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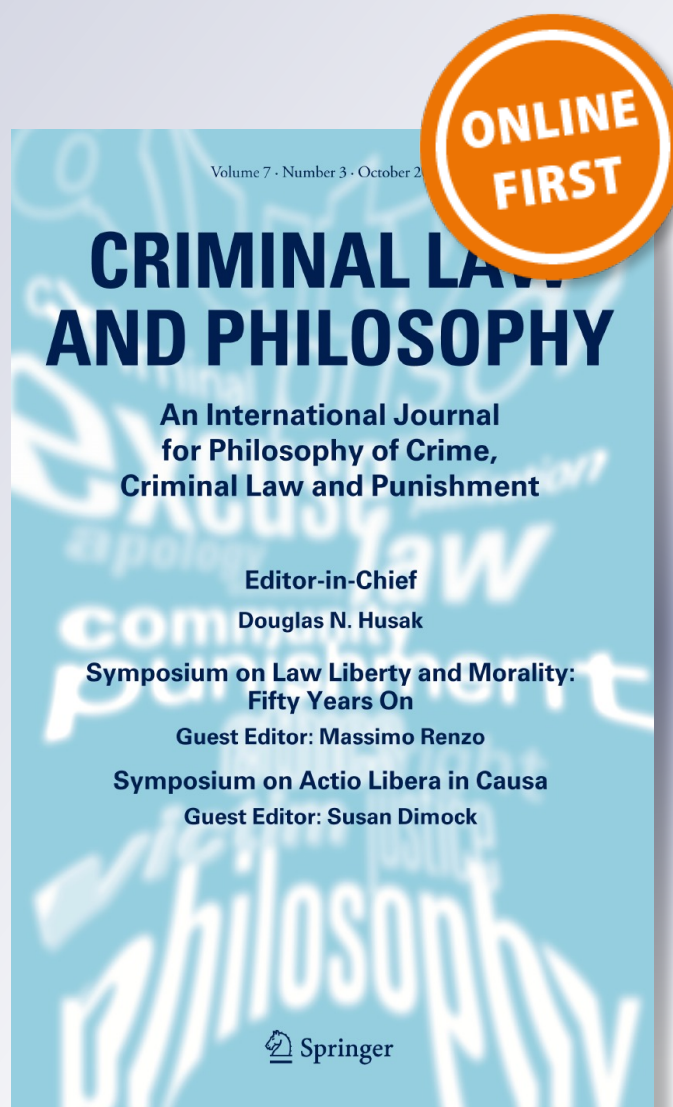
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Republican Responsibility in Criminal Law

Ekow N. Yankah

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Abstract Retributivism so dominates criminal theory that lawyers, legal scholars and law students assert with complete confidence that criminal law is justified only in light of violations of another person's rights. Yet the core tenet of retributivism views criminal law fundamentally through the lens of individual actors, rendering both offender and victim unrecognizably denuded from their social and civic context. Doing so means that retributivism is unable to explain even our most basic criminal law practices, such as why we punish recidivists more than first time offenders or why "hate crimes" are of special concern. A republican view of criminal law brings our most natural intuitions back into focus by insisting that the core of criminal responsibility lies in the offender's attack on the civic bonds that make living in a society as equals possible. By grounding our punishment practices in an Aristotelian republicanism that for so long was the unquestioned basis of mutual responsibility, we understand that hostility, as expressed in the offender's "civic character," matters to us all while still seeing our obligations to reintegrate both victim and offender into our shared civic project.

Keywords Retributivism · Criminal responsibility · Republicanism · Aristotle

The dominant modern view that state punishment is best justified by retributivism, blameworthy violation of another's rights, is in a sense Copernican. It is seen as the modern innovation that swept away unjustified historical beliefs; punishment based on parochial communal beliefs that bordered on superstition. In particular, focusing state punishment on the violation of another's rights corrects mistaken historical views that premised punishment on not just subjective communal prejudice but on the state's right of moral instruction. Given the obvious dangers of allowing the power of the state to be used in service of one particular group's view of the best way of living, limiting the justification of state punishment to some form of retributivism based on rights violations fits perfectly

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with the nearly unquestioned philosophical liberalism of our age. Yet, while liberalism and its focus on rights have correctly taught that punishment cannot be a free roaming search into perceived “criminal character,” something important has been lost in liberalism’s maniacal commitment to individual rights as the only proper focus of state power.

It is, after all, striking that the dominant retributivist impulse in the academy, as far as I can tell, is not generally shared by laypersons. If you were to press an average person on what justifies state punishment by criminal law, the reply is likely to be an amalgam of “hurting people,” “doing something really bad,” “violating socially agreed upon rules,” with violence oft cited in the background. Simply put, the violation of the rights of another does not capture the richness of our intuitions about when the use of state police power is justified. All the messy intuitions that law students, practitioners and academics must suppress or the awkward twists we must apply to a conception of “rights” to explain our commitments are evidence that rights violations alone cannot explain the justification for criminal law.

A singular focus on the violation of rights fails to explain our doctrinal commitments as well. Take an obvious example. Many find it perfectly natural that criminals who are repeat offenders are punished more than first time offenders. Yet this commonplace intuition is surprisingly difficult to explain on retributivist grounds. If I commit two identical robberies to different persons, 5 years apart, it would I have committed the same rights violation in each case. Yet, every American jurisdiction and, just importantly, widely held intuitions regard the second robbery as meriting greater punishment. A second, if more controversial, example. In nearly every American jurisdiction and many foreign ones, attacking another for a set of special reasons, their race, religion, sex, sexual orientation and the like, will make an offender liable to enhanced punishment. Again, many retributivist theories find such laws puzzling. If the sole basis of criminal liability is that an offender has chosen to violate your rights, that they do so because of your race does not seem to add anything extra to the rights violation. That retributivist theories must twist themselves round to explain such deeply ingrained practices and intuitions is telling, perhaps damning. It points to an important shortcoming of theories that premise criminal law solely on retributivism and its underlying rights violations. These examples make clear that retributivist theories fall importantly short.

