despite these convictions. It follows that a greater reduction in flora and fauna crime would result from a regulatory change — more stringent licensing — than from increased dosages of law enforcement.

The situation in relation to motor vehicle theft is somewhat similar. When joyriders are discounted, motor vehicle theft is predominantly an activity of a criminal network, basically composed of persons within or on the fringe of the motor trade. Those motor vehicles stolen by "professionals" don't quite disappear into the same "black hole" that other stolen property disappears into; we know a great deal about what happens to them. Most go back on to the road; usually through being reconstructed as another similar vehicle. This pattern will keep occurring as long as the vehicles being registered are subject to fairly cursory inspection. It seems logical that one of the most effective means to deal with motor vehicle theft in Queensland would be to educate Transport Department inspectors on the identification of stolen vehicles and to upgrade inspection practices. There is also another way of approaching the problem, which is to break the nexus between wreck and reborn vehicle. This could be achieved by removing or defacing the compliance plates from wrecked vehicles. However, insurance companies have in the past been reluctant to agree to such measures because it would reduce the prices that are received for wrecks at auction. This was because the thieves were in the front row of bidders at the auctions. However, the point we wish to make is that both of our suggestions would be regulatory actions likely to produce more effective reductions in at least this crime than would be the case if the major strategy was towards more intense law enforcement measures.

CONCLUSION

Two major theoretical models, the so-called "mafia" model and the social systems approach, have dominated the literature on organised crime. Most of the working definitions that law enforcement agencies use have not moved beyond operational definitions. In many cases, they are nothing more than tautologies, of limited assistance in any analysis of major criminal activity.

We suggest an approach to "organised crime" which moves away from formal definitions towards a specific analysis of three critical factors. These factors are the pattern of criminal organisation, the degrees of influence exercised over markets and regulators and the economic significance of illegal activities. These dimensions have been conceptually and operationally useful in dealing with some illegal drug activity and some forms of prostitution. We believe this approach also has powerful potential in analysing other types of activities subsumed under the label of "organised crime". Our approach has implications for all law enforcement agencies dealing with organised crime. It emphasises research, accurate intelligence and regulatory mechanisms rather than responses based simply on arresting individual operators and confiscating their assets.

NOT JUST DESERTS, EVEN IN SENTENCING*

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In *Not Just Deserts: A Republican Theory of Criminal Justice*, we attempted to set out the overall view of the criminal justice system which a republican philosophy would support.[1] We explored the shape that a criminal justice system would assume, if it were organised so as to promote the goal of republican liberty; this goal we described as one of enjoying personal dominion. We argued that it is necessary to think comprehensively about the shape that a criminal justice system ought to take and that, in this enterprise, the republican approach serves us well. In particular, we argued that it can serve us better than any other goal-oriented approach, such as utilitarianism, and better than any approach that is built around the constraint of delivering just deserts: the constraint of meting out punishment in proportion to the gravity of the offence and the culpability of the offender.

A broad range of issues is involved in the design of the criminal justice system. The issues include questions to do with what should be criminalised, what guidelines should govern police surveillance, what initiatives should be possible in the pursuit of offenders, what procedures should be followed in prosecution and adjudication, and what sentences should be imposed for given offences. We argued in our book that it is important to consider how the system should respond to all of these challenges and not to focus on just one of them, taking the response in other areas to be already fixed; the trouble with focussing on one area in this way is that any initiative taken in one part of the criminal justice system is liable to impact on other parts of the system. In arguing this line, we took issue in particular with the so-called just deserts approach; this retributivist way of thinking tends to focus our attention exclusively on the question of what sentences to impose for different offences.

In a recent response to our book, two leading retributivists, Andrew von Hirsch and Andrew Ashworth,[2] maintain that, whatever there is to be said for going comprehensive in thinking about the criminal justice system — and they express some undocumented doubts about that — the republican theory that we advanced is certainly unsatisfactory in the area of sentencing policy. They suggest that on our theory, as on other goal-oriented or consequentialist theories, the courts should pronounce sentence in the manner that best

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1 Braithwaite, J and Pettit, P, *Not Just Deserts: A Republican Theory of Criminal Justice* (1990) OUP (paperback edition 1992).

2 "Not Not Just Deserts: A Response to Braithwaite and Pettit" (1992) 12 *Oxf J Leg Studies* 83–98.

serves the society overall, even if doing so expresses an indifference to the offender's degree of guilt, or indeed the victim's level of suffering. They imply that on the republican approach, the conviction of an offender provides the courts with a licence to look to the future and try to optimise results, neglecting the nature of the offence to which the sentence is meant to be a response. "What thus remains troublesome about the authors' 'dominion' theory is its forward-looking and aggregative features. These features appear to give licence to punish whenever, and to the extent that, potential victims' net gain in dominion exceeds the loss in dominion of those punished".[3]

The charge against us, then, is that whatever we say to the contrary, the logic of the republican position supports a licence-to-optimise sentencing policy. This paper is an attempt to show that that is not so, by developing in greater detail the sentencing policy implicit in the republican approach. The paper introduces new developments in our republican way of thinking, though developments that are fully in line with the spirit of the book.

