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REPUBLICANISM AND THE FOUNDATIONS OF CRIMINAL LAW

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ESTABLISHING the philosophical foundations of criminal law is less a matter of excavation than of reconstruction. Neither criminal law nor law in general is the product of an architect's design, which careful digging in the right places will reveal, but something that has emerged, evolved, and developed over the centuries. Codifiers and constitution drafters have played parts in this development, to be sure, but their efforts have had less to do with excavation than with the reconstruction of the criminal law. That is, their aim typically has been to clarify the form and improve the substance of the law as it has come down to them in order to approximate more closely the law as they think it ought to be. To carry out these tasks, however, the codifiers and drafters must have some sense of what law can and ought to be—some theory, however implicit and inarticulate it may be, of the law. To articulate such a theory is to provide a rational reconstruction of the law.

Rational reconstruction thus aims to discover the reason or logic inherent in the law despite its irregular development over time and the various courses it takes

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from one place to another. In the case of criminal law, rational reconstruction must account for the leading features of criminal law and point the way to its reform or further development. Such a reconstruction, in other words, should lead to a theory that will have, in Antony Duff's terms, both an analytical and a normative dimension. The theory must not only account, analytically, for the typical operations and aspects of criminal law but also take a position, in its normative dimension, on 'what it [criminal law] ought to be (and whether it ought to be at all)'.[1]

My purpose in this chapter is to make a case for the republican tradition in political philosophy as a theory that can provide this rational reconstruction of criminal law. I claim no originality in this regard, as others have found the underpinnings of criminal law and law more generally in republicanism. John Braithwaite and Philip Pettit advance 'a republican theory of criminal justice' in their *Not Just Deserts*, for instance, and Antony Duff suggests that republicanism provides a basis for criminal law in his recent writings.[2] I shall argue, like Duff, not that republicanism is superior to every possible competing theory, but that it offers a reconstruction of criminal law that is both rational and plausible. In particular, I shall try to show that republicanism can help us to make sense of three important features of criminal law: first, the conviction that crime is a public wrong; second, the general pattern of development of criminal law historically; and third, the public nature of criminal law as a cooperative enterprise. To begin, however, I must explain what I take republicanism to be and why it is a proper place to look for a rational reconstruction of criminal law.

1 Republicanism, Briefly Considered

Whether one thinks the republican tradition a likely place to look for a rational reconstruction of criminal law will depend in large part on how one conceives of the relationship between political and legal philosophy. A quarter of a century ago Jeffrie Murphy complained that philosophers of law often forget 'that the philosophy of law is a part of social and political philosophy and not merely of moral philosophy... [I]n addition to considering the intrinsic moral merits and demerits of a legal practice,

[1] RA Duff, 'Theories of Criminal Law', *Stanford Encyclopedia of Philosophy* (<http://plato.stanford.edu>; posted 14 October 2002), §1. See also M Moore, *Placing Blame: A Theory of Criminal Law* (Oxford: Clarendon Press, 1997) on why 'descriptive theories of an area of law are also evaluative theories', 15–18, at 18.

[2] J Braithwaite and P Pettit, *Not Just Deserts: A Republican Theory of Criminal Justice* (Oxford: Clarendon Press, 1990); RA Duff, 'Toward a Theory of Criminal Law?' (2010) 84 *Proceedings of the Aristotelian Society*, Supp Vol, 1–17, and *Answering for Crime: Responsibility and Liability in the Criminal Law* (Oxford: Hart Publishing, 2007), 49–53.

such as punishment, philosophers of law must also see such practices in terms of the general problems of social and political philosophy—particularly the problems of the nature and justification of the state and its coercive power'.[3] Murphy is right, in my view, and emphatically so where criminal law is concerned. The determination of what counts as a crime, the prevention of crimes, the proper treatment of those charged with crimes, the conviction and subsequent treatment of criminals—all these are matters typically entrusted to political authorities. One might argue that no one *should* entrust these powers to political authorities, or that no one is truly justified in claiming political authority, but to advance such arguments is in itself to engage in political philosophy.

The republican tradition's place in political philosophy should not disqualify it, then, from consideration as a theory of criminal law. But what is republicanism? As I see it, the fundamental elements of republicanism, today as in classical Greece and Rome, are *publicity* and *self-government*.[4] That is, republicans believe that government is a public concern—the *res publica*—rather than the personal business or property of some ruler or ruling class; and public concerns are the province of self-governing citizens who will seek to enjoy liberty under and through the law. Understood in this way, republicanism is not sharply different from some other traditions of political thought, including the liberalism to which Murphy and many other philosophers of law claim adherence. John Locke, John Stuart Mill, and other exemplars of liberalism maintain that government is a public concern and citizens should enjoy liberty under law, just as republicans do. There is, however, a difference of emphasis, best captured in the republican claim that liberty is not so much a matter of freedom *from* the law as of freedom *by* or *through* the law.[5] To put the point another way—and to do so while allowing for the possibility of a liberal republicanism or republican liberalism—we may say that liberals tend to worry about protecting the privacy of individuals from unwarranted intrusion,

[3] J Murphy, 'Retributivism, Moral Education, and the Liberal State' (1985) 4 *Criminal Justice Ethics*, 3–11, at 4. For a general consideration of the connection between the philosophy of law and political philosophy by an author who deplores 'the artificial boundary' between the two, see J Waldron, 'Legal and Political Philosophy', in J Coleman and S Shapiro (eds), *The Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford: Oxford University Press, 2002), 352–81, at 381. For a contrary view, at least with regard to the philosophy of punishment, see M Davis, 'The Relative Independence of Punishment Theory', in Davis, *To Make the Punishment Fit the Crime: Essays in the Theory of Criminal Justice* (Boulder, CO: Westview Press, 1992), 18–41.

[4] The remainder of this section draws on my 'Republicanism and Crime', in S Besson and JL Martí, *Legal Republicanism: National and International Perspectives* (Oxford: Oxford University Press, 2009), 148–50. For a somewhat fuller sketch, see my 'Republicanism', in G Klosko (ed), *The Oxford Handbook of the History of Political Philosophy* (Oxford: Oxford University Press, 2010).

[5] Philip Pettit is fond of quoting in this regard the 17th-century republican James Harrington's disparagement of Thomas Hobbes's conception of liberty, which Harrington took to be an untenable 'liberty or immunity *from* the laws'; see, eg, J Braithwaite and P Pettit, *Not Just Deserts*, 59 (emphasis in original).

while republicans worry more about the need to promote active and responsible citizenship.

That republicans are committed to the importance of publicity and self-government has been evident since at least the first century BCE, when Cicero set down his definition of the republic. The 'commonwealth [res publica]', he wrote, 'is the concern of a people, but a people is not any group of men assembled in any way, but an assemblage of some size associated with one another through agreement on law and community of interest'.[6] According to another classical definition, a republic is the empire of laws, not of men. Both of these definitions focus on the rule of law because law limits the rulers' ability to impose their will or whims on their subjects; when everyone is subject to the law, no one is subject to the arbitrary, unchecked power of another. As an empire of laws, the republic protects the public interest and promotes the liberty of its citizens, who will be free to govern themselves because they are free from the grip of those who would dominate them.

