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

Which is more temporary, the soul or the body? In matters of law, morality and religion, what is most external and visible, such as custom, behaviour and ceremony, has the most endurance; it is the body to which a new soul is always being added. The culture is, like a fixed word-text, always being newly interpreted, concepts and sensations are the fluid element, practices the solid. Here Nietzsche arranges a number of oppositions – custom and feeling, body and soul, text and interpretation, solid and fluid – in parallel fashion, to make a point about social life: that the same practice may have very different meanings at different times. For Nietzsche, the distinction between punishment as a material practice and the further functions which it has or is believed to have implies that there is no single explanation of justification of punishment. So any attempt to assign a single meaning to the concept is misguided. Today it is impossible to say for certain why people are really punished: all concepts in which an entire process is semiotically concentrated elude definition; only that which has no history is definable. Here Nietzsche’s historical approach is taken to its ultimate conclusion: a radical rejection of the tradition of philosophical inquiry which investigates the meanings of concepts like that of punishment, and thus a rejection of the presuppositions common to the retributivists and utilitarians of his time.

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**Republicanism Theory and Criminal Punishment**

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

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

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

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I REPUBLICAN THEORY

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

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

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


A Two notions of freedom

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

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

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

Where the liberal account of freedom opposes freedom directly to interference, then—freedom just is non-interference—the second.
Philip Petit

Blackstone represents the eighteenth century orthodoxy when he follows the same line: "laws, when prudently framed, are by no means obviated; where there is no law there is no freedom." 11 The difference between the two conceptions of liberty in their attitude to the law was of great significance from the point of view of liberty enabled Hobbes to withstand the criticism that he anticipated as an arbitrary rule as distinct from a rule of law; an arbitrary rule as distinct from the republican vision of an "empire of laws, and of men." 12 And the same view enabled Bentham to argue that his view of the American cause in the 1770s, when the conflict between the British parliament and those countries was constrained in the laws that it passed for the governance of the American colonies that it was not constrained in the same way. He argued that Leviathan did no worse than contemporaries in respect of the liberty of its subjects, since all law compromises liberty. 13 Hobbes would argue that Leviathan and Hobbes could argue that the American cause in the 1770s was constrained in the same way that it was constrained in Britain itself - those laws represented an arbitrary interference with America's and compromised their liberty. 14

C. Easier to lose freedom as non-domination

So much for the harder-to-lose freedom of opposing freedom to non-domination, not non-interference, but what of the easier-to-lose freedom of shifting the antagonism? This effect comes from the fact that someone loses freedom, not just to the extent that another person interferes on an arbitrary basis in their choices but to the extent that another agent has the capacity to do this. The fact is, under the republican conception of liberty, that someone even if that thumb is never used, or at least never used with hostile intent, against them. Suppose that under the existing law and in a certain measure. Even if her husband is at least loving and caring individual, such a wife cannot count as fully free under the construction of freedom as non-domination. And neither can

12 Harrington, p. 8.
13 See John Laid, Three Letters to Dr Price, London, 1776.
not be arbitrarily imposed there, those in America did not enjoy a simi-
lar status under the law. I should add that the second effect enabled
them to sieve this argument home. They were in a position to argue
that even though the British parliament did not interfere much in
American affairs—even though it levied only a small tax—still the fact
that it could levy whatever tax it wished, without any serious restraint
on its will, meant that it related to the American colonists as master
to slave.