There are five sections to the paper. In the first section we describe the goal of republican dominion, introducing a slight variation on the presentation in our book. In the second, we characterise crime as the denial of dominion; in the third section we present sentencing and punishment as an attempt to rectify this denial of dominion; and in the fourth we outline what such rectification is likely to require in republican practice. Finally, in the last section, we compare the rectification that a republican theory would support with the retribution defended by just deserts theorists.

1 REPUBLICAN DOMINION

The main thing to say about the republican ideal of dominion is that it seeks to articulate the notion of liberty which was dominant in the republican tradition of thinking from Roman times down through the republican philosophies developed in the northern Italian republics of the late middle ages, in the course of the English Civil War, and in the development of English and American political thinking that lay behind the American revolution in the 18th Century.[4] In that long history of thinking about liberty, as recent scholarship has emphasised, freedom was conceptualised as the social status enjoyed by someone who is not a slave and, more generally, by someone who is so protected by the law and culture of his community that he does not have to depend for the enjoyment of independent choice on the grace or favour or mercy of another. This was a tradition of thinking about liberty in which the core of liberty is the negative good of not being interfered with by others. Though the republican notion of liberty was negative in that respect, it naturally emphasised that liberty is constituted by the support against interference, and the status of being manifestly so supported, which goes with citizenship in an appropriately governed society; in a society where the rule of law obtains and power is systematically checked.

3 Id at 87.

4 See above n1 at Chapter 5 for a rough account of these developments and for reference to the important historical scholarship of figures like John Pocock and Quentin Skinner. See too Pettit, P, "Negative Liberty, Liberal and Republican" (1993) 1 *Euro J Phil.*

This republican notion of negative liberty was displaced in 19th century liberal circles by a conception of negative liberty in which the main thing is to avoid interference, not to enjoy the security and status of being protected against possible interference. The 19th century liberals were all involved, one way or another, in arguing the case for lifting government restraints on trade. In the course of this debate, as we see things, they invoked the language of liberty — the language of free trade — and in doing so they came to think of liberty, more and more, as the condition denied under any form of restraint, including the restraint of the law, not as the condition opposed primarily to that of the slave. Under the older, republican tradition, to be free was to enjoy a status constituted, in main part, by the protection and recognition of the law. Under the newer way of thinking, though with some reluctance and some blurring of the issues, freedom came to be represented as a condition that is compromised by any interference from others, even the sort of interference involved in the establishment of a protective law; this is a condition that is perfectly enjoyed, not in society, but in isolation from others. Republican freedom was the freedom of the city, the franchise of being incorporated and protected as well as any others against invasion; liberal freedom came to be conceptualised as the freedom of the heath, the freedom of the state of nature that is always diminished in some measure by participation in community.

Perhaps the best way to articulate the republican ideal of liberty, the ideal of dominion, as we call it, is to say that while perfect dominion requires non-interference by others, however interference is understood, it also requires two other features. First, that the non-interference be enjoyed, not just as a matter of contingent luck, but in virtue of the protection, to the highest degree standard for anyone in the society, of the law and related institutions. And second, if this needs adding, that it be salient to everyone in the society, in particular to the person enjoying it, that the non-interference involved is indeed of this resilient or secure character. Dominion is a social status, a status available in community only, which has an objective and a subjective side. Objectively, it is a condition of resilient non-interference; subjectively, it is a condition of saliently resilient non-interference.

The notion of resilience requires some further comment. Imagine two balls, both of which roll on a straight path. Suppose that while they roll on the straight path under the same dispensation — say, idealising suitably, according to Newton's laws of motion — there is still the following difference between them. Along the path of one of the balls are posts, say posts of the kind found in pin ball machines, which serve a dual purpose: they will tend to dampen the effect of any force that would deflect the ball from its course; and if they fail in this, then they tend to return the ball within a short period to its original straight course. The difference between these balls is that whereas the unprotected ball rolls contingently on a straight path, the other ball rolls on that sort of path resiliently. Not only does it cleave to a straight course in the actual world, where no forces are exerted upon it. It also sticks to that path or tends to return to that path, under eventualities — in possible worlds — where a perturbing force is applied.

The analogy should be clear. Someone who enjoys non-interference but does not do so resiliently lives at the mercy of those who might choose to interfere. Were someone to attempt interference, or at least someone of sufficient power, then the person would be entirely helpless against them. The person who enjoys resilient non-interference, on the

other hand, is more or less protected against the predations of the potential interferer. Were someone to attempt to interfere, then the law or other protective institutions — these supports will correspond to the pin ball posts — would ideally act to block that interference, or at least would intervene to put an end to the interference; and furthermore, they would provide whatever compensation may be required — assuming some is possible — to restore the person to her original status.