In terms recently made familiar by Philip Pettit, the rule of law helps to secure people from both *imperium* and *dominium*.[7] Security from *imperium*—that is, arbitrary power in the hands of those who control the state or government—has been the principal concern of republican theorists through the centuries, but Pettit is surely right to point out the need for security also from *dominium*—that is, arbitrary power in the hands of private individuals. This double security also connects with the republican emphasis on the common interest or public good. Exactly what constitutes the common interest or public good is a point on which republicans will often disagree among themselves. They agree, however, that a political society is a shared or common enterprise that must proceed according to rules, as Cicero's definition indicates. One aspect of the public good, then, will be the need to protect and preserve these rules and the bonds that hold the members of this enterprise together. Another aspect is the need to respect citizens not only as public persons but also as individuals with personal interests. As Mortimer Sellers says: 'Republicanism is the theory that law and government exist to serve the public good, *including the public interest in protecting private interests against each other*, but also against the state.'[8] Protecting private interests against one another is thus a way of securing liberty from *dominium*. It is also the point at which crime becomes relevant to republicanism.

To be sure, crime is not the only way in which one person may exercise arbitrary power over another. There is *imperium*, of course, and one virtue of the criminal law is that its provisions for procedural justice help to protect citizens from various kinds of unwarranted coercion by those holding political office. There are also

[6] Marcus Tullius Cicero, *On the Commonwealth and On the Laws* J Zetzel (ed) (Cambridge: Cambridge University Press, 1999), 18.

[7] P Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford: Oxford University Press, 1997), esp 112 and 130.

[8] MNS Sellers, *Republican Legal Theory: The History, Constitution and Purposes of Law in a Free State* (New York: Palgrave Macmillan, 2003), 72 (emphasis added).

forms of *dominium* that may be quite lawful—the husband who browbeats his wife, for example, or the landowner who bends her tenants to her will. Other forms of *dominium*, such as defamation of character, may be matters for tort rather than criminal law.[9] Yet crime is surely one of the most common and persistent ways in which some people wield arbitrary power over others. Like the unchecked ruler, the criminal interferes with our ability to govern our own lives. By stealing my property or robbing me of the use of an eye or arm, the criminal also leaves me less free to go about my life—less free not only because of the loss of the property, eye, or arm, but also because of the fear and insecurity I now feel.[10] Nor do I need to be the direct victim for crime to make me less free by being less secure or feeling more vulnerable. The fact that others in my vicinity have become victims could be enough to raise my insurance rates, send me to the locksmith or private protection agency, and change the routes I take as I go about my business.

Crime, in short, is a threat to a republic insofar as it threatens the rule of law and interferes with the ability to be self-governing. To say this, of course, is to presume that murder, rape, robbery, and the other offences we commonly call crimes are not really torts—private wrongs inflicted by some individuals upon other individuals, to be settled by lawsuit in civil court. But that is exactly what republicans do presume. As they see it, the standard criminal offences are not matters to be settled by private agreement or arbitration but wrongs deserving of public condemnation and punishment. Crime certainly harms and threatens the persons and property of private individuals, but it also tears at the sentiments that make a sense of common life, under law, possible. Crime is a fitting subject for republican concern, then, because dealing with crime is an important part of the public's business. For that reason, the public should play a part in passing laws that define what crimes are, that provide for agencies to protect its members from crime, and that establish just procedures for treating those accused of committing crimes, including the proper treatment of those found guilty.

Crime is also a very real threat from the republican point of view. Republicans share a persistent worry about the likelihood of corruption, and corruption breeds, among other things, crime. Ambition, avarice, the desire for luxury and ease—these and other temptations to criminal and other kinds of vicious conduct may be held in check or redirected, but republicans see no reason to believe they can be eradicated. Republicans celebrate civic virtue, but they do so largely because they know that such virtue is not to be taken for granted. Putting the public good ahead of one's private interests is a virtue that republicans believe most people can achieve, but they

[9] I venture a republican explanation for classifying defamation as a tort rather than a crime in 'Republicanism and Crime', in S Besson and JL Martí, *Legal Republicanism: National and International Perspectives* (Oxford: Oxford University Press, 2009), 162–5.

[10] On this point, see GP Fletcher, 'Domination in Wrongdoing' (1996) 76 *Boston University Law Review* 347–60, at 347. But cf FM Lawrence, 'Comment: The Limits of Domination' (1996) 76 *Boston University Law Review* 361–70.

also fear that most people can as easily put their private interests ahead of the public good—and ahead of the personal interests of others. For republicans, therefore, finding ways to deal with crime is definitely part of the public's business. But can republicanism help with the problem of defining crime?

2 Crime as the Public's Business

Jaded lawyers and legal theorists sometimes say that the definition of 'crime' is simply a matter of legislative action—that is, what makes something criminal is that the relevant legislature declares it to be so. There is, of course, more than a grain of truth to this way of defining 'crime', but there are also reasons to find it unsatisfactory. The problem, as one influential commentator complains, is that this definition 'is simple, circular, and largely useless'.[11] In particular, it is of no use to the legislators who must decide whether to declare certain acts or activities criminal, for they will find no guidance in the statement that a crime is whatever they collectively say it is. What legislators want to know is *how* they should vote, not what the outcome will be when all of their votes are counted. Like the people they represent, in other words, legislators need to have some sense of independent standards for regarding some acts as criminal and others as not. Who would conclude, for example, that murder is not really a crime, but brushing one's teeth more than twice a week is, simply because a legislature passes laws to make the former legal and the latter criminal? The standards will seldom be as clear and uncontroversial as they are in these far-fetched examples, but the conviction that such standards are to be found—and that there is something more to the definition and determination of crime than legislative *fiat*—is widespread and deeply rooted. Why else would apparently intelligent and reasonable people think it worthwhile to draft and revise such documents as the Model Penal Code? Presumably they believe they have found independent standards, or criteria embedded in the law as it has come down to them, that make some acts and activities fit candidates for the designation 'crime' and others not.

Unsatisfactory as it is, however, there remains an important truth in this 'simple, circular, and largely useless' definition of crime, for it points to the connection between public action and the criminal law. When a legislature declares certain acts

[11] J Dressler, *Understanding Criminal Law* (4th edn; Newark, NJ: LexisNexis, 2006), 1. But cf HL Packer, *The Limits of the Criminal Sanction* (Stanford, CA: Stanford University Press, 1968), 18–19: 'the definition of crime is inescapably tautological. Crime is whatever is formally and authoritatively described as criminal... [C]rime is conduct capable of incurring consequences formally termed criminal.'

or activities to be criminal, it takes a public stance by means of political action; or when a judge or jury declares an act or activity to be an instance of a common-law crime, the judge or jury issues a public pronouncement. We may not always approve of these legislative or judicial stances on these matters—we may even protest, paradoxically, that these decisions make a crime of something that in its essence is not, and surely *ought not* to be, a crime—but the point is that the decisions have, *ceteris paribus*, the force of law. Crimes are not only wrongs but *public wrongs*, and 'public' in the twofold sense that they both require the attention of the law and are different from the *private wrongs*, such as torts and breaches of contract, to which the law also must attend. That is why it is the proper business of legislatures and courts to decide what is to be deemed a public wrong—a crime.

