

DEFINING ORGANISED CRIME: AN OPERATIONAL PERSPECTIVE*

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INTRODUCTION

This paper presents the results of an approach to organised crime now being explored within the Queensland Criminal Justice Commission. In brief, the Criminal Justice Commission was established to carry on the work of the (Fitzgerald) Commission of Inquiry, including specific statutory responsibilities to deal with organised and major crime. The Commission is unique in that it combines research, intelligence and law enforcement functions under the one institutional umbrella. The organised crime research project now being carried out within the Commission is a direct consequence of the need to find a way to fulfil its statutory obligations in respect of organised crime. It also owes a lot to the Commission's internal need to intertwine a research approach to organised crime with a law enforcement approach. The project began with the analysis of current models of organised crime as defined by academic researchers and by practitioners working in law enforcement agencies. This paper reports on the progress of this project. However, it has not yet developed to the stage of being either Commission policy or practice and the views contained herein are those of the authors.

MODELS OF ORGANISED CRIME

Many of our considerations in regard to organised crime are heavily influenced by two major theoretical models. The first could be called the mafia model (sometimes called the evolution-centralist perspective). The second is the social systems approach, which locates organised crime in its social and cultural contexts.¹

Proponents of the mafia or evolution-centralist model believe the following: organised crime is "grafted" onto society. It is a conspiracy of Italian (or other ethnic) criminals bound together by rules of silence. It is hierarchical in organisation and runs like a large-scale business.

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1 Geason, S, "Definitions of Organised Crime and their Implications" (1989) mimeographed paper, Australian Institute of Criminology, Canberra.

On the other hand, the social systems theorists regard the mafia model as old fashioned and simplistic: "Perceiving organised crime as an alien parasite, sapping the strength of the body politic fails to recognise the symbiotic relationship between parasite and host".²

When social systems theorists analyse organised crime they fail to see a highly bureaucratised illegal corporation. Rather, they perceive loose associations based on kinship networks ("families") or client-patron power relationships. Social systems theorists regard organised criminal actors as economic rationalists, who carry out a cost-benefit analysis of sectors or the illicit market. They (the criminal actors) move into the market, either as retailers or wholesalers, where such a move appears to be cost-effective.³

These two models of organised crime have been severely criticised. The mafia model, for example, erroneously views the relationship between organised crime and society as antagonistic, instead of seeing organised crime as an integral and natural outgrowth of complex social forces. Further, it fails to differentiate between complex criminal activities such as prostitution, drug trading, extortion and so on. Also, it focuses on ethnicity to the exclusion of other factors such as social class.⁴

The problems with the systems approach is that it often fails to recognise the national or international links in much criminal activity, ignores or plays down clear ethnic links in some illegal situations and focuses little attention on the bureaucratic and hierarchical, almost quasi-military units that permeate much illegal activity. For example, the unique structure of Italian-American organised crime has led to a franchised "McDonald's-ization of the mafia" which has "enabled a relatively small number of persons to exercise a great deal of power and generate considerable income with a minimum of effort".⁵

In Australia, those who have adopted a "mafia" model of organised crime — such as Costigan — believe that the answer to the problem is in targeting organisations, not their activities for investigation. The view is that if you eliminate the organisation, you stop or at least curtail its illegal activities. This approach is the opposite of that recommended by social systems theorists who target the crimes, not the criminals. It is relevant to note that in the United States RICO (Racketeer Influenced and Corrupt Organisations) legislation (often mooted for Australia) is aimed at the criminal organisation rather than at individual criminal acts.

Law enforcement agencies traditionally have little interest in academic discourse on definitions of organised crime. However, Wardlaw has pointed out the critical significance of conceptual frameworks for both research and policy:

Developing new conceptual frameworks and using new conceptual tools is part of the necessary work which must be done before we can ever really get to grips with organised crime and demonstrate we have done so. If we continue to fail to address our conceptual

2 Above n1 at 3.

3 Albin, J L, *The American Mafia: Genesis of a Legend* (1971).

4 Geason, above n1; Bynum, S, *Organised Crime in America: Concepts and Controversies* (1987).

5 Abadinsky, H, *The McDonald-ization of Organised Crime in America: Concepts and Controversies* (1987) at 43.

inadequacies in the organised crime field we will ensure that debate about organised crime will continue to be based primarily on rhetoric and emotion, we will prevent serious consideration of options other than law enforcement ones, we will reduce the ability of law enforcement to effectively target illegal markets and we will stifle public debate about the social consequences of current policy directions. We do have serious problems with major crime in Australia, whether we call it organised crime or not, and we owe it to our society to employ the best tools at our disposal to analyse the problem and devise solutions. We should not neglect conceptual tools. Used the right way they can be powerful and practical and need not to be academic irrelevancies.⁶