Joseph Priestley offers a nice example of this line of argument:
Q: What is the great grievance that those people complain of? A. It is their
being taxed by the parliament of Great Britain, the members of which are so
far from taxing themselves, that they ease themselves at the same time. If this
measure takes place, the colonists will be reduced to a state of absolute
servitude, as any people of which there is an account in history. For by the
same power, by which the people of England can compel them to pay a
penny, they may compel them to pay the last penny they have. There will be
nothing but arbitrary imposition on the one side, and humble petition on the
other.39

So much by way of explicating the core republican value of freedom
as non-domination. What, then, is republican political theory? It is
theory of what the state ought to be and to do—that theory of politi-
cal forms and aims—which takes the freedom as non-domination of all
its citizens as the ultimate goal that the state ought to promote. Under
traditional republicanism, of course, the citizens were limited to
proprietary, mainstream males but the version of the doctrine that I
envision follows the liberal development associated with Bentham in
expanding the citizenry to the limit. ‘Everybody to count for one,
nobody for more than one,’ in the slogan ascribed to Bentham by John
Stuart Mill.40 What I think of as republican theory might better be
described, then, as neorepublican theory. It keeps the republican
concept of liberty in place, while embracing the liberal view of the
constituency for which such liberty should be achieved.41

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Stuart Mill, x:357.
41 I have argued elsewhere that what may have led Bentham and his fellow essays
from the republican conception of liberty was the sense that it was infeasible to think of
achieving such a goal for an expanded constituency. See Republicanism, ch. 1. Ben-
tham’s fellow utilitarian, William Paley, was aware that the notion of freedom as non-
domination was the established conception of freedom but as early as 1785 argued
against it—and in favour of the liberal alternative—on the grounds that it would
‘inflame expectations that can never be gratified, and disturb the public content with
complaints, which no wisdom or benevolence of government can remove’. See William

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II. THE REPUBLICAN VIEW OF CRIME

I shall not be able to say anything here on why we should be attracted
to republican political theory, casting freedom as non-domination in
the role of the supreme, perhaps even the unique, political value.42 But
assuming that we do embrace republicanism, the question which I now
want to raise bears on which acts we should thereby be led to crimi-
nalize, and on what grounds. What are the evils that republicans will
see in those acts that deserve, by their own lights, to be designated as
crimes? I ask the question because I believe that the answer to it gives
us a useful line on how the republican politics ought to deal with those
convicted of committing crime or those who have confessed to a crime.

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

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

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

42 See Pettit, Republicanism, ch. 3.
more harm than good comes of the fact that republicanism takes and ought to take a consequentialist attitude to the value of non-domination, as I have argued elsewhere. It ought to be committed to those measures, and only to those measures, that will make a real difference to the amount of non-domination enjoyed in the society. There will be no point in criminalizing something in order to reduce domination, if the very act of criminalization itself facilitates more domination than it removes.

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

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

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

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

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13 See John Braithwaite and Philip Pettit, Not Just Deserts, ch. 3, and Pettit, Republicanism, ch. 3.

14 See Pettit, ‘Freedom as Antipower’ and Republicanism, ch. 2.

15 Prouty, pp. 55-6.
C. Crime as the consequence of a community's freedom

But not only does a successful act of crime threaten the freedom of all of us, it also contains within it an element of the victim's freedom. The victim is a member of the community as a whole in particular. We can easily imagine a situation in which a man commits a murder, knowing that his victim is a fellow member of the community. Despite the fact that his victim's freedom is legally protected, the act of murder still poses a threat to the community as a whole. The victim's freedom is threatened by the act of murder, but the act also contains within it an element of the victim's freedom.

III. THE REPUBLICAN RESPONSE TO CRIME

There have been three main responses to crime in the republic. The first is to ignore crime and hope that it will go away on its own. The second is to try to prevent crime by making sure that the victim's freedom is protected. The third is to actually commit crime and thereby protect the victim's freedom.

We have seen that the problem of crime in the republic is not just one of protecting the victim's freedom. It is also a problem of protecting the community's freedom. The community's freedom is threatened by the act of crime, but it is also threatened by the act of prevention. The community's freedom is threatened by the act of prevention, but it is also threatened by the act of commitment.