Etymology is not especially illuminating in the case of 'crime', but it does tell us something about the nature of crime as public wrong. According to the *Oxford English Dictionary*, 'crime' derives, by way of Old French, from the Latin *crimen*, meaning 'judgement, accusation, offence'; or, as the *Oxford Latin Dictionary* defines *crimen*, 'An indictment, charge, accusation'. In *The Data of Jurisprudence*, William Galbraith Miller also suggests a connection between *crimen* and the Greek *κρίνω*, which Liddell and Scott's *Greek-English Lexicon* translates as 'decision, judgement'; 'decree, resolution'; 'legal decision'; 'matter for judgment, question'; 'law-suit'; 'judging, judgment'.[12] What is most striking about these definitions, from the modern perspective, is that the forebears of the English 'crime' apparently referred to an accusation brought or a judgment rendered against someone, and not, as we would expect, to the wrongful act that the accused or judged supposedly committed. How this shift occurred is not clear, but Miller's conclusion seems apt: 'The mere trial, the accusation, the very suspicion is a stigma—*crimen*, a charge, becomes *crimen*, a crime.'[13] Such a conclusion is consistent, at least, with the *Oxford Latin Dictionary*'s fourth definition of *crimen* as, with references to Ovid and Seneca, a 'misdeed, crime'.

Less striking, but more important for present purposes, is the way that the Latin and Greek ancestors of 'crime' invoke public activity. To bring an indictment or an accusation against someone is to call him to account; to seek a judgment against that person, or to pass judgment on him, presupposes that at least one other person is in the position of judging. Something official or public takes place, in short. The office in question may be only loosely defined, and in the ancient world it would have been concerned as much with what we now think of as religion, morality, and custom as with politics or law. Nevertheless, calling to account and passing judgment were, and are, actions that involve more than the putative offender and victim, as the aggrieved party must appeal to some standard—and typically to some third party in at least a quasi-official position—for a judgment against the accused. In this sense,

[12] WG Miller, *The Data of Jurisprudence* (Littleton, CO, 1980 [1903]), 193. Henry Liddell and Robert Scott, *A Greek-English Lexicon*, vol I (rev edn; Oxford: Clarendon Press, 1948).

[13] Ibid 193–4.

crimen was, as crime continues to be, concerned with wrongs that were not simply private or personal matters. What etymology suggests, in sum, is that the concept of crime emerged not from an attempt to identify wrong or wrongful conduct as such but from attempts to provide a public, formal response to certain kinds of activities already identified as wrong. Extending Miller's comment, it seems that '*crimen*, a charge, becomes *crimen*, a crime', because the public charges brought against certain wrongdoers led eventually to the conclusion that their activities were wrongs for which one would face a public charge and judgment.

But what have these considerations to do with republicanism? The answer is to be found not in etymology but in the rational reconstruction of which I wrote earlier. 'Crime' and 'republic' both relate to matters of *public* concern—implicitly in the former case, as we have seen, but explicitly in the case of *res publica*. The classical republican thinkers—including at least one, Cicero, who had considerable experience of criminal law—thought that the public business encompassed far more than accusing and passing judgment, but they certainly included these actions among the proper concerns of republican citizens and officials. More generally, they conceived of the republic as a common enterprise, under law, in which citizens were to enjoy freedom through self-government. If the republic truly was to be an empire of laws rather than of men, as we have seen, then it was necessary to identify those wrongs that threaten the public enterprise and to pass judgment on those who commit them. Defining crime, then, is as important to the public's business as the apprehension, conviction, and punishment of criminals.

This conclusion may seem to be neither surprising nor compelling. Apart from the anarchists, one might ask, who does not take crime to be an important part of the public's business? Even monarchies and other non-republican regimes have systems of criminal law in which acts and activities called 'crimes' are defined, condemned, and punished as public wrongs. Why, then, should we look to republicanism for a rational reconstruction of criminal law?

The republican response to this challenge has two aspects. The first consists in pointing out that monarchies, juntas, and authoritarian regimes of various sorts can only have systems of criminal law insofar as they rely, albeit implicitly and perhaps parasitically, on the republican ideal of the empire of laws. If King Rex, to borrow Lon Fuller's famous example, is to rule through law rather than whim or sheer will, there are certain things he must and must not do—make his pronouncements public, for example, and not command his subjects to do what they cannot possibly do.[14] In other words, laws must at least carry the appearance of satisfying Thomas Aquinas' definition of law as an 'order of reason for the common good by one who has the care of the community, and promulgated'.[15] The more difficult it becomes to see even the

[14] L Fuller, *The Morality of Law* (rev edn; New Haven, CT: Yale University Press, 1969), 33–8.

[15] T Aquinas, *On Law, Morality, and Politics*, trans RJ Regan (2nd edn; Indianapolis, IN: Hackett, 2002), 15 (*Summa Theologica*, I-II, Q. 90, Art 4).

appearance of reason, authority, promulgation, or a concern for the common good in the ruler or rulers' pronouncements, the less likely it is that those subject to these pronouncements will believe themselves to be subject to the rule of law.[16]

The second aspect of the republican response is simply to proceed to develop a republican reconstruction of criminal law in the expectation that its value thus will become clear. For example, the republican might try to show that a theory of criminal law grounded in the desire to be free from *imperium* and *dominium* is not merely plausible but powerfully illuminating, both analytically and normatively. That, indeed, is what Pettit has tried to do.[17] I shall proceed in a different way here, however, by looking more directly to the reconstruction of the *foundations* of criminal law. In doing so, I shall make use of the familiar idea of the state of nature.

3 The State of Nature, the 'Self-Help' Model, and Law's Potential

Republican thinkers typically have not resorted to state-of-nature or social-contract arguments. In general they have begun, like Aristotle, by conceiving of men and (more recently) women as political or social beings, which leaves little reason to investigate a supposedly natural condition in which law and government do not exist. Jean-Jacques Rousseau is an exception to this rule, however, and I believe that we can learn something from his example.[18] But I also take it that appeals to the state of nature and the social contract can illuminate important aspects of political and legal philosophy even when they are not presented as historically accurate accounts of how political and legal authority came to be—or adequate justifications, for that matter, for claims to such authority.[19]

Rousseau conceives of the state of nature in his *Discourse on the Origin of Inequality* (1755) less in the 'what if' fashion of Thomas Hobbes than in a 'how it must

[16] I return to this point in section 4 below, with reference to HLA Hart's 'internal aspect' of law.

[17] J Braithwaite and P Pettit, *Not Just Deserts: A Republican Theory of Criminal Justice* (Oxford: Clarendon Press, 1990); also, inter alia, P Pettit, 'Republican Theory and Criminal Punishment' (1997) 9 *Utilitas* 59–79.

[18] For an explication of the republican (or republican-liberal) aspects of Rousseau's political thought, see ch 6 of my *Civic Virtues: Rights, Citizenship, and Republican Liberalism* (New York: Oxford University Press, 1997).

