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Republicanism and Crime

*Richard Dagger**

What is a crime, and how does it differ from other wrongs or wrongful actions? To this question there seem to be two standard answers. The first is the ‘simple, circular, and useless’ answer that crime is whatever the lawmakers say it is; the second is that a crime is a public wrong, or a wrong involving public rather than civil or private law.¹ Whether this second answer is itself satisfactory is a matter of debate, but there is no doubt that it has had a widespread and long-lasting appeal. Cesare Beccaria, for example, held that ‘all the actions which are inimical to the public good . . . can be called crimes.’² His contemporary, William Blackstone, divided wrongs into ‘private wrongs and public wrongs. The former are an infringement or privation of the private or civil rights belonging to individuals, considered as individuals; and are thereupon frequently termed *civil injuries*: the latter are a breach and violation of public rights and duties, which affect the whole community, considered as a community; and are distinguished by the harsher appellation of *crimes and misdemeanors*’.³

Blackstone, Beccaria, and those who join them in defining crime as public wrong may give the better of the two standard answers, but it is not fully

* Earlier drafts of this essay were presented to the Law and Republicanism Workshop of the IVR Congress in Krakow, Poland, in August 2007; to a colloquium at Arizona State University in November 2007; and to a workshop on criminal law at the University of Warwick in July 2008. Whatever faults remain, this essay is much the better for the spirited discussion and criticism it received on those occasions. I am especially grateful to the editors of this volume, to Antony Duff, to Sandra Marshall, and to Jeffrie Murphy for additional discussion of and written comments on one or more of the earlier drafts.

¹ Quoting Dressler, J., *Understanding Criminal Law*, 3rd edn. (New York: LexisNexis, 2001), 1. *Black’s Law Dictionary* combines both answers by defining crime as ‘any act done in violation of those duties which an individual owes to the community, and for the breach of which the law has provided that the offender shall make satisfaction to the public’. *Black’s Law Dictionary*, 6th edn. (St. Paul, MN: West Publishing Co., 1990), 370.

² Beccaria, C., *On Crimes and Punishments and Other Writings*, ed. R. Bellamy, and trans. R. Davies and V. Cox (Cambridge: Cambridge University Press, 1995), 20; see also p. 22, ‘the one true measure of criminality is the damage done to the nation . . .’; and p. 24: ‘We have seen what the true measure of crime is, namely, *harm to society*’.

³ Blackstone, W., *Commentaries on the Laws of England*, vol. 2, ed. G. Sharswood (Philadelphia, PA: Childs & Peterson, 1860), Book III, Chapter I, p.1 (emphasis in original).

satisfactory. For we still need to know what makes a wrong 'public' rather than 'private'. Why is it, for instance, that murder, rape, and assault are public wrongs rather than simply infringements or violations of the private or civil rights of individuals, 'considered as individuals'? Why is breach of contract or defamation of character not a public wrong subject to criminal prosecution and punishment instead of the private wrong that it is usually taken to be in common-law systems?

These are but two of the difficult questions that arise when one examines the claim that crime is a public wrong. I take it, though, that their difficulty is an indication of the importance of thinking through the presuppositions and implications of this conception of crime, not a reason to abandon it. A thorough 'thinking through' is too large and complex a task for this chapter, but it is possible to make a case here for the right way to proceed with such an undertaking. That right way, in my view, is to look to the republican tradition of political thought for guidance in unravelling the problems that surround the analysis and practice of criminal law. In particular, I shall argue that republicanism can help us to understand what 'the public' is, how an action may wrong it, and why some of those wrongs should be designated crimes.

I. Crime as the public's business

In their introduction to the present volume, the editors state that the 'core values' of republicanism are liberty, equality, self-government, and civic virtue. I see no reason to disagree with them, but I think it is both simpler and historically correct to say that the fundamental elements of republicanism are *publicity* and *self-government*. That is, republicans believe that government is a public concern, not the private 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.

These core commitments have been evident in republican theory since at least the time of Cicero's definition of the republic: 'the commonwealth [*res publica*] 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'.⁴ According to another classical formulation, a republic is the empire of laws, not of men. Both 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

⁴ Cicero, M. T., *On the Commonwealth and On the Laws*, ed. J. Zetzel (Cambridge: Cambridge University Press, 1999), 18.

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*.⁵ 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. 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*’.⁶ 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 there are 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. But crime is undoubtedly 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.⁷ 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 in so far as it threatens the rule of law and interferes with the ability to be self-governing. It 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 themselves from crime, and that establish just procedures for treating those accused of committing crimes, including the proper treatment for those found guilty.

⁵ Pettit, P., *Republicanism: A Theory of Freedom and Government* (Oxford: Oxford University Press, 1997), esp. 112 and 130.

⁶ Sellers, M., *Republican Legal Theory: The History, Constitution and Purposes of Law in a Free State* (New York: Palgrave Macmillan, 2003), 72; emphasis added.

⁷ On this point, see Fletcher, G. P., ‘Domination in Wrongdoing’, *Boston University Law Review*, 76 (1996), 347. But cf. Lawrence, F. M., ‘Comment: The Limits of Domination’, *Boston University Law Review*, 76 (1996), 361.

Crime is also a very real threat from the republican point of view. Republicanism is marked by 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 there is no reason to believe that they can be eradicated. Republicans celebrate civic virtue, of course, but they do so largely because they know that such virtue cannot 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 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, then, finding ways to deal with crime is definitely part of the public's business.

II. Toward a republican theory of criminal law

Before republicans or anyone else can deal with crime, they must have some idea of what counts or should count as a crime. Many writers simply ignore or sidestep this question, perhaps on the assumption that everyone has a good-enough idea of what crime is to proceed with the business of outlining a theory of criminal law. It is worth the effort to try to do better than that, though, for a theory of criminal law that tells us what a crime *is* surely will be superior to one that does not.

