closely linked to this one, stating a principle which covers not only revenge and punishment, but many other features of human life.

Which is more temporary, the soul or the body? In matters of law, morality and religion, what is most external and visible, such as custom, behaviour and ceremony, has the most *endurance*; it is the *body* to which a *new soul* is always being added. The cult is, like a fixed word-text, always being newly interpreted; concepts and sensations are the fluid element, practices the solid.[62]

Here Nietzsche arranges a number of oppositions – custom and feeling, body and soul, text and interpretation, solid and fluid – in parallel fashion, to make a point about social life: that the same practice may have very different meanings at different times. For Nietzsche, the distinction between punishment as a material practice and the further functions which it has or is believed to have implies that there is no single explanation of justification of punishment. So any attempt to assign a single meaning to the concept is misguided: 'Today it is impossible to say for certain why people are really punished: all concepts in which an entire process is semiotically concentrated elude definition; only that which has no history is definable.'[63] Here Nietzsche's historical approach is taken to its ultimate conclusion: a radical rejection of the tradition of philosophical inquiry which investigates the meanings of concepts like that of punishment, and thus a rejection of the presuppositions common to the retributivists and utilitarians of his time.

[62] Ibid., sect. 77.
[63] *The Genealogy of Morals*, II, sect. 13.

Republican Theory and Criminal Punishment

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Suppose we embrace the republican ideal of freedom as non-domination: freedom as immunity to arbitrary interference. In that case those acts that call uncontroversially for criminalization will usually be objectionable on three grounds: the offender assumes a dominating position in relation to the victim, the offender reduces the range or ease of undominated choice on the part of the victim, and the offender raises a spectre of domination for others like the victim. And in that case, so it appears, the obvious role for punishment will be, so far as possible, to undo such evils: to rectify the effects of the crime that make it a repugnant republican act. This paper explores this theory of punishment as rectification, contrasting it with better established utilitarian and retributivist approaches.

This essay is an attempt to present the outlines of what I see as a characteristically republican picture of how to deal with those who have been identified as criminal offenders.[1] The discussion breaks down into three sections. First I introduce the core idea, as I see it, in republican political theory: a conception of the freedom that the state ought to sponsor, not as non-interference – not as the absence of restraint and constraint – but as non-domination: as the absence of exposure to a capacity for arbitrary interference on the part of another. In the second section I look at how this political ideal would lead us to criminalize certain acts, identifying them as offensive in three salient ways to people's enjoyment of freedom as non-domination. And then in the third section I show that the offensiveness of those acts, as that appears in a republican point of view, suggests a particular line on how to deal with those who have been convicted of such acts or who have confessed to such acts.

The ordinary word for our mode of dealing with those who have been identified as criminal offenders is 'punishment'. I go along with that convention in this essay, though I should say that the word raises serious misgivings. To ask about how best to punish suitably identified offenders is, under certain ways of understanding the word, to beg important questions. For talk of punishment goes most naturally with a retributive model of how to deal with offenders and it may direct attention away from the possibility that the best way of treating offenders does not line up with retributive assumptions. I continue to

[1] I draw heavily on John Braithwaite and Philip Pettit, *Not Just Deserts: A Republican Theory of Criminal Justice*, Oxford, 1990 as well as on two related articles: Philip Pettit with John Braithwaite, 'Not Just Deserts, Even in Sentencing', *Current Issues in Criminal Justice*, iv (1993), pp. 225–39; and 'The Three R's of Republican Sentencing', *Current Issues in Criminal Justice*, v (1994), 318–25.

speak of 'punishment' in this essay, deferring to the established practice, but I hope that the word will not warp the direction of discussion.

I. REPUBLICAN THEORY

The republican way of thinking about government dominated European thinking down to the end of the eighteenth century, when it gave way to the new way of conceiving of the role of government that came to be described, initially in a term of abuse, as liberalism.[2] Where republicans had insisted that the freedom of citizens was a public affair – it was more or less equivalent to citizenship – the new liberals tended to think of freedom as something that pre-existed government, and indeed citizenship, and that was consummated in the private, non-civic realms of family and friendship, contract and commerce.

The republican tradition of thinking which liberalism supplanted had a long history. It is the tradition associated with Cicero at the time of the Roman republic; with Machiavelli – 'the divine Machiavel' of the *Discourses* – and various other writers of the Renaissance Italian republics; with James Harrington and a host of lesser figures in and after the period of the English civil war and commonwealth; and with the many theorists of republic or commonwealth – with the commonwealthmen, as they were often called – in eighteenth century England and America and France. It was thinkers of this stamp who were responsible for the publication of texts like *Cato's Letters* and *The Federalist Papers*.[3]

These eighteenth century thinkers include less radical figures like Montesquieu and Blackstone – the author of the famous commentary on the laws of England – as well as the anti-monarchists responsible for the United States Constitution and for the various declarations emanating from revolutionary France. If such figures did not seek a political republic – if they were happy with a constitutional monarchy – they still espoused a conception of freedom that linked them with the republican tradition; they looked for what we might describe as a judicial republic. Thus in an unmistakeable reference to Britain, which he admired greatly, Montesquieu could describe it as 'a nation where the republic hides under the form of monarchy'.[4]

[2] For background see John Pocock, *The Machiavellian Moment: Florentine Political Theory and the Atlantic Republican Tradition*, Princeton, 1975 and Quentin Skinner, *The Foundations of Modern Political Thought*, 2 vols, Cambridge, 1978.

[3] See Caroline Robbins, *The Eighteenth Century Commonwealthman*, Cambridge, Mass., 1959; Felix Raab, *The English Face of Machiavelli. A Changing Interpretation 1500–1700*, London, 1965; and Blair Worden, 'English Republicanism', *The Cambridge History of Political Thought*, ed. J. H. Burns and M. Goldie, Cambridge, 1991, pp. 443–75.

