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Crime, morality, and republicanism

Richard Dagger

One of the abiding concerns of the philosophy of law has been to establish the relationship between law and morality.¹ Within the criminal law, this concern often takes the form of debates over *legal moralism*—that is, “the position that immorality is sufficient for criminalization” (Alexander 2003: 131). This paper approaches these debates from the perspective of the recently revived republican tradition in politics and law. Contrary to what is usually taken to be liberalism’s hostility to legal moralism, and especially to attempts to promote virtue through the criminal law, the republican approach takes the promotion of virtue to be one of the necessary aims of a polity. The virtue in question, however, is a specifically *civic* virtue, and calling for its promotion does not entail that the criminal law should be a straightforward reflection of the conventional morality of a society. What republicanism offers, instead, is a form of legal moralism resting on a distinctively *civic* morality that lays particular stress on such virtues as fair play and tolerance.

According to the republican conception of the criminal law, the questions of what should count as a crime and how a polity should respond to criminal offenses are to be answered by the members of a polity. In answering, though, they should not think themselves free to respond to these questions however they please, or however the majority at the time pleases. Moral and other practical considerations must play a part in determining what counts as a crime and how to respond to those who commit crimes. Such considerations, however, are not resolved by straightforward appeal to what is morally right and wrong, or to what criminals do and do not deserve. Some conception of the polity, and of how its members stand in relation to one another, is also necessary.

In this way the republican version of legal moralism occupies the ground between “pure” legal moralism, which holds that “acts that are immoral and degrading may be criminally punished, even if they are harmful in no other way” (Alexander 2003: 132), and the “liberal” position, according to which harmfulness rather than moral wrongness should determine whether an action or activity is criminal. To establish the soundness of this position, however, I shall need to say something about the varieties of both legal moralism and republicanism. These are the tasks I take up in the first two parts of this essay, respectively. In Part Three, I elaborate the republican conception of legal moralism—a conception resting on the civic morality of fair play—and conclude by demonstrating how it underpins the criminal law.

Part one: Legal moralism and its varieties

Legal moralism emerged in the course of two controversies over the proper extent of the criminal law. The earlier of these involved John Stuart Mill and his British compatriot, the jurist James Fitzjames Stephen. In 1873, the year of Mill's death, Stephen published a rebuttal to the "one very simple principle" that Mill had advanced 14 years earlier in *On Liberty*. According to Mill's principle, "the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant" (Mill 1991: 14). In response, Stephen maintained that the criminal law quite properly affirms "a principle which is absolutely inconsistent with and contradictory to Mr. Mill's—the principle, namely, that there are acts of wickedness so gross and outrageous that, self-protection apart, they must be prevented as far as possible at any cost to the offender, and punished, if they occur, with exemplary severity. . . ."²

Although this nineteenth-century controversy looms in the background, the term "legal moralism" itself seems to be a product of the second controversy, which has come to be known as "the Hart–Devlin debate." What sparked this debate was the official Wolfenden Committee Report of 1957, which recommended that neither homosexual activity nor prostitution should be outlawed in Britain when conducted in private between consenting adults. This report provoked a British judge, Lord Patrick Devlin, to argue that "society is justified in taking the same steps to preserve its moral code as it does to preserve its government and other essential institutions. The suppression of vice is as much the law's business as the suppression of subversive activities. . . ."³ Devlin, in turn, provoked a retort from the legal philosopher H. L. A. Hart, who defended both the committee's recommendation and Millian liberalism more generally. Indeed, Hart seems to be the one who gave legal moralism its name: "In England in the last few years the question whether the criminal law should be used to punish immorality 'as such' has acquired a new practical importance; for there has, I think, been a revival there of what might be termed *legal moralism*" (Hart 1963: 6; emphasis in original).

This revival was not only something that Hart deplored but something he did much to discourage. Among legal philosophers, at least, "legal moralism" became associated in the 1960s and '70s with a smothering imposition of social norms that would deprive individuals of the essential freedom of self-expression. More recently, however, such prominent legal theorists as Michael Moore and Antony Duff have proclaimed their adherence to legal moralism, while others have tendered it a grudging respect.⁴ Two considerations seem to lie behind this shift. The first is the growing appreciation of the *expressive* or *communicative* function of criminal punishment, and the second is the recognition that morality may be entwined with the criminal law in a more complicated fashion than Devlin's arguments had suggested.

In 1965, in the midst of the Hart–Devlin debate, Joel Feinberg published an article that raised the first of these considerations. In that article Feinberg drew attention to a characteristic of punishment that distinguishes it from other penalties. That characteristic, he argued, "is a certain expressive function: punishment is a conventional device for the expression of attitudes of resentment and indignation, and of judgments of disapproval and reprobation, on the part either of the punishing authority himself or of those 'in whose name' the punishment is inflicted" (Feinberg 1970: 98). Following Feinberg's lead, other legal philosophers have taken this expressive, reprobative, or condemnatory function to be a key feature of legal punishment, including some who have argued that the function is better described as "communicative," because "communication involves, as expression need not, a *reciprocal* and *rational* engagement" on the part of those who are punished (Duff 2001: 79; see also Hampton 1992; Morris 1981: 274; and Pettit 2015: 135). Rather than simply expressing or venting society's anger, in other words, the

aim of punishment is to communicate both social disapproval and the reasons for holding the wrongdoer's actions to be deserving of punishment. Moreover, this communication should proceed in ways that will help to restore him to good standing in society.