As I noted at the outset, most of those who wrestle with the definition of crime seem to conclude, like Blackstone, that it is a 'public wrong'. Carleton Allen's statement of this position is worth quoting at length:

Crime is crime because it consists in wrongdoing which directly and in a serious degree threatens the security or well-being of society, and because it is not safe to leave it redressable only by compensation of the party injured. Wronged individuals are sometimes timid, sometimes supine, sometimes lazy, sometimes unable for one cause or another to pursue their remedy; the suppression of injurious wrongdoing must not be left to the mercy of such accidents, but must be controlled by some public authority more powerful and less erratic than the private plaintiff. Besides, there are a great many kinds of actions which do not injure any specific person at all, or at all events injure all persons equally, and for these there are no private remedies, for the excellent reason that they are not private wrongs.⁸

This is probably as clear and eloquent a statement of the view that crimes are public wrongs as one can find. Even so, not everyone finds it convincing. According to Glanville Williams, Allen's attempt to provide a 'material' definition of crime that rests on the distinction between public and private wrongs fails. The problem is 'the overlap between a crime and a tort. Since the same

⁸ Allen, C. K., 'The Nature of Crime', in Allen, C. K., *Legal Duties and Other Essays in Jurisprudence* (Oxford: Clarendon Press, 1931), 234.

act can be both a crime and a tort, as in murder and assault, it is impossible to divide the two branches of the law by reference to the type of act'.⁹ Those who look for a way to distinguish crimes from torts typically resort to one or both of two claims: either crimes differ from torts in being moral wrongs, or they differ in 'the aspect of damage to the public'.¹⁰ But neither claim is sound, Williams says, for 'torts and breaches of trust may be, and often are, gross moral wrongs', while some crimes are not obviously immoral at all.¹¹ Nor is it true that crimes always damage or harm the public: 'Some crimes are punished as an affront to the moral feelings of the community although they cause no damage to the community as a whole'.¹² Moreover, 'the distinction between the community and the individual is not sufficiently clear-cut to explain the use of the legal term [i.e., "crime" or "tort"]'. Between society as an aggregate of individuals at one end of the scale and a single individual at the other there are various intermediate groups... There is no line clear enough to make a definition in these terms express the sharpness of the legal concept of crime'.¹³ In short, the best we can do is to define crime in formal or procedural terms, not as a public wrong, but as 'an act capable of being followed by criminal proceedings having a criminal outcome, and a proceeding or its outcome is criminal if it has certain characteristics which mark it as criminal'—especially the characteristic of the offender's liability to punishment.¹⁴

Williams' objections are well grounded in his knowledge of English law, but they are not powerful enough, in my view, to lead us to reject the definition of crime as public wrong. The fact that murder, assault, and other wrongs can be both crimes and torts attests to the overlap between the two categories, as Williams says, but that is not a reason to abandon the belief that crimes are public and torts private wrongs. On the contrary, the overlap exists because some wrongs have both a public and a private aspect, which is why prosecuting someone for committing a public offence leaves open the possibility that his or her victims may also seek damages in a civil suit. Nor should we be persuaded by Williams' claim that formal or procedural considerations give us all we need to distinguish crimes from torts. It is true that the burden of proof is more stringent in criminal cases than in civil, just as it is true that the offender is liable to punishment in criminal but not in civil cases.¹⁵ But we still need to know which cases should be subjected to the stricter burden of proof and which should involve the possibility of punishment, with the public condemnation of the wrongdoer it connotes. In such cases we will need something like the rule, 'crimes are public wrongs and torts are private wrongs', to help us make these determinations. Nor has Williams given us any reason to believe that some other rule, such as the severity or seriousness of

⁹ Williams, G., 'The Definition of Crime', *Current Legal Problems*, 8 (1955), 116.

¹⁰ *ibid.*, 117.

¹¹ *ibid.*, 117–18.

¹² *ibid.*, 121.

¹³ *ibid.*

¹⁴ *ibid.*, 130.

¹⁵ The distinction here is doubly complicated, however; someone convicted of a crime may be ordered to make restitution to the victims, and someone found guilty of a tort may be ordered to pay 'punitive' damages.

the offence, will do a better job than this one. I conclude, then, that a definition is unsatisfactory when it says, in effect, that a crime is a crime if it is one of those acts that we treat as crimes. We will do better to continue to regard crimes as public wrongs.

This conclusion is provisional, of course, but it warrants the claim that an adequate theory of the criminal law will rest on—and elucidate—the belief that crimes are in some sense public wrongs. To borrow a distinction from Antony Duff, an adequate theory of criminal law will also be analytically sound and normatively helpful.¹⁶ That is, theories of criminal law come in two varieties, the analytical and the normative. Analytical theories ‘seek to explain the concept of criminal law, and related concepts such as—most obviously—that of crime’, while normative theories ‘seek an account not just of what criminal law is, but of what it ought to be (and whether it ought to be at all)’. Because normative theories presuppose ‘some analytical account’ of the ‘goals, values, scope and structure’ of the criminal law, they are more inclusive than analytical theories. A republican theory of criminal law must be a normative or inclusive theory of this kind, for republicans cannot be content with an analytical account of the criminal law as it is. On the republican view, the rule of law forms a large part of the public business—of the way in which a self-governing people governs itself. Such a people will need to concern itself not only with what the law is and how it operates, but also with the question of what the law ought to be or say on this or that matter. An adequate republican theory of criminal law therefore will be a normative theory.