Starting with the definitions generally current in law enforcement or in Commissions of Inquiry into the operation of major criminal syndicates, it appears that, in essence, they derive from some combination of the following propositions:

- Organised crime is crime that is organised;
- Organised crime is crime committed by organisations;
- Organised crime covers certain defined activities.⁷

Such circular definitions are of very limited assistance to any analysis of organised crime. Also, as Geason has demonstrated, research definitions have led to widespread and often contradictory suggestions from Commissions of Inquiry on how to deal with such crime.⁸

The next level of definition delineates organised crime by one or a number of inherent or common characteristics (typically varieties of criminal activity), the presence of corruption and the role of violence. A more unusual variant of such definitions was bequeathed to the Commission by Mr G E Fitzgerald, QC:

A working definition might focus on the destination of the proceeds of crime. If they stay with and are used on 'legitimate' expenses by the people directly engaged in misconduct, then the crime is clearly local. If a 'cut' goes to others, remote from the misconduct, then the crime is clearly 'organised'.⁹

The weakness in such definitions is the neglect of the social, political, economic and historical context of organised crime. In order to take account of this weakness the next level of definition might therefore be described as a social systems or contextual perspective: this would include Michael Bersten's proposal that "organised crime be defined as the field of transactions materially connected to markets in illegal goods and services".¹⁰

This economic (mode of) definition has some attractions, as does the historical approach of Alfred McCoy, in his analysis of the development of the Sydney criminal

6 Wardlaw, G, "Conceptual Frameworks of Organised Crime — useful tools or academic irrelevancies" (1989), paper presented to Australian Institute of Criminology conference on Organised Crime, 5-7 September 1989, Canberra, at 2.

7 See *National Crime Authority Act 1984* (Cth).

8 Above n1.

9 Fitzgerald, G E, "Report of an Inquiry Pursuant to Orders in Council" (1989) Brisbane.

10 Bersten, M, "Defining Organised Crime in Australia", paper presented at the 1988 ANZAAS Congress, Sydney University.

milieu.¹¹ However, the problem with economic, historical or social systems definitions is that, while they may yield theoretically more sophisticated explanations of organised criminal activity, these definitions are perceived as fairly abstract exercises as far as the law enforcement agencies and their personnel are concerned.

TOWARDS A WORKING FRAMEWORK

The need is perhaps not so much for an all-purpose definition of organised crime for all time but some more precise understanding of how patterns of criminal activity, patterns of organisation and the social and economic context interact within a defined geographical and political area. This approach proceeds from the analysis of criminal activities in a particular location to specific descriptions of how these activities are conducted or “organised” and what factors contribute to the activity, and its extent. The approach does not mean abandoning all conceptual frameworks; rather, it proceeds from more specific problems to general principles.

The first factor then, is that of organisation. Potentially, criminal activity can be an activity of:

- Individuals, which is self explanatory;
- Family groups, which we categorise as a familial pattern of organisation;
- Partnerships, or persons who are not related engaged in either short or long term criminal activities;
- Enterprises, in which there are persons in an “employee” type of role;
- Corporate enterprises, which are where some of the “employees” fulfil management functions;
- Networks, or definable groups of people involved in serial criminal activity; and
- Fraternities, where a critical factor in criminal activity is membership of some group.

These patterns of organisation are not mutually exclusive. For example, most of what is commonly thought of as organised crime — groups such as the Sicilian Mafia or the US La Cosa Nostra — have both fraternal and corporate characteristics. The Sydney based criminal milieu described in the work of McCoy is, in essence, a network which covers many enterprises and some criminal “corporations”.¹² Also an individual can engage in criminal activity on their own account, with relatives and/or associates while at the same time fulfilling obligations of a fraternal nature. The individual can be placed at several points on a continuum of criminal activity. However the organisational requirements vary considerably — a fraternity is likely to develop some internal rituals and obligations to fulfil or reinforce its separate identity while the essence of a corporate structure is the assignment to individuals of specific roles in a wider organisation. While this analysis

11 McCoy, A W, *Drug Traffic: Narcotics and Organised Crime in Australia* (1980).

12 Ibid.

establishes the impossibility of seeking a clear distinction between organised and other (disorganised?) crime, it does emphasise different structures requiring differing degrees of organisation.