Whether we call it the expressive or the communicative function, the point is that punishment and criminalization are tied to the moral censure—to “resentment and indignation” and “judgments of disapproval and reprobation,” in Feinberg’s terms—that the offender’s unjust actions provoke. Punishment certainly has its “conventional” aspect as a matter of “[p]ublic condemnation,” according to Feinberg (98, 114), for it is an expression of a social reaction to a public offense, not a disinterested reaction to an abstract moral wrong. One cannot take this view of punishment, however, without also taking the view that the criminal law is somehow bound up with morality. To be sure, it is possible to hold that murder, robbery, rape, and other central examples of criminal wrongdoing are wrong not because they are immoral but because they are harmful, with “harm” defined in a way that excludes moral considerations.⁵ But even those who are tempted by such a view must concede that the expression or communication of social resentment and indignation through punishment involves at least an implicit appeal to justice and morality. If we are to regard punishment as a form of moral censure, in other words, we must also regard the criminal law as upholding in some sense the moral standards of the polity. In that respect, the expressive or communicative aspect of punishment lends support to legal moralism.⁶

That is not to say, though, that anyone who conceives of punishment in this way must also conclude that the criminal law either is or should be a straightforward reflection of the conventional morality of a society. The relationship between law and morality—indeed, morality itself—is more complicated than that. Hart himself pointed in this direction by distinguishing “the morality actually accepted and shared by a given social group,” or “positive morality,” from “critical morality”—that is, “the general moral principles used in the criticism of actual social institutions, including positive morality” (Hart 1963: 20). Positive morality might well endorse, for example, “morals legislation” proscribing “vice crimes” that are not obviously harmful to anyone, including those who engage in those “vices.” Devlin and the early advocates of legal moralism seemed content with this conclusion, but theirs is not the kind of legal moralism its current advocates are propounding.⁷ As Moore takes pains to point out, a circumscribed conception of morality and a presumption in favor of liberty, among other considerations, has led him to a highly qualified form of legal moralism that is no less hesitant than Mill and Hart to reject much of “morals legislation.” Immoral actions should indeed count as crimes, Moore insists, but his “spare view” of morality leaves no room for “duties to others with respect to many of the items about which customary morality so fusses and fumes, such as sex” (Moore 2008: 32).

Duff reaches a similar conclusion in part for similar reasons, but also by way of the traditional distinction between civil and criminal law (Duff 2014: 222–24). Both branches of law are concerned with wrongs, but one has to do with private and the other with public wrongs. Someone who breaches a contract, for example, is ordinarily guilty of wrongdoing, but the law, regarding it as a private wrong, leaves the aggrieved party to decide whether to bring suit in civil court or not. Someone arrested for burglary or some other crime, on the other hand, is liable to prosecution by the state or commonwealth regardless of whether the victim wants to press charges. In the case of a crime, in other words, the wrong is not only to the immediate victim or victims but in some sense to the public as a whole. Hence, the concern of criminal law with public rather than private wrongs.

Of course, whether a wrong is private or public is not always a clear-cut matter. Some legal systems regard defamation of character as a public wrong and thus a crime, for example, while

others take it to be a private wrong (Dagger 2009: 162–65). Some might even hold that breach of contract is properly a criminal offense because, by weakening trust in the security of contracts, it constitutes a public wrong. Whatever one thinks of these particular cases, the point is that some guidance is necessary if we are to find a principled way of distinguishing private from public wrongs. Duff suggests that such guidance is to be found in political rather than moral theory and particularly in the political theory of republicanism. His remarks in this connection are brief, though, and require the kind of elaboration I try to provide in the following sections of this paper (Duff 2007: 50, 53; 2014: 222–24). For the present, the important point is that Duff takes the distinction between private and public wrongs to lead to a “modest” form of legal moralism that eschews the “kind of moral witch hunt” in which “we must collectively seek out wrongdoing (of the appropriate kind) in order to make sure that it is criminalized and punished” (Duff 2014: 222).

In this respect, as I have noted, Duff’s conclusion is much the same as Moore’s. There are differences between them, however, as Duff observes while developing a useful taxonomy of the varieties of legal moralism. First he distinguishes between negative and positive versions of legal moralism; and then, within the latter category, he distinguishes modest from ambitious forms. According to negative legal moralism, only immoral actions or activities should be outlawed; according to the positive version, the immorality of an action or activity is always a reason—but not always a *conclusive* reason—to outlaw it (Duff 2014: 218; also Duff 2012: 179–204, esp. 186). The distinction, however, is not a dichotomy, for one may accept both negative and positive legal moralism, as Duff says both he and Moore do. The difference between them is that Moore takes the *ambitious* view that “criminal law must punish all and only those who are morally culpable in the doing of some morally wrongful action” (1997: 35), while Duff holds the *modest* view that “only certain kinds of moral wrongdoing are even in principle worthy of criminalization ...” (2014: 222).⁸ In particular, as we have seen, he argues that the proper concern of the criminal law is with public wrongs, for “the criminal law is not simply the moral law given institutional form,” as it would have to be were it to reflect the ambitious version of positive legal moralism (Duff 2014: 223).

Duff’s case for a modest version of positive legal moralism is both powerful and persuasive. Nevertheless, three difficult questions remain to be answered: (1) How firm is the distinction between public and private wrongs? (2) Are such paradigmatic crimes as murder, rape, and robbery really *public* wrongs? And (3) are *mala prohibita* offenses, such as speeding or driving without a license, really *moral* wrongs? Duff and his sometime co-author, Sandra Marshall, have provided answers to these questions, but fully adequate answers are only available through a full-fledged embrace of the civic morality of republicanism. To appreciate why that is so requires a brief consideration of the answers they have ventured.