Such a theory will help, analytically, to make sense of the ordinary operations and distinctions of the criminal law. For present purposes, that means that it will have to account for the distinction between crimes and torts and, within criminal law, for the distinction between crimes that are *mala in se* and *mala prohibita*; how is it, in other words, that both kinds of crimes are public wrongs when the former have individual victims and the latter do not? We should also want a theory that makes sense of the distinction between crimes and administrative wrongs—that is, violations of administrative regulations, such as health and safety standards for restaurants. How is it that a violation of an administrative regulation is a wrong subject to a *penalty* rather than a crime subject to *punishment*?¹⁷ We may decide, of course, that these and other well-established distinctions should be abandoned, as a powerful theory of criminal law may demonstrate that they do more to confuse than to clarify legal relationships. We should begin, however,

¹⁶ Duff, R. A., ‘Theories of Criminal Law’, *Stanford Encyclopedia of Philosophy*, (<<http://plato.stanford.edu>>; posted 14 October 2002), §1. All quotations in this paragraph are from §1 of this essay.

¹⁷ For the distinction between penalties and punishments, with their ‘condemnatory meanings’, see Duff, R. A., *Answering for Crime: Responsibility and Liability in the Criminal Law* (Portland, OR: Hart Publishing, 2007), 88. For calling my attention to the importance of administrative wrongs, I am grateful to Samantha Besson.

with the assumption that such distinctions have become well-established because they have proven their value over the years.

That assumption does not preclude us from holding that an adequate theory must also provide normative guidance by pointing us toward ways of settling some of the controversies that surround the criminal law and its boundaries. We should not expect too much in this regard—we should not insist, for example, that a theory must take a compelling and definitive stand on inchoate crimes, so-called victimless crimes, strict liability, crimes of offence (such as flag burning), and every other controversy involving criminal law—but we should expect a theory to provide some guidance when we ask what the law *should* say about matters such as these. Whether a republican theory of criminal law can meet these standards—analytical and normative—is the question to which I now turn.

III. Three republican approaches to criminal law

Neo-republicans are not in perfect agreement on all matters, and we should not expect them to speak with one voice where the criminal law is concerned. Such an expectation could only be disappointed, in fact, by a reading of the three republican approaches to criminal law advanced in recent years. Two of these explicitly advertise themselves as ‘republican’ theories, while the third links itself only in passing with ‘civic republicanism’.¹⁸ All have some claim to the title, however, and we cannot simply assume that only one of them can be a genuinely republican theory of the criminal law. Indeed, I will suggest that the three approaches, different as they are from one another, provide the bases for a more adequate theory than any of them supplies on its own. But first it is necessary to examine these three approaches.

1. First approach: crime as a threat to dominion

The first approach is found in the republican writings of Philip Pettit, especially in his book with John Braithwaite, *Not Just Deserts*.¹⁹ Pettit is well known for identifying and defending in his book *Republicanism* what he believes to be a distinctively republican conception of liberty, freedom as non-domination; moreover, he takes freedom so conceived to be the ‘supreme political value’ of the

¹⁸ Marshall, S. E. and Duff, R. A., ‘Criminalization and Sharing Wrongs’, *Canadian Journal of Law and Jurisprudence*, 11 (1998), 7 at 21.

¹⁹ Braithwaite, J., and Pettit, P., *Not Just Deserts: A Republican Theory of Criminal Justice* (Oxford: Clarendon Press, 1990). See also: Pettit, P. and Braithwaite, J., ‘Not Just Deserts: Not Even in Sentencing’, *Current Issues in Criminal Justice*, 4 (1992–93), 225; Pettit, P. and Braithwaite, J., ‘The Three Rs of Republican Sentencing’, *Current Issues in Criminal Justice*, 5 (1993–94), 318; and Pettit, P., ‘Republican Theory and Criminal Punishment’, *Utilitas*, 9 (1997), 59.

republican tradition.²⁰ In *Not Just Deserts*, however, published seven years earlier, the term Braithwaite and Pettit give to the republican conception of liberty is *dominion*.

According to Braithwaite and Pettit, dominion is a form of negative liberty.²¹ As such, it ‘involves, roughly, the absence of interference by others...’, and it is to be distinguished from autonomy and other forms of positive liberty, which involve something more than the mere absence of interference—something such as ‘the absence of physical inability, psychological incapacity, personal ignorance, or something of that kind...’.²² Unlike other forms of negative liberty, however, dominion is a specifically republican conception of liberty, which means that it is not so much a matter of being left alone as it is ‘the condition of citizenship in a free society, a condition under which each is properly safeguarded by the law against the predations of others.’²³ To enjoy dominion is therefore to enjoy a standing or status—that of the citizen—that depends upon the rule of law and the recognition of others; for ‘the bearer of dominion has control in a certain area, being free from the interference of others, but has that control in virtue of the recognition of others and the protection of the law’.²⁴

Dominion (or non-domination) is a concept with implications extending well beyond the criminal law. Crime, however, will be a major concern of anyone who wishes to promote or maximize dominion, as Braithwaite and Pettit do. On their account, crime constitutes an ‘invasion of dominion’ in the form of an assault on one’s ‘person’ (as in murder or rape), ‘province’ (as in kidnap or harassment), or ‘property’ (as in burglary or theft).²⁵ Republicans must therefore aim to prevent crime, and to punish those who commit it, in order to promote dominion. A republican theory of criminal justice thus must be a consequentialist (but not utilitarian) theory. It must also be a comprehensive theory—‘a serious attempt at a general normative theory of criminal justice’²⁶—rather than a theory that speaks only to problems of punishment, or sentencing, or law enforcement, or any one or two of the many considerations involved in the criminal law. One especially important feature of this comprehensive theory is that it calls for reintegration into the community, and reintegration not only of offenders but also of victims, whose sense of violation may leave them estranged from the public.²⁷

To assess Pettit’s (and Braithwaite’s) theory, we must begin by asking whether it is truly republican. The answer is yes, I think, even if we balk at his claim that freedom as non-domination is the ‘supreme political value’ of republicanism. There is much debate as to the adequacy and distinctiveness of Pettit’s ‘republican’ conception of freedom, but little doubt that he has revived an important

²⁰ Pettit, *Republicanism* (above, n. 5), 80.

