Comment

Republican Criminology and Victim Advocacy

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Scheingold, Olson, and Pershing (1994) have posed an interesting challenge to the republican perspective on criminal justice, and we attempt to meet that challenge here. But before considering their argument, we find it useful to set out the main elements in the republican position. In doing so, we summarize the approach in *Not Just Deserts* (Braithwaite & Pettit 1990) and in some followup articles (e.g., Pettit with Braithwaite 1993, 1994); the summary breaks down this approach, very loosely, into three axioms and eight theorems.

Republican Theory

The first axiom of our republican theory is that while there are many goods or values engaged in social and political life, a single goal for the criminal justice system can be the basis of a sophisticated policy; in furthering this goal, the justice system will be more sensitive to the many things that matter than will other more complex theories. The goal in question we describe as republican or civic freedom; in a word, "dominion." Our idea is that if the criminal justice system is designed to promote dominion, then it will also promote values such as people's physical integrity, freedom of movement, secure property rights, procedural rights, a suitable concern for equity, and so on.

What is dominion? It is not the absence of interference—however broadly interference is understood—which is hailed in classical 19th-century liberal thought; it is not negative liberty in the established sense of that term (Berlin 1958). But neither does dominion involve the presence of self-mastery, the presence

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of power over self—however that power is articulated—with which Berlin (p. 16) identifies positive liberty. Dominion is something in between. It requires, in the old 18th-century republican phrase (Reid 1988), that the individual enjoy "the absence of arbitrary power" on the part of any other person or corporate body—even on the part of the self-governing community—to interfere in the person's affairs; specifically, it requires that this immunity to power be established by publicly assured, transparent means. Dominion is negative to the extent that it requires the absence of an evil perpetrated by others—the absence of an arbitrary power of interference. Dominion is positive to the extent that it requires not just that others not actually interfere but that they do not have—and be seen not to have—the arbitrary power of interfering: the power of interfering at will and with impunity in some aspect, however restricted, of the individual's life (Pettit 1993a, 1993b, 1994). Citizens cannot enjoy this liberty as antipower, this resilient liberty, if they are unable effectively to invoke certain rights or if they live in a poverty that leaves them vulnerable to the powerful.

The second axiom of our republican theory is that the criminal justice system should be designed so that this goal is maximally promoted overall in the fashion associated with consequentialist or means-end rationality: the system's institutions, procedures, and policies should be such that there is more rather than less dominion enjoyed in the society at large. We emphasize in *Not Just Deserts* that setting up a goal like this does not run a risk associated with many consequentialist theories: the risk of making it look legitimate for individuals in the system to bend the most sacrosanct of rules in the name of advancing the systemic goal, as with the utilitarian sheriff who is supposed to be justified in scapegoating an innocent individual in order to avoid a riot. If it is even suspected that an official may pursue such a wayward course, then dominion is jeopardized, for it will cease to be a matter of visible assurance that no one has arbitrary power over you. Scheingold, Olson, and Pershing doubt this. They think arbitrary state power directed at pariahs is not something that worries average citizens, who cannot put themselves in the shoes of a pariah. In our own country, Australia, it may also be true that most adult whites are unconcerned about arbitrary abuse of power against serious criminal defendants. Yet many young people and black Australians, and not so long ago gay Australians (and German and Japanese Australians during the war), felt acute insecurity over arbitrary criminal justice powers; even elite white males feel occasional insecurity that they may be capriciously accused of sexual harassment.

The third axiom of our theory is that if dominion is to be promoted by the criminal justice system, then all components of that system ought to be taken into account in planning systemi-

cally for the promotion of dominion. If only sentencing policy is considered, for example, then the measures recommended may prove to be self-defeating: if just sentencing requires hanging for theft of more than 40 shillings, we may find, as happened in 18th-century England, that juries, prosecutors, and police who have different ideas will either acquit those so accused or find them guilty of stealing 39 shillings (Hartung 1952). Republican theory is not just dominion-centered and consequentialist, then; it is also comprehensive in its orientation. One important feature of this comprehensiveness is that the theory requires us always to think not just about the effects of crime in diminishing the dominion that people enjoy but also about the effects on people's dominion of investing authorities like the police, the courts, and the prison officers with high levels of power.