The first question is important because failure to establish a firm distinction between private and public wrongs could lead to the kind of ambitious legal moralism that Moore embraces but Duff eschews; it could even lead, in the absence of Moore’s circumscribed conception of morality, to a pure and decidedly immodest form of legal moralism.⁹ Marshall and Duff open themselves to the latter possibility by resting their argument on the idea of *shared* wrongs, with crime taken to be “socially proscribed wrongdoing” (Marshall and Duff 1998: 13). This understanding leads to a position uncomfortably close to Devlin’s claim that society has as much reason to defend itself against immorality as against treason: “We must ask [write Marshall and Duff] ... what kinds of wrong should be seen as wrongs against ‘us’; and this is to ask which values are (which should be) so central to a community’s identity and self-understanding ... that actions which attack or flout those values are not merely individual matters which the individual victim should pursue for herself, but attacks on the

community” (Marshall and Duff 1998: 21–22). So stated, one could conclude that acts that apparently “attack or flout” a community’s dominant values concerning sex, religion, or ethnic homogeneity are “attacks on the community” to be counted as “socially proscribed wrongdoing.” If the aim is to advance a modestly positive form of legal moralism, then Duff (and Marshall) will need to find some less communitarian way to distinguish public from private wrongs. The civic morality of republicanism, as I shall argue below, is both available and appropriate.

The second and third questions both trade on the familiar distinction between actions wrong in themselves (*mala in se*) and those that are wrong only because they are prohibited (*mala prohibita*). In the case of paradigmatic crimes such as rape, robbery, and murder, it is easy to see how, as *mala in se*, they are morally wrong. The problem is to show how they constitute *public* wrongs. In contrast to perjury, tax evasion, and treason, which are by definition wrongs to the public, the paradigmatic crimes are wrongs to individuals. Again, Marshall and Duff have a response, which is to argue that such crimes are *not only* wrongs done to their individual victims: “an attack on a member of the group is thus an attack on the group—on their shared values and their common good. ... ‘[H]er’ wrong is also ‘our’ wrong insofar as we identify ourselves with her” (Marshall and Duff 1998: 20). But this prompts the further question of *how* the wrongs are shared or common. Is it a matter of choice or identification—of what “we” choose as our values and mutual concerns, or of how “we” define our values and ourselves as a group? Here again, I shall argue, republican theory provides the adequate answer.

The third question—how to account for *mala prohibita* as moral wrongs—arises because the proscribed acts or activities may be obviously public but not obviously immoral. Speeding, driving without a license, and drinking alcohol in a city park provide clear examples. If relevant statutes or ordinances proscribe them, all three are *legally* wrong even though none of them seems to be intrinsically immoral. But if *mala prohibita* need not be moral wrongs, then immorality cannot be the necessary condition of criminality that negative legal moralists—and negative *plus* positive legal moralists, such as Duff and Moore—take it to be. In response to this challenge to legal moralism, Duff has drawn a distinction between *pre-criminal* and *pre-legal* wrong. To use his example, failure to comply with tax laws can only be morally wrong if there are such things as tax laws; there is thus no pre-legal wrong of failing to pay taxes. Once tax laws do exist, however, failure to comply with them, *ceteris paribus*, counts as a morally wrongful failure to do one’s civic duty. When other laws make a crime of failing to pay one’s taxes, they make a crime of an action that was pre-criminally, but not pre-legally, a moral wrong (Duff 2014: 219; see also Duff 2012: 198–204, and Duff 2007: 91–2). The idea, then, is that actions that do not seem to be morally wrong in themselves, such as speeding or driving on the left-hand side of the street, can become wrongful when relevant laws are promulgated, such as traffic laws. Something that was not wrong pre-legally thus becomes a wrong pre-criminally—that is, even before it is designated as a crime or infraction—which is consistent with the legal moralist’s claim that only immoral actions should be made crimes.

This distinction between pre-legal and pre-criminal is, I believe, both sound and to the point. It fails, however, to account for the *moral* element of the pre-legal wrongfulness that Duff has identified. Paying taxes may be a legal duty, and failure to pay them a legal (but pre-criminal) wrong, but what makes it a *moral* duty, the violation of which counts as a moral wrong? Duff appeals in passing to republicanism to forge the link between legal and moral wrongfulness, referring to civic duties and using the language of fair shares (Duff 2014: 219, 222, 227; also Duff 2012: 203), but these are references and appeals that must be supported by an account of republicanism as a matter of fair play. That account I shall now try to provide, beginning with a brief synopsis of republican political and legal theory.

Part two: Republicanism as fair play

Perhaps the simplest way to distill the leading themes of its long and complicated history is to say that republicanism is largely a matter of *publicity* and *self-government*. That republicanism involves publicity is evident from the term's derivation from the Latin *res publica*, the business of the public. To the republican, government and law are not the purview of a single ruler or a small set of rulers, who may dispose of people and territory as if they were the ruler's personal property. On the republican view, government and law are the people's business, to be conducted on the people's terms (Pettit 2012). For that reason, republicanism also involves publicity in the sense of openness. That is, the public's business is to be conducted *in public*, open to the scrutiny and criticism of members of the public.

Quentin Skinner's and Philip Pettit's influential writings have brought the second feature of republicanism, self-government, to the center of attention in recent years (esp. Skinner 1998 and Pettit 1997). Pettit's contributions are especially important here, for he has explicitly connected republican freedom to the concerns of criminal law (esp. Braithwaite and Pettit 1990 and Pettit 2015). His conception of freedom as non-domination stops short of where I think republican freedom takes us, which is to freedom understood as autonomy (Dagger 2005), but the essential point is that republicans believe freedom is more than a matter of being left alone. Whether regarded as freedom from domination or as autonomy, republican freedom requires self-government under, by, and through the law. Hence the proclamation, from Roman antiquity to modern times, that a republic is an empire of laws, not of men. That is, the republic is the rule of free citizens who govern themselves through laws that they enact or ratify, if not directly, then through their elected representatives.

How, though, do these republican concerns, publicity and self-government, bear on criminal law or legal moralism? Part of the answer is that together they underpin the republican commitment to the rule of law; another is that they represent a civic morality grounded in the principle of fair play.