²¹ In this and the following paragraph I draw on my ‘Republican Punishment: Consequentialist or Retributivist?’, in Laborde, C. and Maynor, J. (eds.), *Republicanism and Political Theory* (Oxford: Blackwell, 2008), 219.

²² Braithwaite and Pettit, *Not Just Deserts* (above, n. 19), 55. ²³ *ibid.*, 57.

²⁴ *ibid.*, 60. ²⁵ *ibid.*, 69. ²⁶ *ibid.*, 24. ²⁷ *ibid.*, 91–2.

aspect of republicanism. Any theory of criminal law that takes dominion or non-dominion as its central concept should therefore be considered a republican theory, if not the one and only republican theory.

But what of the idea that crime is public wrong? On this point Pettit's theory is difficult to assess, because he (and Braithwaite) offer no definition of crime, let alone a distinction between crime and tort or *mala in se* and *mala prohibita* crimes. On the one hand, the emphasis on dominion suggests that crime, as an 'invasion of dominion', constitutes a public wrong. As Braithwaite and Pettit say in the Preface to their book, 'Dominion amounts to freedom in the *social* sense of full citizenship...'.²⁸ To invade someone's dominion is thus to attack her status as a citizen—as a *public* person—and therefore to commit a public wrong. On the other hand, other kinds of wrongs may also interfere with or decrease one's dominion. Libel and slander may threaten or damage my 'province', for example, just as kidnap and harassment do, and the neighbour who accidentally breaks my window may do more damage to my property than the vandal who maliciously throws rocks at my house. Libel, slander, and accidents, however, typically fall into the category of torts, not crimes, and it is not obvious that an appeal to dominion can help us to distinguish the two kinds of wrongs. Indeed, if there is reason to believe that we can better maximize dominion by treating what we now call crimes as torts, then Pettit's (and Braithwaite's) theory could prove to be a theory of criminal justice that advocates the abolition of crime as a legal category.

There is another respect, though, in which *Not Just Deserts* offers more guidance with regard to the idea of crime as public wrong. In addition to offences against person, property, and province, Braithwaite and Pettit also follow Joel Feinberg in recognizing a category of 'derivative crimes'—that is, 'crimes which are not threats to dominion as such but which endanger the system whereby dominion is protected', such as escape from prison, tax evasion, and practising medicine without a licence.²⁹ These crimes that 'endanger the system whereby dominion is protected' are clearly public wrongs—direct public wrongs, perhaps, in contrast to the indirect public wrong that is done when an offender invades an individual's dominion.³⁰ In this way Braithwaite and Pettit could account for public wrongs in their theory while also making sense of the distinction between *mala in se* and *mala prohibita* by putting 'invasions of dominion' into the former category and 'derivative crimes' into the latter.

Finally, with regard to normative guidance, Braithwaite and Pettit's theory does well, at least in that it addresses a number of controversial issues in criminal law. Taking dominion as their touchstone, they hold that victimless (or 'consensual') crimes should be made legal, although the activities in question should in some

²⁸ *ibid.*, vii; *emphasis added.*

²⁹ *ibid.*, 94.

³⁰ The escapee and the unlicensed practitioner could threaten the person or province of specific individuals, of course, but they need not do so. The escapee could lead a peaceful life while out of prison, and the person practising medicine could be a competent, if unlicensed, physician.

cases, such as heroin use, be closely regulated;³¹ that strict liability is justified ‘where the threats to dominion are sufficiently profound’;³² and that crimes of offence, such as blasphemy and flag burning, are unjustifiable threats to religious and political freedom, respectively (but note their more complex position with regard to public indecency).³³ Other republicans may reach different conclusions on one or more of these controversies—a republican case for protecting flags and other symbols of the *public*, for example—but Braithwaite and Pettit at least address, in plausible fashion, these controversial topics.

2. Second approach: republican virtue and criminal vice

To see that self-proclaimed republicans do not speak with one voice, we need only look to the ‘republican theory of inculcation premised on Aristotle’s *Nichomachean Ethics*’ that Kyron Huigens advances in ‘Virtue and Inculcation’.³⁴ As the title indicates, Huigens is concerned with what it is that inculcates an offender, or justifies the ‘punishing majority’ in holding him or her culpable.³⁵ The title also indicates that the central concept is not dominion or non-dominion, but virtue.³⁶ ‘The law has a purpose, an end in view’, he writes, ‘which is to promote the greater good of humanity. *The criminal law serves that end by promoting virtue*; that is, by inquiring into the quality of practical judgment displayed by the accused in his actions’.³⁷

For Huigens, inculcation is ‘an act of communal interpretation that we engage in as we construct a good life’.³⁸ In judging a member of the community accused of an offence, ‘we are concerned not only with the *effects* of her actions, but also with her *decisions*. We care about the quality of the accused’s practical judgment, for it is by means of that faculty that the accused participates with us in the conduct and construction of our shared political life’.³⁹ When a jury sits in judgment, the judgment it reaches ‘is not about the actions of the accused, but about the right course of action in the circumstances of the accused’.⁴⁰ In other words, juries do not simply judge whether the accused did or did not commit the offence with which he or she is charged. What they really have to decide is whether the accused did what is right or reasonable in the circumstances. Faced, for example, with a car left unlocked and the key in the ignition, did the accused properly exercise practical reason when deciding to drive away with the car? If the answer is no, then the conclusion is that the accused lacks the virtue of practical reason—the

³¹ Braithwaite and Pettit, *Not Just Deserts* (above, n. 19), 97–9.

³² *ibid.*, 100. ³³ *ibid.*, 95–7.

³⁴ Huigens, K., ‘Virtue and Inculcation’, *Harvard Law Review*, 108 (1995), 1423 at 1425.

³⁵ *ibid.*, 1425 and 1467.

³⁶ Huigens mentions neither Braithwaite’s and Pettit’s book nor any of Pettit’s writings on the concept of freedom cited in this chapter.