The project initiated by the Criminal Justice Commission had another starting point. This was a consideration of the illegal economy and, in particular, the similarities and differences between legal and illegal economic activities. The concept of an illegal economy is close to Bersten's notion of the "field of transactions materially connected to markets in illegal goods and services",¹³ except that we would also emphasise the role of the illegal economy in the provision of employment and income as well as illegal goods and services.

It is important to recognise the impossibility of drawing a clear dividing line between the legal and illegal economies. There is a large "grey" area covering such activities as professional services to crime and investment of criminal proceeds in legitimate enterprises that should perhaps be thought of as the "semi-legal economy". Within the illegal economy the critical distinction would appear to be between what might be called illegal commerce — trade in illegal commodities and services such as illicit drugs, vice and gambling, protected flora and fauna — and criminal depredations upon society — theft, fraud, racketeering and the like.

The key point here is that different illegal activities tailor themselves to differing patterns of organisation; some require a sophisticated degree of organisation and some may proceed without any organisation. An example here is prostitution, which is often equated with the presence of organised crime.

In itself, prostitution requires very little in the way of training, facilities or capital outlay; it is a trade that can be and often is conducted by "enthusiastic amateurs" or other individuals. However, the provision of capital and facilities can be justified by an appropriately remunerative rate of returns and, up to a limit, economies of scale can be achieved. Normally, then, one would expect a range of prostitution services to be available, extending from the unorganised single operator with no facilities to establishments offering a choice of services and facilities. In organisational terms, the top end of the prostitution market would be the domain of criminal enterprises or corporations.

If, however, one or the other form of prostitution predominated, it could be seen as an indication of the presence of non-economic factors; two that come to mind are heavy handed enforcement regimes which discriminate against permanent facilities, and corrupt regimes which favour permanent establishments over single operators. We had some experience of this in Queensland up to the time of the Fitzgerald inquiry.

The illustration above is a brief example of the multi-faceted analysis that can follow from joint consideration of patterns of illegal economic activity and patterns of criminal organisation. We believe there is much more predictive and explanatory potential with

13 Above n10.

this type of analysis than there is with a framework postulating that prostitution or vice should be equated with the presence of organised crime.

If you consider the legal economy, you find a great deal of disquiet with the abstraction known as “big business”. The differences between big business and small business are more than differences of scale — they relate to the disproportionate market power of organisations. Big businesses that most concern us in economic terms are those with a substantial degree of vertical integration — their activities dominate a single market — and those firms with a substantial degree of horizontal integration — those firms that straddle a number of markets. The economic concern is that such firms are thereby in a position to unduly influence supply, demand and price.

There are commonly other concerns with big business. One substantial concern relates to suspicion of closeness with, and undue influence over, the regulatory environment, through such mechanisms as large and anonymous political donations and personal associations between the captains of industry and senior politicians and bureaucrats.

There would appear to be some related concerns in the illegal economy — enterprises, corporations and criminal fraternities — with degrees of vertical and/or horizontal integration within illegal and semi-legal markets and at least a suspicion of undue influence through mechanisms such as corruption. A shorthand way of viewing organised crime is as the “big business” of the illegal economy — a mixture of the mafia and social systems perspectives. We do not pretend this to be a comprehensive working definition of organised crime but more a framework to analyse certain kinds of illegal activity. Indeed, one approach we would favour for law enforcement agencies is the abandonment of the term “organised crime” in favour of a specific analysis of:

- the pattern of criminal organisation;
- the degrees of influence over market or effective regulation; and
- the economic significance of illegal markets in relation to the legal economy.

IMPLICATIONS FOR LAW ENFORCEMENT

Under such an approach, law enforcement agencies would cease to equate drug crime with organised crime. Rather, they would be interested by the discovery of a fraternal, major enterprise or corporate patterns of criminal organisation; by evidence of domination of legal or semi-legal markets by illicit interests; or, by signs that illicit interests are attempting to or are able to modify their operating environment to any significant degree.

Much more far-reaching however are the potential implications of the application of this type of analysis to specific illegal industries and activities. In this approach there are possibilities for increasing the effectiveness of law enforcement in a variety of areas, including some not generally considered as relating to “organised crime”.