With regard to the rule of law, the republican element is evident in all three themes that Brian Tamanaha has discerned in the rule of law (2004: ch. 9). First, the rule of law entails a commitment to limited government. No one is to hold absolute or unchecked power, and the aims of those in positions of authority must be limited to the service of the public good. Second, the rule of law is, in the old republican formula, the rule of *law*, not of men—not, that is, rule by the arbitrary will or whims of those in power. Finally, in order to satisfy the two previous conditions, the rule of law also requires *legality*. For a rule or ordinance to be a law, in other words, it must meet certain formal requirements regardless of what its substance is. Thus, among other things, a law must be general in its application, must be made known to the public, and must not contradict itself or other laws.¹⁰ All of these themes, in short, bear traces of the republican concern for publicity and self-government. In the case of legality, moreover, there is a clear connection to the idea of fair play. For it is simply not fair to hold people accountable to “laws,” or expect them to “play by the rules,” when these people have no way of knowing what the rules are; nor is it fair to subject them to “laws” that apply to some but not to others, or that simultaneously require and prohibit an action.

The rule of law, then, is linked not only to republicanism but also to the sense of fair play. Nor is this simply a coincidence. Implicitly if not explicitly, republicans are committed to the moral principle of fair play, which forms the basis of republicanism's civic morality. This connection to fair play admittedly is not a feature of standard accounts of republicanism, but I shall try to demonstrate why it should be in three steps. The first is to define the principle of fair play and to identify its key features; the second is to show how this principle connects to the main concerns

of republicanism; and the third is to explain how following the principle of fair play leads to a civic morality that underpins a modest form of positive legal moralism.

Step one: The principle of fair play

Fairness and fair play are ancient concepts, grounded in widely and firmly held intuitions about right and wrong conduct. Straightforward formulations of the principle of fair play, however, are little more than half a century old. The first appeared in 1955, before the Hart-Devlin debate, in H. L. A. Hart's "*Are There Any Natural Rights?*" As Hart there wrote, "when a number of persons conduct any joint enterprise according to rules and thus restrict their liberty, those who have submitted to these restrictions when required have a right to a similar submission from those who have benefited by their submission" (Hart 1970 [1955]: 70). Hart did not refer explicitly to "fairness" or "fair play" in this passage, but John Rawls did in his 1964 essay, "*Legal Obligations and the Duty of Fair Play.*" There Rawls explained "the principle of fair play" in this way.

Suppose there is a mutually beneficial and just scheme of social cooperation, and that the advantages it yields can only be obtained if everyone, or nearly everyone, cooperates. Suppose further that cooperation requires a certain sacrifice from each person, or at least involves a certain restriction of his liberty. Suppose finally that the benefits produced by cooperation are, up to a certain point, free: that is, the scheme of cooperation is unstable in the sense that if any one person knows that all (or nearly all) of the others will continue to do their part, he will still be able to share a gain from the scheme even if he does not do his part. Under these conditions a person who has accepted the benefits of the scheme is bound by a duty of fair play to do his part and not to take advantage of the free benefit by not cooperating.

(Rawls 1964: 9–10; see also Rawls 1999: 96)

Taking Hart's and Rawls's formulations together, we can identify four key elements in the principle of fair play. First, the principle applies to *cooperative practices*; second, these practices are governed by *rules* or *laws*; third, these rule-governed practices are subject to *collective-action problems*; and fourth, coercion is necessary to *assure* the people engaged in such a practice that their compliance will not be exploited or wasted. None of these points is novel, but they do require brief explanation.

Regarding the first point, the principle of fair play applies only to those activities involving a *cooperative practice*. Those who find themselves in a street fight or anything that counts as a "free for all," such as a Hobbesian state of nature, are not engaged in a cooperative practice in which the participants have a duty of fair play to one another. Cooperative practices must be mutually beneficial, as Rawls said, for otherwise there would be no point to the cooperation. But they also must be in some way burdensome. A group of musicians must cooperate if they are to play together, but their playing will not constitute a cooperative enterprise if it is all benefit to them and no burden. There must be some hardship—at least some restriction of their liberty, in Hart's terms—that is necessary to the achievement of the good or benefit the participants aim to achieve. In the case of the musicians, there must be occasions on which one or more of them would rather not play a certain piece or would prefer not to rehearse so often or so long. Something similar is true of all cooperative practices.

Cooperative practices are also ongoing. They may begin with spontaneous, unrehearsed activity, but they will need *rules* or *laws* to continue. That is the second key element of cooperative practices that raise considerations of fair play. In some cases these rules are nothing more

than informal and perhaps unspoken norms. In a small group, when the point of the activity and the need for cooperation are obvious, the rule may be nothing more than “You do your part, I’ll do mine, and no shirking.” In larger groups, and especially in those in which the cooperation is supposed to extend well into the future, formal rules that specify the nature of the required cooperation will be necessary.

The third feature of a cooperative practice is that it is susceptible to *collective-action* problems. As Hart’s and Rawls’s formulations indicate, the principle of fair play applies to cooperative enterprises that produce *public or collective goods*—that is, goods that are indivisible, non-excludable, and non-rival, so that one person’s enjoyment of a good does not deprive another of an equal opportunity to enjoy it. Such goods, of course, are not likely to require universal cooperation to produce, as the standard examples of national defense and clean air attest. They are, instead, goods that non-cooperators may enjoy as fully as those whose cooperative efforts produce the goods in question. Cooperative practices are thus open to free riders who hope to benefit from others’ cooperative labors and sacrifices without themselves bearing those burdens. Cooperative practices typically can tolerate some free riders, but at some point free riding will lead to the collapse of the enterprise. That is why coercive measures are usually necessary if the practice is to survive.