These three axioms support a number of theorems. In our book we paid attention to the general features that we may expect a criminal justice system to display, if it is faithful to a republican brief and the main ones are captured in theorems 1 to 4 in the list below. Theorem 4 is the point, as we shall see, at which Scheingold, Olson, and Pershing challenge the approach. Theorems 5 to 8 bear in particular on sentencing and are elaborated in the articles where we address the retributivist concerns raised by von Hirsch and Ashworth (1992) and Ashworth and von Hirsch (1993) about the extent to which republican sentencing policy can deal fairly with offenders.

Theorem 1. The criminal justice system should implement a presumption in favor of parsimony: this, because almost every criminal justice intervention involves certain costs to dominion and only uncertain benefits.

Theorem 2. The system should equally implement a pattern of checking every form of power that it bestows on its agents; such checking may be realized by any of a variety of measures—review procedures, credible professional self-regulation, appeal mechanisms, etc.—and is essential for the reduction of people's exposure to arbitrary power.

Theorem 3. The system should be designed, not primarily to punish offenders but, rather, out of community-based dialogue, to bring home to them the disapproval of others and the consequences for others of what they did: this, on the grounds that such a pattern is more likely to affect offenders and is more supportive of their own dominion.

Theorem 4. The system should be focused, in good part, on the reintegration of victims, and the families of victims, into their community: this, in order that they may be restored to the dominion, and the sense of dominion, they previously enjoyed.

Theorem 5. The aim of promoting dominion would not legitimate a "license-to-optimize" strategy of sentencing. It

would require the courts to impose sentences that rectify, so far as possible, the damage that the crime inflicted on the victim's dominion and on the dispensation of dominion within the community at large.

Theorem 6. The damage done to dominion by a crime means that *ideally* a convicted offender should be persuaded: (*a*) to manifest a *recognition* that the victim is indeed possessed of dominion; (*b*) to give the victim *recompense* for the material harm he inflicted; and (*c*) to commit to measures sufficient to provide both victim and community with *reassurance:* sufficient, that is, to make up for the damage done by his crime—and only by his crime—to their subjective sense of enjoying dominion.

Theorem 7. What recognition, recompense, and reassurance require in practice is a matter for detailed investigation by criminologists, courts, and affected communities, but a number of observations are obvious: that recognition is not a matter of verbal assurance only—words are cheap—but that it should ideally involve reconciliation with the victim; that recompense may mean restitution in exact kind, compensation in some alternative currency or, most weakly, reparation of a kind fit to express repentance; and that reassurance is not likely to be well served, in the republican's books, by a resort to hard treatment, though escalation toward harder treatment may be required with repeat, especially dangerous, offenders.

Theorem 8. The emphasis on rectification means that republican theory requires the treatment of offenders as equals: in every case the criminal justice system should try, without favor, to rectify the damage to dominion. But the treatment of offenders as equals in this sense does not necessarily mean equal treatment for acts in the same offense type, since circumstances may affect what rectification requires; for example, circumstances may call for a less demanding sentence in some cases (though never for a breach of upper limits on sentences, since this would jeopardize the dominion of all of us).

A Dilemma for Republicans?

We accept as correct (or as empirical findings that we have no reason to contest) the following conclusions of Scheingold, Olson, and Pershing.

1. Washington State's Community Protection Act (CPA) is a package of crime prevention measures with a deeply flawed criminological rationale.

2. It is a package that republicans should oppose because the effect of such repressive, stigmatizing policies of such doubtful preventive value is to reduce dominion.

3. A primary reason for CPA's introduction was the political activism of victim advocacy groups.

4. These victim advocacy groups prosecuted a get-tough criminal justice agenda that was decidedly antirepublican (i.e., a threat to dominion).

Scheingold, Olson, and Pershing seem to pose a terrible dilemma for republicans. First, a central tenet of republican criminology is that criminal justice institutions should seek to reintegrate victims, to restore victims to the full enjoyment of dominion. Second, the civic republican tradition of political theory finds virtue in citizen activism through social movement politics; it sees the institutions of civil society—those institutions that lie between the individual and the state—as in many ways more important than the state itself to securing the objectives of a republican democracy. With crime control, we have been quite explicit in hypothesizing that social movement politics (such as feminist or environmental activism) holds out more hope for ameliorating our deepest crime problems than state policies (e.g., Braithwaite 1995).