[4] See Charles de Secondat Montesquieu, *The Spirit of the Laws*, tr. and ed. A. M. Cohler, B. C. Miller and H. S. Stone, Cambridge, 1989, p. 70.

A. *Two notions of freedom*

The main difference between the old republicans and the new liberals, as I have urged elsewhere, is that whereas the liberals generally argued that freedom consists in non-interference republicans associated freedom with the quite distinct status of non-domination: that is why they thought of freedom as equivalent to citizenship. For them freedom means not being vulnerable to interference by another, or at least not being vulnerable to arbitrary interference: to interference at the unconstrained will or judgment – the *arbitrium* – of that other.[5] Not only must people escape interference if they are to be fully free, under this conception; they must also escape exposure to arbitrary interference: they must escape domination.

The intrusions that count as interference under both approaches have to be intentional acts, or at least acts for which the agent can be held responsible.[6] Are such intrusions to be restricted to acts which make certain options impossible for the agent or should they be extended to include acts that coerce or manipulate the agent in choosing between options? I shall assume that for both conceptions of freedom interference is to be understood in the broader fashion. Thus the victim of interference may be stopped from doing something, may be threatened with some extra cost, say some penalty, in the event of doing it, or may simply be penalized for having done the act in question.

The republican conception of freedom invokes the notion, not just of interference, but of arbitrary interference: interference on an arbitrary basis. What makes an act of interference arbitrary? Roughly, as I have indicated, the fact that it is subject just to the *arbitrium*, the decision or judgement, of the agent. An act of interference will be non-arbitrary so far as it is suitably constrained: in particular so far as it is constrained to satisfy the interests of those who suffer the interference, according to their ideas about those interests; if it imposes alien ideas or interests, then it will represent imposition on an arbitrary basis.

Where the liberal account of freedom opposes freedom directly to interference, then – freedom just is non-interference – the second

[5] See Philip Pettit, *Republicanism: A Theory of Freedom and Government*, Oxford, 1997. See also Philip Pettit, 'Freedom as Antipower', *Ethics*, cvi (1996). In this argument for the centrality of the republican notion of freedom I have been greatly encouraged by the work of Quentin Skinner. See for example 'The Idea of Negative Liberty', *Philosophy in History*, ed. R. Rorty, J. B. Schneewind and Q. Skinner, Cambridge, 1984. The account given here uses material from my 'Republican Political Theory', *Political Theory: Tradition, Diversity and Ideology*, ed. A. Vincent, Cambridge, forthcoming.

[6] See David Miller, *Market, State and Community*, Oxford, 1990, p. 35, and Jean-Fabien Spitz, *La Liberté Politique*, Paris, 1995, pp. 382–3.

varies this opposition in two ways. The antonym of freedom no longer involves interference as such, only interference on an arbitrary basis. And the antonym of freedom does not require actual arbitrary interference, only vulnerability to someone with the capacity for such interference.

The first variation has the effect of making it harder for someone to lose their freedom or to have a reduced measure of freedom. For it means that if an agent interferes non-arbitrarily in their choices, that does not offend as such against their freedom; whatever damage is done by the interference, the non-arbitrariness is enough to ensure that their freedom is not compromised. But the second variation has the contrary effect of making it easier, not harder, for someone to suffer a loss of freedom. For it means that if an agent has the capacity to interfere in any of their choices, then that in itself compromises their freedom; they suffer a loss of freedom even if the other person does not actually exercise their capacity for interference.

B. Harder to lose freedom as non-domination

The harder-to-lose-freedom effect makes for a difference in how law bears on liberty under the two conceptions. A regime of law, being necessarily coercive, involves systematic interference: people all live under the threat of legal penalty for breaking the law. And so under the liberal conception of freedom, a regime of law systematically compromises people's freedom, even if the consequence of putting the regime into operation is that less interference takes place overall. Subjection to the law, in and of itself, represents a loss of liberty.

Under the republican conception, however, subjection to the law need not represent a compromise of liberty for anyone who lives under it, provided – and of course it is a big proviso – that the making, interpretation and implementation of the law is not arbitrary: provided that the legal coercion involved is constrained by the interests and judgements of those affected. The proviso is that the legal regime represents a fair rule of law and that it is imposed in such a manner – such a democratically contestable manner – that any aggrieved individual or group can gain, by their own standards, a fair hearing and judgement on whether an allegedly objectionable law represents the imposition of alien interests or ideas.

Consistently with not itself constituting a compromise of liberty, of course, a regime of legal coercion and restraint may have the same effect as a natural obstacle in limiting the choices available to people or in making them more costly: in defining the range over which people enjoy undominated choice. And such a limitation of freedom is a serious intrusion. Ordinary citizens are not at liberty to behave illegally, under this form of limitation, and citizens who are subjected

to legal penalty are not at liberty to do things that would otherwise be perfectly legal: prisoners are not at liberty to move about as they might wish and those who are fined are not at liberty to spend their money as they wish.

Proponents of freedom as non-inteference do not count natural obstacles as factors that compromise liberty – this, because they are in no way intentional – but they do admit that such obstacles affect the range of choice over which freedom as non-interference may be exercised; the obstacles condition freedom, as we might put the distinction, but they do not compromise it.[7] Proponents of freedom as non-domination move the locus of this boundary between compromising and conditioning factors so that the interference associated with a fair and democratic rule of law conditions people's liberty in the manner of a natural obstacle – and thereby ensures that they are not at liberty to do various things – even if it does not compromise that liberty.