The intuition that criminal law is not solely about one individual violating the rights of another, that it includes the context in which an act is committed, needs to be rescued. But this broader view needs to be rescued without returning to a criminal theory that stood as a church, measuring the worth of an offender’s character. A republican theory of criminal law, focused on how law makes our living in society as civic equals, provides a distinct and attractive way of understanding criminal law that makes sense of our intuitions.

What’s Wrong (or at least incomplete) With Rights

Liberal retributivism may be very roughly defined as committed to justifying state power only where someone has autonomously violated the rights of another. Retributivism, so put, gains its attractiveness as a bulwark against a totalizing state, which may deploy its power to bend citizens to particular (perhaps traditional, perhaps majoritarian) conceptions of the good life. Perhaps nowhere is this check against state power more important than in criminal law.

In pre-modern history, criminal responsibility was grounded in communal views of criminal character (Lacey 2001, 2010). In stark contrast to modern liberal doctrine which ostensibly segregates the question of one’s character from the question of criminal liability,

criminal law as a practice long viewed these questions as inseparable. Whether the accused committed a particular act as well as the mental state with which he committed it have only recently been separated into the concepts of *actus rea* and *mens rea*. The answers to both questions, historically, were thought to be most naturally accessed by examining the person's character. Because character assessments stood in place of modern day *mens rea*, character assessments in a very real way determined the extent of criminal liability (Lacey 2001: 261). Character judgments so thoroughly grounded criminal liability that even being seen as a moral agent open to punishment turned on character assessments. Women, to take one example, who committed acts that could otherwise have been the object of criminal punishment were often insulated from punishment; their acts were seen as the result of feminine 'hysteria' rather than masculine criminality (Lacey 2001: 272–274; Lacey 2008; Lacey 2010: 120–125).

Against this background, retributivism appears as a modern rationalization of criminal law, erasing superstition and stereotypes and premising the state's power on our rational agency. Thus, liberal retributivism owes much of its domination of the theoretical landscape to both its justifying state punishment of core crimes and limiting the state's legal power to only those who have wronged another.¹ Because criminal law immediately evokes the state's coercive power to prohibit, pursue, arrest and imprison, it provides the most visceral testing grounds of our political theory commitments. Any plausible political theory must provide a justification for state sanctioned punishment of certain core crimes, particularly violent threats, attacks against bodily integrity, gross impositions on freedom of movement and some kinds of attacks on property. Perhaps more importantly, particularly in this age of ever expanding state reach, a particular theory must shed light on the intrinsic limits of justified criminal law (Husak 2008). It is in criminal theory that liberal deontological (retributivist) theories have established the most compelling beachhead.

Moreover, liberal retributivism formulates both the reach and the boundaries of punishment, that is of what could possibly count as justified punishment, in a manner that lays claim to analytical truth (Lacey 2001: 252–254). To be held criminally responsible in ways that violate the theory's political and moral criteria is to have been unjustly punished. On this view, liberal retributivism in a sense defines criminal responsibility.² Why then should a retributivist be any more cowed in light of historical understandings than a doctor should cede to a reinvigoration of medicine based on the humors?

Retributivism, I have suggested, gains much of its attractiveness by defining the grounds of criminal punishment and placing inherent limits on the state's ability to impose criminal punishment. Retributivism does so, however, at the cost of artificially abstracting the criminal offender from his social context in ways that make it difficult to understand powerful intuitions and causing our suppressed interest in character to manifest itself in many of our ugliest criminal law practices. The retributivist's ostensible rejection of

¹ The chief rival to retributivism, consequentialism, is most powerfully embarrassed by the inability to appropriately restrict criminal law in principle. The classic thought experiment undermines the consequentialist by imagining a situation where harm to a large group of people can be avoided by framing and "punishing" an innocent person for a crime he did not commit. That consequentialism does not provide a principled reason not to punish in such cases means its advocates must either deny that such a scenario is plausible, import foreign deontological constraints (Rawls 1955) or bite the bullet and admit that inflicting punishment on innocent persons for the sake of increased utility is morally acceptable (Smart 1973). In any case, the lack of intrinsic limits on the reach of state power lands a deep blow to the plausibility of consequentialism as a political theory.

² Indeed, I have elsewhere argued for a rejection of character-based theories of criminal law based on stringent liberal deontological grounds (Yankah 2004; Yankah 2009).

considerations of character in criminal punishment does not truly omit character as a basis of criminal punishment but rather submerges it. Assessment of a person's character often plays a role in determining whether she is seen as law-abiding and innocently mistaken or a criminal offender (Kahan 1997). One need not resort to historical examples to witness this phenomenon. Young black and brown men across the America are keenly aware of how racially informed snap judgments and stereotypes can determine your position in the eyes of public authorities and other citizens, turning on whether one is dressed in the suit and tie of the office work or in the causal hoodie of the gym (Fagan 2014). Not unlike Lacey's example of the criminal liability of women turning on gender, the current outrage over the shooting death of Trayvon Martin turns not simply on the tragic "accident" but on the perception that public officials failed to arrest his shooter based on a shared assumption that one is entitled to assign the role of threatening criminal to young, black men.³

Nor are these simple mistakes, stereotypes accidentally slipping into criminal law. Our criminal law, in doctrine and in practice, often has just beneath the surface, a deep hunger to punish "the bad guys." This view of dark and threatening characters as permanently "bad guys" undergirds much of American criminal punishment. The recent experiment with "Three Strikes and Out" legislation, which permanently imprisoned offenders on the commission of a third felony, no matter its seriousness, illustrates the social contention that once we know you are a bad person we no longer owe you a duty to calibrate a punishment that fit the crime (Yankah 2004: 1026–1033). The permanent disenfranchisement of ex-offenders based on the metaphor of keeping the ballot box pure relies on an analogy to a permanent tainted character. Likewise, the countless collateral sanctions—from being denied government support to continue education or even necessary food—that deny re-entry into civic life reveal the same view of permanently stained persons who no longer deserve civil regard (Yankah 2004: 1026–1033; Lacey 2013). Even where not directly determining criminal liability, the subconscious links between race, poverty and an image of criminal character often define whether the police grant one the presumption of being a law abiding citizen or treat a person with contempt and racial humiliation (Fagan 2014).