Coercion or some other means of preventing or punishing free riders thus speaks to the fourth fair-play element of cooperative practices, the need for *assurance*. Even people who are willing to make cooperative sacrifices will be unwise to do so when their sacrifices will be in vain. It makes no sense, for example, to pay membership dues to a club or organization when few of the other supposed members are doing so. Cooperative practices must find some way to assure those who would willingly cooperate that their cooperation will not be wasted. Such people will quite happily acknowledge that they have a duty of fairness to contribute to the support and maintenance of the cooperative practice, but they must be given security against those who would take unfair advantage of their cooperative good nature and endanger the practice with their attempts at free riding.

This analysis of fair play and cooperative practices bears on political and legal philosophy because Hart and Rawls, among others, believe that we should regard political societies and legal systems as cooperative enterprises. For Rawls, in fact, the idea “of society as a fair system of cooperation over time, from one generation to the next,” is “the fundamental organizing idea” of his theory of justice as fairness (Rawls 2005: 15). To be sure, some political regimes have been so despotic, tyrannical, oppressive, and exploitative that they could not be properly described as cooperative enterprises. All political regimes rely on some degree of cooperation, however, and many of them have been cooperative enough to qualify as the mutually beneficial and reasonably just schemes of social cooperation that Rawls took to warrant duties of fair play. That is why the principle of fair play has found its chief employment in discussions of political obligation and the justification of punishment. In both cases the arguments are controversial, but the underlying idea is that the citizens of a polity that may be reasonably regarded as a cooperative venture have a general duty to obey its laws. Those who do not comply with this duty make themselves liable to punishment by the legal authorities. Other things being equal, in short, fair play requires obedience to the law and justifies punishing those whose disobedience violates the duty of fair play.¹¹

Two further points remain before turning to the connection of fair play to republicanism. The first is that the duty of fair play is something that every member of a cooperative practice owes to the other members, or at least to those whose cooperative efforts help to support and sustain the practice. We often speak of duties or obligations that are owed to “the state” or “the law,” but that is simply a short-hand way, according to the fair-play view, to refer to obligations owed to one another as cooperating members of the practice—to the law-abiding members of the polity, for instance. The second is that the principle of fair play has a critical and aspirational

aspect. Because the principle applies only to cooperative practices, it requires us to subject political regimes to scrutiny in order to determine whether they truly qualify. If they fall well short of the ideal of a cooperative practice—if they are thoroughly oppressive and exploitative—then there will be no duty of fair play to comply in general with their ordinances. In other cases the question will be whether a regime is cooperative *enough* to qualify as a cooperative practice. For that matter, even the best regimes will not completely realize the ideal of a fully cooperative practice. There will always be something further to aspire to if a body politic is to be a mutually beneficial and just scheme of social cooperation. And that is why the principle of fair play has a critical and aspirational aspect.

Step two: Fair play and the republic

The most direct way to mark the connection between fair play and republicanism is to attend to a word often used to render *res publica* into English. That word is *commonwealth*. The republic is the public's business, as we have seen, and the *weal, wealth, or well-being* of the public is a matter of common concern. It is not the business of one or a few, nor of a faction or sect, but of the people in their common capacity as citizens. If the republic truly is to succeed, the people must cooperate, as citizens, to ensure that it provides the public goods of order and security under law. They must bear the burdens involved in establishing and maintaining the rule of law, in other words, in order to enjoy its benefits.

Like other cooperative practices, then, the republic is a rule-governed enterprise. Cicero made that point two millennia ago when he defined the republic as “an assemblage of some size associated with one another through agreement on law and community of interest” (1999: 18). In order to provide the rule of law, however, the citizens of the republic must cooperate by paying taxes and bearing other burdens; but because the rule of law is a public good, some citizens will be tempted to become free riders. In the face of this temptation, the republic must find ways to assure those who are willing to bear their shares of the cooperative enterprise that their efforts will not be futile.

This is to say that republics rely on the spirit of fair play. Of course, they must employ coercion against those who would take unfair advantage of other citizens; but coercion cannot by itself generate the *spirit* of fair play. The threat of coercion may lead to a grudging acceptance of the need to do one's fair share by paying taxes and obeying other laws that one would rather disobey. But republics need more than grudging acceptance. They need citizens who are willing to put the public good ahead of their personal desires not because they fear coercion but because they want to do their duty. To put the point in time-honored republican terms, republics need to foster *civic virtue*. And civic virtue, I am suggesting, is largely a matter of fair play.

To reinforce this point, we should consider what the classical republicans took to be the antithesis and enemy of civic virtue—namely, *corruption*. Corruption takes various forms, but at bottom it is a matter of acting selfishly rather than civically—of putting one's interests and desires ahead of the public good that one shares with one's fellow citizens. If civic virtue is largely a matter of fair play, then corruption, or civic vice, is largely a matter of refusing to play fair. Two terms frequently linked in republican discourse, *ambition* and *avarice*, are instructive in this regard. Ambition, to republicans, is the overweening desire for personal power that threatens the stability of the republic and the freedom of its citizens. Avarice is the desire for personal wealth that blinds some people to the duty to contribute to the public enterprise and may even lead them to steal from it. Both are failures to act with proper regard to the rights and interests of one's fellow citizens and therefore violations of the duty of fair play.¹²

By saying this, I do not mean to suggest that public corruption is no worse than the failure to play fair in a game. The ambitious man who tries to seize power by overthrowing a republic is far worse than someone who cheats while playing tennis, as is the avaricious woman who betrays the public trust by embezzling public funds. But that simply means that some violations of fair play are worse than others, just as some corrupt actions are worse than others. The point here is that surrendering to avarice or ambition counts as corruption because it is a failure of fair play. It is also a violation of the republican commitment to publicity.