Hobbes and Bentham are the great advocates of the idea that law in itself represents a compromise of liberty. 'As against the coercion applicable by individual to individual, no liberty can be given to one man but in proportion as it is taken from another. All coercive laws, therefore ..., and in particular all laws creative of liberty, are, as far as they go, abrogative of liberty.'[8] Or as Hobbes had put it: 'The Liberty of a Subject, lyeth therefore only in those things, which in regulating their actions, the Soveraign hath praetermitted'.[9]

But Hobbes and Bentham were consciously breaking with the republican tradition in taking this line; they were consciously redefining freedom as non-interference and recasting the relation between freedom and law. That tradition was defended in the first instance by James Harrington, who argued that Hobbes was confusing freedom from the law with freedom proper: freedom by the law.[10] John Locke took Harrington's side, embracing 'freedom from Absolute, Arbitrary Power' as the essential thing[11] and presenting law as essentially on liberty's side : 'that ill deserves the Name of Confinement which serves to hedge us in only from Bogs and Precipices ... the end of Law is not to abolish or restrain, but to preserve and enlarge Freedom'[12]. William

[7] When proponents of this ideal speak of making freedom as non-interference effective, not just leaving it as a formal freedom, I assume that they often have in mind removing or reducing the obstacles that condition the exercise of freedom as non-domination: extending the range of choice available to people.

[8] Jeremy Bentham, 'Anarchical Fallacies', in *The Works of Jeremy Bentham*, ed. J. Bowring, Edinburgh, vol. 2, 1843, p. 503.

[9] Thomas Hobbes, *Leviathan*, ed. C. B. MacPherson, Harmondsworth, 1968, p. 264.

[10] See James Harrington, *The Commonwealth of Oceana and A System of Politics*, ed. J. G. A. Pocock, Cambridge, 1992, p. 20.

[11] John Locke, *Two Treatises of Government*, ed. Peter Laslett, New York, 1965, p. 325.

[12] Locke, p. 348.

Blackstone represents the eighteenth century orthodoxy when he follows the same line: 'laws, when prudently framed, are by no means subversive but rather introductive of liberty; for (as Mr Locke has well observed) where there is no law there is no freedom'.[13]

The difference between the two conceptions of liberty in their attitude to the law was of great significance from the point of view of Hobbes and Bentham. The view that all law compromises people's liberty enabled Hobbes to withstand the criticism that he anticipated from republicans, that his Leviathan was utterly inimical to freedom, constituting an arbitrary rule as distinct from a rule of law: an arbitrary rule as distinct from the republican vision of an 'empire of laws, and not of men'.[14] And the same view enabled Bentham and those friends of his who opposed the American cause in the 1770s to argue against the complaint that since the British parliament was not constrained in the laws that it passed for the governance of the American colonies – since it was not constrained in the same way that it was constrained in Britain itself – those laws represented an arbitrary interference with Americans and compromised their liberty.[15] Hobbes could argue that Leviathan did no worse than commonwealths in respect of the liberty of its subjects, since all law compromises liberty. And Bentham and his friends could argue on the same grounds that in regard to liberty Americans fared no worse under the law imposed by the British parliament than those in Britain itself.

C. *Easier to lose freedom as non-domination*

So much for the harder-to-lose-freedom effect of opposing freedom to non-domination, not non-interference. But what of the easier-to-lose-freedom effect of shifting the antonym?

This effect comes of the fact that someone loses freedom, not just to the extent that another person interferes on an arbitrary basis in their choices but to the extent that another agent has the capacity to do this. The fact is, under the republican conception of liberty, that someone loses freedom to the extent that they live under the thumb of another, even if that thumb is never used, or at least never used with hostile intent, against them. Suppose that under the existing laws and mores a wife may be abused on an arbitrary basis by her husband, at least in certain areas and in a certain measure. Even if her husband is a loving and caring individual, such a wife cannot count as fully free under the construction of freedom as non-domination. And neither can

[13] See William Blackstone, *Commentaries on the Laws of England*, 9th edn., New York, p. 326.
[14] Harrington, p. 8.
[15] See John Lind, *Three Letters to Dr Price*, London, 1776.

the employee who lives under the thumb of an employer, nor the member of a minority who lives under the thumb of a majority coalition, nor the debtor who lives under the thumb of a creditor, nor anyone in such a subservient position.

Whereas the first effect of shifting antonym shows up particularly in the assessment of law and liberty, the second relates to the association between law and slavery. As it became a matter of common assumption after Bentham that law represents a compromise of liberty, albeit a compromise that may be for the good overall, so it became impossible to maintain that to be unfree is always, in some measure, to be enslaved; no one was prepared to say that the law makes slaves of those who live under it. But before Bentham, when freedom was opposed first and foremost to domination, the association between unfreedom and slavery was complete. To be unfree was to live at the mercy of another; and that was, to live under a condition of enslavement to them.

Thus, Algernon Sydney could write in the 1680s: 'liberty solely consists in an independency upon the will of another, and by the name of slave we understand a man, who can neither dispose of his person nor goods, but enjoys all at the will of his master'.[16] And in the following century, the authors of *Cato's Letters* could give a characteristically forceful statement to the theme. 'Liberty is, to live upon one's own Terms; Slavery is, to live at the mere Mercy of another.'[17]

The easier-to-lose-freedom effect of opposing liberty to domination connects with the slavery theme, because one of the striking things about slaves is that they remain slaves even if their master is entirely benign and never interferes with them. As Algernon Sydney put it, 'he is a slave who serves the best and gentlest man in the world, as well as he who serves the worst'.[18] Or as it was put by Richard Price in the eighteenth century: 'Individuals in private life, while held under the power of masters, cannot be denominated free, however equitably and kindly they may be treated. This is strictly true of communities as well as of individuals'.[19] There is domination, and there is unfreedom, even if no actual interference occurs.