That our criminal law system continues to subconsciously target criminal character speaks to a second larger problem. The retributivist view which cabins off any consideration of character, of our social selves, in favor of an isolated individual, replaces a richer view of character with the antiseptic *mens rea* that is somehow unsatisfying. Without some view of offenders' characters and our social relationship to them, even the most basic punishment practices are inexplicable. As mentioned, greater punishment for recidivists is awkward to incorporate into a modern liberal retributivism view for it is hard to explain what greater rights violation occurs the second time a person commits a crime (Lee 2009). Likewise, common retributivist views struggle to explain the hard to shake intuition that it is legitimate to punish those who commit hate crimes more severely than those who

³ Trayvon Martin was a 17-year old African-American, fatally shot by George Zimmerman, a multi-racial Hispanic man who was appointed the neighborhood watch coordinator in the gated community where Martin was staying. Zimmerman noticed Martin and felt the young, African-American man was behaving suspiciously. He contacted the police, who instructed him not to interact with Martin and informed him they were en route. Despite this Zimmerman approached Martin and the encounter ended with Zimmerman shooting Martin, once in the chest.

When the police arrived, Zimmerman, bleeding from the nose and lacerations on the back of his head, claimed that Martin had attacked him. Though questioned for 5 h Zimmerman was not arrested or charged with a crime. For many in the African-American community, the decision not to charge Zimmerman was evidence that police acquiesced in the social image that young, black men could be treated as a constant threat and in any case the life of a young black man was of less value.

commit otherwise identical crimes. Hate crime legislation seems to premise punishment on the offender's underlying despicable character (Hurd and Moore 2004).

Further, even if deontological retributivism can successfully separate punishment and the image of criminal character, as I have previously advocated, this would at best contain our current voracious appetite for punishment with no power to curtail our collateral sanctions that last far beyond the spotlight of the courtroom (Yankah 2004, 1026–1033). What I am suggesting is that the pretense of dividing criminal liability entirely from a socialized view of a criminal offender, a person after all, is obtuse to history, results in unattractive criminal law practices and bound to fail.

What is needed is a theory of criminal punishment grounded in a richer view of both the criminal offender and the ways in which he is socially embedded. Highlighting our shared interest in some aspects of a criminal offender's character no longer relegates every aspect of character off the stage forcing it to be inspected only surreptitiously. Socializing criminal responsibility makes sense of the nearly universally shared intuition that recidivism is of special concern to society and of other important intuitions such as that increased sentences for hate crimes are at least plausible. At the same time, a successful theory must meet the challenge of explaining the inherent limits of state power.

It is here that the current character based theories of criminal law have fallen short. In this piece, I build on the work of scholars like Lacey, Duff, Pettit and Braithwaite to forward a republican conception of responsibility in criminal law. My goal is to develop in a more explicit way the foundations already incorporated into their work and attach them to a particular justification for criminal punishment. By building an explicitly republican view of criminal punishment, particularly an Athenian or Aristotelian theory, we reconnect law to a rich history and recapture the social context in which punishment was thought (and should be thought) to exist. At the same time by remaining rigorous about the contours of republican justification, we can avoid the dangerous excesses of basing criminal punishment on character, which threatens to make central racist or sexist practices. Properly viewed, a republican theory illustrates why the state can not only properly take an interest in one's civic character but why it is central to criminal punishment.

Republican Responsibilities—A Theory of Criminal Law (in brief)

At its heart, a liberal retributivist theory of criminal punishment is based on a view of isolated individuals crashing into each other. The view, loosely put, is one of a criminal offender who violates the rights of an innocent person and thus can and even must be punished because they deserve it (Fletcher 1978; Moore 1998). This view divorces justification for punishment from its future consequences, i.e. whether punishment ultimately reduces future crime rates. The basic insight is typically grounded in something akin to the Kantian moral imperative that moral censure and punishment should track blameworthy rights violations.⁴ Just as importantly, because liberal retributivism justifies punishment based only on autonomously violating the rights of another (desert), state power is illegitimate if premised on the pursuit of other goals, be it perfecting character,

⁴ Whether this accurately captures Kant's views on legal punishment is a matter of much greater controversy. On the best reading of Kant it is at least severely incomplete as it ignores the important inconsistencies in Kant's ambivalent musings on punishment and the fact that the basis of legal power in the *Rechtslehre* is securing equal freedom rather than punishing internal moral blameworthiness. See Murphy (1987); Ripstein (2009).

consequentialist benefits or paternalistic protection.⁵ Because government power is based only on rights protection, the citizen is entitled to be free of government interference unless his actions threaten harm to another.

This has obviously all been put much too briefly and sophisticated versions of liberal retributivism complicate each contention. Yet the basic idea captures the way that liberal retributivism both justifies the punishment of core crimes and restricts state power. The limitation of state power is of such particular importance to the modern mind that even political theories which have their roots in very different soil have slowly evolved to center on individual liberty. Indeed, to nominate a republican theory of criminal punishment in the modern philosophical landscape risks misunderstanding from some and causes others to question whether one is offering a genuine alternative. Republicanism has come to be associated with the “civic republicanism” of Quentin Skinner, which made central the freedom of the individual from arbitrary state interference (Skinner 1978, 1984). Its most powerful modern proponent, Philip Pettit, has championed a republicanism based on the value of “non-domination,” that is the right to be free of the threat of arbitrary interference. For Pettit, what is crucial is that legal interference under roughly just conditions does not constitute arbitrary interference and thus is not illegitimate (Pettit 1999). Because Skinner and Pettit’s Machiavellian or “Roman” republicanism not only secures but makes central the individual’s freedom from government action, it downplays the civic bonds that I wish to highlight in Aristotelian or “Athenian” republicanism. Ultimately, Skinner and Pettit’s views have more in common with modern liberal retributivism than the theory I wish to forward.