³⁷ Huigens, ‘Virtue and Inculcation’ (above, n. 34), 1425; emphasis added.

³⁸ *ibid.*, 1445. ³⁹ *ibid.*, emphasis in original. ⁴⁰ *ibid.*, 1463.

virtue that enables a person to participate ‘in the conduct and construction of our shared political life’.⁴¹

How should we assess this virtue-based approach to criminal law? In this case I think we need to question both its credentials as a republican theory and its adequacy as a theory of criminal law. That is, we may concede that virtue has a role to play in the criminal law and in republicanism without thinking that it plays the central role that Huigens gives it. There is also reason to doubt that his virtue-centred approach meets the standard appropriate to analytical theories of the criminal law—namely, that they make sense of and elucidate ordinary features of that law. We have already seen, for example, that Huigens maintains that a jury’s judgment ‘is not about the actions of the accused, but about the right course of action in the circumstances of the accused’.⁴² But surely the jury does have to pass judgment on the actions of the accused—on whether he did indeed do what he is accused of doing. There may be circumstances in which jurors should take other considerations into account, but one thing we should always want them to consider is ‘the actions of the accused’. We may also worry about Huigens’ view of the reasons for punishment. The criminals’ offence, he says, ‘is, in the final analysis, a failure of practical judgment; they have failed to assemble and pursue an appropriate scheme of ends premised on an adequate conception of the good. *We blame and punish them for that failure*’.⁴³ That failure may be blameworthy, but is it enough by itself to warrant *punishment*? If so, we apparently are warranted in punishing anyone who fails to ‘assemble and pursue an appropriate scheme of ends premised on an adequate conception of the good’, including those persons whose poor judgment may never lead them to break the law.⁴⁴

What of the adequacy of Huigens’ approach as a *republican* theory? Virtue is certainly an important concept in the republican tradition, and one can fault Pettit and Braithwaite for giving it too little weight in their neo-republican theory. Huigens goes to the other extreme, however, in making virtue the sum and substance of republicanism. Indeed, it seems fair to say that what he is really offering is an Aristotelian virtue theory of criminal law, with ‘republican’ being little more than a label—a label that Huigens has since discarded in favour of ‘aretaic’.⁴⁵ He does, of course, make a case for taking the promotion of virtue to be the public’s business, but he has nothing to say about *civic virtue* as such. His

⁴¹ *ibid*, 1445. ⁴² *ibid*, 1458; emphasis added. ⁴³ *ibid*, emphasis added.

⁴⁴ In a subsequent essay Huigens responds to a similar criticism from R. A. Duff by saying, ‘it was at least clear [in “Virtue and Inculpation”] that I did not mean to use harm and criminal wrongdoing only as evidence of poor judgment or bad character’. Huigens, K., ‘On Aristotelian Criminal Law: A Reply to Duff’, *Notre Dame Journal of Law, Ethics & Public Policy*, 18 (2004), 465 at 483.

⁴⁵ See *ibid*, p. 496: ‘In [“Virtue and Inculpation”] ... I tied the theory of punishment to a larger political theory, classical republicanism, that can fairly be described as illiberal ... I dropped this argument some time ago, and ... a republican political theory is not a necessary feature of the aretaic theory of punishment’.

theory bears traces of republicanism, in short, but they are not sufficient to make it a truly republican theory of criminal law.

There is no doubt, though, that Huigens puts forward a strong case for regarding crime as a public wrong. Virtue is important because it contributes to the public good, and crime is bad because it detracts from and even threatens the public good. The problem is that his case may be too strong. If crime is a public wrong, and if crime is, 'in the final analysis, a failure of practical judgment', then many of the things we ordinarily take to be torts or even personal offences—breaking promises, engaging in gossip, insulting someone—may become crimes. There also seems to be no basis for distinguishing *mala in se* offences from those that are *mala prohibita*.

Huigens's virtue-based approach does offer some normative guidance, finally, with regard to controversial matters in criminal law. In fact, he argues that the 'leading rationale for punishing inchoate offenses is customarily stated in terms of virtue ethics', for this rationale is based on the actor's 'dangerous disposition', not on the criminal act she attempted but failed to complete.⁴⁶ He also distinguishes criminal negligence from strict liability, arguing 'that criminal negligence is genuinely inculpatory and not merely a form of strict liability'.⁴⁷ Whether this means that strict-liability offences should not be considered crimes or merely that the offender should not be counted culpable in the *mens rea* sense is not clear.

3. Third approach: crime as shared wrongs

Sandra Marshall and Antony Duff develop the third of the recent republican approaches to the criminal law in their essay, 'Criminalization and Sharing Wrongs'.⁴⁸ They do not align themselves with republicanism until late in their essay, however, when they say:

Any account of the concept of crime and of the proper scope and aims of the criminal law must, we assume, be informed by a political theory... The political theory to which we would appeal, and on which the idea of community involved in our argument depends, is some version of the 'civic republicanism' sketched by Charles Taylor.⁴⁹

They also draw a connection to Braithwaite and Pettit on dominion when they argue that 'proscribing and punishing attacks on individual Rechtsguter [i.e., significant legally protected interests]... serves at the same time to assure all citizens that such wrongs against them will not go unpunished, and thus to foster collective security...'.⁵⁰ For the most part, however, they seem as happy

⁴⁶ Huigens, 'Virtue and Inculcation' (above, n. 34), 1477. ⁴⁷ *ibid.*, 1472.

⁴⁸ Marshall and Duff, 'Criminalization and Sharing Wrongs' (above, n. 18).

⁴⁹ *ibid.*, 21. Their reference is to Taylor, C., 'Cross-Purposes: The Liberal-Communitarian Debate', in Rosenblum, N. (ed.), *Liberalism and the Moral Life* (Cambridge, MA: Harvard University Press, 1989), 170.