I mentioned that the first effect of opposing freedom to domination helped the defenders of the American cause to argue that while those in Britain were not made unfree by the law, given that the law could

[16] See Algernon Sydney, *Discourses Concerning Government*, ed. T. G. West, Indianapolis, p. 17.
[17] See John Trenchard and Thomas Gordon, *Cato's Letters*, 6th edn., New York, 1971, vol. ii, pp. 249–50.
[18] Sydney, p. 441.
[19] See Richard Price, *Political Writings*, ed. D. O. Thomas, Cambridge, 1991, pp. 77–8.

not be arbitrarily imposed there, those in America did not enjoy a similar status under the law. I should add that the second effect enabled them to sheet this argument home. They were in a position to argue that even though the British parliament did not interfere much in American affairs – even though it levied only a small tax – still the fact that it could levy whatever tax it wished, without any serious restraint on its will, meant that it related to the American colonists as master to slave.

Joseph Priestley offers a nice example of this line of argument:

> Q. What is the great grievance that those people complain of? A. It is their being taxed by the parliament of Great Britain, the members of which are so far from taxing themselves, that they ease themselves at the same time. If this measure takes place, the colonists will be reduced to a state of as complete servitude, as any people of which there is an account in history. For by the same power, by which the people of England can compel them to pay *one penny*, they may compel them to pay the *last penny* they have. There will be nothing but arbitrary imposition on the one side, and humble petition on the other.[20]

So much by way of explicating the core republican value of freedom as non-domination. What, then, is republican political theory? It is that theory of what the state ought to be and do – that theory of political forms and aims – which takes the freedom as non-domination of all its citizens as the ultimate goal that the state ought to promote. Under traditional republicanism, of course, the citizens were limited to propertied, mainstream males but the version of the doctrine that I envisage follows the liberal development associated with Bentham in expanding the citizenry to the limit. 'Everybody to count for one, nobody for more than one', in the slogan ascribed to Bentham by John Stuart Mill.[21] What I think of as republican theory might better be described, then, as neorepublican theory. It keeps the republican conception of liberty in place, while embracing the liberal view of the constituency for which such liberty should be achieved.[22]

[20] See Joseph Priestley, *Political Writings*, ed. P. N. Miller, Cambridge 1993, p. 140.

[21] J. S. Mill, *Utilitarianism*, ed. J. M. Robson, Toronto, 1969, *Collected Works of John Stuart Mill*, x.257.

[22] I have argued elsewhere that what may have led Bentham and his fellows away from the republican conception of liberty was the sense that it was infeasible to think of achieving such a rich ideal for an expanded constituency. See *Republicanism*, ch. 1. Bentham's fellow utilitarian, William Paley, was aware that the notion of freedom as non-domination was the established conception of freedom but as early as 1785 argued against it – and in favour of the liberal alternative – on the grounds that it would 'inflame expectations that can never be gratified, and disturb the public content with complaints, which no wisdom or benevolence of government can remove'. See William Paley, *Principles of Moral and Political Philosophy*, London, 1825, p. 359.

II. THE REPUBLICAN VIEW OF CRIME

I shall not be able to say anything here on why we should be attracted to republican political theory, casting freedom as non-domination in the role of the supreme, perhaps even the unique, political value.[23] But assuming that we do embrace republicanism, the question which I now want to raise bears on which acts we should thereby be led to criminalize, and on what grounds. What are the evils that republicans will see in those acts that deserve, by their own lights, to be designated as crimes? I ask the question because I believe that the answer to it gives us a useful line on how the republican polity ought to deal with those convicted of committing crime or those who have confessed to a crime.

Any criminal justice system will tend to criminalize certain acts that undermine the operation of the system as well as those acts which the system is introduced in the first place to combat. In asking about the evils that republicans will see in acts that deserve to be criminalized, I focus on acts of the kind that a criminal justice system is introduced to combat, not on acts of the other sort. I focus, as it is sometimes put, on primary rather than secondary crimes. Among acts that are taken as primary crimes, however, there will be some more contentious examples – say, victimless crimes – and others that have the status of paradigms: acts like murder, assault, theft and kidnap; and acts also like drink-driving or tax-evasion whose victims are the community as a whole. In what follows I will have such paradigms in mind, since there is little doubt but that they will be crimes under any plausible republican dispensation.

There are many different grounds on which we might complain about acts of these kinds: that they do damage to people, that they frustrate people's needs, that they affect the level of happiness that people enjoy, and so on. But when a political theory nominates a certain good as the supreme political value, it suggests that we should only legitimate complaints that are grounded in a concern for that value; it suggests that political affairs can be sensibly organized around the project of promoting that value and without having recourse to other grounds – often politically less compelling grounds – of assessment. So what are the grounds of complaint that republicans should make, in the name of freedom as non-domination, about the sorts of acts that deserve in their view to be criminalized?

But before the answer, a word of warning. Whatever grounds republicans have for complaint, they will support an argument for criminalization only so far as criminalization is not likely to do more harm than good to the cause of non-domination. This proviso about not doing

[23] See Pettit, *Republicanism*, ch. 3.

more harm than good comes of the fact that republicanism takes and ought to take a consequentialist attitude to the value of non-domination, as I have argued elsewhere.[24] It ought to be committed to those measures, and only to those measures, that will make a real difference to the amount of non-domination enjoyed in the society. There will be no point in criminalizing something in order to reduce domination, if the very act of criminalization itself facilitates more domination than it removes.

A. Crime as the compromising of a victim's freedom

The first ground on which republicans can and should complain about those acts that they are likely to criminalize is that when someone commits a crime they typically present themselves as dominators of the victim: they act in a way that suggests a belief that they can interfere on an arbitrary basis with that person. If you like, they assume a dominating position in relation to the victim. After all, if someone believed that they did not have the capacity to interfere on an arbitrary basis – they were effectively blocked, for example, or the penalty for interfering was too great and too credible – then presumably they would not try to interfere. So the very act of interference communicates a belief that they have the capacity to interfere in the manner exemplified by the crime, even though that interference runs counter to the interests and ideas of the agent.

