speculate on how the range of criminalization might be effectively reduced. One proposal worth considering is that other systems should follow the example of those countries that distinguish a range of regulatory statutes, in particular statutes directed against offensive behaviour, from criminal laws. In Germany, for example, a range of regulatory offences—*Ordnungswidrigkeiten*, as they are known—are distinguished from criminal offences and treated in a distinct manner. These offences include violations of restrictions on public gatherings, for example; creating a public nuisance by being drunk and disorderly; and breaking the speed limit and other traffic regulations.

V. How to Criminalize?

The third question to be addressed bears on the form that criminalization should assume and breaks down into two main issues. First, assuming that the criminal justice authorities are not to be given total discretion in the matter, what sorts of penalties should be attached in law to different crimes? And second, assuming that the criminal justice authorities are to enjoy some discretion, what restrictions should be placed on them in seeking to identify and convict offenders and in

²⁵ Parsimony might raise similar worries about some of the preventive measures envisaged in Ferzan, 'Inchoate Crimes at the Prevention/Punishment Divide'.

²⁶ D. Husak, *Overcriminalization* (Oxford: Oxford University Press, 2008).

applying penalties to those convicted? I address each of those issues briefly in this final, somewhat longer section.

The answer to the first question is that acts should be subject to reprobative penalties that do best by a mix of goals:

1. the penalties reduce the aggregate incidence of such acts, amounting to more than token rebukes;
2. they are not so great or gruesome that the authorities that can impose them—and that might impose them in error or malice—are liable to dominate the public at large;
3. they do not make it likely that charged or convicted offenders will be exposed to humiliation and domination by agents of the system or members of the public;
4. they treat offenders as capable of regretting the ill they did—and not just as susceptible to intimidation—and they allow for reintegration of offenders into the community;
5. they vary in harshness with acts of varying seriousness so that potential offenders are likely to see the difference in the acts and register the difference in the penalties.

These constraints argue for having deterrent penalties but penalties that avoid terrorizing citizens in general or offenders in particular.²⁷ They argue in the abstract for establishing a hierarchy of penalties, from least to most harsh, and then matching those penalties with different types of offences, beginning with the least serious and advancing to the most serious. More realistically and plausibly, they argue for a hierarchy that allows for some judicial discretion—more on this in a moment—matching penalty ranges to ranges in the seriousness of an act.

An act's seriousness will be determined by the grievousness of the harm imposed, the culpability of the agent performing the act, and, I would say, the extent to which the agent has been convicted of similar offences in the past. Such a pairing of penalties with offences makes sense in virtue of the fifth consideration given, arguing against the danger of an offender thinking, in the old proverb: 'might as well be hanged for a sheep as a lamb'.²⁸ But it also makes sense on the separate ground, important under a republican perspective, that the sentences imposed on different offenders should not vary to the point where offenders have good reason to judge that they are not being treated as equals.²⁹

What sorts of penalties are likely to meet these constraints? Capital and corporal punishment would be outlawed by a number of the constraints, as would branding or any form of long-term stigmatization.³⁰ No surprise there. The constraints would

²⁷ E. Kelly, 'Criminal Justice without Retribution', *Journal of Philosophy*, 106 (2009), 440–62.

²⁸ C. de S. Montesquieu, *The Spirit of the Laws* (Cambridge: Cambridge University Press, 1989).

²⁹ A. Ashworth and A. Von Hirsch, 'Not Not Just Deserts: A Response to Braithwaite and Pettit', *Oxford Journal of Legal Studies*, 12 (1992), 83–98.

³⁰ J. Braithwaite, *Crime, Shame and Reintegration* (Cambridge: Cambridge University Press, 1989).

allow escalating penalties for repeat, and presumably dangerous, offenders, under the account of seriousness just given. But in view of the case for parsimony, they would favour penalties at the lighter end of the spectrum such as community service and fines, if only because prison offers so many opportunities for the domination of inmates by guards or by other prisoners. In particular, they would favour penalties that communicate the community's recognition of the status of the victim and its disapproval of the offender's action. This consideration will come up again when we address the mode in which penalties ought to be imposed and its relevance there argues for associating different offences with penalty ranges rather than precise penalties; such a loose linking with penalties allows a range of discretion to the sentencing judge.