⁵⁰ *ibid.*, 9; referring in a note to chaps. 4 and 5 of *Not Just Deserts* (above, n. 19).

to think of their position as communitarian, or as an amalgam of liberalism and communitarianism, as republican.⁵¹ Clearly they are less concerned with the tradition to which their ideas belong than with making sense of the idea that crime is a public wrong.

To make their case, Marshall and Duff focus on the 'paradigmatic crimes', such as murder, rape, and theft, which 'tend to be crimes that directly victimize individuals'.⁵² They recognize that other crimes pose more direct threats to the public or collective good—they refer, for example, to such crimes of 'abstract endangerment' as drunken driving or those involving toxic materials—but they take the challenge to be that of demonstrating how crimes with specific individual victims can and should be regarded as public wrongs.

According to Marshall and Duff, crime involves '*socially proscribed wrongdoing*'.⁵³ Some of these socially proscribed actions will be the otherwise innocent actions that are made wrong by their prohibition, such as driving without a licence. But others will be *mala in se*, and the members of the society have a responsibility to proscribe these inherently wrong actions: 'to believe that a certain kind of conduct should be criminal is to believe, at least, that it is conduct which should be declared wrong by the community: that it is a matter on which the community should take a shared and public view, and claim normative authority over its members'.⁵⁴ Crime is thus the public's business, and it remains the public's business even when it is committed in private: 'the community claims the right, for instance, to declare that spouse-beating is wrong'.⁵⁵

The next step in the argument is to show how the members of a group can 'share' a wrong. Here Marshall and Duff rely on the example of a group of women responding to a sexual attack on a member of the group. The women in the group:

... may see it as a collective, not merely an individual, wrong... insofar as they associate and identify themselves with the individual victim. For they define themselves as a group, in terms of a certain shared identity, shared values, mutual concerns—and shared dangers which threaten them: an attack on a member of the group is thus an attack on the group—on their shared values and their common good. The wrong does not cease to be 'her' wrong: but it is also 'our' wrong insofar as we identify ourselves with her.⁵⁶

Nor is there any reason to believe that this sense of group membership cannot extend to the political society; and if it can, then the members of that society can 'share' in wrongs against individual members.

[S]uppose... that citizens see (or should see) each other as bound together in a way analogous to the way in which members of the women's group... see each other as bound together (even if those bonds may be somewhat less intimate). We can then also see how

⁵¹ Elsewhere Duff advocates 'a republican liberal communitarianism': *Answering for Crime* (above, n. 17), 50, n. 36.

⁵² Marshall and Duff, 'Criminalization and Sharing Wrongs' (above, n. 18), 8.

⁵³ *ibid.*, 13; emphasis added.

⁵⁴ *ibid.*

⁵⁵ *ibid.*, 14.

⁵⁶ *ibid.*, 19–20.

wrongs against individual citizens can be understood as shared wrongs, as wrongs against the whole community, insofar as the individual goods which are attacked are goods in terms of which the community identifies and understands itself.⁵⁷

In this way Marshall and Duff claim to show how the paradigmatic crimes can be understood both as crimes against individuals and as shared or public wrongs. The wrong done to a rape victim 'is not "our" wrong instead of hers; it is "our" wrong because it is a wrong done to her, as one of us—as a fellow member of our community whose identity and whose good is found within that community'.⁵⁸

Is this account of crime adequate? It will not seem so to anyone who believes that all crimes are offences against individuals, full stop, or that there is no such thing as society, as Margaret Thatcher once declared. It should have a strong appeal to republicans, however. There is, after all, a Ciceronian flavour to much of what Marshall and Duff say, as in the following passage:

A group can... 'share' the wrongs done to its individual members, insofar as it defines and identifies itself as *a community united by mutual concern*, by genuinely shared (as distinct from contingently coincident) values and interests, and by the shared recognition that its members' goods (and their identity) are bound up with their membership of the community. Wrongs done to individual members of the community are then wrongs against the whole community—injuries to a common or shared, not merely to an individual, good.⁵⁹

To be sure, a republican may complain that Marshall and Duff rely too heavily on the sense of identity or membership in a community, thus opening themselves to an objection often raised against communitarians—namely, that some communities foster a commitment to narrow-minded, intolerant, and even wicked values and interests. There is also another problem betrayed by one of the passages quoted above. '[S]uppose', they say, 'that citizens see (or should see) each other as bound together...'⁶⁰ As the parenthetical 'or should see' indicates, the *sense of membership or identity may be missing when it should be present; citizens may share values and interests that they fail to perceive as shared, perhaps because of the size and diversity of their polity. For these reasons, republicans prefer to talk of the importance of the rule of law as a binding force among citizens, not the sense of community or identity as such.*

Setting those problems aside for the moment, the account that Marshall and Duff give of crime as public or shared wrongs seems to me the most promising of the three recent republican approaches to criminal law. It accounts for *mala in se* and *mala prohibita* as distinctive kinds of public wrongs, and it also offers the neatest way of preserving the distinction between civil and criminal law. This it can do through the conception of crime as socially proscribed wrongdoing, which allows them to distinguish wrongs that should be authoritatively proscribed from those that society leaves to individuals to address as private

⁵⁷ *ibid.*, 20.

⁵⁸ *ibid.*, 21.

⁵⁹ *ibid.*, 20; emphasis added.

⁶⁰ *ibid.*

matters. For Braithwaite and Pettit, the appeal to dominion blurs the crime and tort distinction in one way, by opening the possibility that dominion might better be protected by collapsing crimes into torts; for Huigens, the appeal to virtue blurs the distinction by moving in the other direction. For Marshall and Duff, however, the distinction does not rest on a single concept or value, but on the judgment of the public as to what should be a private and what a fully public matter. 'We must ask, in part, what kinds of wrongs 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, to its conception of its members' good, 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.'⁶¹ If this falls short of a definitive answer to the question of where the line between criminal and civil law should be drawn, it is a shortfall that republicans can appreciate, for it leaves to self-governing citizens the task of reaching a public decision concerning where this line between public and private wrongs should be drawn.