[19] For a recent example of the illuminating use of the idea of the social contract, see BC Zipursky, 'Philosophy of Private Law', in J Coleman and S Shapiro (eds), *The Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford: Oxford University Press, 2002), esp §4, 'A Contractarian Model of Private Rights of Action in Private Law'.

have been' manner. That is, Hobbes presents the state of nature as the 'solitary, poore, nasty, brutish, and short' condition in which the men and women of his day would find themselves were there to be—perhaps as the result of a civil war—no political or legal authority over them.[20] Rousseau, by contrast, proceeds in an anthropological rather than hypothetical manner, asking what the state of nature must have been like, and how political and legal authority might have arisen out of it. For present purposes, how Rousseau answers these questions is less important than his general approach. We need not follow him, for example, when he suggests that human beings in the state of nature were originally little more than brute animals wandering about the fields and forests, each living a solitary existence save for the occasional satisfaction of natural urges that led to pregnancy and childbirth. In contrast to this view, which has social life and sentiments developing only as people slowly come to recognize the benefits of cooperation, it seems more plausible to think that humans have always lived in groups of some kind—families, clans, or tribes, if not societies or polities. Nor is Rousseau's famous account of the foundation of civil society, at the beginning of Part II of the *Discourse*, as persuasive as it is provocative:

> The first man who, having fenced off a plot of land, thought of saying 'This is mine' and found people simple enough to believe him was the real founder of civil society. How many crimes, wars, murders, how many miseries and horrors might the human race have been spared by the one who, upon pulling up the stakes or filling in the ditch, had shouted to his fellow men, 'Beware of listening to this impostor; you are lost, if you forget that the fruits of the earth belong to all and that the earth belongs to no one!'[21]

Such an account is plausible only if one takes the existence of property relations as the defining feature of civil society. Even then, as Aristotle and many others have argued, there is at least as much to be said for private property as Rousseau says against it here. Indeed, Rousseau himself endorses an essentially Lockean justification of private property in his *Social Contract* (Bk I, ch 9).

Why, then, should we take Rousseau's approach to the state of nature as a model when we look for the foundations of criminal law? The answer has two parts. First, suitably modified, Rousseau's 'how it must have been' approach provides a helpful way to think about the gradual *emergence* of criminal law, and law in general, over time. Second, it also tells us something about the potential of criminal law, and law in general, as a force for good that is vulnerable to manipulation and ideological distortion.

Concerning the first point, a suitably modified account of the emergence of criminal law would take something like the following form. In the original state of nature, as it must have been, men and women lived in small groups, clinging together from

[20] T Hobbes, *Leviathan* (1651), Book I, ch XIII.

[21] Jean-Jacques Rousseau, *Discourse on the Origins and Foundations of Inequality among Men*, in A Ritter (ed) and J Conaway Bondanella (trans), *Rousseau's Political Writings* (New York: WW Norton & Co, 1988), 34.

affection and for the sake of survival. Other groups of people would have threatened them, however, and rivalries, jealousy, and sheer selfishness occasionally must have disturbed every group's harmony, so that it became necessary not only to join in defensive efforts but also to find ways to deal with those who harmed or wronged other members of the group. There were also probably some misdeeds—violations of a deeply shared belief, perhaps—that seemed to wrong no one as an individual but the group as a whole. In this state of nature, individuals presumably tried to set things right by acting on their own. You hit me, so I hit you back; you maimed my brother, so I maim you or your brother in return. In clans or groups that included many families, the retaliation or retribution would be not so much an individual as a familial matter; in even larger groups, it would be a clan-based matter. In this fashion, the idea of a crime as something more than an individual offence—as a public wrong—must gradually have emerged.

Crucial to this emergence would have been the dissatisfaction with the blood feuds and vendettas that grew out of private acts of vengeance. In some cases rough and informal standards for meting out retribution may have served to keep the violence in check, but the obvious problem with private vengeance is that it is as likely to incite bitterness, enmity, and further violence as it is to leave all parties feeling that justice has been done. Whether a grievance is slight or truly significant is a matter the parties can easily disagree about, as are the questions of whether the offence was real or merely imagined, intended, or accidental. So too is the question of whether a retaliatory act is in or out of proportion to the original harm or wrong. For these reasons, private vengeance would produce unending feuds and escalating violence as it drew more and more people into the conflict—or in some cases left the weak to nurse their grievances as they cowered before the strong. One need not conclude that the state of nature would thus become a catastrophic state of war—a conclusion that Hobbes and Rousseau shared—to believe that people caught up in feuds and vendettas would eventually come to perceive the desirability of some better way to try to set matters right. This better way would necessarily consist of some means of defining and dealing with offences too serious simply to leave to the individuals directly involved to settle among themselves. Such is the story that Aeschylus' *Oresteia* trilogy tells in dramatic form, with Athena founding a system of laws to quell the spiralling violence of blood feuds. In John Locke's terms, in place of the state of nature, where everyone has the right to punish offenders, the rule of law would provide 'an established, settled, known... standard of right and wrong', a 'known and indifferent judge, with authority to determine all differences according to the established law', and an enforcement agency 'to back and support the sentence when right, and to give it due execution'.[22] In short, one need not resort to the social contract, as Locke did, to imagine how something like criminal law, and the rule of law in general, could have emerged from a state of nature as a response to these defects.

[22] J Locke, *The Second Treatise of Government*, §§124, 125, 126.

I say 'something like criminal law' here because it is conceivable that the public system of dispute resolution that emerges from a state of nature will resemble a system of civil rather than criminal law. If all that matters is finding a way to end blood feuds and vendettas, then public arbitration may be sufficient. In fact, historical scholarship on the origins of law suggests that something of this sort is what happened. According to James Q Whitman, 'our dominant model of the origins of law and the state' is what has come to be called the 'self-help model'.[23] In Whitman's capsule version, this model comprises:

> four fundamental stages in the early development of law and the state. Stage one is the stage of the state of nature. This is a stage of ordered vengeance and vendetta. In this first stage, clans and/or individuals exact vengeance, in a systematic and rule-governed way, when injured by other clans and/or individuals; in particular, they exact *talionic* vengeance, seeking, in the famous biblical phrase, 'an eye for an eye, a tooth for a tooth'. In stage two, the early state emerges. This early state does not, however, attempt to prevent violence. Rather, it sets out to supervise the existing system of vengeance. Thus, the early state assumes a kind of licensing power over acts of talionic vengeance, requiring that injured parties seek formal state sanction before avenging themselves. In stage three, the early state itself begins to function as an enforcer, taking vengeance on behalf of injured clans; in [Max] Weber's phrase, the early state of stage three monopolizes the legitimate use of violence. Only in stage four does the early state at last move to eliminate private violence. In this fourth stage, the early state institutes a system of 'compositions', substituting money damages for talionic vengeance.[24]

So described, the self-help model is consistent in its broad outlines with the Rousseauvean account. There are important respects, however, in which the Rousseauvean account differs from the self-help model. To begin with, the two differ with regard to the question of how orderly the 'ordered vengeance and vendetta' of stage one, the state of nature, truly was; but I think a resolution may be found, following Rousseau, by conceiving of the state of nature in a more dynamic fashion than 'stage one' of the self-help model suggests. That is, the model's first stage would have occurred later in the course of the state of nature than the beginning point of the 'how it must have been' account. In addition, the model's first stage depicts 'clans and/or individuals' exacting vengeance '*in a systematic and rule-governed way*', before 'the early state emerges' in stage two.[25] This seems to presume some sense of a community—of being part of a *public*—that underpins this system of rules for exacting vengeance. Those who do wrong and those who suffer wrongdoing are not completely alien to one another, in other words, but members of a public insofar as they accept this system of rules as something that applies to all of them. In this respect, the Rousseauvean account, with its picture of societies forming before civil society forms, complements the self-help model.