The grassroots victim advocacy described by Scheingold, Olson, and Pershing is social movement politics par excellence. And it was pursued by victims whose agenda could be described as restoring dominion they lost from their crime and who were indeed empowered through their engagement with politics. Scheingold, Olson, and Pershing seem to have put republicans on the horns of a dilemma: either support the republican means of social movement politics and defeat republican ends, or defend republican ends by repudiating the republican means of social movement politics.

The dilemma is easily dissolved when one realizes that social movement politics is precisely a means and not an end. Dominion is the only end, albeit a nuanced one, valued by republican criminology. Social movement politics has a special attraction as a means for republicans because civic engagement empowers the common people and thereby enhances their dominion vis-à-vis the powerful. Yet ultimately, whether a particular social movement is good or bad is adjudicated according to its aggregate contribution to dominion. It is simply not a problem for republicans to denounce neofascist social movements in Eastern Europe, even though the very act of participation in these social movements may add something to the dominion of the disenfranchised, unemployed youths who are their front line. The benefits to dominion of this taste of political participation for the disenfranchised are comparatively small compared to the costs to dominion of Turks who live in terror, or worse, of the mass terror

in prospect should fascists again win state power in Europe. The republican pursuit of dominion which we advocate motivates a search for social movements to support, social movements which will advance dominion. The women's movement, aboriginal rights movements, the consumer movement, the environmental movement are examples of such movements. Republicans do not look to support any old social movement, only movements with pro-dominion agendas. Indeed, as one of us has said elsewhere (Braithwaite 1995), republicans must resist elements within generally progressive social movements, such as the women's movement, when those elements seek to stigmatize men in a way that threatens dominion.[1]

Just as there are better ways to reenfranchise unemployed East Germans than by empowering them to get tough with Turks, there are better ways of empowering crime victims than by social movements that get tough on crime. We and others have written extensively on the modality of victim empowerment that we consider most likely to reintegrate victims and restore them to the full enjoyment of dominion (Braithwaite & Mugford 1994; Moore 1992; O'Connell 1992; on similar New Zealand programs see Maxwell & Morris 1993; for critiques see Alder & Wundersitz 1994). Moreover, we have initiated programs of evaluation research to assess whether our empirical claims in this respect are true or false (Sherman, Braithwaite, & Strang 1994). The next section describes this particular version of a wider movement variously called restorative justice (Cragg 1992; Galaway & Hudson 1990), reconciliation (Dignan 1992; Marshall with Fairhead et al. 1985; Umbreit 1985), peacemaking (Pepinsky & Quinney 1991), making amends (Wright 1982), and redress (de Haan 1990).

A Better Way to Restore Victim Dominion?

While the Washington victim advocates favored intrusive and exclusionary state policies of a decidedly antirepublican kind, Scheingold, Olson, and Pershing found that "there was an uncanny consonance between the way these victim advocates and republican criminologists Braithwaite and Pettit diagnosed the problems of the criminal justice system" (p. 741). The following quotations certainly support the critique of states "stealing conflicts" from citizens that republicans embraced from Nils Christie (1977).

[1] Unlike Scheingold et al., we are optimistic that the women's movement, at least in Australia, but we suspect elsewhere as well, is becoming a less retributive, less stigmatizing social movement. It will remain a plural social movement, one where republicans will find both assertive adversaries as well as allies who share platforms concerning antipower conceptions of liberty and equality, ethics of care and community.

> I realized that it was a *criminal* [her emphasis] justice process and there was no room, according to the court's interpretation, any place for the victims to assert their rights. . . . It was not Charles Harris versus Trish Tobis. It was Charles Harris versus the state. (P. 736)
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> I felt (*long pause*) I'm trying to search for the right word. There's no connection between the crime and me. The crime happened to me but it was the state prosecuting this man. . . . I was just a piece of evidence. (P. 737)

The remedy to this problem would seem to be to give back to the victim the particular crime, to give the victim a say in what is to be done about the crime, an opportunity to confront the offender with the hurt caused and to do that in the victim's own words rather than as part of an incomprehensible legal discourse. In comparison, the opportunity to project frustrations from their silenced emotions in their own case by influencing other citizens' cases seems a profoundly unsatisfactory proxy empowerment.