The classical or Athenian republicanism I wish to highlight here is best exemplified by the political (rather than ethical) theory of Aristotle. Rather than begin from the idea that political rights are based on an individual’s primary claim to independence, Aristotle starts with the perfectly natural notion that human beings are first and foremost social animals. We rely on each other not just for material well-being but for social and emotional support; it is in our nature to pursue life in common (Cooper 2005). On Aristotle’s picture, because human beings are deeply social and political animals, there is a sense in which one’s innate worth cannot be fully expressed without a functioning polity (Aristotle (1941a), *Politica*: bk. I, ch.2). This claim is captured in the ancient word *isonomia* or in the Greek sense of the word franchise (Vlastos 1953), implicating the freedom enjoyed in knowing that you were the equal of every citizen and need not fear your secure place in your civic society (Pettit 1989).

Even if one hesitates at the most dramatic interpretation of this view, the claim that people survive and flourish in political communities and can only do so when secure in the most basic human needs is a compelling one. I have expanded on this basic Aristotelian idea elsewhere but it is intuitive enough to offer in brief (Yankah 2012). Human beings are compelled to live together to maintain even their most basic needs. Obviously, this is in part to secure material needs. But it is equally important to notice that people seek each other to satisfy our social needs; company, coupling, forming families, friendships and other relationships. Human beings are not simply rational agents, they are moral agents with thick and rich ends, both individual and shared, which extend beyond a crass view of singular interests (Gargarella 2009: 44). Only a completely denuded view of social interaction could ignore that we grow together as communities to pursue a more robust vision of the good life, form friendships and partnerships and care for our emotional and social needs (Aristotle, *Nicomachean Ethics* (1941b): bk. VIII, ch. 12, 1162a16–19; *Politica*: bk. I, ch. 2, 1252b29–30; Kraut 2002: 257). We are interconnected in complex ways

⁵ Some philosophers have famously tried to find space in liberalism for a sort of perfectionism. Raz (1986).

which ground our communal (and political) identities, cheering for our teams during the Olympics and saddened and angered when we learn of some injustice done by our government in a way that is different than if the same tragic event was committed in someone else's name (Cooper 2005: 72–73). Of course there are some rare individuals who wish to spend the vast majority of their lives in complete solitude. But these individuals attract our attention precisely because they are rare and when taken to its limits such behavior can be evidence of deep emotional trauma or mental illness. It is the critical fact that human beings cannot survive alone, that makes it necessary for human societies to sort out the ways in which we can live securely and well together. On the whole human beings flourish as part of social and political communities (Cooper 2005: 65–70, 74–75).

On this view, criminal punishment is not solely the state's enforcement of pre-social rights or justified by retributivist imperatives. Rather, legal power, and thus legal punishment, is embedded in the very social project of our living together as a civic community. Indeed, even the idea that one can determine the shape of innate rights, beyond perhaps the most basic rights to bodily integrity, outside human communities is rather speculative and abstract. Even Kant, the foundational thinker of much of modern liberalism, it is too little remembered, thought that beyond your right to control your body, all legal rights were provisional until adopted by a republican government in the name of the polity (Kant 1996: 89–91). Rights and society, it may be said, go together and our rights against one another cannot be abstracted from the civil society we share. As Lacey puts it,

...the conception of an a- or pre-social human being makes no sense. What individual human beings perceive as the proper bounds of autonomy around themselves, what they regard as just distributions, how they regard their relations with each other and a thousand other questions central to political philosophy, are ones which we simply cannot imagine being answered outside of some specific social and institutional context (Lacey 1994: 171; Lacey 2013; Rawls 1999).

Once this is clear, it becomes obvious that even the definition of crime in many instances depends on social decisions about the boundaries of rights and obligations.

A republican view of criminal law makes clear that criminal law represents a reciprocal duty that flows between a citizen and their civic community (Lacey 1994: 175–186). Because a well formed individual will understand that laws are one of the most significant ways in which we organize our joint pursuits, including the basic pursuit of living peacefully and flourishing as a community, they will understand that criminal laws represent the agreed upon boundaries of acceptable behavior. Law provides normative guidance not only in particular actions but in “setting parameters within which individuals carry on together their social interactions, pursue their individual and common projects, and the means for repairing the relationships when things go wrong.” (Postema 2010: 1856). In many ways then, criminal law represents precisely the dynamic process of negotiation by which a society demarks those interests which are so important that their transgression will be met by forceful repudiation (Lacey 1994: 176–177, 182–183, 190–191). In doing so, law provides the standards by which we evaluate and hold accountable the actions of others in our community (Kraut 2002: 124–128).

The republican view understands the duties of criminal law as reciprocally held between citizens and community. Just as the citizen recognizes a civic duty to support a just system of criminal law, a well-formed society will recognize that the key role of criminal law is to protect and secure the civic freedom of each individual and reaffirm their civic equality (Braithwaite and Pettit 1990: 63–64). In any community that claims to be dedicated to the project of flourishing as a community, the most basic human interests will require

protection. Any functioning society will protect interests of bodily integrity against attack or serious threat through murder, rape or assault, certain liberties from being imposed upon through kidnapping and the like and afford some level of protection of property, since human beings cannot plausibly flourish in a community without such basic protections (Braithwaite and Pettit 1990: 69).