[23] JQ Whitman, 'The Origins of Law and the State: Perversion of Violence, Mutilation of Bodies, or Setting of Prices?' (1995–96) 71 *Chicago-Kent Law Review* 41–84, at 41.

[24] Ibid.

[25] Ibid (emphasis added).

Whether this system of rules would be likely to produce 'a stage of ordered vengeance and vendetta' in the absence of a state, as the self-help model indicates, is, however, a point at which the model and the Rousseauvean account appear to be at odds. Indeed, there seem to be two interpretations of the self-help model in this regard. According to one interpretation, the state emerges, in effect, when a group of entrepreneurs seizes the opportunity to take control of the already existing system of 'ordered vengeance and vendetta' in order to advance the entrepreneurs' interests. According to the second interpretation, the state emerges in response to some defect or deficiency in the already existing system, the most likely of which is the tendency of the system of 'ordered vengeance and vendetta' to break down when there are no public institutions to maintain it. This second interpretation is more in keeping with the Rousseauvean, republican account of the emergence of criminal law, as I have previously suggested, but there is also room, as we shall see, for elements of the first interpretation in that account.

Despite these differences, the 'how it must have been' story of the emergence of criminal law seems broadly consistent with the self-help model. But is the self-help model itself altogether satisfactory? Whitman and others maintain that it is not.[26] The key word here, though, is 'altogether'. The critics agree that the model is sound in important respects, and those respects seem to be those most salient to the 'how it must have been' account of the emergence of law and legal authority. As Whitman acknowledges: 'Some sort of vengeance or vendetta system *must* lie somewhere in the background of our earliest sources; the evidence for the partial truth of the model is too powerful to be thrown out.'[27] But there is also another aspect of the self-help model that is problematic, at least from the standpoint of a rational reconstruction of *criminal* law. According to Whitman's description, the early state moves 'to eliminate private violence' in stage four, but it does so by instituting 'a system of "compositions", substituting money damages for talionic vengeance'.[28] So described, however, the early state seems to have instituted a system of civil rather than criminal law, as there is no suggestion that condemnation or punishment attached to the 'money damages' the early state apparently imposed. In this respect, again, the Rousseauvean account provides a useful supplement to the self-help model. On that

[26] In addition to Whitman's 'The Origins of Law and the State', see WI Miller, *Eye for an Eye* (Cambridge: Cambridge University Press, 2006), esp 25.

[27] 'The Origins of Law and the State', 43 (emphasis in original); also 82: 'The idea that some kind of private vengeance order lies in the background of the archaic codes is too plausible, and too revealing, to be abandoned. It must surely be correct that the authorities that erected the bronze tables and the diorite steles upon which the early codes are inscribed meant, *in part*, to meddle in a system of vengeance' (emphasis in original). To be sure, Whitman goes on to say (82), 'The most attractive starting hypothesis is that the codes that have come down to us were produced not in the course of a typically nineteenth-century campaign to clamp down on violence, but in a much more alien archaic effort to control the marketplace and to deal with the problems of body mutilation in a world of sympathetic magic and ritually-ordered social hierarchy.'

[28] 'The Origins of Law and the State', 41.

account, those charged with enforcing the law will have the authority to express the public's condemnation of lawbreakers and to punish them for their crimes.

There is reason, then, to regard the Rousseauvean sketch as a plausible account of the gradual emergence of criminal law, and law in general, at least in broad outline. But what of the second reason for taking Rousseau's *Discourse on Inequality* as a model? That is, what does this approach reveal about the potential of criminal law?

In brief, the 'how it must have been' account indicates that criminal law has the potential to protect interests, both private and public, and to promote autonomy. Insofar as criminal law works to secure people against the wrongdoing of others, it protects their interest in health, safety, and property, among other things. In doing so, moreover, it promotes their autonomy, both in the sense of their freedom to go about their business and in the stronger sense of self-government. Criminal law requires a sense of *publicity*—that is, of being part of a body politic under the rule of law. Criminal law proscribes and punishes certain acts and activities that it somehow identifies as public wrongs. But the 'it' that identifies, proscribes, and punishes these wrongs is not criminal law itself, but the public, or some person or persons acting in the name of the public. To be sure, monarchs, dictators, and functionaries sometimes talk as if their word is law, but in doing so, as I indicated earlier, they are trespassing on the presumption that law is a public rule of conduct—an 'order of reason', to recur to Aquinas's definition, for the common good enacted by those in authority and promulgated. Criminal law is a public responsibility, in other words, that presents an opportunity for members of the public to participate in self-government by helping to give definition and force to the law—an opportunity that republicans would have us seize and preserve.

Rousseau's *Social Contract* (1762) is apposite here, especially as it appears to present a picture of the 'passage from the state of nature to the civil state' very different from the one he set out seven years earlier in the *Discourse on Inequality*. This passage, he now says:

> produces a most remarkable change in man, by substituting justice for instinct in his conduct, and giving his actions the morality they previously lacked. Only when the voice of duty succeeds physical impulse and right succeeds appetite does man, who had until then considered only himself, find himself compelled to act on different principles and to consult his reason before listening to his inclinations. Although in this state he denies himself several of the advantages he owes to nature, he gains others so great—his faculties are exercised and developed, his ideas are extended, his feelings are ennobled, his whole soul is so uplifted—that if the abuses of this new condition did not often degrade him beneath the condition from which he emerged, he would constantly have to bless the happy moment that tore him away from it forever, and made a stupid and shortsighted animal into an intelligent being and a man.[29]

[29] A Ritter (ed) and J Conaway Bondanella (trans), *Rousseau's Political Writings* (New York: WW Norton & Co, 1988), 95 (Bk I, ch 8).

In the course of this remarkable transformation, people give up the 'natural liberty' of the state of nature, 'which is limited only by the strength of the individual', in order to enjoy 'civil liberty'—freedom under law—and 'moral liberty, which alone makes man his own master, for impulsion by appetite alone is slavery, and obedience to the law that one has prescribed for oneself is liberty'.[30]

'Moral liberty' is thus the kind of self-government that is possible in the civil state, under the rule of law, but not in the state of nature. There is clearly much to be said for Rousseau's position here, taking 'moral liberty' to be equivalent to 'autonomy' and recognizing that an autonomous person must be self-*governing* rather than simply at liberty to do as he or she pleases. There is also an obvious problem, however. For how is one to obey 'the law that one has prescribed for oneself' while living under laws that others also have had a voice in making? This, indeed, is the problem that Rousseau sets himself in the *Social Contract*: 'To find a form of association that defends and protects the person and possessions of each associate with all the common strength, and by means of which each person, joining forces with all, nevertheless obeys only himself and remains as free as before.'[31] Whether Rousseau's solution to the problem is satisfactory, or even coherent, is a question we need not take up here. What is clear is that his and any plausible response to the problem he sets must rest on an understanding of freedom as 'moral liberty', autonomy, or the freedom of self-governing citizens who have a voice in the making of the laws under which they live. It must rest, that is, on a broadly republican understanding of politics and law.