So we favor a radical redesign of the criminal justice system, a redesign with which we are actively experimenting in our home town of Canberra. We like to call this alternative model community accountability conferences, also known as "family group conferences" and "diversionary conferences." It is a model that applies only in cases where defendants "decline to deny" their guilt. Since fewer than 20% of defendants plead not guilty in the jurisdictions we know (e.g., New South Wales Bureau of Crime Statistics & Research 1983:20–21), the model can cover most of the action currently handled by the courts. In the small fraction of cases where the prosecution alleges guilt and the defendant asserts innocence, courtroom adjudication remains the favored approach.

Community accountability conferences are meetings of citizens (generally seated in a circle) to discuss a criminal offense and agree on a plan of action for the problems caused by the offense. A facilitator invites the offenders to nominate as participants the people most important in their lives, the people for whom they have most respect and affection. Victim(s) also attend and are invited to nominate participants with a special relationship of care to support them. The selection principle for participants reverses that which applies in trials: The citizens invited to participate in trials are those who can inflict maximum damage on the other side; citizens invited to participate in conferences are those who can provide maximum support to their own side. As some cultural feminists would put it, the conference selection principle is an ethic of care, while court participation is predicated on an adversary ethic. In terms of republican theory, the selection principle is designed to structure both shaming and reintegration of both offenders and victims into the conference.

Participation of victims who confront offenders and their families with the hardship and insecurity they have suffered as a result of the crime structures shaming into the conference; participation of supporters of both offenders and victims is intended to structure reintegration into proceedings.

Courts seek to excise emotion from the process of deliberation. Conferences under citizen control support that open expression of emotion which is necessary to shaming and to a remorse that will be accepted by victims to have an authenticity which justifies acceptance of apology-forgiveness. This can be accomplished by citizens who accept the simple procedural rule that shouting, haranguing, or abusing other participants is forbidden. The focus is on the consequences of the act for victims and for offenders' families (which is where the emotion comes in) and on what is to be done about the act (which is where apology, reparation, and constructive problemsolving enables retribution to be transcended).

Conferencing differs from traditional mediation in many ways, the most important of which are: (*a*) there is no professional mediator, just a facilitator who insists on some simple procedural rules; (*b*) the conference begins from agreement (rather than dispute) that there is wrongdoing to be admitted on the part of the offender; (*c*) it is not a mediation between two individuals, but a problemsolving dialogue between two communities of care. The latter is a critical distinction given the importance of the imbalance of power critique of alternative dispute resolution (Abel 1982; Auerbach 1983; Fiss 1984; Astor & Chinkin 1992). For example, if the concern is that there will be an imbalance of power when the offender is a man and the victim a woman, or when the offender is a child, the victim an adult, this concern is ameliorated in a dialogue between two communities of care both of which comprise men and women, adults and children (and where all of them have obligations to act as advocates for the rights of the person they are supporting). Community accountability conferences have worked better than courts in conditions of the most extreme imbalance of power imaginable—cases in which the offenders were global corporations and victims were illiterate citizens of remote Aboriginal communities (Braithwaite, in press; Fisse & Braithwaite 1993:232–37).

Readers can look elsewhere for detailed debates about how conferences work, their strengths and weaknesses (particularly Alder & Wundersitz 1994) and the conditions under which they succeed and fail to secure republican reintegration (particularly Braithwaite & Mugford 1994). A central question that Scheingold, Olson, and Pershing will pose, however, is why victims should not be every bit as retributive and antirepublican in conferences as they are in social movement politics. Our observation is they are not; indeed, it seems that almost everyone we know to

have witnessed conferences is surprised at the low level of victim vengefulness. This is not to deny that victims come to conferences angry and upset but to point out that often they are brought to a point of forgiveness by the end of the conference, or even, in the most extreme cases, to the point of helping with shelter or employment for homeless, unemployed offenders. Perhaps this should surprise us when confronted with the Scheingold, Olson, and Pershing data or with the punitiveness of the Australian community toward criminals when they respond to public opinion polls. But it should not surprise us when we consider the evidence that citizens are less prone to be punitive the more they know about the complexity of the life situation of a criminal. Because distance enables the simplification of evil, citizens are more likely to support capital punishment in response to a decontextualized survey question than they are when they sit in a courtroom as jury, judge, or prosecutor. They are more punitive in response to newspaper stories of crime than they are after reading edited court transcripts of the same crime (Doob & Roberts 1983, 1988). Conferences bring victims a big step closer to offenders than courts, because conferences replace choreographed encounters designed to exaggerate the evil of the other with face-to-face dialogue that aspires to understand the other. In due course, we hypothesize that a study randomly assigning Canberra cases to conference versus court will show that victims are more dissatisfied with the justice of the heavier punishments of courts than with the lesser sanctions imposed by conferences. Only a random assignment experiment can provide the satisfactory empirical evidence needed on this question, however (Sherman et al. 1994).