This means that the successful act of crime compromises the freedom as non-domination of the victim: it establishes that the offender's belief is correct. Not only does the act of crime constitute a denial, then, that the victim enjoys non-domination in relation to the offender. If the offender gets away with the crime, and if the victim's protection against the sort of offence in question is not increased, then the crime proves that the denial is warranted: the victim is indeed dominated by the offender and by those who are relevantly similar to the offender. The crime may not prove that the offender has an absolutely unchecked capacity to interfere: every attempt at the interference in question may run a serious risk of apprehension. But it certainly proves that the victim's freedom is compromised in some degree, that the offender and those like the offender do dominate the victim at a certain level of intensity.

It is worth emphasizing the serious loss involved in this compromise of a person's freedom. One of the main reasons why freedom as non-domination is valuable, by traditional lights, is that it is hard to have it without knowing that you have it and without its being a matter of

[24] See John Braithwaite and Philip Pettit, *Not Just Deserts*, ch. 3, and Pettit, *Republicanism*, ch. 3.

common knowledge that you have it; if there are grounds in place that deny others a capacity to interfere arbitrarily in your affairs, after all, it is likely that these grounds will be generally salient.[25] The fact that freedom as non-domination is likely to be a matter of common knowledge means that it should have the benefit of making a person conscious of not being vulnerable to another and conscious, therefore, that they can look others in the eye without need of fear or favour. As Joseph Priestley put it, if in rather a sexist way, 'a sense of political and civil liberty, though there should be no great occasion to exert it in the course of a man's life, gives him a constant sense of his own power and importance; and is the foundation of his indulging a free, bold, and manly turn of thinking, unrestrained by the most distant idea of control'.[26]

The fact that an act of crime compromises the victim's freedom as non-domination means that the person loses access to this great benefit. The crime tells the victim: you may have felt immune from arbitrary interference, you may have previously enjoyed the tranquillity that is associated in the republican tradition with freedom, but you are mistaken; I and my ilk claim a certain lordship over you; whether or not you like it, you live at our mercy.

B. Crime as the conditioning of a victim's freedom

So much for the first evil that crime typically represents in a republican's books. Where this first evil is associated with the measure in which a crime challenges and compromises the victim's freedom as non-domination, the second comes of the way in which a crime is likely to condition that freedom. When I take your money, or when I obstruct you in your dealings, or when I thwart your efforts to achieve certain ends, or when I harm or even kill you, it is certainly true that I challenge and compromise your status as a free, undominated person; I reduce the intensity with which you enjoy non-domination. But what is also true is that when I do any such thing I reduce the extent of undominated choice that you enjoy. I reduce the range of choices in which you can enjoy non-domination – if I kill you then I reduce it to zero – or I increase the difficulty of your enjoying non-domination across that range, making some of the available options more costly. This conditioning effect is different from the compromising effect, because it is something that a non-intentional cause – say, a natural misfortune – might equally have brought about and brought about without any assertion of domination on the part of another agent.

[25] See Pettit, 'Freedom as Antipower' and *Republicanism*, ch. 2.
[26] Priestley, pp. 35–6.

C. Crime as the compromising of a community's freedom

But not only does a successful act of crime compromise and condition the freedom as non-domination of the victim, typically it also has a bad effect on the non-domination of people in the society as a whole, in particular on the group comprising those who occupy positions similar to that of the victim or victims. In the case of certain crimes like tax-evasion or governmental corruption there won't be a distinction between the victims and those who occupy similar positions to the victims but with most crimes there will be and I concentrate here on those.

Consider those individuals who are on the same footing as the victim; consider those who have no more and no less protection, whether of a formal or informal kind: they belong to the same vulnerability class. The act of crime challenges all such people and not just the direct victim or victims. It communicates a belief on the part of the offender, and no doubt on the part of the offender's ilk, that they are not protected against arbitrary interference of the sort represented by the crime; those of the offender's ilk have the capacity, however circumscribed, to interfere in their lives in that manner.

The point here is fairly straightforward. Let a man rape a woman in a public park and the position of all women who use that park is put under question. Let a young person burgle the flat of a pensioner, perhaps pushing the person around, and the protection of all pensioners comes under doubt. Let a state official thwart someone's just claims, for reasons of personal interest, and the status of every member of the public is jeopardized. Even if the other people in question do not come to learn of the crime, still the crime compromises their freedom in some measure, just as it compromises the freedom of the victim. Assaults on freedom can never be cordoned off and insulated. When someone is the victim of crime, then the compromise to their liberty propagates in a wave motion among all of those who are equally vulnerable.

I mentioned that the evil involved in compromising a victim's freedom as non-domination becomes salient when we consider the effect on that person's sense of themselves as free and in no need of fear or deference. The same is true with this third ground for complaint about crime. The compromise of a group's freedom which is implied in a crime against any member can have a devastating effect, as they learn of that crime. It can undermine the tranquillity that Montesquieu, in the tradition of many republicans, takes to be at the heart of freedom. 'Political liberty in a citizen is that tranquillity of spirit which comes from the opinion each one has of his security, and in order for him to

have this liberty the government must be such that one citizen cannot fear another citizen.'[27]

III. THE REPUBLICAN RESPONSE TO CRIME

We have seen three reasons why republicans, just on the basis of a concern for people's freedom as non-domination, can and should object to crimes. The fact that crime typically represents such a three-dimensional evil gives republicans reasons to devise political institutions for protecting people against crime. It is a serious question in republican criminology as to how such protection is best secured, especially given that whatever means the state adopts to counter crime, they had better not be measures that themselves have a negative effect on people's freedom as non-domination.[28]

Our concern however is not with what the republican state and society ought to do in order to protect people against crime. Nor is our concern with such related matters as how the state and society ought to go about investigating crimes, charging alleged offenders and ensuring fair trials. Our interest, much more narrowly, is in what the republic ought to do in response either to those who have been formally convicted – and, we may assume, convicted reasonably – of criminal offences or to those who freely confess to the crimes and are willing, assuming that is allowed, to waive the right to a formal adjudication process. How ought the legislature, the courts and the administration behave in constraining, deciding and implementing measures against convicted or confessed offenders? How ought they to organize the punishment of such offenders, as the matter is ordinarily phrased?