There is also a second problem to consider here, however, and it is one to which Rousseau pointed in the *Discourse on Inequality*. This problem is that potential is not always realized. That means, in this case, that we cannot simply take for granted that the gradual emergence of law according to the 'how it must have been' account has led, or necessarily leads, to a just or republican society in which everyone enjoys civil and moral liberty. According to Rousseau's analysis, the social contract that established the civil state was a bad bargain for all but the rich and powerful, who persuaded the poor and weak to surrender their natural liberty in order to replace the 'right' of the strongest with known and settled laws—laws that have been settled by agents of the rich and powerful. 'Such was, *or must have been*, the origin of society and laws', Rousseau declares, 'which gave new fetters to the weak and new powers to the rich, irretrievably destroyed natural liberty, established forever the law of property and inequality, made clever usurpation into an irrevocable right, and, for the benefit of a few ambitious individuals, henceforth subjected the whole human race to labor, servitude, and misery'.[32] In this respect, the Rousseauvean account clearly has something in common with the interpretation of the self-help model that links

[30] Ibid 96 (Bk I, ch 8).
[31] Ibid 92 (Bk I, ch 6).
[32] Ibid 44–5 (emphasis added).

the emergence of the state to the entrepreneurial efforts of a few to take control of what had been a private system of vengeance and vendetta.

What Rousseau presents, then, is a contrast between law's potential and its perversion. Law is the public's business, and life under the rule of law promises freedom from domination—the freedom to be a self-governing member of a self-governing citizenry. That is the law as it ought to be, however, and too often the law as it is, through manipulation by the powerful and ideological distortion, falls far short of what it ought to be. In the case of criminal law, this means that the definition and interpretation of what counts as a crime, and the enforcement of the law's proscriptions, may be largely in the hands of some dominant individuals or groups. It also means that social conditions may make it extremely difficult for many people to live within the law. Crime entails liability to punishment on virtually all definitions of 'crime', but the justice of punishing those who seem driven by circumstances to break the law is hardly obvious. 'The justice of the punishment depends', as the British Idealist TH Green observed, '...not merely on...maintaining this or that particular right which the crime punished violates, but on the question whether the social organization in which a criminal has lived and acted is one that has given him *a fair chance of not being a criminal*'.[33]

The question for a republican theory of criminal law, then, is whether it can point the way toward fulfilment of the law's potential and away from its perversion. To that question I now turn.

4 Criminal Law as a Republican Practice

The foregoing pages have demonstrated, I hope, that there is a connection between criminal law and the republican concern for publicity. They have also established that a republican 'how it must have been' explanation of the criminal law's emergence provides a plausible reconstruction of the historical foundations of criminal law. But what of the *philosophical* foundations of criminal law? How adequate is this republican account in this respect?

[33] TH Green, *Lectures on the Principles of Political Obligation*, §189 (Ann Arbor, MI: University of Michigan Press, 1967), 190 (emphasis added). Anatole France's famous remark about the law forbidding the poor as well as the rich from sleeping under bridges, begging, and stealing bread is also pertinent here, as is, in the recent philosophical literature, Jeffrie Murphy's widely cited 'Marxism and Retribution' (1973) 2 *Philosophy and Public Affairs* 217–43. For a helpful exploration of related issues, see Stuart Green's contribution to this volume, 'Just Deserts in Unjust Societies: A Case-specific Approach'.

To answer this question, it may help to turn to an eminent philosopher of law who is far more likely to be considered a liberal than a republican. That philosopher is HLA Hart, and he is relevant here because of his depiction of the rule of law as a cooperative practice—in his terms, 'a joint enterprise according to rules'.[34] In *The Concept of Law*, Hart gives the following account of law as a practice that is both cooperative and coercive:

> The facts that make rules respecting persons, property, and promises necessary in social life are simple and their mutual benefits are obvious. Most men are capable of seeing them and of sacrificing the immediate short-term interests which conformity to such rules demands... On the other hand, neither understanding of long-term interests, nor the strength or goodness of will, upon which the efficacy of these different motives towards obedience depends, are shared by all men alike. All are tempted at times to prefer their own immediate interests and, in the absence of a special organization for their detection and punishment, many would succumb to the temptation... [E]xcept in very small closely-knit societies, submission to the system of restraints would be folly if there were no organization for the coercion of those who would then try to obtain the advantages of the system without submitting to its obligations. 'Sanctions' are therefore required not as the normal motive for obedience, but as a *guarantee* that those who would voluntarily obey shall not be sacrificed to those who would not. To obey, without this, would be to risk going to the wall. Given this standing danger, what reason demands is *voluntary* co-operation in a *coercive* sytem.[35]

What Hart calls 'a special organization for [the] detection and punishment' of those who break the rules that protect 'persons, property, and promises' is usually called the state or government; or, if the emphasis is on the word 'special', some branch(es) of the state or government. Those terms will suffice, but republicans will prefer, for reasons to appear shortly, to call the (comprehensive) entity the polity, commonwealth, or, of course, republic. For now, however, the important point is to understand how a system of laws is a cooperative practice or enterprise.

To say that a legal system is a cooperative practice is to point out, first, that no system of laws can rely entirely on coercion. It is doubtful that even the most thoroughgoing dictatorship, in which the dictator's every wish is an enforced command, can rest entirely on coercion. Anyone who thinks that *laws* cannot be reduced to the commands of the powerful will have all the more reason to believe that a system of laws must depend upon the general cooperation of those to whom the laws apply. For these people, as Hart argues, the law will have the *internal aspect* characteristic of social rules, so that 'some at least must look upon the behaviour in question as a

[34] HLA Hart, 'Are There Any Natural Rights?', in AI Melden (ed), *Human Rights* (Belmont, CA: Wadsworth, 1970), 70; originally published in (1955) 64 *Philosophical Review* 175–91.

[35] HLA Hart, *The Concept of Law* (2nd edn; Oxford: Oxford University Press, 1994), 197–8 (emphasis in original).

general standard to be followed by the group as a whole'.[36] In the case of a system of laws, the 'behaviour in question' will consist in taking the laws as rules by which members of the group must guide their conduct—that is, obey the law. By doing so, the members of the group may enjoy the benefits of the rule of law, benefits that would be unavailable to them if there were not sufficient cooperation in the form of obedience to the law.

Obeying the law is sometimes burdensome, however, which points to the second respect in which a legal system is a cooperative practice. Cooperation often entails restraint or sacrifice, and the temptation to avoid doing one's cooperative part is sometimes quite strong—for some people, it seems, frequently so. The temptation is especially strong when one recognizes that it is possible to be a free rider, thereby enjoying the benefits of others' cooperation without bearing one's full share of the burdens of the cooperative practice. Coercion and the threat of coercion are thus necessary, as Hart says, to ensure that 'those who would voluntarily obey will not be sacrificed to those who would not'.[37] In some circumstances, such as the small and close-knit societies Hart mentions, the sense of solidarity will be powerful enough to make the threat of sanctions for non-cooperation almost unnecessary. But those circumstances are rare, and probably growing rarer; and even when they do obtain, the threat of coercion must still be present.