The same point holds with regard to republicanism's second leading feature, self-government. For republicans, I have noted, to be free is to be self-governing under, by, and through the law. To be free in this way, however, requires more than forbearance or lack of coercion or interference from others. It requires others to do their part in maintaining the rule of law that makes self-government possible; and this is a matter of fair play.¹³ Freedom under law thus requires the citizens to bear the burdens of legal cooperation so that all of them may enjoy the benefits of self-government. This is in large part a matter of obeying the law. Laws do not write themselves, though, and republican citizens bear some responsibility for determining what the laws are to be. They may also have some duty to enforce the law, as they do in countries that require citizens to serve on juries. If citizens are to be self-governing, in short, they owe it to one another to pay some attention to public affairs and cast at least an occasional vote for a representative. This is a matter of civic virtue, but it is also a matter of freedom as self-government. With regard to both elements of republicanism, in sum, self-government as well as publicity, fair play is a crucial ingredient.

To clarify this point, it may be helpful to draw a contrast with another conception of self-government. According to this other conception, freedom or self-government is mainly a matter of being left alone to do as one wants without restraint. With regard to law, this means that self-government amounts to *freedom from* law or, as Hobbes put the point, the liberties of subjects depend largely on "the silence of the Law" (1985 [1651]: 271). The republican view of self-government stands in contrast to this conception because, as I have said, it takes freedom to be something achieved under, or through, or by the law. In terms that Pettit frequently invokes, the difference is between "the freedom of the heath"—that is, the liberty of life in a lawless wilderness—and "the freedom of the city"—that is, the liberty of life in a civilized society under the rule of law (e.g., Pettit 1989). Self-government in the latter, republican sense is to be understood not as freedom from restraint, but as the liberty possible under *shared* government; for the freedom one can enjoy as a member of a republic is as much a matter of *interdependence* as it is of *independence*. Self-government under and through the rule law, or of restraints that people impose upon themselves, is in this way intimately connected with cooperative fair play.

Step three: Implications of fair play for republicanism

What follows for criminal law theory from this fair-play conception of republicanism? The answer is a modest form of legal moralism, as I shall explain in Part Three. It is necessary to begin, though, by considering briefly two broad implications of the fair-play conception of republicanism. The first is that republics must cultivate the spirit of fair play among their citizens; the second is that republics must play fair with their members.

Implications of the first kind begin with the reminder that we cannot simply assume that citizens will be imbued with the spirit of cooperative fair play. That assumption might be warranted in a small, tightly knit community, but not in anything as large as a republican polity. Indeed, one of the principal challenges for modern republics is to help their members to appreciate the cooperative foundations of their political and legal systems. That is a difficult task when

political and legal authority are likely to seem remote from people's lives and more coercive than cooperative in their bearing. There are ways to meet this challenge, however, with civic education probably the most widely accepted among republicans. Especially important in this regard is education in the rights and responsibilities of citizens under the rule of law.

The second broad implication of conceiving of republicanism as fair play is that the republic itself must be worthy of cooperative, fair-playing citizens. If people are to think of themselves as participants in a cooperative venture, and therefore subject to a duty of fair play, then the practice must treat its members fairly. Taxation again provides an example. Government and the rule of law are public goods, and taxes are part of the burden we bear to provide them. But what if the tax collectors are filling their pockets with our tax payments? Or what if relatively few people are paying their full and fair shares of the tax burden? In these circumstances, there seems to be no duty—and certainly none based on fair play—to pay one's taxes. For that duty to be in force, the tax system itself must operate fairly. The same point holds for other legal institutions. We simply cannot expect people to play fair when they are not themselves treated fairly.

Pressing this point farther, republicans must see to it that their members have good reason to think of themselves as parts of a *commonwealth*. Among other things, that means that economic inequality will be a subject of concern. There is no single republican formula that determines how much inequality of wealth and property is tolerable, but Rousseau grasped the essential point when he declared, in the footnote that ends Book I of his *Social Contract*, that everyone must have something and no one too much. Everyone must have enough, that is, to live as a self-governing citizen free from dependence upon those whose superabundant resources put them in position to dominate others.¹⁴

Beyond economic considerations, treating people fairly within a republic involves treating them as *citizens*. Their individual characteristics—sex, religion, ethnicity, sexual orientation, and so on—are irrelevant. The important consideration is whether a person is subject to, and will contribute to, the republic understood as a cooperative practice. If so, then that person deserves the same concern and respect under law as every other citizen; but she owes that same concern and respect, as a matter of fair play, to her fellow citizens. This is in some respects a social matter, for it relates to the attitudes of citizens and their spirit of cooperation. But it is also a legal issue insofar as the law must be concerned with fostering the spirit of fair play if the rule of law is to survive.

Part three: Republican legal moralism

Criminals, though, do not play fair. Thieves, for example, want others to respect their property, but they do not respect the property of their victims. To be sure, we must make allowances for situations in which the criminal law itself is unjust, either in what it proscribes or in how it is enforced. The burdens of fair play fall upon polities and legal systems too; that is part of republicanism's critical and aspirational aspect. When a polity is reasonably regarded as a cooperative enterprise, however, we can say that criminals violate the civic morality of republicanism by taking unfair advantage of their fellow citizens, whose cooperation makes the rule of law possible. In that sense, all crimes are crimes of unfairness. This claim strikes some not only as counterintuitive but false, despite the defenses of it I have offered elsewhere (1993 and 2008; but cf. Duff 2008). Here I shall try to extend and strengthen that defense by way of legal moralism.

From the standpoint of legal moralism, the question of whether to declare an act or activity to be criminal means that we must begin, at least conceptually, with the suspicion that the act or activity is likely to be immoral. From the standpoint of republican and modest legal moralism, we must also have reason to believe that the act or activity constitutes not only a moral

but a public wrong. To make the case for criminalization, we must therefore be able to provide satisfactory responses to the three questions raised earlier concerning Duff's (and Marshall's) modest legal moralism.