Conclusion

Scheingold, Olson, and Pershing made a useful contribution to the debate around republican criminology with the empirical finding that a victim advocacy movement had profoundly antirepublican effects on criminal justice policy. Republicans are required to seek and sift empirical evidence about which are progressive and regressive social movements in terms of effects on dominion. We hope to have shown in this comment that whichever way these empirical findings fall, they pose no threat to the coherence of the republican theoretical position; rather, they serve to inform republican praxis.

Our suspicion is that the Scheingold, Olson, and Pershing findings could be replicated on the effects of victim advocacy movements in many parts of the world. Indeed, it has always been our presumption that crime victim advocacy organizations are movements to resist through the agency of movements with opposing agendas, such as civil liberties unions and prisoner ac-

tion groups.[2] It is valuable to have some empirical confirmation of that presumption. Victimology, moreover, has always been an intellectual movement within criminology with which we have not engaged. As republicans, the intellectual agenda of Australian victimology seems for us to have too much in common with the political agenda of the victims' movement. More important, because feminist criminology is a much more important force than republican criminology, we hope feminist criminologists would adopt a similar view. We cannot imagine a greater intellectual tragedy than to reduce feminist criminology to victimology. That is terrain we should leave, however, in the more capable hands of Kathleen Daly.

Finally, some qualifications should be considered. Henk Eijkman (1992), a thoughtful Australian republican criminologist, believes that in the Australian context we are wrong in our presumption that the victims' movement is necessarily retributive. Eijkman has argued with us that in Australia we make a political mistake to eschew engagement with the victims' movement.

> First, what is most striking about the Australian victim movement, especially when compared to the United States, is its balanced and humanitarian victims' rights agenda. . . . The Australian movement advocates the creation of equity; a parity of rights and services so that both victims and offenders find similar protection under the law, in administrative procedures and in terms of the services available to them . . . they argue for equal consideration with respect to the treatment and rights accorded to offenders. (Eijkman 1992:279)

We think this might be rather too charitable; yet we remain open to persuasion by Eijkman's further empirical work as it unfolds. Let us highlight this empirical openness further by confessing that one of us (Braithwaite) has been a sometime collaborator with victims' movements with respect to survivors of corporate crime. For reason of profound power imbalance between individual victims and corporate offenders in these cases, the practical risks of oppressive outcomes from such campaign-

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[2] We share all of the following concerns about the victims' movement articulated from different quarters in Scheingold et al. (pp. 734–35):

> Civil libertarians worry about the temptation to take short cuts through constitutional rights (Boruchowitz 1992:831–32). Robert Elias (1990) . . . argues that victim advocacy groups are, in effect, coopted by conservatives on behalf of punitive policies (pp. 242–47). . . . Albert Reiss (1981:225) worries about a serious mismatch between problem and policy insofar as policy decisions are driven by the misconceptions and exaggerations derived from aberrant, inflammatory events. . . . Andrew Ashworth and Andrew von Hirsch (1993:88) worry that victims may well push for and receive disproportionate sentences.

Hence, we favor community accountability conferences that are constrained against imposing sanctions heavier than a court would impose and against any incarcerative sanction, that are constrained to protect rights, that empower victims directly without any need for the intercession of politicians, and that direct participatory energy to the day-to-day cases that affect people's lives rather than focus enthusiasms on headline-grabbing sensational cases.

ing never seemed a worry. With regard to responding to gross human rights violations by authoritarian regimes, Stan Cohen (1995) is cautiously sympathetic to working with survivor movements as part of the international human rights community, and this from a perspective we would characterize as republican, certainly as antiretributive. Power imbalance again may be the issue here, at least up to a point when the survivors take over and become tyrants themselves.

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