These protections reflect what individuals are owed in terms of civic respect. No one can plausibly believe that their civic community is acting with due regard for their individual and communal flourishing without these basic goods being especially cared for. Indeed, when such basic goods are breached, it is not only the direct victims who have their sense of civic security breached but all those who become aware that such important interests can be violated without recourse (Braithwaite and Pettit 1990: 69–72). Criminal law stands for the idea that violations of a certain set of values are not simply frowned upon but are inaccessible in a society that aims at a shared and common flourishing.

Here then is the republican view of criminal responsibility I forward, one that is present in the work of Lacey, Duff, Braithwaite, Pettit and others. Rather than seeing autonomous rights as the primary justification for criminal law, it is a view that makes central that human beings must function in political societies, working with each other to survive. Though human communities begin by pursuing material benefits, they quickly grow to become complex and interwoven, wherein each pursues various ends both together and independently. Regardless of where on the sociability spectrum one falls, from the lonesome frontiers man to the urban bon vivant, we pursue life in common; none can survive without the ability to coordinate both actions and expectations with others to define the parameters of acceptable behavior. Freedom certainly belongs to all but whether I may enter this building, whether this area is a public park or private property, whether 5 parts per million of this heavy metal is poisoning or acceptable industrial by-product, these and countless other acts cannot be determined without reference to socially determined expectations. In contrast to abstract, Kantian independence, a republican view makes central that the parameters we set, our justified expectations and our rights, stem from our position as social beings, nowhere more forcibly than in criminal law (Lacey 1994: 171).

So defined, crime here represents “civic” or “public” wrongdoing; acts which are serious threats to our ability to continue the necessary project of living together and protecting the values that we as a civic society have designated as most important (Duff 2007: 51–53, 140–146). In the central case, committing a crime not only attacks the victim but also represents an attack on the values that make living together possible. As such, crimes are “public” wrongs insofar as their seriousness makes them the appropriate subject of public concern. This justification of criminal law makes clear that criminal acts are very often moral wrongs (often obvious in the crimes we describe as *mala in se*). But obviously not all moral wrongs will or should constitute crimes nor are all crimes a priori moral wrongs. What is meant by public wrongs here then is not simply that the acts are ones that are of concern to the public (Duff and Marshall 2010: 70–85). After all, tort liability, unjust enrichment and even divorce decrees, all various civil actions, are of public concern insofar as one marshals the power of the state to pursue civil legal entitlements. Thus, the notion that something must concern the public is insufficiently fine-grained to ground a justification for crime.

At the same time, to imagine that something constitutes a crime because it harms the polity in some abstract way seems to miss the core wrong in much criminal behavior. As Duff has persuasively argued, the visceral wrong we first feel in learning of a rape is not that such a brutal act has harmed the public generally, has created social volatility or has taken unfair advantage of other persons' law abidingness. The core and most important

wrong is the harm and the violence done to the victim (Duff 2007: 141). Thus public wrong here is not meant to denote, or at least solely denote, a harm done to an abstract public whole.

What justifies criminalization in a republican theory then is made of at least two characteristics. First, crimes are acts that often make it impossible for each individual to continue sharing the project of living together. A community that allowed one to be attacked without reprisal, to be raped or beaten, to have one's home violently entered and so on, could not secure conditions under which people can live successful lives. Secondly, crimes deny their victims the equal respect that is their due as citizens with whom one shares a common polity. Tort liability in a negligence case, for example, centers on an act that has harmed another but its unintentional nature does not stand for the proposition that the victim occupies a lower standing or is due less regard than the tortfeasor. Not surprisingly, where the tortfeasor's actions do attack the equal standing of the victim, as in a battery, there is typically a criminal law analog to the tort as well as punitive damages. Taking these two tenets together, a republican justification premises criminal liability on actions that are wrongful in part because they make impossible the project of flourishing as equal members of a political community.

Once the republican justification for criminal law is seen, the concept of public wrong becomes clear. Republican criminal law is justified by the basic idea that we do not merely live beside each other but that we live together and as such there are reciprocal duties and obligations we impose on each other in order to secure our common good (Duff 2007: 44). Crimes are wrongs because in the core instances they undermine the ways human beings flourish by injuring body, harming soul or depriving one of the fruits of one's labor, casting aside justified expectations and injecting fear and uncertainty into our lives. They are public in that they exhibit hostility to the goods and values that make civic commitments possible. In this sense, the public nature of crime highlights that what most crimes share in common is that they are violations of one's civic duty (Duff 2013). The commission of a crime all too often represents an offender disregarding the civic equality of another or shirking the civic duty to share the burdens of common governance.

Defining the law in this way may seem to overly idealize or fetishize the law. Some measure of this accusation is fair, for an Aristotelian republicanism views respect for the law and internalization of law abidingness as a civic virtue. But law abidingness on such a view is not slavish and unthinking devotion to legal norms no matter how immoral. This is true for two reasons. The first is that breaking the law is not always a sign of a lack of civic virtue. Those who engage in open civil disobedience in order to draw attention to legal injustice with a willingness to accept the legal consequences of punishment are often displaying the highest levels of civic virtue. Those engaged in civic disobedience in the Jim Crow South, for example, illustrate beautifully that one can disobey particular laws without disrespecting law generally (Edmundson 2006: 8, 26–28).

Secondly, it is critical to remember that a republican theory of criminal law turns on a republican vision of political obligation generally. As mentioned earlier, republicanism, properly understood, is as concerned with the obligations owed to citizens by their civic community as the duties owed by citizen to their polity; each citizen in a well formed civic community is owed equal civic respect that must be reflected in the laws of the society. That is not to say that any laws that a citizen dislikes can be disregarded at will. As Aristotle notes, some laws will be so obviously destructive to human flourishing and civic equality that they cannot be internalized by those who have properly internalized civic virtue (Aristotle, *Nicomachean Ethics*, bk.III, ch. 1, 1110a4-27; bk. III, ch. 4, 1277a27; *Politica*, bk. V, ch. 2, 1313a40-1314a9). The laws of antebellum America and Nazi

Germany would be recognized by a virtuous citizen as directly hostile to the flourishing of persons, destructive to a flourishing society and thus incapable of being internalized as a law that serves the common good (Aristotle, *Nicomachean Ethics*, bk. V, ch. 1, 1129b17-19; Kraut 2002: 114–118; Solum 2006: 104–105.)