It should be obvious why dominion is an attractive ideal for someone to enjoy and an appealing goal for social institutions to promote. The enjoyment of dominion means that a person can look others squarely in the eye, aware that he does not depend on their mercy or grace for living the unimpeded life. Like them, indeed equally with them, he is more or less proof or more or less secure against any ill that others wish upon him. Like them, and equally with them, this is a matter marked by common knowledge; he enjoys the socially recognised status, as well as the objectively reinforced condition, of being guarded against interference. Anticipating what is essentially the liberal conception of negative liberty, Thomas Hobbes suggested that a resident of republican Lucca, protected by the law, might enjoy no more liberty than a counterpart in despotic Constantinople; if they enjoy non-interference to the same extent, albeit one enjoys it with salient resilience and the other only by good fortune, then for Hobbes they are equally free. The attraction of the ideal of dominion is that it articulates the manifest difference in the condition of these two people. They may enjoy non-interference to the same extent, but only the Lucchese enjoys freedom in the proper, republican sense of salient and resilient non-interference.[5]

2 CRIME AS THE DENIAL OF DOMINION

Every normative criminology is bound to give a characterisation of the evil inherent in crime: that is, inherent in the perpetration of those acts that ought, by the lights of that criminology, to be criminalised. Utilitarianism will represent crime as inimical to happiness, retributivism will see it as the breach of certain constraints — say, an offence against the rights of the victim — and standard liberal approaches will picture it as straightforward interference, as the doing of harm to another. It is important for a normative criminology to be able to offer a distinctive characterisation of the evil of crime, as that characterisation will then inform discussion as to what measures ought ideally to be taken by the courts in punishment of convicted offenders.

So how is crime to be described in republican theory? What evil does it distinctively represent within the economy of republican liberty? Our reply is that the sort of activity that gets to count as crime under a republican dispensation — and this may not coincide with crime in our actual societies — will always represent a denial of dominion. More specifically, it will involve a negative challenge both to the dominion status of the victim or victims and to the dispensation of dominion as it exists in the community at large. Not every challenge to dominion will count as a crime, for if something is to be criminalised, as we argued in *Not Just Deserts*, then it must be the sort of challenge that can be

5 On the Hobbesian claim, and the response of the contemporary republican figure, James Harrington, see n1 at 59.

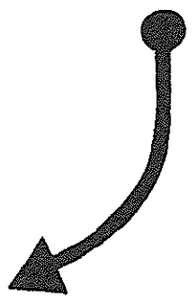
criminalised with profit: it must not be the sort of challenge whose criminalisation is likely to do more harm than good. But even if not every challenge to dominion is criminalised, still every crime will constitute such a challenge and this is what will make it distinctively objectionable to the republican.

There are two aspects to the denial of the victim's dominion involved in crime. First of all, any act of crime against an individual will involve the disregard of the dominion of that person, the flouting of his status as a citizen protected, indeed saliently protected, against interference. If someone commits a crime against a person, then his act asserts the vulnerability of the victim to his, the criminal's, will. The act of crime nullifies that status; it amounts to the claim that the status is hollow: that it is nothing in itself or that this individual is no true possessor of it.

We describe this first aspect of the evil done by a crime as the disregard of the victim's dominion. While every crime involves the disregard of dominion, many crimes will also have a second evil aspect. If they are successful — if the criminal attempt is not frustrated — then they will tend either to diminish or even perhaps to destroy the dominion of the victim. To destroy a person's dominion will be to take it away, as in kidnap or murder. To diminish someone's dominion will be to reduce the range of activities over which the dominion is exercised. For example, to take some of the person's property or to assault them physically will be to diminish their dominion: it will be to undermine certain exercises of dominion that they might have pursued.

Returning to the metaphor of the balls that roll on a straight line, we can identify analogues to the diminution and destruction of dominion. Think of the ball as composed of little particles: as consisting of a constellation of such particles moving in aggregate along the straight line. The analogue to the diminution of dominion will be where some of those particles move off the straight course and veer away indefinitely. The analogue to the destruction of dominion will be where the ball as a whole, the entire constellation, is forced off the straight path and veers indefinitely away on a deviant course. The cases are easy to picture:

Dominion diminished



Dominion destroyed

So much for the evil done to the victim by an act of crime. Every crime will also tend to do an evil to the community as a whole; it will affect, not just the dominion-status of the victim, but the overall dispensation of dominion established in the society. To enjoy dominion, as we know, is to enjoy the unimpeded life with salient resilience. Every act of crime amounts to a challenge to the dominion of people in the society as a whole, it does not affect just the victim alone. This is because, with every act of crime, it becomes less clear to everyone that they really do have non-interference in a resilient manner. The best testimony to the resilience with which I enjoy the unimpeded life is the resilience with which others enjoy it. If I see that crimes are committed against others — especially when the victims of crime do not have their complaints taken seriously or redressed — then the basis for believing that I enjoy resilient non-interference is undermined. My dominion is endangered. Dominion is a good whose enjoyment by anyone is highly sensitive to evidence of its enjoyment by others. Let anyone's dominion be disregarded, let anyone's dominion be diminished or destroyed, and the dominion of others is thereby reduced in some corresponding measure. It is sometimes said, controversially, that one cannot be a just person in an unjust society. What ought not to be controversial is that one cannot enjoy dominion, one cannot enjoy the unimpeded life with the salient resilience provided by the rule of law and associated institutions, in a society where the dominion of others is systematically disregarded, diminished or destroyed.