There are really three questions here. One is the question of what kinds of measures – in particular, what kinds of penalties – ought to be acceptable to republicans. A second is the question of how penalties should be delivered: who ought to decide on them and, in particular, how far the courts and such bodies ought to have discretion in imposing them. And the last, and logically prior, question is how punishment should be cast or conceptualized within a republican perspective.

The republican view obviously has implications for the answers to all of these questions. On the first issue, for example, it suggests that no forms of punishment should themselves compromise people's freedom as non-domination. Domination is the main evil against which the state sets itself, after all, and ways of conditioning people's freedom

[27] See Montesquieu, p. 157.

[28] For some work in this direction see Braithwaite and Pettit, *Not Just Deserts* and Ian Ayres and John Braithwaite, *Responsive Regulation*, New York, 1992.

already offer adequate penal resources. This consideration argues in favour of fines and community service and against prison, since domination is all too likely, if not logically inevitable, under prison regimes.[29]

Again on the second issue republicanism suggests that the courts should be subject to strict upper bounds in the penalties they can impose. If the courts did not have to respect upper bounds, or if the upper bounds were not strict, then it is hard to see how they could avoid standing over offenders, in a dominating posture; there would be an intuitive sense in which those who came before the courts – as any one of us might – would be at their mercy.

But in the present essay I concentrate on the third question of how republicans ought to conceptualize punishment. Ought they to think of it in retributive terms as an attempt to pay back the offender, by suitable criteria of proportionality, for the offence? Ought they to consider it in broadly utilitarian terms as an opportunity to be exploited, perhaps subject to constraints against the *ad hoc*, for what it can offer – for what utilitarian pay-off it can deliver – in reducing the overall level of crime? Or ought they to think of it in different terms again?

A. Punishment as rectification

The considerations in the last section give us a good basis for tackling this question. For the salient thing about those considerations is that the evil effects to which they draw attention can often be undone or, if not undone, at least diminished. It is possible to give the lie to a claim of domination – a would-be compromise of liberty – and it is possible to make up for many of the ways in which someone's liberty may have been conditioned. Thus it may often be possible at least partially to rectify the evil, as that appears in a republican perspective, that is perpetrated by an act of crime.

This being so, the considerations rehearsed point us to a third and different way in which we might conceptualize punishment. We might see it as an attempt to rectify the crime committed, not as an exercise in exacting retribution or in pursuing utility. If I may play a little on words, we might focus in our view of punishment on making the offender pay up, not on delivering a suitable pay-back and not on securing a suitable pay-off.

[29] In *Not Just Deserts* John Braithwaite and I argued that punishment represents the very same evil as crime; it is an offence, as we put it, against dominion. I modify that claim a little here. Punishment is an offence against non-domination (i.e. what we earlier called dominion) but not necessarily of exactly the same kind as crime: it has to condition freedom as non-domination but strictly it need not compromise it; it has to reduce the range or ease with which the offender exercises non-domination but it need not itself dominate the offender.

So far as it is feasible, rectification represents a compelling ideal for any theory about what the state and society should do in response to a convicted or confessed offender; after all, total rectification would mean that it is as if the crime did not take place. But rectification represents a particularly attractive ideal from a republican perspective.

The thing to be avoided under republicanism is domination, one agent's dominating another if they can interfere on an arbitrary basis in that other's life or affairs. Thus the penal state must do all that it can to avoid dominating those that it punishes and, by extension, to avoid dominating those who recognize that conviction for an offence, whether correct or not, is always a possibility. Any punishment is bound to represent a sort of interference with the offender and so the state can avoid dominating offenders only so far as it is able to represent that interference as pursued on a non-arbitrary basis: only so far as it can represent it as being constrained to track the person's interests according to their ideas. The interests which a republican state ought to track are interests that each shares, at whatever level of abstraction, with others; that state is meant to be public property, after all, not the tool of any particular class or coterie. And so penal interference will be non-arbitrary, and saliently non-arbitrary, so far as it tracks interests that the offender shares with others in the society, and shares according to shared ideas; it will be non-arbitrary, indeed, even when the pursuit of those interests means frustrating the wish of the offender to be given a special deal.

The state which does nothing more in response to a crime than try to rectify the evil perpetrated can readily argue that this response is dictated by interests that the offender shares, and shares according to shared ideas, with others in the society. Thus to the extent that the penal state is a rectificatory state it can avoid any suggestion of itself exercising a sort of domination over the offender. What it does to the offender, what punishment it imposes on the offender, can easily be justified by reference to the common interests and ideas that must exist for a non-dominating state to be a possibility. Rectification is necessary in order to respect the interests of the victim – interests of a kind that the offender shares – and while it may be costly to the offender there is no reason why it should fail to respect any of those interests that the offender shares with others, victim included.