The issue of what penalties work well is a matter for continued monitoring in any society and common sense suggests that the legislature should set up a semi-autonomous sentencing commission to conduct such monitoring and to make recommendations for change in an incremental manner that allows for confirmation or retraction on the basis of careful study. This is particularly important in view of the fact that politicians are bound to be tempted to play politics with penalties, using the outrage caused by particular crimes to build an emotive, eye-catching campaign for ever stricter sanctions.³¹

I said that the principles enumerated argue in the abstract for a proportional pairing of penalties with offences. But in legislating for penalties certain variations from abstract proportionality are inevitable—ideally, variations that are intelligible to all and need not count as discriminatory. Consider for example the sort of criminal act that is manifestly very hard to detect. Should the penalty for such an act be increased with a view to keeping the expected cost of the penalty—this is determined by the harshness of the penalty times the probability of detection and conviction—at a level that can still plausibly inhibit would-be offenders? I would say that other things being equal, it ought to be increased towards that level. I prefer to regard the example as introducing an exception to the abstract rule of proportionality but it might be thought that the evidence for premeditation and culpability is higher—the probability of the offender having blundered into the crime is lower—the higher the presumptive confidence of the offender that the offence would escape detection.

But there is another consideration that can argue, in the opposite direction, for reducing the penalty associated with an offence to a lower level than might otherwise seem appropriate. This is that reducing the penalty in that way increases the chances of detection and conviction—and ultimately the chances of reducing the aggregate number of offences. It might be, for example, that corporations would be more inclined to expose corruption in their ranks if the penalties incurred by offenders were relatively light, perhaps even being suspended in the event that internal disciplinary action is taken against the culprit.³²

³¹ P. Pettit, 'Is Criminal Justice Politically Feasible?', *Buffalo Criminal Law Review*, Special Issue ed. Pablo de Greiff, 5 (2) (2002), 427–50.

³² B. Fisse and J. Braithwaite, *Corporations, Crime and Accountability* (Melbourne: Cambridge University Press, 1993).

These considerations can sometimes come into conflict, raising pressing issues of institutional design and effective regulation in determining the penalties that ought to be legally attached to different offences. Consider insider trading, for example. It is an offence that can be very difficult to detect, thereby attracting an especially heavy penalty. But it is also an offence that might be much more readily reported and detected, if the penalty were on the lighter rather than the heavier end. I mention this case to underline the fact that philosophy and theory cannot rule on such concrete issues. It can only provide general, flexible guidelines, indicating the cases where exceptions may have to be made.

Such flexibility will be perfectly acceptable on the broadly goal-centred way of thinking about criminalization and criminal justice that I am advocating here. The idea is that the system as a whole, including the pattern of criminalization, should be designed so that if the participants stick to their roles—if they only exercise discretion, for example, in the measure and the manner allowed—then the result will be the optimal promotion of the republican ideal: that people should be enabled equally to enjoy security in the exercise of their basic liberties.³³ It should be no surprise that the system that does this will often have to be adjusted away from abstract, inflexible templates that permit no variation in the proportional pairing of penalties with offences.³⁴

We have been discussing the issue of what sorts of penalties ought to be associated with different offences. The second issue that I mentioned bears on what restrictions should be placed on the exercise of discretion by criminal justice authorities on two fronts: in seeking to identify and convict offenders and in imposing penalties on those convicted.

In regard to restrictions on the first front, republican theory broadly supports official, traditional practice, albeit a practice that often fails to be honoured under contemporary pressures of court business; more on this in the Conclusion. In line with such practice, it would draw on the presumption of parsimony to argue for a range of constraints on state procedure. Thus the police should be strictly limited in the surveillance they may practise in searching out offenders; the prosecution should carry the burden of proof in seeking to establish the guilt of offenders; the prosecution should be required, at least in general, to establish intent or recklessness or some such guilty attitude—*mens rea*—in the offender; and the criterion of proof should guard against the conviction of the innocent by requiring guilt beyond reasonable doubt.

But what of the constraints that ought to guide criminal justice authorities in imposing penalties on the convicted: that is, their sentencing and punishment? The goal-centred approach adopted in republican theory argues against any mechanical application of abstractly assigned penalties to convicted offenders, recognizing that there are salient and relevant differences between individual offences and that these

³³ J. Rawls, 'Two Concepts of Rules', *Philosophical Review*, 64 (1955), 3–32.