One qualification. The distribution-sensitivity of dominion, as we might describe it, obtains with regard to groups of individuals who each see themselves as relevantly interchangeable with others. It must be the case with any one of them that, seeing another in difficulty, in particular seeing another suffering criminal interference, he can think: it could just as well have been me. We assume that this condition of interchangeability generally obtains in modern democratic societies even if it is somewhat weakened by divisions of class and other cleavages. We assume that there is no division within those societies akin to the sort of division that might have marked off the class of citizens from the class of slaves in earlier communities, even indeed in earlier communities of a republican persuasion.

To summarise, then, every act which counts as criminal in the republican's book represents a challenge both to the individual victim or victims and to the community as a whole. The crime disregards the dominion status of the victim and may diminish or destroy his dominion. And the crime always does something to endanger the general dispensation of dominion enjoyed in the society as a whole.

3 RECTIFYING THE EVIL OF CRIME

If we think that every act of crime amounts in these ways to a denial of dominion, then what ought we to expect the courts to do in response to the convicted criminal? What is going to be required by way of response, in the dispensation of republican dominion? What is going to be required, if the system is to promote the enjoyment of republican dominion overall?

We assume that under a republican dispensation criminal justice agencies should be assigned limited roles or briefs within the system; no agency should have the global brief of doing whatever it can to promote republican dominion. We assume, in particular, that

criminal courts should have a limited sentencing brief: that in responding to convicted criminals, their job should be specified in non-global terms. We rehearsed various reasons for taking such a line — such an uncontroversial line — in *Not Just Deserts*: the main consideration is that if any agency had the discretion required for the global brief, then people would be peculiarly vulnerable to its decisions and that would impact negatively on their enjoyment of dominion.

How then are we to specify a limited sentencing brief for criminal courts? Given that crime represents a certain sort of damage to dominion, given that the damage done by crime is at least partly remediable — more on this later — and given that the task of the system as a whole is to promote dominion, one answer becomes particularly salient. This is that the sentencing job of the courts is to try to rectify or put right — to try to remedy — the damage caused by the crime. Rectification will be the natural way for a sentencing body to make its contribution to the consequentialist, republican project.

What is such rectification going to involve? In thinking about this question, it is useful to consider in turn the rectification required for an act of disregarding someone's dominion; for an act which diminishes or destroys someone's dominion; and for an act, finally, which has the effect of endangering the dispensation of dominion enjoyed by people at large. We consider these matters in this section at a very abstract level and with regard only to what ought ideally to occur. We shall then try, in the next section, to give a more concrete and realistic interpretation of the responses indicated.

If we are interested in the promotion of dominion, and we are concerned about the disregard that an offender has shown for someone's dominion, then what ought we ideally seek in order to make up for the disregard: in order to put the disregard right? Clearly, we ought to want the offender to withdraw the implicit claim that the victim did not enjoy the dominion challenged by his crime. We ought to want the offender to recognise the dominion status of the victim and to do so with credibility and contrition. The act of recognition cannot nullify the past disregard unless it is credible to the victim and to people generally: words can come too cheap. And neither can it nullify the disregard if it is not attended by contrition for the offence. But given the credible and contrite recognition of the victim's dominion by an offender — however that is assured in practice — it is hard to see what else we might seek by way of putting the disregard right. Such an act of recognition would seem to do all that is possible by way of rectifying the past disregard.

What if the act of crime not only disregards the dominion status of the victim but also diminishes or destroys his dominion? It is not going to be enough in this case, by way of intuitively putting the offence right, that the offender should express contrite and credible recognition of the victim's dominion-status. Something else is obviously needed.

Working, as we are, at an abstract level and with regard only to what is ideally possible, the extra dimension of response that is needed can be described as recompense for the damage done to the individual's dominion. We characterised diminution and the destruction of dominion with analogues from the metaphor of the balls which roll on a straight line. We can characterise what, ideally, recompense would involve by corresponding analogies. Recompense for the diminution of dominion would involve something analogous to the

deviant part of the constellation rejoining the whole on its straight path. Recompense for the destruction of dominion would involve an analogue to the constellation as a whole being brought back to the straight path. The analogies are easy to picture:

Undoing diminution

Undoing destruction

We have been considering what the courts ought to do in response to the disregard of individual dominion, and the diminution or destruction of that dominion, involved in an act of crime. We need to consider, finally, what response the courts ideally ought to make to the fact that any act of crime endangers the dispensation of dominion in a society as a whole.