The first question—how firm is the distinction between private and public wrongs?—poses a difficulty for Duff (and Marshall), I have argued, because the attempt to draw the distinction by defining public wrongs as *shared* wrongs implies a communitarian position that seems uncomfortably close to Devlin's version of legal moralism. For an answer more congenial to modest legal moralism, we should ask instead whether the putative wrong inhibits or endangers the rule of law as a cooperative practice. Lying and promise breaking, for example, will not in general have this effect. Indeed, were we to try to bring the law to bear on every lie or broken promise, we would almost surely bring about the collapse of the rule of law. Some lies, though, such as perjury and false accusations, are clearly threats to the rule of law. The same holds for some kinds of promise breaking, such as breach of contract, that are typically counted as civil rather than criminal wrongs. Whether such forms of lying and promise breaking should be subject to the criminal law will then depend largely on the question of whether civil law provides suitable remedies. If it seems to, as in the case of breach of contract, then the wrong should be regarded as a private matter to be left to individuals to pursue through the civil law. If the offense is on the order of fraud, though, then the offender is guilty of an intentional violation of fair play and thus guilty of a public wrong deserving of the communicative or condemnatory force of the criminal law.

The second question—are such paradigmatic crimes as murder, rape, and robbery really *public* wrongs?—poses another difficulty for the conception of crimes as shared wrongs. In this case, the problem is to explain how the wrong is *shared*. How is it, that is, that the murder of Jones or the robbery of Smith constitutes a wrong the rest of us share? To say, as Marshall and Duff do, that the sharing is the result of our identification with the victims—of seeing the attacks on them as somehow attacks on us—is to invoke notions of sympathy and community that may prove embarrassing. For suppose that Jones and Smith are not—for reasons of race, religion, language, or numerous other factors—persons with whom “we” fully identify as members of “our” community. In that case, is the murder of Jones or the robbery of Smith really a shared wrong? If it *ought to be* so regarded, as Marshall and Duff no doubt believe, then we will have to have some reason other than identification or fellow-feeling to account for these offenses as public wrongs.

In these cases, again, the civic morality of fair play provides the reason. Anything that makes it difficult or impossible to play one's part as a self-governing participant in the cooperative practice of the polity counts as a public wrong—and hence is a candidate for criminalization. Murder, rape, robbery, arson, and the other paradigmatic crimes fall into this category. When the victims of such crimes survive, they are often crippled, physically or otherwise, in ways that inhibit their participation in the polity. Nor are the immediate or direct victims the only ones who suffer from these crimes, which bring in their wake not only the attitudinal costs associated with fear and the sense of injustice but also insurance and avoidance costs for the secondary or indirect victims of crime. These are the reasons even the paradigmatic crimes are as much public as private wrongs.

Finally, the third question—how to account for *mala prohibita* as *moral* wrongs—is important because any theory of criminalization that claims to be grounded in legal *moralism* must be able to show that *mala prohibita* are not merely *legal* offenses. Duff's distinction between pre-legal and pre-criminal wrongs goes some way toward meeting this challenge, as we have seen, but it does not itself account for the *moral* wrongfulness of *mala prohibita*. To do this, as his gestures toward republicanism indicate, the distinction must be grounded in a political theory that provides a credible basis for invoking civic *qua* moral duty. What Duff misses, though, is the critical importance of the principle of fair play to republicanism.

That this principle is linked to the justification of *mala prohibita* is not surprising. Indeed, it is difficult to see what is wrong with many of the prohibited activities other than the unfairness of those who engage in them. To return to the example of tax evasion, it is hardly obvious that any *harm* will result from the average citizen's failure to pay his taxes. Other things being equal, though, his failure to pay is morally wrong because he is taking unfair advantage of those whose cooperation enables him to enjoy, as a free rider, the rule of law and other public goods. That is why even those who doubt the validity of the fair-play account of *mala in se* offenses, including Duff, often acknowledge the account's plausibility when applied to *mala prohibita* (Duff 1986: 211).¹⁵ What must be recognized, however, is the vital role that this principle plays in republican legal and political theory.

Conclusion: Legal moralism and republican virtue

Recognizing this role, and elaborating it, will further advance two aims of fundamental importance to criminal law and justice. One of these is to strengthen the case for legal moralism. As I have argued above, republican civic morality provides the underpinning for a version of legal moralism that is both modest and attractive—and attractive largely because of its modesty. Legal moralism of this kind allows us to capture the intuition that criminal acts are morally wrong without turning criminal law into the legal instrument of a polity's conventional morality or licensing “the kind of moral witch hunt” that Duff and others have rightly deplored (Duff 2014: 222). According to a modest and republican form of legal moralism, criminal acts are *public* wrongs, deserving of public condemnation, because they are immoral *at least* in the sense of violating the spirit of fair play and endangering the cooperative practice of the polity, including the rule of law.

Recognizing and elaborating the role of fair play within republicanism should also advance republican legal moralism, and republican theory more broadly, by deflecting concerns about the republican emphasis on virtue. Because of its association with civic virtue, republicanism is sometimes taken to be a threat to individual rights and liberties—and especially to rights and liberties that protect activities at odds with conventional conceptions of virtuous conduct (Gey 1993; Goodin 2003). Adding republicanism to legal moralism, according to this view, is simply to encourage moral witch hunts and other attempts to stamp out vice. When republican virtue is understood in terms of the civic morality of fair play, however, these worries should disappear. So understood, republican virtue is fundamentally a matter of playing one's part as a citizen engaged in the cooperative practice of the polity, and playing this part includes respecting the rights and liberties and tolerating the personal preferences, orientations, and activities of everyone who is also doing her civic duty. Republican legal moralism will indeed endorse attempts to suppress vice by means of criminal law, but those attempts will aim at violations of *civic* morality rather than the standard “vice crimes.”