From the republican standpoint, then, Marshall and Duff offer the most promising of the three neo-republican approaches to criminal law. The promise, however, is not fully realized. There are two problems that stand in the way, beginning with one already noted. When they appeal to the sense of community and its shared values as a way of distinguishing public from private wrongs, Marshall and Duff rely on communitarian considerations that are doubly troublesome. On the one hand, these considerations are not necessarily congenial to republicanism. The values that the members of a community share do not have to be republican values, and they may even be hostile to them. On the other hand, the values prevailing in some communities may make crimes of activities that Marshall and Duff presumably believe should be legal—crimes such as helping someone to escape slavery, for example, or challenging the official religion. If they are to avoid such unpalatable possibilities, they will have to take the apparently *ad hoc* step of specifying the kind or kinds of communities whose shared sense of public wrong does or should count when activities are deemed to be criminal. The idea of 'the public' does no real work here, then. It all depends on what the values of the community are, and on what kind(s) of community we are willing to countenance.⁶²

The second problem relates to their focus on murder, rape, and theft as 'paradigmatic crimes'. These crimes are surely paradigmatic in the sense that they are the kinds of wrongs that come quickly to mind when most people think about

⁶¹ *ibid.*, 21–2; emphasis added.

⁶² To be fair, Marshall and Duff seem to assume a two-stage theory, in which first one makes a communitarian case for conceiving of crime as a shared public wrong and then, at the second stage, makes a case for a political theory that provides the best account of how the public or community ought to be conceived. I do not think that the stages can be so neatly separated; but even if they can, Marshall and Duff still must supply stage two of the theory.

crime. As Marshall and Duff recognize, though, these crimes are not obviously *public* wrongs. If we were to draw up a list of ‘paradigmatic public wrongs’, I suspect that treason, tax evasion, and obstruction of justice would be more likely to appear than murder, rape, and theft. After all, we can easily conceive of the latter set of offences as private wrongs, but not the former. We can even think of defamation of character, typically classified as a tort in common-law systems, as an offence that is more truly public than those acts of violence that Marshall and Duff label ‘paradigmatic crimes’.⁶³ Jones can murder, rape, or steal from Smith without anyone else ever becoming aware of the offence; but if Jones is to libel or slander Smith, other people must hear (of) or read (of) what Jones has to say. When there is no publicity, there is no defamation, no matter how much Smith may be hurt by what Jones says in their private conversation. Why, then, isn’t defamation a public wrong, and hence a crime, and perhaps even a ‘paradigmatic crime’?

One could argue, of course, that defamation should be a crime rather than a tort, and perhaps a republican theory of criminal law, in its normative aspect, will point us to that conclusion. But if we want such a theory, in its analytical dimension, to make sense of well-established legal categories and distinctions, then we should first see what may be said for regarding defamation as a private wrong and murder, rape, and theft as public wrongs. There are good reasons, in my view, to hold to these standard classifications, but these reasons require us to rely more heavily and explicitly on republicanism than Marshall and Duff do. So, at least, I shall now try to show.

IV. Private, public, and republican

There is a sense in which all wrongs are public, including those that have no legal remedy (such as callously hurting someone’s feelings). All are public, that is, in the sense that public definition of some sort determines whether a wrong is a matter of criminal law, civil law, or none of the law’s business. In this sense, defamation and murder both are public (or publicly defined) wrongs. Moreover, both are wrongs for which the public provides avenues of remedy; for the judges and juries who hear civil cases are agents of the public as fully as are those who hear criminal ones. There is a paradox here, however, in that distinguishing public from private wrongs and handling them differently under the law appear to be of value to the public. It seems to be in the public interest, in other words, to place murder in the public-wrong category and defamation in the private. How can that be, and how can republicanism help us to understand how it can be?

Defamation is a wrong, as I have noted, with an inescapably public dimension. Why, then, should we want to place it on the private-law side of a legal system?

⁶³ I owe this point to Jeffrie Murphy.

Perhaps, in the end, we should not. Yet there is a republican case for keeping defamation in the tort category that would unfold in something like the following fashion. Defamation, republicans can say, is undoubtedly of great concern to the individual who is, or believes that she is, slandered or libelled. In many cases a clear harm to the victim results from the defamation; and in others the victim is wronged by the slander or libel even if it produces no clearly harmful results. But defamation is also a public wrong, both in the sense already discussed—that we cannot privately defame someone—and in the sense that it can have serious public repercussions. Defamation may lead people to withdraw their trust, for example, from someone whose services could prove highly valuable to them. Defamation may also wrong someone not only as an individual but as a *citizen*—that is, in her public capacity. By casting doubt on the character of citizens, moreover, defamation can contribute to an attitude of cynicism and civic distrust, thereby lowering the quality of public or civic life. Clearly, the public has a reason to see to it that slander and libel are discouraged. But this can better be done through civil than criminal law.

This is so, republicans can say, because it is better to leave these matters to the supposedly aggrieved individual to pursue. In the case of defamation, that pursuit will take the form of a civil suit. In the case of other torts, we may even prefer that individuals settle matters between themselves, in neighbourly fashion, rather than take their dispute to court. Republicans are committed to the rule of law, but that does not mean that they will think the good citizen is someone who appeals to the law at every provocation. In the case of defamation, republicans can hold that the initiative for defending his or her reputation should be left to the individual, not placed in the hands of a public prosecutor. Taking responsibility for one's reputation is a public or civic virtue, in other words, but it is a virtue that the individual must exercise at his or her discretion, and it must be balanced against other considerations. If the individual believes that the (perceived) libel or slander is of no great moment, or that pursuing a legal remedy would distract her from more important matters, then she should be free to make that decision, in keeping with the republican ideal of self-government. But if she takes the (perceived) libel or slander to be worth pursuing in court, then she must be the one who takes the initiative. Granting some public official the authority to uncover and prosecute cases of defamation is also likely to dampen free and open public discussion, which is not an outcome republicans will welcome. Defamation may be a matter of public concern, in short, but it is a matter best left to civil law.