These points should be familiar enough to require no further elaboration here. There is a sense, however, in which the rule of law is a distinctive kind of cooperative practice, and something does need to be said in that regard. To put it succinctly, a system of laws is a *super-* or *meta-*cooperative practice.[38] In other words, the legal order is not only a cooperative practice; it is a cooperative practice that enables people to engage in other cooperative practices. The members of a car pool, for example, are engaged in a cooperative practice that provides them with benefits that they produce for themselves by taking in turns the burdens of picking up and driving those who are sharing the ride. But in order to produce these benefits for themselves, they must also be able to take advantage of benefits provided by the legal order, such as the traffic laws that make it possible for them to drive in relative safety to the workplace, school, play group, or other destination. Unless they live in a libertarian utopia, wherein every inch of their journey takes place on privately owned roads governed by the owners' regulations, they must rely indirectly on the law as a meta-practice if their car pool is to be the joint venture for mutual benefit that they want it to be.

A further implication of this way of thinking about a system of laws is that such a system is necessarily *political.* As a meta-practice, the legal system must establish laws that make it possible for people to engage in other cooperative practices and to

[36] Ibid 56.

[37] Ibid 198.

[38] In what follows I develop some sketchy remarks in my 'Punishment as Fair Play' (2008) 14 *Res Publica*, 259–75, at 269.

go about their individual lives. Laws by themselves are not sufficient, however. The members of the car pool need not only traffic laws but traffic signals and roads on which to drive, and these require the collection and expenditure of funds. They also require that decisions be made as to where roads are to be built, what kind of roads they should be, and where the signals should be placed, among other things. What is necessary, in short, is a political order operating under the rule of law.

In a political order of this kind, the political order itself will be a cooperative practice—or, more properly, a meta-cooperative practice. The laws in such an order will be the terms of fair cooperation, or of what the members take to be the terms of fair cooperation. Laws will thus need to be promulgated, and cooperation will need to be encouraged, but the laws themselves will become matters of debate and the products of public decisions. 'What laws do we need?' thus becomes a vital question, as do the related questions of who should make these laws, who should enforce them, and who should apply and interpret them. There is also, finally, the question of how to hold those who make, enforce, and apply the laws accountable to the public—that is, to those who have not only duties but rights as members of the cooperative meta-practice that is the political order.

Conceiving of the legal order as a cooperative practice, in Hartian fashion, thus has a number of significant implications. One is that the legal order is also a political order, with the further implication that the philosophy of law—including the philosophy of criminal law—is entangled with political philosophy. Other things being equal, those who commit crimes threaten the rule of law, and it is necessary to find ways to prevent them from doing anything more than merely posing a threat, and then to punish them on those occasions when the preventive efforts fail. What kinds of actions really do threaten the meta-practice, and should therefore count as crimes, are not always obvious, however. Robbery, rape, murder, and other standard examples of crime clearly threaten the meta-practice, as we can hardly expect people to think and act as participants in a cooperative enterprise when they believe themselves to be in constant jeopardy from those who are supposedly fellow members of the polity. So do offenses that directly threaten the rule of law itself, such as suborning witnesses and other forms of obstruction of justice. But what of flag burning, say, or drug use? Or what of so-called Bad Samaritan laws, according to which those who fail to intervene in or even report a criminal act when they could do so safely are themselves guilty of a crime?[39] Decisions that affect the members of the polity will have to be taken in these and many other cases, which is to say that the definition of crime must in this way be a public or political matter.

Yet another implication of conceiving of the legal *cum* political order as a cooperative practice is that the connection to republicanism becomes more evident. So conceived, the need for what Hart calls a 'special organization for [the] detection

[39] See, eg, J Dressler, 'Some Brief Thoughts (Mostly Negative) about "Bad Samaritan" Laws' (2000) 40 *Santa Clara Law Review* 971–89.

and punishment' of those who would not respect 'persons, property, and promises' is clear. Such an organization, as I said earlier, is usually called a (branch of the) 'state' or 'government'. To the extent that these terms imply that faceless, nameless functionaries are the ones who make, enforce, and apply the laws, however, these terms are less satisfactory than terms such as 'polity', 'commonwealth', or 'republic'. The latter all convey that the law is a matter of public concern—a crucial part of the public's business. Such must be the case if the legal *cum* political order is a meta-practice, for then the terms of fair cooperation will be of vital importance to the government of their lives. That means both the ability to govern their individual lives, free from interference when possible, and the ability to govern their lives collectively through the making of laws, whether directly or indirectly by the election of legislators. Conceived as a meta-cooperative practice, in short, the rule of law implies the two leading features of republicanism—that is, publicity and self-government. That is the republican potential implicit in the law, at any rate, even if that potential is far from realized in actual systems of law, criminal and otherwise.

A final implication is that the conception of the legal *cum* political order as a cooperative practice helps to clarify the *communicative* aspect of the criminal law. According to some philosophers, legal punishment is, among other things, an attempt to communicate to those who break the law the wrongness of their actions, with the aim of bringing them into the fold or restoring them to the community whose standards they have violated. In *Punishment, Communication, and Community*, for example, Antony Duff develops a 'communicative theory' of punishment, 'according to which punishment should be understood as a species of secular penance that aims not just to communicate censure but *thereby* to persuade offenders to repentance, self-reform, and reconciliation'.[40] Similarly, Herbert Morris's paternalistic theory of punishment 'relies essentially on the idea of punishment as a complex communicative act...'; moreover, Morris takes a 'communicative component' to be 'a defining characteristic of punishment' that 'in part distinguishes it from mere retaliation or acting out of revenge...'.[41] But what, we may ask, gives some of us the right or authority to communicate our standards in this way? We may grant that punishment of lawbreakers is a way of communicating the society's, community's, or polity's displeasure with them, but punishment is typically an especially harsh and unpleasant form of communication. As such, it requires more of a justification than, say, a remonstrance or mere expression of disapproval does. Such a justification may be found, however, in the offender's violation of the laws comprising the meta-practice that, *ceteris paribus*, supplies him or her with benefits through the cooperative restraint of others. As part of that practice, we give some of our members

[40] RA Duff, *Punishment, Communication, and Community* (Oxford: Oxford University Press, 2001), xviii–xix (emphasis added).

[41] Both passages quoted from H Morris, 'A Paternalist Theory of Punishment', in A Duff and D Garland (eds), *A Reader on Punishment* (Oxford: Oxford University Press, 1994), 7; originally printed in (1981) 18 *American Philosophical Quarterly* 263–71.

the authority to detect and punish those who do not respect the 'persons, property, and promises' of the other members of the practice—that is, the other members of the polity, commonwealth, or republic. Insofar as the offender enjoys the benefits of the meta-cooperative practice without fully contributing to their provision by bearing his or her share of the burdens of obeying the law, then the offender in effect justifies the rest of us in punishing him or her. In Rousseau's terms, the offender wants to 'enjoy the rights of a citizen without wanting to fulfill the duties of a subject, an injustice that would bring about the ruin of the body politic, were it to spread'.[42] That is why the polity is justified in communicating its censure to the offender by means of punishment. How severely to punish, or whether a mere remonstrance will be sufficient, is a judgment that will have to vary with the severity of the crime and other circumstances; but the *authority* to punish rests on the polity's commitment to the meta-practice of law.