This is not to say that republican legal moralism will neatly or swiftly dispose of every controversy concerning what should or should not be deemed a crime. It does, however, provide essential guidance. If an activity or action poses no threat to the republic as a cooperative practice, then it cannot be considered civically vicious, and it should not be proscribed. Those who would make a crime of some form of sexual activity between consenting adults would thus have to show that the activity in question poses a serious threat to the polity as a cooperative practice. That case, I take it, would be difficult to make. In other cases, though, the judgment will not be as easy to reach. One could argue, for instance, that the production and/or consumption of any drug that renders people incapable of fair play or of carrying out their duties of civility should be a crime. Couched in those terms, the proposal is perfectly acceptable under the republican version of legal moralism.

But those who are charged with determining what is to count as a crime would then have to make an informed judgment as to which drugs, if any, do in fact have these propensities. Once they have identified such drugs, if any, they would then have to make the further determination of whether the criminal sanction is the appropriate way to deal with the problem and, if it is, whether a blanket prohibition or a more limited response is better. In the case of alcohol, there is little doubt that its consumption at some point inhibits civility and the spirit of fair play. Laws against public drunkenness and enhanced punishment for those who harm or endanger others while drunk, though, seem likely to address the problem more effectively than outright prohibition of the production, sale, and/or consumption of alcohol. Nor would such criminal laws place an unfair burden on anyone, neither those who fail to play fair because of their drunkenness nor those who consume alcohol without endangering others or otherwise threatening fair play within the polity. Extending this republican reasoning to drugs that are widely proscribed at present would almost certainly result in a dramatic reduction in drug laws, with corresponding reductions in drug crimes and in prison populations, especially in the United States.

The point, again, is not that republican legal moralism offers straightforward resolutions to controversial aspects of the criminal law. But it does offer essential guidance, as the examples above should show, and it does so while preserving the connection between criminal law and morality. This modest form of legal moralism, however, connects the criminal law not with the positive or conventional morality of any society, but with the civic morality of fair play within a republican polity. If it happens that the conventional morality of a society is in large part consistent with the civic morality of republicanism, then it will be a fortunate society indeed.

Notes

- 1 I am grateful to Antony Duff and Jonathan Jacobs for valuable comments on an earlier draft of this essay, including comments I have not been able to address here.
- 2 Stephen, *Liberty, Equality, Fraternity*, quoting from the selection reprinted in Stephen 1994: 35.
- 3 From Devlin's 1959 lecture, 'The enforcement of morality', reprinted as 'Morals and the criminal law' in Devlin 1971: 36–37.
- 4 For Moore's legal moralism, see Moore 1997: chs. 1, 16, and 18; and 2008. For Duff's views, see Duff 2007, esp. ch. 4, and 2014: 217–35. For the grudging respect legal moralism now elicits, see Husak 2008: 196–206; and Murphy 2012: 69–76.
- 5 Indeed, one familiar response to earlier arguments for legal moralism has been to draw a distinction between actions that are harmful and those that are immoral, with only actions in the first category to be deemed criminal. Such a view is often attributed to Mill in *On Liberty*. I think it more plausible to read Mill as holding that the law ought to concentrate on proscribing actions that are harmful to others who have not consented to take part in them, because those actions—and not those “vices” that are merely contrary to conventional morality—are the truly immoral actions. In this respect I follow Louch (1968), both in his reading of Mill and in his general position with regard to the “libertarian” opponents of Devlin's legal moralism.
- 6 Note, e.g., Duff's claim (2014: 219) that “Negative Legal Moralism ... seems plausible” because criminal law “inflicts not just penalties, but punishments—impositions that convey a message of censure or condemnation; the convictions that precede punishment are not mere neutral findings of fact, that this defendant breached this legal rule, but normative judgments that this defendant committed a culpable wrong.”
- 7 One of the current advocates, Antony Duff, has suggested in personal correspondence that Devlin was not a legal moralist, properly speaking, but “a proponent of the harm principle, with some curious views about how various kinds of conduct could cause social harm.” Thus Devlin believed that failure to uphold and enforce the conventional morality of a society—including proscriptions of homosexuality, prostitution, and other sexual practices—could lead to the harmful outcome of social dissolution.
- 8 Moore does constrain his ambitious legal moralism, however, by allowing that some immoral activities and actions should not be deemed criminal because treating them as crimes would prove too limiting or inhibiting of autonomy (e.g., Moore 1997: 75–80). The difference between Moore's ambitious

- and Duff's modest versions of legal moralism thus proves to be a difference in principle rather than a substantial one in what each would count as criminal.
- 9 Failure to establish a firm distinction between private and public wrongs also raises the possibility that so-called crimes are really private wrongs, and thus to the absorption of criminal into tort law. See, e.g., Barnett 1977.
 - 10 The *locus classicus* of discussions of legality is Fuller 1969: ch. 2.
 - 11 I defend these contentions at length in a forthcoming book, *Playing Fair: Political Obligation and the Problems of Punishment*.
 - 12 For apposite remarks about Aristotle's criticism of "grasping" persons who want "more than their fair share of benefits and less than their fair share of burdens," see Yankah 2013: 72. Here and elsewhere in his essay Yankah uses the language of fair-play theory without explicitly connecting it to republicanism.
 - 13 Note in this regard John Finnis's statement about the "desiderata" of the rule of law: "The fundamental point of the desiderata is to secure to the subjects of authority the dignity of self-direction and freedom from certain forms of manipulation. The Rule of Law is thus among the requirements of justice or fairness" (Finnis 1980: 273).
 - 14 Indeed, in Pettit's view, "the most crucial idea for a theory of criminalization is that of equal freedom as non-domination" (2015: 136).
 - 15 But cf. Morison 2005, n. 160, which holds that fair play can account for both *mala prohibita* and *mala in se*; and Husak 2008: 118–19, for the argument that fair play is limited even as an account of *mala prohibita*.

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