By way of example, we find that the most pervasive form of criminal organisation is the network, usually as the backdrop for constantly forming and dissolving short-term partnerships. It is the network, however, that is the key; it is the source of the personnel, the contacts, the ideas, the facilities and the services underlying some forms of crime.

A number of specific networks, in the areas of flora and fauna trafficking, illicit drug using and dealing and motor vehicle theft have been identified in Queensland. By far the largest and most significant of the networks so far identified is what, for want of a better term, we call the general petty criminal network.

These petty criminal groups, either because of their socialisation or subculture, are intensively involved in a range of criminal roles and activities. They are responsible for a significant proportion of household thefts, thefts from vehicles, shopstealing and lower level fraud and dealing in drugs and stolen property. They are also a significant market for illicit drugs, vice and illicit gambling services and stolen property. In addition, they are the main "workforce" of illicit commerce. A proportion of juvenile criminals can be viewed as "graduating" into the network and some criminals within the network "graduate" to more significant criminal activities.

Potentially at least, effective law enforcement action directed specifically at the network can affect a great deal of localised criminal activity. The possibility of such effective action flows from the realisation that not all members of a network are equal; in terms of the general petty criminal network the key points are reliable receivers of stolen property and reliable suppliers of illicit drugs. Indeed, in some cases, these two roles are combined and illicit drugs become an alternative currency to money within the network.

The following case study demonstrates, we believe, that the removal of key elements of a network does appear to reduce a range of localised criminal activities. This effect was fortuitously achieved rather than deliberately intended. However, the case does seem to show that an approach of targeting a network does have potential.

Detectives on the Gold Coast followed through all possible leads from a minor shoplifting offence which would normally have resulted in an insignificant charge; at the end of the day their haul included two general receivers, two receivers who also dealt in drugs and a further specialist jewellery receiver as well as a number of others involved in break and enters, credit card fraud, motor vehicle theft and a prison escapee wanted for armed robbery. The important point, however, was the apparent reduction in break and enter offences in the area where the receivers operated.

The potential of a network approach to criminal enforcement can be illustrated by some statistics: theft accounts for around 90 per cent of all crimes reported to police in Queensland each year, and there are about 170,000 instances of theft a year, of which some 33,000 or 20 percent are "cleared" by police. Currently, the number of receiving offences preferred by police is about 2000 offences a year, of which most are very minor. There is an obvious need for research to illuminate that great "black hole" into which a vast amount of stolen property is disappearing.

We can look at the same criminal problem from an economic perspective. Our current calculation is that heroin worth about \$154 million in street prices is consumed each year in Queensland and that about \$117 million a year is required to purchase this heroin after allowance is made for direct personal importations, a degree of discounting between users and their long term regular dealers and the effect of payments in heroin rather than cash. Of the total amount, it is estimated that about \$40 million is raised through dealing in heroin and about \$43 million in property crime. Depending on the return to thieves from

crime, this could require the theft of property worth twice or three times as much — perhaps more. In other words, the users of heroin, who are generally members of this petty criminal network, are responsible for a sizeable proportion of overall theft.

The general petty criminal network cannot be equated with any conceptualised mafia model of “organised crime”. However, there is “organisation” involved and the crime is of a serious magnitude with considerable consequences. The example was chosen not because it illuminates stereotypes of organised crime but as an illustration of the possible potential of this approach to crime and its organisation.

It is not possible, however, to talk about organised crime, without mentioning words like “Mafia”, “Triad”, “Yakusa” and other terms with which organised crime groups are generally labelled. Most of the organisations which fit the media’s image of organised crime appear to us, on closer analysis, to be criminal fraternities. A fraternity is, in one sense, a form of network. As in the network, the key to the criminal effectiveness of the fraternity is the constant association between members. However, in the fraternity there is, by definition, a formal aspect of the association; there is often some formal hierarchy and internal rituals; and there is an at least understood, if not explicitly formalised, code of discipline.