³⁴ There a contrast in this respect with a retributivist theory, otherwise quite close to the republican, in which something like the pairing mentioned is given a canonical status that allows of few if any exceptions.

cannot be ignored in criminal justice practice. This consideration offers support for the prescription of penalty ranges rather than exact penalties for different offences and, as we shall see, for other forms of judicial discretion. There is a danger associated with giving too much discretion to a court, of course, since the capricious judge may wantonly abuse any discretion. But that danger can be countered, at least in principle, by the possibility of review and by the bad publicity that a capricious judge is likely to attract.

Whatever discretion judges enjoy, however, they should not have a power of exceeding the upper limit on penalties, or ranges of penalties, which is generally allowed. This is because the possibility of exemplary punishment would give a judge the power of interfering at will in the fortunes of the offender in the dock. It would permit the judge to act on a personal antipathy towards that individual, or that individual's religion or ethnicity, in choosing to breach the upper bound on normal penalties. There are possible protections against the abuse of such a power, since its exercise might have to be justified and would be subject to appeal by the defence. But these might well be thought insufficient to counter the domination that a 'hanging judge' can wield or seem to wield over a defendant.

Whereas this consideration argues that judges ought not to be able to breach the upper limit on recognized penalties, no equally weighty consideration argues against allowing judges to exercise discretion and impose penalties that fall below the corresponding bottom limit. The individual offender in the dock is not exposed to the will of the judge in the same way when that judge has a power of mercy as distinct from a power of imposing an exemplary punishment. Or at least that will be so when the exercise of the power requires justification, is subject to appeal by the prosecution, and, in the nature of the case, is only exercised occasionally. Such measures can guard against a scenario in which mercy becomes the norm, and the opportunity not to display mercy becomes an opportunity for exemplary harshness.

To say that there is no powerful argument against mercy, as there is against exemplary punishment, is not yet to make a case for allowing mercy. But there is a case that can be made in republican theory on behalf of such a possibility. The best way of making the case may be to think more generally about the function that the sentencing and punishment of convicted offenders ought to serve. It turns out that such general reflection offers a ground on which, among other measures, to defend the possibility of mercy.

Taking freedom as non-domination to be a central value in political life, there are three distinctive ills that a crime in the primary category, as we conceive of that category, imposes. First, it represents an assumption of personal power on the part of the offender and ignores or rejects the victim's status as a free, undominated citizen. Second, it deprives the victim of resources, whether of life or latitude or property, that are needed for the exercise of the basic liberties and the enjoyment of freedom as non-domination. And third, it reduces the confidence that others in the community are entitled to place in legal protections, thereby impacting on their enjoyment of such freedom.

The attempt to rectify such ills ought to guide the sentencing and punishment of offenders, as indeed it ought to guide the determination of legally permitted penalties. Rectification of the denial of the victim's status argues for a mode of sentencing in which the offender is made aware of the grounds on which the community disapproves of the offence and is given the opportunity to feel and register remorse. Rectification of the second ill—the deprivation of life, latitude, or property—argues for demanding restitution, where possible, and where not, a degree of compensation or reparation; this might support penalties that allow for such rectification, as in fines that benefit the victim or the victim's family or community service that plays a similar role. And rectification of the third ill argues for imposing a sufficiently deterrent penalty to provide reassurance for others in the community that they are not worse off than before the offence occurred.

With these points in place, the case for allowing mercy is straightforward. It may often be that while the offence of which the defendant has been convicted generated one of these ills—say, the denial of the victim's status—it did not cause any others. Perhaps a burglar broke into your house but caused himself such an injury—perhaps a debilitating head injury—that he did not take any property and made himself incapable of reoffending. In such a case there is every reason why a judge might exercise mercy, and do so on grounds that allow other more harshly treated burglars to realize that they are not being discriminated against.

This sort of argument can generalize to offer support for mercy in any of a variety of cases. It can also serve to explain why the unsuccessful attempt to commit a crime should not necessarily attract the same penalty as the successful crime. In many cases the difference between the successful and the failed attempt will be registered in legally assigned penalties but even if it were not, then there is reason why it should be registered in the exercise of a certain mercy by the court. The failed attempt will not inflict the second of the three ills associated with a primary crime and will not call on at least that account for redress. Still, short of the lack of success indicating rank incompetence on the part of the offender, the failed attempt to perpetrate an offence may attract a penalty quite close to what a successful counterpart would have earned.