This aspect of the evil of crime is primarily of subjective significance, of significance in the realm of consciousness. The fact of the crime, in particular the fact of a successful crime, will have undermined the salience with which other individuals enjoy, if they enjoy, resilient non-interference. What is to be required, then, of the convicted criminal by way of putting right this particular evil? The answer, we suggest, is that the court should seek such measures against the offender, or should seek to elicit from him such a response, as will provide general reassurance to those whose enjoyment of dominion may have been reduced by his crime. We have a third 'R' — reassurance — to add to the elements already noted. In sentencing the convicted criminal, it appears that the courts ought to seek the *recognition* by the offender of the dominion status of the victim, *recompense* by the offender for the damage he may have done, and *reassurance* to the community of a kind that may undo the negative impact of the crime on their enjoyment of dominion.

We mentioned at the beginning of this section that our discussion would be initially abstract and idealised. The notions of recognition, recompense and reassurance are abstract to the extent that they can be more concretely interpreted in terms of any of a variety of requirements. And talk of recognition, recompense and reassurance is idealised to the extent that while something of the kind may be what the courts should ideally seek, they may not be actually available in practice, at least not in proper form or full measure; it may even be that they are more properly and fully available under a response to crime that avoids the courts altogether.[6] These points will become clearer in the discussion that follows in the next section.

6 If so, then republican theory, being more than a theory of sentencing, will support that sort of response.

But before going to a more detailed and realistic level in interpreting what the courts should do in response to convicted criminals, there is an important matter that we should mark. Dominion is unusual among goods in being such that it is possible to conceive of rectifying acts that deny it to the individual: of remedying the evil that an offence represents.[7] The damage done to the victim's dominion is undone if the offender can deliver the appropriate measure of recognition and recompense. Dominion consists in the saliently resilient enjoyment of the unimpeded life and, however unwelcome it may be, an act of interference by another does not actually deprive someone of dominion if the interferer is required to give due recognition and recompense to the victim. On the contrary, the dominion of the victim is made manifest in the imposition of that requirement: it is made clear that the victim does indeed enjoy the protected status of the full citizen. The damage done to dominion in an act of crime is not the sort of thing, then, that has to be regarded as just a sunk cost when the courts come to deal with the offender. Dominion is such that it is natural, indeed essential, for the courts to consider in the first place how to undo the damage and make the victim's dominion manifest.

The point emerging here is of the utmost importance. Although the courts are designed to promote dominion, as they ought to be under a republican regime, their first concern in sentencing is backward-looking in character: it is a concern for the rectification of the past crime, ideally by way of recognition and recompense. This point is of importance because, to return to a phrase employed earlier, it shows why a guilty verdict does not provide the republican court with a licence to optimise, where optimisation is taken to be entirely a forward-looking matter. If a guilty verdict provides such a licence, it does so only in a sense in which the first element in optimisation must be the rectification, so far as possible, of the damage to the victim's dominion.

What holds for the damage to the individual victim holds also for the damage done by crime, under the republican picture, to the dispensation of dominion at large. Like recognition and recompense, the notion of reassurance also has a backward-looking dimension. In seeking such measures against the offender, or such a response from him, as will reassure the community, the courts are again gauging what should be done by reference to what has been done in the past. What is sought is the restoration of the status quo in assurance: the restoration of the assurance enjoyed in the community prior to the offence. The notion of rectification, the notion of putting right a past wrong, remains firmly in place, even though the overall rationale of sentencing is to promote dominion in the society.

4 RECTIFICATION IN PRACTICE

As we look at rectification in practice, it will be useful, first, to put aside the assumption that perfect rectification is always possible: that is, to be more realistic; and second, to

An example of such a response may be the family group conference that is used in New Zealand for certain sorts of cases. See Braithwaite, J and Mugford, S, "Conditions of Successful Reintegration Ceremonies" (1992), mimeograph, Australian National University.

7 Our notion of rectification is closely related to the idea of redress introduced in de Haan, W, *The Politics of Redress* (1990) at 156 ff. See also del Vecchio, G, *Justice: An Historical and Philosophical Essay* (1952) at 210–11 for congenial remarks.

move from the abstract characterisation of rectification, perfect or imperfect, to a more concrete description of what it is likely to involve: that is, to be more detailed. We shall take these steps in turn, looking at each stage into the requirements of recognition, recompense and reassurance.