Here is a more or less intuitive test by which to determine whether a certain way of treating offenders is non-arbitrary, being designed to track common interests according to common ideas. Ask if someone who fully internalizes the possibility of finding themselves in the position of a convicted or confessed offender, can still complain that the treatment does not answer to interests that they share with others: to these and not, for example, to their interest in being given special,

lenient treatment. If they cannot make such a complaint, or at least not persuasively, then the treatment is non-arbitrary; if they can, then it is arbitrary.[30] By that test it is surely plausible to say that rectificatory treatment is a non-arbitrary way of dealing with offenders, so that giving the power of rectification to the state does not mean giving it a dominating status in relation to convicted or confessed offenders.

The force of this point is easily appreciated when we consider the pay-back and pay-off ways of conceptualizing punishment. Suppose we say that the point of punishment is to express the outrage or condemnation of the community in relation to the particular crime, or even the type of crime, in question. Such a conceptualization demonizes offenders – it intrudes a them-and-us view of their status – allowing the punishment to be dictated in a way that may well trample on interests that we all share in common but in respect of which only offenders are saliently vulnerable: for example, interests in not being exposed to pain, or cruelty, or ridicule. The conceptualization is all too likely to usher in what Montesquieu described, in a tellingly republican phrase, as a 'tyranny of the avengers'.[31]

But this is not the only conceptualization of punishment that would hold out the spectre of penal domination. Consider the alternative account in which punishment is supposed to increase overall utility by reducing the level of crime: this, through deterring the offender in question, through deterring other potential offenders, through keeping the offender off the streets or perhaps through reconditioning the offender. Any such dispensation, rational though it may seem to be, runs a risk of introducing a tyranny of the reformers. The shared interest in crime-reduction is given such exclusive prominence in that dispensation – and the other, shared interests of the offenders are so totally eclipsed – that the treatment of offenders will be arbitrary and the power of so treating offenders will be dominating. The state, whether at the level of parliament or the courts, will assume that in dictating sentences it has a licence to optimize on crime-reduction: and this, at no matter what cost to offenders.

The tyranny of the avengers represents a rather crude version of the retributivist conceptualization of punishment and the tyranny of the reformers an equally crude version of the utilitarian conceptualization. Without suggesting that all other versions of those approaches are equally likely to legitimate the arbitrary treatment of offenders, I hope it is at least clear that the rectificatory conceptualisation scores particularly well in this regard and will have a natural appeal for republicans. But what would rectification be likely to require? Where would it lead us in the design of criminal justice institutions?

[30] I borrow the idea of such a test, of course, from the sort of contractarian tradition represented in John Rawls, *A Theory of Justice*, Oxford, 1971; T. M. Scanlon, 'Contractualism and Utilitarianism,' *Utilitarianism and Beyond*, ed. A. Sen and B. Williams, Cambridge, 1982; and Brian Barry, *Justice as Impartiality*, London, 1995. There is an intuitive connection between the idea of a form of state action being non-arbitrary and its being, in Scanlon's terms, the sort of action about which no one could reasonably complain.

[31] Montesquieu, p. 203.

B. Recognition

The best way of sketching an answer to this question is to consider what would be required for rectifying each of the three evils that we associated with crime. The first evil is the assumption of a position of domination over the victim or, as they may be, victims. The very fact that the offender is apprehended and made accountable for what they did is already a vindication of the victim's position; it shows that the offender did not have the assumed, even vaunted, capacity to interfere: interference carried a cost. But is there anything else that can be done by way of rectifying the offender's challenge to the freedom as non-domination of the victim?

Clearly, there is. The offender can withdraw the assumption of a dominating position over the victim, acknowledging the victim's standing and admitting the mistake made in the original challenge. The offender can help to rectify the challenge to the victim's freedom, in a word, by an act of recognition. This recognition may be driven by an acknowledgement that the victim is well enough protected not to be susceptible to interference with impunity. Or it may be driven, perhaps driven in addition, by an acknowledgement of a kind based in commonly endorsed norms – by a moral acknowledgement – that the victim is deserving of respect and ought not to be exposed to interference. The ideal act of recognition will have both aspects, of course, since that will presumably entail a greater assurance for the victim.[32]

How to secure such recognition? In particular, how to secure a saliently sincere act of recognition for the victim? This is hard territory and the answer is only going to be discernible in the light of empirical research. But the need for recognition certainly argues for the desirability of introducing a possibility of confronting the offender with the harm they have done, perhaps even arranging for dialogue with the victim or the victim's family or friends, and thereby eliciting an appreciation of how objectionable their offence was. This sort of arrangement may not always be possible but there is room for imaginative consideration of how it can be facilitated in different cases. It

[32] See Spitz, pt. 3, on Rousseau's insistence that freedom as non-domination requires a moral-cum-legal acknowledgement of a person's status. See also Pettit, *Republicanism*, ch. 8.

is a centrepiece, for example, in the conferencing processes that have recently been sponsored and trialled for certain self-confessed offenders who opt not to have their case adjudicated in court; these processes are designed to have the offender, in the company of some people they nominate, enter into dialogue with the victim or the victim's family or friends as to how they can best make up for the crime.

C. Recompense

The second evil associated typically with crime involves, not the compromise of the victim's non-domination, but its conditioning. The victim is deprived of resources or choices and may be psychologically traumatized, physically harmed or, at the limit, killed. How to make up for such an evil? What is required in this case, so far as that is possible, is recompense. The offender must make up to the victim, and/or the victim's dependants, for the loss incurred.

Recompense will be easiest so far as restitution is available: the offender restores what is stolen, perhaps with an extra contribution to cover the trauma involved. Where restitution is impossible, compensation may still be feasible; in this case the offender cannot restore what was taken but can compensate in some measure by a financial contribution or some sort of contribution in kind or service. And where compensation is impossible or clearly inadequate, as in the case of homicide, it may be possible to have recourse to a form of reparation in which the offender communicates, ideally in a voluntary manner, a sharing in the loss.