For these reasons, I believe that republicanism supplies a plausible philosophical as well as historical reconstruction of the foundations of criminal law. The account sketched above is too brief to be fully satisfactory, of course, and some parts of it are surely controversial. The justification of punishment that follows from conceiving of the legal *cum* political order, for example, is the oft-criticized reciprocity or fair-play theory. Whether the critics are right, though, remains a matter of dispute.[43] In any case, I believe that it should now be clear that republicanism provides the materials for a coherent philosophical account of the foundations of criminal law with considerable appeal. That this account draws heavily on HLA Hart's conception of law as a cooperative practice suggests that republicanism is capable of attracting wide support. Two worries remain, however, and I now turn to them in concluding this chapter.

5 Conclusion

These two worries stem from the suspicion that republicanism may not be an altogether benign approach to either politics or law. When it is taken to provide the underpinnings for criminal law, there is therefore cause for concern that the power of the law will be employed in ways that are inimical to individual liberty and rights. In particular, there is the worry that taking criminal law to be the public's business will lead to some kind of majoritarianism or populism that will declare unpopular

[42] Rousseau, *On the Social Contract*, Conaway Bondanella (trans), *Rousseau's Political Writings* 95 (Book I, ch 7).

[43] I respond to the critics in 'Playing Fair with Punishment' (1993) 103 *Ethics* 73–88, and the previously cited 'Punishment as Fair Play'.

acts and practices to be criminal; and even if the majority is held in check, there is the further worry that republican regimes will impose the pursuit of virtue on people who simply want to go about their lives without harming or being harmed by others.

In the space remaining, I cannot hope to set out a fully adequate response to these worries. I can, however, indicate how such a response would proceed. With regard to the first worry, the response is simply the denial that republicans are committed to any kind of straightforward majoritarianism or populism. Indeed, one of the complaints against republicans is that their tendency to exalt the virtues of the arms-bearing, property-owning citizen has led them to be insufficiently appreciative of democracy and of the importance of women to public life. Contemporary republicans have taken pains to meet this objection, but in doing so they have also made it plain that the neo-republican commitment to democracy is not a commitment to the unchecked, unqualified rule of the majority. Not only do constitutionalism, mixed government, and separation of powers remain as important to neo-republicans as to their forebears; they are now supplemented by attempts to devise 'contestatory' and deliberative forms of democracy.[44] Republicans do believe that crime is very much a part of the public's business, to be sure, but they do not hold that crime is simply whatever the majority declares it to be. To take such a position would be to surrender the republican commitment to self-government.

That leaves us, though, with the second worry. Republicans place considerable emphasis on virtue, it may be said, and the desire to cultivate virtue among the citizenry could easily lead to the abuse of the criminal law. Although he does not expressly refer to republicanism in this regard, Jeffrie Murphy's concerns about attempts to use the law, and punishment in particular, to promote virtue are surely apposite. In brief, his concern is that such attempts are illiberal, with liberalism understood to be an ideology that is 'basically *fearful* of government (because of its potential to impose a uniform vision of the good life) and tolerates government only as a kind of *umpire*, an agency to make sure the basic ground rules that preserve individual moral autonomy—such as the rules of toleration—are observed'.[45] Taking liberalism thus understood as his baseline, Murphy then goes on to say:

> It is hard indeed to see how any very strong or interesting program of coercive state moral education and improvement is consistent with this outlook—whether carried out explicitly

[44] For 'contestatory democracy', see P Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford: Oxford University Press, 1997), 277, and, inter alia, his 'Republican Freedom and Contestatory Democratization', in I Shapiro and C Hacker-Cordón (eds), *Democracy's Value* (Cambridge: Cambridge University Press, 1999). For republicanism and deliberative democracy, especially with regard to criminal law, see JL Martí, 'The Republican Democratization of Criminal Law and Justice' and R Gargarella, 'Tough on Punishment: Criminal Justice, Deliberation, and Legal Alienation', both in Besson and Martí, *Legal Republicanism*, 123–46 and 167–84 respectively.

[45] Murphy, 'Retributivism, Moral Education, and the Liberal State', 8; also R Dworkin, 'Liberalism', in S Hampshire (ed), *Private and Public Morality* (Cambridge: Cambridge University Press, 1978).

in the public schools or in some indirect and symbolic way via criminal punishment. To see such programs as representing a compelling state interest is, I think, simply to abandon the liberal theory of the state.[46]

What is there to say in response to this worry? Those who see a sharp distinction between republicanism and liberalism might well grasp the nettle here and accept that abandoning liberalism is the price to pay for using schools and criminal punishment to promote virtue—a price well worth paying, in their view. For those who deny, as I do, that republicanism and liberalism either can or should be sharply distinguished from each other, a more conciliatory response is appropriate. The key point here is that the kind of virtue that republicans want to promote—the kind that they fear too many liberals have taken for granted—is *civic* virtue.[47] Republicans do want to make people better, in other words, but they want to make them better citizens; and this means, among other things, that they want people to be better observers of 'the rules of toleration' and the other liberal 'ground rules' that Murphy takes to be necessary to the preservation of 'individual moral autonomy'. They also want to foster the conditions under which men and women will be citizens who are willing to do their part in maintaining the cooperative practice that is the rule of law—and who can thus set aside the temptation to violate the person, province, and property of others.[48]

These worries, then, should not deflect us from the project of developing the republican theory of criminal law. Such a theory will take criminal law to be a cooperative, communicative practice that is itself part of the meta-practice of the polity. As such, it will be necessary to determine what activities threaten the existence of the practice as a whole and the interests of its cooperating members, what steps are necessary to prevent these activities, and what measures are to be imposed on those who nevertheless engage in them. In other words, what activities are to count as crimes, how are crimes to be prevented, and how are criminals to be punished? The answers to these questions will for the most part be the standard answers—rape, murder, robbery, and assault must be crimes, for example—and in other cases the answers will vary with the circumstances of the polity. At the most general level, however, the answer will always be the response to this question: what kinds of activities should we proscribe as threats to our republic, should we be fortunate enough to inhabit one, and to ourselves as self-governing citizens?

[46] Murphy, ibid 8.

[47] It may be worth noting here that Kyron Huigens, who advanced a republican *qua* virtue theory of criminal law in 'Virtue and Inculpation' (1995) 108 *Harvard LR* 1423, subsequently abandoned republicanism in favour of virtue (or 'aretaic') theory simpliciter: Huigens, 'On Aristotelian Criminal Law: A Reply to Duff' (2004) 18 *Notre Dame J of Law, Ethics & Public Policy* 465, at 483.

[48] To borrow terms from Braithwaite and Pettit, *Not Just Deserts*, 69.