Relatedly, when the laws of a society have become so corrupted as to have clearly set aside pursuit of the common good, used merely as an instrument of parochial power, the very obligation to obey the law is jeopardized and the rule of law comes under threat (Yankah 2012). For law to claim that it is morally obligating, the law must meet its republican justification of pursuing the common good in order to be properly considered the law of its community rather than an instrument of factional power. Where groups of individuals are systematically excluded from participation in political life, “the law sounds to them as an alien voice... [and] the claim that they, as citizens, [are] bound by the laws and answerable to their community becomes a hollow one” (Duff 2001: 196). Where the law serves factional rather than common interests, it suffers from a particular sort of vice which leads to legal alienation and ultimately undermines the citizens’ understanding that they are bound by the law (Gargarella 2009; Yankah 2012). The realization that legal institutions are instrumental tools of power undermines law globally; the belief that law is to be used to consolidate power and advantage is one that necessarily casts doubt on the very point of legal obedience.

The Shape of Republican Criminal Law

I have indicated the ways in which republicanism captures the core crimes that any plausible theory will reach, even as a republican theory provides a very different way of conceptualizing the justification for punishing these crimes. That some obvious crimes will be punished under any theory of law should not obscure the important differences such a theory implies for our current criminal law practices. Before focusing on the aforementioned examples, recidivism and hate crimes, it may be of use to canvas briefly a few broader differences between a republican theory of criminal responsibility and our current system.

First the republican view expressed here would, to my mind, result in not just different criminal law but less criminal law. A political system motivated by a republican view of civic bondedness cannot help but to be critical of our current instinct to use criminal law as a knee jerk means of social control. To take one easily visible yet, devastating example, the American response to drug use as a criminal law rather than public health problem is the type of driver of incarceration of which a republican theory should be deeply suspicious. Because the justification of criminal law here is the maintenance of our civic union, this republican view limits the use of criminal law as far as possible to regulation that is fundamentally necessary to civic functioning. Lacking the retributivist impulse that the object of criminal law is a categorical imperative to punish any culpable impositions on freedom, a civic republican theory will seek less harsh, intrusive and permanently scarring ways to punish where we must and repair civic violations where we can.⁶

A republican theory will also be more sensitive to the way punishment itself can do damage to civic bonds. I have already mentioned the way our current punishment regimes can leave those we punish, even when we rightfully punish them, ostracized and isolated,

⁶ Other scholars balance the retributivist impulse to punish against a rigorous deontological view of rights as against state interference in order to cabin modern excesses of criminal punishment. See Husak (2008).

in a sense excommunicated from our political community upon release. Just as importantly, a criminal law system that focuses on the poor, black and brown, hollows out neighborhoods and returns too many ex-convicts to our streets without the skills to contribute to a functioning community, would be of utmost concern to a republican theory in a way untouched by a retributivist theory of punishment. A legal regime justified only by retributivist impulses finds little room to explain why a polity must also extend itself to reincorporating criminals after they have been fully punished (Braithwaite and Pettit 1990: 91–92). Modern criminal law systematically shows a stunning lack of civic concern for those we must and should punish. A republican view of criminal law highlights that our civic bonds with the criminal offender do not evaporate upon punishment. From the practice of disenfranchising felons, our flirtation with “Three Strikes and Out” legislation, which amounted to little more than a thirst for lifetime warehousing of criminals and the countless ways in which we exclude ex-felons from civil, economic and social participation, a republican theory of criminal law would require us not just to dramatically change controversial features in our criminal law but to reimagine many widely unnoticed core practices (Yankah 2004: 1028).

One way to reinforce the distinctness of a republican theory of criminal law is to illustrate how such a theory explains deeply held intuitions that are nearly universally embedded in law but that seem mysterious from the standard liberal retributivist theory. In the hopes that examples help ground abstractions, it is worthwhile to notice that a republican theory of criminal punishment can make sense of both the “recidivist premium” in criminal punishment, that is, the fact that sentences for crimes are enhanced when the convicted person is a repeat offender and hate crime legislation, which enhances the penalty for a crime when it is committed for reasons of bias against the victim for a set of characteristics such as race, religion, sex or sexual orientation. Of course the fact that a retributivist theory is hostile to such doctrines does not by itself count against it; in addition to explaining key features of criminal law practices, our theories must tell us when to alter our doctrine. Still, that these doctrines are stubbornly held in the intuition of many and nearly universal in our criminal law doctrine should give pause as to a theory that cannot account for them. Though a full throated defense that can convert those with a deep hostility towards these doctrines will have to wait for future work, the ability of a republican theory to easily account for these features, in a sort of reflective equilibrium, certainly counts in favor of the view.

The recidivist premium is so intuitive that most lay people would find it strange that the dominant theory of criminal punishment struggles to explain it (Roberts 2008: 35–36). Other than the seriousness of the crime itself, an offender’s criminal history is the most important determinate of the severity of their sentence (Roberts 1997).⁷ One may attempt to justify increased punishment for recidivists for reasons of deterrence for those who have shown that they are harder to deter, to incapacitate those dedicated to crime or as revealing the need for greater rehabilitative efforts (Lee 2009: 573). Whatever the merit of those arguments, the widely held sense that repeat offenders *deserve* greater punishment, the justification for increased punishment in the Federal Sentencing Guidelines,⁸ is harder to satisfactorily explain and has largely been met with hostility by retributivist desert theorists.

⁷ Bureau of Justice Assistance, Dep’t of Justice, National Assessment of Structured Sentencing 71, 341–352 (1996).