The media impression we have, guided very largely by United States experience and perspectives, is that the Mafia, the Yakusa and the Triads are themselves major criminal players. We believe there is another possibility which, though less dramatic and well publicised, is significant. In this perspective we would see the fraternity as providing an umbrella for the criminal activities of its members. Indeed, one American author views the American La Cosa Nostra (Mafia) as a sort of Rotary club for otherwise self-employed criminal entrepreneurs of mainly Italian ancestry.¹⁴

In the Queensland context the fraternity most fitting the stereotype of being itself a major player in major crime is the outlaw motorcycle gang — though we are certainly not implying that all motorcycle gangs/clubs are engaged in illegal activity. It is particular gangs, rather than individual members, that are engaged in the manufacture, wholesaling and retailing of amphetamines, distilled liquors and offensive weapons. Other fraternities to a larger or lesser extent function more in the sense of providing the umbrella and the “networking” support for the individual criminal acts of their members. Some other supposed criminal fraternities seem to be, at least in the Queensland context, a myth. To be a bit more specific, it appears that there is a southern Italian criminal fraternity active in Queensland but the fraternity itself is more the social and organisational backdrop to crime rather than the criminal player itself. Our ethnically Chinese criminals are just ethnic Chinese criminals; they can be organised in the corporate or enterprise sense but Triad membership or otherwise appears something of an irrelevance.

The Yakusa is worth a special mention because it is not, as is widely supposed, a Japanese equivalent of the mafia. In the terms used in this paper, the Yakusa is the most corporate of the criminal fraternities; in Japan, many if not most of its manifestations are

14 Haller, M H, “Bureaucracy and the Mafia: An Alternative View” (1992) 8/1 *J Contemp Crim Just.*

semi-legal and it is the criminal fraternity most integrated with its host society. There is no compelling evidence of widespread Japanese involvement in traditional criminal activities in Queensland; however, there is a legitimate concern over the potential for illegally sourced incoming investment flows to produce local and regional economic and social distortions. It appears that what law enforcement agencies and governments need to do in relation to the Yakusa "threat" is to be more sure of where money for such things as tourism development come from.

In Queensland, Tony Fitzgerald's requirement was the development of an "integrated, comprehensive and wide range of corrective measures" for organised crime control. In our view such an approach necessarily entails the following elements:

- **Research:** to discern the nature, prevalence, contributory factors to, and costs of organised criminal activity and devise and evaluate appropriate control measures.
- **Legislative measures:** to provide an appropriate and enforceable framework for the control of organised criminal activity.
- **Regulatory measures:** to build on the legislative framework and, in particular, to provide a means of minimising factors contributing to the operation of illegal markets and organised criminal activity.
- **Intelligence:** to gather, evaluate and disseminate highly specific information on criminals, criminal activities and criminal organisations for research and enforcement purposes.
- **Law and regulatory enforcement:** to ensure maximum individual and group compliance with law and regulatory frameworks through apprehension of offenders, elimination or disruption of illegal markets or organisations; recovery of proceeds of crime.

Such an approach might be called a research regulatory response to organised crime and could be contrasted with the current enforcement approach. The current approach places a greater stress on "arrest and seize" responses and operates under the presumption that society will achieve control over organised crime by catching and punishing sufficient "Mr Big Enoughs" and taking away their money and assets. The other assumption inherent in the current law enforcement approach appears to be that if the targeting of the "Mr Big Enoughs" doesn't work, we redouble our efforts and the money we spend on them!

Two examples will suffice to illustrate the neglected potential of what we have called the research-regulatory approach:

Flora and fauna crime is our most significant illegal export industry, although it does not do a great deal to alleviate the disastrous balance of payments position that results from importing a much larger volume and value of drugs, pornography and weapons. Those involved in flora and fauna crime are once again a network. It is a relatively small and specialised network; many of those involved appear to know and deal with each other. Most of these persons are licensed by our National Parks Service to deal in birds or reptiles that are supposedly bred in captivity. These permits are critical to their operations because they provide a ready made reason for possession of birds or reptiles if a ranger or police officer calls by. Research in this area showed that some bird traders had been given permits despite previous convictions for fauna offences and some still hold their licences

despite these convictions. It follows that a greater reduction in flora and fauna crime would result from a regulatory change — more stringent licensing — than from increased dosages of law enforcement.

The situation in relation to motor vehicle theft is somewhat similar. When joyriders are discounted, motor vehicle theft is predominantly an activity of a criminal network, basically composed of persons within or on the fringe of the motor trade. Those motor vehicles stolen by “professionals” don’t quite disappear into the same “black hole” that other stolen property disappears into; we know a great deal about what happens to them. Most go back on to the road; usually through being reconstructed as another similar vehicle. This pattern will keep occurring as long as the vehicles being registered are subject to fairly cursory inspection. It seems logical that one of the most effective means to deal with motor vehicle theft in Queensland would be to educate Transport Department inspectors on the identification of stolen vehicles and to upgrade inspection practices. There is also another way of approaching the problem, which is to break the nexus between wreck and reborn vehicle. This could be achieved by removing or defacing the compliance plates from wrecked vehicles. However, insurance companies have in the past been reluctant to agree to such measures because it would reduce the prices that are received for wrecks at auction. This was because the thieves were in the front row of bidders at the auctions. However, the point we wish to make is that both of our suggestions would be regulatory actions likely to produce more effective reductions in at least this crime than would be the case if the major strategy was towards more intense law enforcement measures.