Going More Realistic

Abstractly, the recognition of the dominion of the victim by the offender would seem to require a mix of symbolic and substantial measures. Symbolically, it might involve an apology on the part of the offender for the past offence, a commitment not to offend again, and some sort of reconciliation with the victim. Substantially, it ought to involve whatever material measures are necessary to give credibility to those symbolic acts, providing an assurance of the sincerity with which they are performed. What exact mix of the symbolic and the substantial ought to be sought in practice? That will vary with different sorts of offences, depending on the relationship between offender and victim, and depending of course on the kind of offence perpetrated. The victim may not wish for reconciliation or apology; he may shy away from any exposure to the offender. The victim may be an organisation that is represented by its officers; it may even be the government or the community, as in tax fraud. Or, of course, the victim may be dead, as in a case of murder, and may have to be represented by others. Again, the offender may be a hardened character in whom it is difficult to render any act of apology or reconciliation, or any commitment not to offend again, credible. With variations in these matters, there will obviously be variations in what may be thought to be required by way of securing recognition, or something close to recognition, for the victim.

Similar points apply as we begin to think more realistically, if still abstractly, about what recompense should involve. If possible, recompense would involve *restitution* to the victim of whatever it was he lost in the original act of offence. But of course restitution will not always be possible; it is likely to be possible only with crimes against property. In such a case *compensation* should be provided, if something in the way of compensation is itself possible. Compensation would involve the offender providing something to the victim to make up for the loss suffered: something different in kind, unlike the case of restitution, but considered to be at least roughly commensurable in value. But it may be that neither restitution nor compensation is possible, as in the case of murder. Here recompense would seem to require something of the kind that is traditionally described as *reparation*. Compensation may be required for those close to, and dependent on, the victim of the offence but we would naturally look for some form of reparation to make up for the damage, the fatal damage, to the victim himself.

Finally, reassurance. Perfect reassurance would be available if the offender were removed from the community: removal from the community may be final, as in capital punishment, or temporary, as in imprisonment. But capital punishment is unlikely to appeal to republicans, because its availability would impact on the dominion of anyone who reckons — and which of us may not — that he may himself fall foul of the courts; it is liable to offend against the dispensation of dominion in the manner of the unlimited penalties discussed and rejected later in this section. And, in any case, both capital punishment and imprisonment, by the evidence of criminology, are dubious means of securing the sort of reassurance sought. Imprisonment has been the dominant means of reassurance that western communities have pursued since the eighteenth century. But because prisons embitter

offenders and introduce them to criminal values and criminal skills, they provide only a false assurance. Increasingly the falsity of the assurance given by prisons is becoming transparent to ordinary people, as the falsity of the assurance provided by capital punishment became transparent during an earlier period of European history.

What to say, then, about reassurance? We believe that the criminal justice system should take all reported crimes seriously and refrain from treating a crime lightly simply because it is a first offence or because there are so many others like it. But we think that it can do this, without responding very harshly to every offence. It will be enough for the system to be minimalist in its responses, minimalist in particular in the sentences passed by the courts, provided that the capacity is there to escalate responses progressively — ultimately to imprisonment — as an offender displays more and more intransigence about offending against others. It is the capacity to escalate responses in this way, rather than the level of response implemented in any given case, that is crucial to the promotion of community reassurance. Or so at least we believe; the claim cannot be defended in the present context.[8]

Going More Detailed

So much for the more realistic but still very abstract interpretation of recognition, recompense and reassurance. The pressing question for normative criminologists is how to interpret such abstract requirements in more detailed ways. Here we can only offer some general remarks in order to indicate the direction in which specific republican proposals are likely to go.

First, some remarks about the statutory constraints which republicans are likely to want to place on the sentencing practices of the courts. We argued in *Not Just Deserts* for two general sorts of constraint. One was a constraint which would outlaw capital or corporal punishment and put in place a preference for fines and community service over imprisonment. We argued for this sort of constraint on the grounds that such punishments would interfere less with the dominion of the offenders, while promising the best that we can hope to get by way of specific and general deterrence. Second, and very importantly, we argued that the courts ought to be constrained by the statutory imposition of upper limits on the sentences that may be handed down. We argued for this constraint on the grounds that if there were no upper limits, then that would have a very negative effect on the dominion of citizens at large. It would mean that citizens at large would have to recognise that in the event of coming before a court that found them guilty of some crime, perhaps mistakenly found them so guilty, they would then be at the mercy of the courts, in particular at the mercy of individual judges and, later, prison or other authorities. This would involve a substantial breach of people's dominion generally. It would mean that there was one serious sort of eventuality under which their status would be little better than that of the slave: they would be reduced to a condition of utter vulnerability.

8 See Ayres, I and Braithwaite, J, *Responsive Regulation: Transcending the Deregulation Debate* (1992). Needless to say, sanctions are only a small part of what makes for reassurance in many cases. With domestic violence, for example, shelters may be more important than imprisonment in promoting the relevant form of reassurance. See Sherman, L W, *Policing Domestic Violence* (1992).