⁸ U.S. Sentencing Comm’n, U.S. Sentencing Guidelines Manual § 4A, introductory cmt. (2008).

The retributivist intuition, put very simply, is something like this. Punishment is only justified in proportion to the crime and the culpability of the offender. Since a robbery is no more serious the third time it is committed than the first, any greater punishment is unjustified without an adequate theory of the increased culpability of the offender (Morse 1996: 146–147; Bagaric 2000: 17–18). The immediate worry then becomes that a theory of why a repeat offender is more culpable than a first time offender is going to rely, in one way or another, on considerations of the underlying bad character of the offender, considerations that should be off limit to a liberal state (Moore 1990: 51–54; Lee 2009: 578–579; Yankah 2004). While many scholars have asserted some form of character theory as importantly underlying criminal punishment,⁹ liberal retributivists reject character theories, viewing them as violating the state's commitment to neutrality in judging one's vision of the good unless it violates the rights of others. Lacking an explanation of why the offender is more culpable, recidivist enhancements seem to simply punish for being a worse type of person or to collapse into a moralistic state reinforcing its moral censure on a defiant subject (Fletcher 1982: 57). While it is possible to offer alternative accounts of the recidivist premium (Lee 2009) or give it up entirely, it is striking that retributivist theories cannot explain one of the most deeply held intuitions and practices in our criminal law. Once again, we are returned to Lacey's long held insistence, echoed by scholars like Duff and Tadros, that retributivist theories unhelpfully isolate us from considering the role that character plays in punishment, openly historically and sublimated today (Lacey 1994: 66, 71; Duff 1993: 374–378; Tadros 2005: 48).

Nearly as puzzling as the inability of current retributivist theories to account for increased punishment for recidivists is their inability to account for the nearly universal practice of enhancements for punishments when a crime is motivated by hatred of or bias against enumerated characteristics such as race, religion, sex or sexual orientation. Hate crime laws exist, in some form or another, in nearly every state in America as well as by federal statute (Kim 2006: 846–847; Abel 2005). The widespread adoption and popularity of hate crime legislation illustrates the stubbornly held intuition that committing a crime from racial or other bias is appropriate grounds for enhanced punishment. Indeed, the virulent and persistent controversy in academic circles only highlights how resistant popular sentiment and our legal regime have been to abandoning the commitment to inflicting greater punishment upon those who commit hate crimes.

Take the extended and intricate treatment of hate crime legislation by Heidi Hurd and Michael Moore. Though a full attempt at refutation will have to await future work, even a brief look at their reasoning instructs us as to the important differences between their retributivism, which concludes hate crime legislation is unjustified, and a republican theory that makes hate crime legislation a clearly legitimate basis of criminal liability. As we noted earlier, retributivists like Hurd and Moore premise liability to punishment on culpable wrongdoing (Hurd and Moore 2004: 1117–1118). Any punishment without culpable wrongdoing or any punishment in excess of the proportion of culpable wrongdoing is thus unjustified. Thus, for Hurd and Moore enhanced punishment for crimes committed out of bias can only be justified if committing such a crime makes the offender more culpable than the identical crime committed for different reasons.¹⁰ Hurd and Moore survey a

⁹ George Fletcher, for example, once held that it was the ability to attribute a criminal act to the offender's character that grounded liability and provided an explanation of the nature of excusing conditions. Fletcher (1978: 799–802). Jeremy Horder has indicated the same. Horder (2007). For a fuller discussion of character theories of law see Yankah (2004).

¹⁰ Here I bracket Hurd and Moore's arguments that hate crime legislation is unique in inculcating greater punishment for motive.

number of possible reasons why an offender who commits a crime out of a hateful motive might be more culpable than an unbiased but otherwise identical offender and find that punishing on the basis of hateful motivations either redundantly punishes for the same harms already captured by the underlying crime or is over-inclusive in attempting to isolate a further harm. Because hate crimes are, on their view, not necessarily more harmful than non-hate motivated crimes, then any increased blameworthiness must stem from the actor's more culpable mental state. But because being a hateful person is a largely stable trait and not within a person's immediate control in the way that one's intentions are within one's control, punishing one for hateful motivations is to punish for an ugly disposition of character (Hurd and Moore 2004: 1117–1138). Despite recognizing the importance of eradicating racism and other hateful impulses, Hurd and Moore ultimately conclude that enhanced punishment for crimes motivated by hate simply punishes the offenders for being bad persons, an inappropriate justification in a liberal state. Worrying that hate crime legislation unjustifiably targets bad character, the retributivist rejection of hate crime legislation follows some of the same contours we noticed in the debate around the recidivism premium.

While it is worth noting that I find many of their claims that crimes motivated by racial (or other) hatred are identical to crimes that come from other motives unconvincing, those are not the objections I wish to explore here.¹¹ The point to highlight, for immediate purposes, is that this important and widely accepted feature of our criminal law practices cannot be accounted for by standard retributivist theories insofar as one is committed to ignoring the considerations of character urged by Lacey and her fellow travelers. Indeed, for the kind of liberal retributivism championed by Hurd and Moore, the shift to considerations of character is exactly what makes hate crime legislation unjustified in a liberal state.

The republican justifications of criminal responsibility make perfect sense both of the intuition that recidivists may be punished more than first time offenders and of the widespread commitment to enhancing punishments for those who commit crimes out of certain hateful motives. Remember that we earlier discovered that an Aristotelian or Athenian republican theory of criminal law is justified by the need to protect the civil bonds necessary to continue the project of living together as political equals. Criminal law, on this view, is embedded in the general justification of political obligation, the duty to protect and promote the common good in civic matters (Yankah 2012).