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Republic Theory and Criminal Punishment

So far it is possible, rectification represents a compelling idea for anyone to be convicted if the state and society should be responding to a theory about what the state and society should be responding to the conduct of the offender. After all, full rectification means that it is a successful rectification of the offender's conduct. The thing to be remembered in this respect is that if we can interfere with an individual's conduct, we can certainly do so in such a way that it is more likely to be rectified than it might otherwise be. The question whether it is in fact more likely to be rectified is one which must be answered by every prospective offender. It is no good arguing whether it is or not. The question is, whether it is or not.

The thing to be remembered in this respect is that if we can interfere with an individual's conduct, we can certainly do so in such a way that it is more likely to be rectified than it might otherwise be. The question whether it is in fact more likely to be rectified is one which must be answered by every prospective offender. It is no good arguing whether it is or not. The question is, whether it is or not.

A. Punishment as rectification

The consideration of whether it is a good thing to be punished is given a good deal of weight by the argument that the evil effects of a crime can be remedied by punishment. This is not the case in all cases. A crime is not necessarily an evil, and even if it is, it does not necessarily follow that punishment is the best way to remedy its effects. For instance, in a case of theft, the evil is not directly caused by the theft itself, but by the failure to punish it. If the theft is punished, the evil is not remedied, but it is prevented from occurring again. Therefore, punishment is not necessarily the best way to remedy the evil effects of a crime.

This being the case, it seems that the considerations outlined so far are not a good reason for punishing a crime. It might be even more effective to find a suitable substitute for punishment, such as social rehabilitation. This would be more effective in remedying the evil effects of a crime than punishment itself. Therefore, we should not punish a crime simply because we can interfere with the conduct of the offender. The question of whether it is a good thing to be punished is not one that can be answered by looking at the effects of punishment on the individual.

B. Punishment as a deterrent

Another way in which punishment can be seen is as a way of deterring others from committing crimes. If we believe that punishment is a good thing, then we should punish the offender so that others will be deterred from committing similar crimes. This is a way of preventing the evil effects of a crime from occurring in the future. However, this is not necessarily the case. Punishment may have the effect of deterring others from committing crimes, but it is not necessarily effective. For instance, if we punish someone for a crime that they committed in the past, it is unlikely that this will deter them from committing similar crimes in the future. Therefore, punishment is not necessarily the best way to prevent the evil effects of a crime from occurring in the future.

C. Punishment as a corrective measure

Another way in which punishment can be seen is as a way of correcting the behavior of the offender. If we believe that punishment is a good thing, then we should punish the offender so that they will be corrected in their behavior. However, this is not necessarily the case. Punishment may have the effect of correcting the behavior of the offender, but it is not necessarily effective. For instance, if we punish someone for a crime that they committed in the past, it is unlikely that this will correct their behavior in the future. Therefore, punishment is not necessarily the best way to correct the behavior of the offender.

D. Punishment as a way of compensating the victim

Another way in which punishment can be seen is as a way of compensating the victim of the crime. If we believe that punishment is a good thing, then we should punish the offender so that the victim is compensated for their loss. However, this is not necessarily the case. Punishment may have the effect of compensating the victim, but it is not necessarily effective. For instance, if we punish someone for a crime that they committed in the past, it is unlikely that this will compensate the victim for their loss. Therefore, punishment is not necessarily the best way to compensate the victim of a crime.

E. Punishment as a way of restoring the community

Another way in which punishment can be seen is as a way of restoring the community. If we believe that punishment is a good thing, then we should punish the offender so that the community is restored. However, this is not necessarily the case. Punishment may have the effect of restoring the community, but it is not necessarily effective. For instance, if we punish someone for a crime that they committed in the past, it is unlikely that this will restore the community. Therefore, punishment is not necessarily the best way to restore the community.
lenient treatment. If they cannot make such a complaint, or at least not persuasively, then the treatment is non-arbitrary; if they can, then it is arbitrary.11 By that test it is surely plausible to say that rectificatory treatment is a non-arbitrary way of dealing with offenders, so that giving the power of rectification to the state does not mean giving it a dominating status in relation to convicted or confessed offenders.