Von Hirsch and Ashworth counter this last argument with the following remark: "Eliminating such limits or making them easily permeable when dealing with dangerous offenders — could arguably enhance potential victims' sense of security against predatory conduct".[9] This response is misconceived. It suggests that potential victims are incapable of conceiving of themselves as potential defendants; it supposes there is a divide between victims and offenders such that measures taken against offenders are not likely to impact in any way on the status of victims. But this is a mistake. Every one in society is a potential victim and equally everyone in society is, if not a potential offender, at least someone who may be mistakenly convicted as an offender; this danger is particularly salient for the members of some minority groups. The fact that the courts could impose a penalty of any degree of severity on a convicted offender — the fact that they could imprison him indefinitely, force him to live in servitude indefinitely to his victim, compel him to pay a substantial proportion of his income to the victim for the rest of his life — would undermine the dominion enjoyed by everyone. It would put in place the sort of vulnerability which it is the business of a republic to try to eliminate.

We have mentioned some general constraints that republicans would want to impose on the courts when it comes to what sorts of concrete sentences the courts should impose on convicted criminals. Any such constraints will leave the courts with a great deal of discretion, albeit a discretion subject to appeal and review, under a republican arrangement: the point is argued at length in *Not Just Deserts*. So how ought the courts to exercise that discretion? What particular sorts of sentences ought they to go for?

The exercise of discretion requires in every case, and in particular in the case of sentencing, a great deal of sensitivity to the particular offence in hand and general information bearing on how different initiatives are likely to work out. We think that at any time the courts ought to be directed by some general principles: ideally, by some general principles that command a high degree of assent in the community at large. But how, in general, do we think that the courts ought to behave?

Consider the issue of recognition, first of all. We think that the courts ought to look for possibilities of mediation whereby an offender might be reconciled with his victim and brought to make a commitment not to re-offend. We recognise, however, that such possibilities may not often exist. We would want the courts to explore what might be sought by way of recognition of the victim's dominion on the part of the offender in other sorts of cases. The offender ought in every case to be given the chance to understand the nature and seriousness of his offence and the opportunity to express regret and affirm a commitment not to re-offend. Failing that, the courts should seek to identify measures which, pursued against the offender, are at least likely to bring him to understand the gravity of what he has done: we are thinking here of the possibility of exposure to the results of similar offences committed by others.

Recompense will involve restitution or compensation or reparation, as we have already noted. In determining the precise form that this ought to take, we would expect the courts to take account of the circumstances of the offender. If restitution is possible, but not

9 Above n2 at 88.

within the means of the offender, then it may be that extra help should be provided from a restitution fund, with the offender contributing only a part. Compensation and reparation will often be so imperfect that what matters is not the cash or service or whatever that is provided by the offender but the cost to the offender of providing it. A poor person may be able to make reparation, offering credible token of repentance, by means of a payment that it would be derisory to impose on a rich individual or corporation. Thus we would expect the courts to be directed in such cases to take account of the wealth and status of the offender in determining what it is right to require of him by way of compensation or reparation.

Finally, reassurance. The courts should pay attention to the contrition and credibility of the offender, so far as there is reliable evidence on this matter; it would be relevant, for example, that this is a first offence and not one of a series of offences. Equally the courts should take account of how far the offender is capable of re-offending again and of how much suffering his offence may have already have caused him and his own; these are matters, after all, that impact directly on how much reassurance the community may require with the offender in question. What is required by way of reassurance about not re-offending, of course, is likely to be a function of how common that offence has become in the community. And so in certain circumstances we might expect the courts to be directed also to take account of the extent of that offence in the community at large.

These remarks are patchy and unstructured. They are meant simply to illustrate the direction in which republican theory is likely to go. What they should illustrate is that while republicans will always seek rectification of the original offence in the sentence imposed by the courts, what rectification requires — what is required by way of recognition, recompense and reassurance — will vary with the character and circumstances of the offender. Every crime will require to be rectified, and that means that the courts must attend to the gravity of the offence and the culpability of the offender. But rectification of the same type of offence may require one set of measures in this instance and another set of measures in that. Putting the matter otherwise, two sentences that represent formally equivalent attempts at rectification may differ materially — and quite dramatically — from one another.

5 RECTIFICATION VERSUS RETRIBUTION

The discussion so far ought to have indicated that it would be quite inappropriate to charge republican theory with supporting the licence-to-optimise policy of sentencing that may rightly be associated with more traditional consequentialist approaches. In bringing that sort of charge against republican theory, von Hirsch and Ashworth are simply not paying attention to the difference between republicanism about criminal justice and other consequentialist theories. But in conclusion to this discussion, we would like to spend a little time considering how republican theory compares with the retributivism — the just deserts theory — supported by thinkers like von Hirsch and Ashworth.

One feature in common between republican theory and retributivism is that they would each have the courts look backwards to the offence committed in determining the sentence to be imposed; they would each reject the licence-to-optimise approach, where optimising is thought of as a forward-looking activity. But this common point leaves room for three

major differences between the approaches and these differences all argue in favour of republican theory, at least by our lights.