CONCLUSION

Two major theoretical models, the so-called “mafia” model and the social systems approach, have dominated the literature on organised crime. Most of the working definitions that law enforcement agencies use have not moved beyond operational definitions. In many cases, they are nothing more than tautologies, of limited assistance in any analysis of major criminal activity.

We suggest an approach to “organised crime” which moves away from formal definitions towards a specific analysis of three critical factors. These factors are the pattern of criminal organisation, the degrees of influence exercised over markets and regulators and the economic significance of illegal activities. These dimensions have been conceptually and operationally useful in dealing with some illegal drug activity and some forms of prostitution. We believe this approach also has powerful potential in analysing other types of activities subsumed under the label of “organised crime”. Our approach has implications for all law enforcement agencies dealing with organised crime. It emphasises research, accurate intelligence and regulatory mechanisms rather than responses based simply on arresting individual operators and confiscating their assets.

NOT JUST DESERTS, EVEN IN SENTENCING*

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In *Not Just Deserts: A Republican Theory of Criminal Justice*, we attempted to set out the overall view of the criminal justice system which a republican philosophy would support.¹ We explored the shape that a criminal justice system would assume, if it were organised so as to promote the goal of republican liberty; this goal we described as one of enjoying personal dominion. We argued that it is necessary to think comprehensively about the shape that a criminal justice system ought to take and that, in this enterprise, the republican approach serves us well. In particular, we argued that it can serve us better than any other goal-oriented approach, such as utilitarianism, and better than any approach that is built around the constraint of delivering just deserts: the constraint of meting out punishment in proportion to the gravity of the offence and the culpability of the offender.

A broad range of issues is involved in the design of the criminal justice system. The issues include questions to do with what should be criminalised, what guidelines should govern police surveillance, what initiatives should be possible in the pursuit of offenders, what procedures should be followed in prosecution and adjudication, and what sentences should be imposed for given offences. We argued in our book that it is important to consider how the system should respond to all of these challenges and not to focus on just one of them, taking the response in other areas to be already fixed; the trouble with focussing on one area in this way is that any initiative taken in one part of the criminal justice system is liable to impact on other parts of the system. In arguing this line, we took issue in particular with the so-called just deserts approach; this retributivist way of thinking tends to focus our attention exclusively on the question of what sentences to impose for different offences.

In a recent response to our book, two leading retributivists, Andrew von Hirsch and Andrew Ashworth,² maintain that, whatever there is to be said for going comprehensive in thinking about the criminal justice system — and they express some undocumented doubts about that — the republican theory that we advanced is certainly unsatisfactory in the area of sentencing policy. They suggest that on our theory, as on other goal-oriented or consequentialist theories, the courts should pronounce sentence in the manner that best

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1 Braithwaite, J and Pettit, P, *Not Just Deserts: A Republican Theory of Criminal Justice* (1990) OUP (paperback edition 1992).

2 "Not Not Just Deserts: A Response to Braithwaite and Pettit" (1992) 12 *Oxf J Leg Studies* 83–98.

serves the society overall, even if doing so expresses an indifference to the offender's degree of guilt, or indeed the victim's level of suffering. They imply that on the republican approach, the conviction of an offender provides the courts with a licence to look to the future and try to optimise results, neglecting the nature of the offence to which the sentence is meant to be a response. "What thus remains troublesome about the authors' 'dominion' theory is its forward-looking and aggregative features. These features appear to give licence to punish whenever, and to the extent that, potential victims' net gain in dominion exceeds the loss in dominion of those punished".³

The charge against us, then, is that whatever we say to the contrary, the logic of the republican position supports a licence-to-optimise sentencing policy. This paper is an attempt to show that that is not so, by developing in greater detail the sentencing policy implicit in the republican approach. The paper introduces new developments in our republican way of thinking, though developments that are fully in line with the spirit of the book.