The force of this point is easily appreciated when we consider the pay-back and pay-off ways of conceptualizing punishment. Suppose we say that the point of punishment is to express the outrage or condemnation of the community in relation to the particular crime, or even the type of crime, in question. Such a conceptualization demonizes offenders—it infuses a them-and-us view of their status—allowing the punishment to be dictated in a way that may well trample on interests that we all share in common but in respect of which only offenders are saliently vulnerable: for example, interests in not being exposed to pain, or cruelty, or ridicule. The conceptualization is all too likely to usher in what Montesquieu described, in a tellingly republican phrase, as a 'tyranny of the avengers'.12

But this is not the only conceptualization of punishment that would hold out the spectre of penal domination. Consider the alternative account in which punishment is supposed to increase overall utility by reducing the level of crime: this, through deterring the offender in question, through deterring other potential offenders, through keeping the offender off the streets or perhaps through reconditioning the offender. Any such dispensation, rational though it may seem to be, runs a risk of introducing a tyranny of the reformers. The shared interest in crime-reduction and the shared interest of the reformers is then exceeded by the interest in the reformers—perhaps by the reformers' desire to express their own moral superiority. This is a similar theme. But it is true that the treatment of offenders will be arbitrary and the power of so treating offenders will be dominating. The state, whether at the level of parliament or the courts, will assume that in dictating sentences it has a licence to optimise on crime-reduction: and this, at no matter what cost to offenders.

The tyranny of the avengers represents a rather crude version of the retributive conceptualization of punishment and the tyranny of the reformers an equally crude version of the utilitarian conceptualization.
The third civil with crime bears on the community, as a whole, not just on the victim. It consists in the more generalized and less personal, but no less real, harm caused to people who are not directly involved in the crime itself. This harm can be caused by the fear of crime, which can lead to an increase in crime itself, and by the psychological trauma of the event. The community as a whole may be affected by the crime, and the fear of crime can lead to a decrease in the quality of life for all residents.

Retribution

D. Retribution

Retribution is the idea that the offender should be punished in a way that is proportionate to the harm caused. This idea is based on the belief that punishment should be a form of justice, and that the offender should be made to experience the same level of suffering as the victim. Retribution is often seen as a way of achieving a sense of justice, and it is often seen as a way of preventing crime, by deterring others from committing similar offenses.

Compensation

C. Compensation

Compensation is the idea that the offender should make reparation to the victim, either directly or through a fine. Compensation is often seen as a way of achieving a sense of justice, and it is often seen as a way of repairing the harm caused by the crime. Compensation can be achieved in a variety of ways, including through restitution, whereby the offender is required to pay the victim for the harm caused, or through community service, whereby the offender is required to perform some form of service for the benefit of the community.

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E An ecumenical ideal

Utilitarians baulk at the lack of social purpose inherent in a retributivist policy of paying back offenders for what they have done, regard less of how that pay-back serves overall social goals. In particular it imposes a common pattern of treating convicted offenders even if the offender has a dependent and vulnerable family, whether or not the arrest – the punishment given will be the same; punishment is wholly dictated, on a retrospective basis, by the nature of the offence and the degree of culpability. There are two reasons why utilitarians may feel better disposed towards a republican policy of punishment as rectification. First, non-domination; it has a teleological or consequentialist rationale, offering a different treatment of equally culpable offenders when their circumstances are relevantly different. In order to impose different punishments. A lot will depend on how far there is evidence of sincere recognition, on how far the offender is able to offer recompense, and on how far the offender is likely to reoffend.

Retributivists baulk at the opportunistic character of any properly utilitarian policy. They argue that on that policy, the convicted punishment will best serve the overall goal of crime-prevention. And different circumstances of different offenders, and of the different effects that would be served by punishment, offenders are not treated in an even-handed way.

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

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

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