The first difference is that whereas retributivist theory cannot go very deep in motivating the sort of response which it would have the courts display in sentencing, republican theory can provide a general and compelling motivation for the response it would seek. The retributivist will say that in passing sentence the courts ought to repay the offender for what he has done, express blame for what he has done, restore the balance that he has disturbed, or something of the kind. Why should the courts seek to do some such thing? The only answer available is that that is what it is right to seek: no crime should go unpunished, and that is an end of the matter. The republican theorist can say much more about why he would want the courts to sentence convicted offenders along the lines that he recommends. He can argue that this is the right thing for the courts to do because it is the sort of contribution required of the courts if they are to serve, as the criminal justice system in general should serve, in the promotion of dominion. There is no quick end of the matter here: the promotion of dominion serves as an independent yardstick for the appropriateness of the court's response.

A second difference between the two approaches is that whereas retributivists look in general for some way of repaying the offence, seeking a penalty that is proportional to it, republican theorists look to what is required by way of rectifying the offence. The point is not to repay in proportional coin, however the need for repayment is formulated, but to put right or to rectify. Thus, whereas the retributivist concentrates on the offence in abstraction, the republican will look to the harm done to victims and communities and will consider how best that harm may be put right in the sentence imposed on the offender. The retributivist may say in his defence that he looks to the law of tort for the rectification of the harm done to the victim and that, more generally, he looks outside the criminal justice system for how the victim may be compensated. The republican will see this defence as a mere statement of conservatism, for he will be happy to see compensation and other tort considerations involved equally in the criminal law: he will see it only as right to take compensation into account when considering matters of punishment. He will argue that a justice system which leaves it to victims to use tort law to get criminal compensation will put compensation beyond the reach of all but the very rich. If compensation comes apart from punishment in his book, that will only be because compensation will often be the appropriate response for the state to make to a victim of crime in the event of the crime not being solved.

Finally, and perhaps most importantly, there is a great difference between the predisposition of the retributivist and the republican when it comes to the question of what kind of penalty and what degree of penalty ought to be imposed. Retributivists generally look for hard treatment as the appropriate kind of response — this is often justified on grounds of deterrence — and seek proportionality between offence and punishment in how this hard treatment is delivered. "Punishment consists in (1) the imposition of hard treatment, in a manner that (2) conveys disapproval of the actor for his conduct".[10]

10 Id at 95.

This means, in effect, that retributivists tend to impose upper and lower limits on the sentences which the courts may hand down. The courts are required to ignore many differences in the character and circumstances of offenders and their families; they are expected to scale the sentences to the gravity of the offence committed and the culpability of the offender, ignoring other factors. Some room may be left for taking other considerations into account but this is generally very restricted.[11]

Republican theorists have a very different approach to the matter of what kind and level of response is suitable for a given offence. Republicans will say that so far as possible every offence ought to be rectified. But, when it comes to the matter of what rectification requires — and many principles, parsimony to the fore, will govern the interpretation of what it requires — they acknowledge that that can differ widely from case to case; the point was made in the previous section. Republican theorists will want to impose upper limits, as mentioned, on the rectification which the courts may pursue. But they will not impose any lower limits, recognising as they must, that in many cases what is sufficient for rectification may fall well below what is required on some retributivist metric of punishment.

We mentioned that we thought these three differences between retributivism and republican theory all argue in favour of the republican approach. But that claim may be challenged in regard to the third difference. For it may be said, as indeed it has been said by Von Hirsch and Ashworth, that republican theory allows a sort of unfairness in the treatment of convicted offenders which retributivism would outlaw. What to say, finally, in response?

What we have to say is that at the formal level, at the level where we consider rectification as such, there is no unfairness in the treatment of convicted offenders. All are treated in the manner required for the rectification of what they have done. If there are differences of a material kind between formally equivalent sentences — if what is required for rectification here is harsher than what is required there — that is hardly something of which an offender can complain, particularly if he is guaranteed against being punished beyond a certain level. A complaint about the matter would be akin to someone complaining that because taxes are proportional — proportional, not even progressive — he, a rich man, is treated unfairly in comparison to someone who is poor: he pays the same percentage of his income but a higher absolute amount.

If the criticism of unfairness continues to be pressed, there is another consideration that we can also mention: one discussed at length in *Not Just Deserts* but ignored by Von Hirsch and Ashworth, when they level the charge against us. This is that we are lucky in any actual society if we can apprehend and punish the offenders in ten per cent of crimes. Thus a concern with the material differences between how we punish convicted offenders is not as well motivated as it might be if we were able to identify and indict most offenders. For if we vary the sentences so that not all get the upper limit of what is permitted by way of material response to crime, that may serve to reduce the sort of unfairness involved in only ten per cent of offenders getting any punishment at all.

11 Id at 96.