This conclusion may seem to be not only too quick but also unfair to those who have been defamed.⁶⁴ Pursuing a civil suit is a time- and money-consuming matter that surely discourages many victims of libel and slander from seeking vindication in a civil trial. How, then, can republicans hold that defamation

⁶⁴ As Jeffrie Murphy has forcefully reminded me.

should remain a tort rather than become a crime? There are, I think, three responses available to republicans. The first is to appeal once again to the dampening effect on freedom of speech that opening defamation to public prosecution is likely to have. The second is to note that those who are sued for defamation may well find that defending themselves is as time- and money-consuming as bringing the suit is for those who think themselves defamed. There are burdens to be borne on both sides of a suit, and it is not obvious that we can best promote justice or fairness by making it less costly to bring charges of defamation. Finally, the third response is to grant the force of the objection while looking for another remedy. If, that is, republicans believe that individuals should not be discouraged by lack of time, money, or other resources from pursuing defamation cases, they can look for ways to provide these individuals with public support—perhaps in the form of publicly funded legal aid—so that they can pursue their cases in civil courts.

Conclusive or not, these arguments indicate how republicans can make the case for counting an offence so difficult to categorize as defamation as a tort. But what about murder and the other ‘paradigmatic crimes’? These are, at first glance, crimes against persons rather than against citizens. They can even be committed, as we have seen, in private, and kept from the public view, in ways that defamation cannot. Yet there is a public dimension to such offences as murder that ultimately makes it proper to treat them as public wrongs. Murder is certainly an offence against a person, but it is an offence that also threatens the public, or republic, in at least two ways. One is that being a person is a necessary condition for being a citizen. Murder and other serious violations of our persons must be treated, therefore, as public offences—as attacks on citizenship. Second, these offences threaten the public through their spillover effects. As noted earlier, one need not be the direct victim of an assault to feel its injurious effects, such as fear, insecurity, and the loss of trust in those who are supposedly one’s fellow citizens. Because they typically ‘spill over’ in these ways, the ‘paradigmatic crimes’ are clearly public wrongs.

They are the kind of wrongs, furthermore, that we have good reason to expect the public authorities to prosecute. We may worry about the dampening effects on free and open discussion of a public search for defamation, but we will not complain if the public attempt to find and punish murderers has a dampening effect on murder. Nor will we think it fitting that the victim of rape, theft, or assault must bear the full responsibility for taking the person who (allegedly) made a victim of him or her to court. As Carleton Allen said in a passage quoted above, ‘the suppression of injurious wrongdoing must be . . . controlled by some public authority more powerful and less erratic than the private plaintiff.’⁶⁵ Murder, rape, theft, and other paradigmatic crimes may have their private or

⁶⁵ Allen, ‘The Nature of Crime’ (above, n. 8), 234.

personal dimension, but they are nevertheless public wrongs that should be dealt with by the criminal law.

There is an objection to this line of argument, however, that I must try to forestall. According to this objection, to say that murder, rape, and theft are public wrongs that 'have their private or personal dimension' is to put things the wrong way. These offences are public wrongs because they are first and foremost *wrongs* done to individuals, whether we think of them as citizens or not. That is why, in Marshall's and Duff's terms, they are *paradigmatic* crimes. But this is a point that republicans can readily accept. As I understand it, the republican claim is not that murder only becomes a wrong when it is an offence against a member of a law-governed public. The claim, instead, is that murder is a public wrong because it is better to live in a society under the rule of law than to live in something like a state of nature or a society governed by norms of private vengeance, such as the vendetta. Murder and the other paradigmatic crimes are not the only or perhaps even the clearest cases of public wrongs—tax evasion and other attempts to free ride on the provision of public goods may provide those—but they are wrongs that we should want the public rather than private individuals to address.

In reaching these conclusions about defamation, murder, and other offences, I have not appealed to community values or broadly communitarian considerations. I have appealed, however, to republican considerations. If my arguments are persuasive, it is because republicanism provides the underpinnings of the conviction that crime is a public wrong.

V. Conclusion

What remains is to indicate, briefly, how a republican theory of criminal law draws on elements of the three neo-republican approaches considered in section III of this chapter. Taking them in the order of that discussion, Pettit's (and Braithwaite's) emphasis on dominion—especially on protecting the person, province, and property of the individual—helps to explain why assaults on the *person* are also assaults on the *citizen*. Huigens' emphasis on virtue—especially virtue understood as the exercise of practical reason—complements Pettit's approach by helping to explain why some offences, such as defamation, are better left to the civil than to the criminal law. And Marshall's and Duff's emphasis on crimes as 'shared wrongs' helps to explain the public stake in preserving some sense of community or solidarity where the law is concerned.

I have argued that Marshall's and Duff's reliance on the sense of community leaves them in an awkward position, as they must find some way of discriminating between the values of acceptable and unacceptable communities. I have also argued that a straightforward appeal to republicanism avoids this problem, as republicanism involves a concern for citizens who govern themselves through the rule of law. There will still be some variation among republics, however, if not as

much as there is among communities *simpliciter*. What is expected of the citizen in one republic need not be exactly the same as it is in another; and the law need not rule in exactly the same way in every republic. Republicanism may explain why crime must be a matter of public rather than private law, with such offences as murder, rape, and theft included in the former category. It will not provide us, though, with an immutable and exhaustive list of offences, every one of them neatly classified as falling under the criminal law, the civil law, or outside the law altogether. There will always be difficult cases, and new kinds of cases arising as circumstances change, and the self-governing citizens of each republic will have to decide what wrongs shall be shared wrongs, or crimes. In this respect, Marshall's and Duff's approach represents an indispensable aspect of a republican theory of criminal law.