There are five sections to the paper. In the first section we describe the goal of republican dominion, introducing a slight variation on the presentation in our book. In the second, we characterise crime as the denial of dominion; in the third section we present sentencing and punishment as an attempt to rectify this denial of dominion; and in the fourth we outline what such rectification is likely to require in republican practice. Finally, in the last section, we compare the rectification that a republican theory would support with the retribution defended by just deserts theorists.

1 REPUBLICAN DOMINION

The main thing to say about the republican ideal of dominion is that it seeks to articulate the notion of liberty which was dominant in the republican tradition of thinking from Roman times down through the republican philosophies developed in the northern Italian republics of the late middle ages, in the course of the English Civil War, and in the development of English and American political thinking that lay behind the American revolution in the 18th Century.⁴ In that long history of thinking about liberty, as recent scholarship has emphasised, freedom was conceptualised as the social status enjoyed by someone who is not a slave and, more generally, by someone who is so protected by the law and culture of his community that he does not have to depend for the enjoyment of independent choice on the grace or favour or mercy of another. This was a tradition of thinking about liberty in which the core of liberty is the negative good of not being interfered with by others. Though the republican notion of liberty was negative in that respect, it naturally emphasised that liberty is constituted by the support against interference, and the status of being manifestly so supported, which goes with citizenship in an appropriately governed society; in a society where the rule of law obtains and power is systematically checked.

3 Id at 87.

4 See above n1 at Chapter 5 for a rough account of these developments and for reference to the important historical scholarship of figures like John Pocock and Quentin Skinner. See too Pettit, P, "Negative Liberty, Liberal and Republican" (1993) 1 *Euro J Phil*.

This republican notion of negative liberty was displaced in 19th century liberal circles by a conception of negative liberty in which the main thing is to avoid interference, not to enjoy the security and status of being protected against possible interference. The 19th century liberals were all involved, one way or another, in arguing the case for lifting government restraints on trade. In the course of this debate, as we see things, they invoked the language of liberty — the language of free trade — and in doing so they came to think of liberty, more and more, as the condition denied under any form of restraint, including the restraint of the law, not as the condition opposed primarily to that of the slave. Under the older, republican tradition, to be free was to enjoy a status constituted, in main part, by the protection and recognition of the law. Under the newer way of thinking, though with some reluctance and some blurring of the issues, freedom came to be represented as a condition that is compromised by any interference from others, even the sort of interference involved in the establishment of a protective law; this is a condition that is perfectly enjoyed, not in society, but in isolation from others. Republican freedom was the freedom of the city, the franchise of being incorporated and protected as well as any others against invasion; liberal freedom came to be conceptualised as the freedom of the heath, the freedom of the state of nature that is always diminished in some measure by participation in community.

Perhaps the best way to articulate the republican ideal of liberty, the ideal of dominion, as we call it, is to say that while perfect dominion requires non-interference by others, however interference is understood, it also requires two other features. First, that the non-interference be enjoyed, not just as a matter of contingent luck, but in virtue of the protection, to the highest degree standard for anyone in the society, of the law and related institutions. And second, if this needs adding, that it be salient to everyone in the society, in particular to the person enjoying it, that the non-interference involved is indeed of this resilient or secure character. Dominion is a social status, a status available in community only, which has an objective and a subjective side. Objectively, it is a condition of resilient non-interference; subjectively, it is a condition of saliently resilient non-interference.

The notion of resilience requires some further comment. Imagine two balls, both of which roll on a straight path. Suppose that while they roll on the straight path under the same dispensation — say, idealising suitably, according to Newton's laws of motion — there is still the following difference between them. Along the path of one of the balls are posts, say posts of the kind found in pin ball machines, which serve a dual purpose: they will tend to dampen the effect of any force that would deflect the ball from its course; and if they fail in this, then they tend to return the ball within a short period to its original straight course. The difference between these balls is that whereas the unprotected ball rolls contingently on a straight path, the other ball rolls on that sort of path resiliently. Not only does it cleave to a straight course in the actual world, where no forces are exerted upon it. It also sticks to that path or tends to return to that path, under eventualities — in possible worlds — where a perturbing force is applied.

The analogy should be clear. Someone who enjoys non-interference but does not do so resiliently lives at the mercy of those who might choose to interfere. Were someone to attempt interference, or at least someone of sufficient power, then the person would be entirely helpless against them. The person who enjoys resilient non-interference, on the