It is probably obvious that measures for providing recompense may also serve to make recognition of the victim more salient and credible. Suppose that the recompense involves community service, if not in relation to the victim – that may be undesirable for a variety of reasons – at least in relation to those who suffered similar offences; the victim can be compensated by the offender's earnings or by a similar service from other offenders. And suppose that the service is such that an offender may prove themselves more or less diligent and dedicated in how it is offered. In that case there will be ample opportunity for the recognition of the victim to be reinforced by the way in which recompense is paid.

There will naturally be cases in which recompense is possible – say, compensation – but in which the offender, for whatever reason, is clearly incapable of providing it. The republican perspective has a straightforward lesson here. It suggests that since recompense can be more or less independent of recognition, and since the state – the state that was supposed to have provided the victim with protection – can often provide that recompense, then where necessary the state should do so. What recompense should be claimed from the state might be decided by the same body, say the same court, that decides on what should be required of the offender in the way of recognition and recompense.

D. Reassurance

The third evil associated with crime bears on the community as a whole, not just on the victim: it consists in the more general challenge to people's non-domination that is going to be implicit in almost any criminal offence. What is required in rectifying this evil is partly provided by the act of recognition of the victim, since recognition will also have more general implications. But so far as that recognition is not wholly convincing rectification will clearly require a response that provides reassurance for the community at large, victim and others included. So far as possible it must be made clear, on whatever basis, that the community is no worse off in terms of non-domination, no worse off in terms of exposure to arbitrary, criminal interference, than it was prior to the offence in question.

Reassurance is the third 'R' in the republican theory of criminal punishment, but it is also the most tricky. To require reassurance is to require a return to the *status quo* prior to the crime, not to require the maximum assurance attainable for the community. Very little may be required to provide reassurance in particular cases: say, cases where the offender is incapable of reoffending due to handicap, or where the crime was clearly a one-off offence. But in other cases it may require more. It may require a prison sentence in the case of the dangerous offender, for example, even though prison is unlikely to do much in the way of facilitating either recognition or recompense.

In connection with this remark, I should just mention that the steps required to facilitate recognition, recompense and reassurance connect, under most plausible scenarios, with reassurance in another sense: reassurance in the broader sense of increasing people's protection and sense of protection against crime. The measures involved are generally designed to inhibit further crimes by the offender and, to the extent that they have a deterrent character, by others too. And so they may be expected to serve the overall purpose of crime-reduction.

I hope that these brief remarks on possible modes of achieving recognition, recompense and reasssurance may illustrate where a republican theory of punishment – punishment as rectification – is liable to lead. That theory is bound to be attractive to anyone, like me, who thinks that republicanism is an independently appealing political philosophy. But I hope that my remarks will also make salient the appeal that the theory ought to have for others. I conclude with an indication of why it might have some appeal for utilitarians on the one hand, and for retributivists on the other.

E. An ecumenical ideal

Utilitarians baulk at the lack of social purpose inherent in a retributivist policy of paying back offenders for what they have done, regardless of how that pay-back serves overall social goals. In particular they baulk at the inflexible side of retributivism: at the fact that it imposes a common pattern of treating convicted offenders even in cases where that pattern serves no good purpose. Whether or not the offender has a dependent and vulnerable family, whether or not the offender is now handicapped – perhaps as a result of the offence or the arrest – the punishment given will be the same; punishment is wholly dictated, on a retrospective basis, by the nature of the offence and the degree of culpability.

There are two reasons why utilitarians may feel better disposed towards a republican policy of punishment as rectification. First it is part of a plausible policy of furthering people's freedom as non-domination; it has a teleological or consequentialist rationale. And, second, it allows for the different treatment of equally culpable offenders when their circumstances are relevantly different. In order to rectify two similar crimes, and rectify them equally, it may be necessary to impose different punishments. A lot will depend, under republican policy, on how far there is evidence of sincere recognition, on how far the offender is able to offer recompense, and on how far the offender is likely to reoffend.

Retributivists baulk at the opportunistic character of any properly utilitarian policy. They argue that on that policy, the convicted offender is treated as a means, not an end, being subjected to whatever punishment will best serve the overall goal of crime-prevention. And they maintain that when account is taken under that policy of the different circumstances of different offenders, and of the different effects that would be served by punishment, offenders are not treated in an even-handed way.

Retributivists may feel better about republican policy, however, than about utilitarian. Even though it has a teleological rationale, the focus on rectification means that it looks to the grievance of the victim and/or community and lets it, and not any aggregate considerations, determine the nature of the remedy. And while it allows for forms of punishment that vary in substance between offenders of equal culpability, it does so only so far as they are required for the achievement of equality or sameness in regard to the most important variable present: the rectification of the offence.

Republicanism is a distinctive and of course controversial political philosophy. In its application to the case of criminal punishment, however, it has an ecumenical face that may make it appealing even to those who remain sceptical of republican claims in other areas. I do not imagine that penal theorists fall neatly into the rather crude categories of retributivism and utilitarianism with which I have been working. But I hope that illustrating the way in which it may appeal to such stock positions will convey something of its virtues in the ecumenical regard.

One last thought may help to reinforce the ecumenical claim. This is that the theory of punishment as rectification enables us to identify what the state ought ideally to do, not just in the small minority of cases in which offenders are identified, but also in the vast range of unsolved crimes. In those cases, as in the ones with which we have been concerned, it ought also to try to rectify the offence, improving the protection of the victim – where that is relevant – compensating for the loss to the victim, and trying more generally to provide a basis of reassurance for the community as a whole. Crime always requires the same response: an attempt to put things right. What criminal punishment represents is nothing more or less than the special sort of rectification that becomes possible when offenders themselves can be recruited to the enterprise.