VI. Conclusion

This brief account should indicate the grounds on which I think that a republican political theory can offer a satisfactory account of criminalization, supporting judgments of criminal justice that are sometimes novel but always worthy of consideration—and, I would suggest, endorsement. Given a natural understanding of criminalization, the theory offers plausible answers to the three questions as to why we ought to criminalize, what we ought to criminalize, and how we ought to criminalize. It does well by the reflective-equilibrium criterion for a satisfactory theory.

In conclusion, however, I note two important limitations on what I have attempted here. The first is that I have only considered crimes in which the offenders

are adult, able-minded, individual human beings. I have avoided the immense qualifications required when we consider the offences of children and of those who suffer from various cognitive or affective disorders. And I have ignored, for reasons of its complexity, the issue of how far corporate organizations can be treated as criminal offenders and what sort of treatment is called for in their case. For the record I do think that corporate entities are fit to be held criminally responsible but there are too many questions raised by this perspective for me to consider them here.³⁵

The second limitation on what I have attempted appears in a degree of idealization implicit in the approach. It is common in the theory of distributive justice, following John Rawls,³⁶ to argue that it presupposes more or less idealized ‘circumstances of justice’: in particular, conditions of moderate but not extreme scarcity and moderate but not extreme egoism. What I have sketched in this chapter is a theory of criminal justice—in particular, a theory of criminalization—that presupposes correspondingly idealized circumstances: specifically, conditions in which sufficiently few actions are criminalized, sufficiently few crimes are committed, and sufficiently few offenders are charged and convicted, to allow for a proper hearing to be given to each particular case.

Unfortunately the circumstances of criminal justice, so described, are not often satisfied in contemporary societies and may rarely have been satisfied in the past. This argues for modifications to the arrangements considered here, if anything even half-satisfactory is to be approximated. In real-world situations, it may often be better, not to try to replicate imperfectly the arrangements described, but rather to introduce variations that allow for the difficulty or impossibility of replication.³⁷ Thus it might make very good sense, as many have argued, to try to supplement the system with programmes of restorative justice in which certain offenders can plead guilty to their crimes and avoid the normal judicial process. Under such a programme the admitted offender enters a conference with the victim, in the presence of a number of associates chosen by each, to determine what the offender should do to make up for the offence.³⁸ While I have not been able to explore the possibility here, restorative justice programmes may well promise in real-world circumstances—and indeed in more ideal conditions too—to serve criminal justice better than anything I have been able to consider.³⁹

³⁵ P. Pettit, ‘Responsibility Incorporated’, *Ethics*, 117 (2007), 171–201; P. Pettit, ‘Corporate Responsibility Revisited’, *Rechtsphilosophie & Rechtstheorie*, 38 (Special Issue: Philip Pettit and the Incorporation of Responsibility) (2009), 159–76; C. List and P. Pettit, *Group Agency: The Possibility, Design and Status of Corporate Agents* (Oxford: Oxford University Press, 2011).

³⁶ Rawls, *A Theory of Justice*.

³⁷ A. Vermeule, *The System of the Constitution* (New York: Oxford University Press, 2011).

³⁸ H. Strang and J. Braithwaite (eds.), *Restorative Justice: Philosophy to Practice* (Aldershot: Dartmouth-Ashgate, 2000); J. Braithwaite, ‘Setting Standards for Restorative Justice’, *British Journal of Criminology*, 42 (2002), 563–77; G. Johnstone (ed.), *A Restorative Justice Reader: Texts, Sources, and Content* (Abingdon: Willan Publishing, 2003).

³⁹ I am grateful to a number of people who discussed the ideas in this presentation at the University of Stirling Conference in Sept 2011 and at a workshop in Queen’s University, Belfast in June 2012. I would like in particular to mention Andrew Ashworth, Chris Bennett, Anthony Duff, Kim Ferzan, Nicola Lacey, Sandra Marshall, Victoria McGeer, Michael Moore, Konstantinos Papageorgiou, Massimo Renzo, Victor Tadros, and Lucia Zedner. I am especially grateful for written comments received from Ben Ewing, John Braithwaite and Massimo Renzo.