On this view, recidivism presents reasons to punish the recidivist more severely than a first time offender who commits an identical offence. Though there are many ways to describe this in colloquial language—that recidivists are in some sense defiant or disobedient, that they continue to thumb their nose at the law—these sentiments share something core and nearly unshakeable in common (Von Hirsh 1986; Duff 2001; Dubber 2001; Green 2006; Robinson 2001). The unifying idea in a republican theory is that recidivism shows a dedicated refusal to value the commitment to civic equality embodied in the law. [I gingerly bracket the deep problems that arise where citizens are rightfully deeply suspicious that the law serves a commitment to civic equality, except to mention that where the law grows sufficiently distant from the project of civic equality its claim to legitimate authority or law abidingness fails (Yankah 2012)]. The recidivist does this in at least two ways, one of which attracts additional punishment. First, the criminal act itself, as much in the second instance as the first, often creates harm or risk in ways that ignores the

¹¹ For an engaging discussion of the ways in which hate crime legislation may not be particularly unique in inspecting motivation and may cause distinct harm see Kim (2006).

equal concern due to fellow citizens. The recidivist, however, imposes an additional injury. The recidivist demonstrates greater disdain for the project of law itself. In doing so, the recidivist shows that he is willing to disregard the very role law plays not just in guiding first order action but in establishing the parameters by which we govern our interactions and hold each other accountable (Postema 2010: 1856). Because law itself plays this role, repeatedly ignoring the law or, worse yet, unjustified attempts to undermine the law where it in fact pursues the common good, represents hostility to our joined civic project and its more forceful repudiation is warranted.

The same justification applies with even greater force in the case of hate crime punishment. Hurd and Moore's commitment to liberal retributivism leads them to conclude that enhanced punishment can only be justified if hate crimes can be shown to do additional damage to those they protect in some (measurable) way. Hurd and Moore are skeptical that such additional harm occurs but even if it does, they argue individual criminal acts should be measured for such harms and increased punishment meted out accordingly. But their impressive analytical rigor threatens to slice so finely that we miss that which is plainly in front of us. Hate crimes are of special concern because an offender establishes as part of the very point of a harmful act—a beating, threat or murder—the denial of another citizen's equal standing as a member of our civic community. Nor is it a reply that some actions spring from a discriminatory passion without meaning to be consciously communicative (Hurd and Moore 2004: 1102–1103). The fact that a racist who attacks a black man for being in his neighborhood acts from spontaneous rage does not lessen the fact that his act both is constituted by racism and in turn constitutes a social message that the black man has fewer (or no) rights in light of his skin color. Let us not forget what bias crimes typically look like; beatings, murders and threats laced with profanity, insults, the burning cross or offensive poster and often the offender's expressed glee at humiliating another for the very reason of their minority status. Unlike Hurd and Moore, who strain to see whether this fits an analytical conception of “communicates,” I find it entirely natural, sadly all too natural, to understand how this expresses the claim of racial inferiority.

In the terms of republican justification, that hate crimes strike at the very nature of our civic equality makes the state especially justified in enhancing punishment. Thus Harel and Parchomovsky have it partially right when they argue that the state is justified in punishing hate crime because likely victims identified by hate crime legislation are more vulnerable to crime and the state ought to equalize the distribution of criminal harm in a society (Harel and Parchomovsky 1999). A state that works to ensure that no one community disproportionately feels the harms of crime shows in one way that it is dedicated to the common good. But this answer is incomplete if it is viewed as entirely numerical in nature. Even if one were to prove that Jewish citizens did not suffer disproportionate violence in a community, that some of the violence aimed at Jewish members was specifically steeped in anti-Semitic bias would remain a reason for greater punishment. In contrast to the retributivism of Hurd and Moore, that in a certain polity certain acts spring from a history of social hatred, racial (or other) bias and civic exclusion is a reason for the state to pay special attention to acts that attempt to reference and reinstate such civic harms (Hurd and Moore 2004: 1098–1110). History matters. And that is because it is often in light of a certain history that one will understand actions that attack other citizens' claim to civic equality. When one understands criminal law to be justified by the republican explanation of preserving the project of a flourishing civic project in which all are equals rather than focusing solely on violations of individual rights, our most natural intuitions come back into focus.

Conclusion

Let us return to the original insight by Lacey's work and place it once again in a republican framework. Remember that Lacey's work highlighted the ways in which criminal punishment all too often submerges our concern with the underlying character of a criminal offender. In so doing, our concern with character leaks into some of our least attractive criminal law practices wherein ostensibly liberal practices hide our view of criminal offenders as permanently bad people beyond redemption or our civic concern. Lee, Hurd and Moore argue forcefully the concern that the universal practices of enhancing punishment for recidivism and hate crimes similarly punishes offenders for having a poor character. For what it is worth, I am deeply sympathetic; elsewhere I have worried that punishment premised on poor character can lead to permanent ostracism of criminal offenders (Yankah 2004: 1028–1033). How then does one reconcile Lacey's call for recognition of the role that character plays in criminal punishment within a republican theory of criminal responsibility?

A republican theory responds to Lacey's point that theories that divorce character entirely from criminal punishment are doomed to be unsatisfying and unconvincing. Indeed, despite the philosophical claim that actions must be separated from character, a moment's reflection makes clear that there are many actions that are impossible to cleanly separate from the underlying character of the actor (Lee 2009: 582–583). Indeed, there are actions that are in part constituted by the underlying character with which they are done. Malicious, cruel and wanton actions often spring from malicious, cruel and wanton characters.

Thus we can recognize that certain aspects of character are crucial to the justification of criminal punishment without allowing the state to make the measuring of the offender's total moral character the premise of state punishment (Duff 2002: 155). Viewing criminal responsibility as part of a republican project responds to Lacey's powerful observation that criminal punishment, indeed legal rights, cannot be understood outside a social and institutional context. The republican theory of criminal responsibility highlights that the rights determined by criminal law are defined in the context of an ongoing civic project that binds us all together; it is a theory of criminal law that does not pretend that human actions ought to be considered in abstract isolation.

Republican criminal responsibility focuses on the way the commission of a crime reflects on what we may think of as one's civil character. Civil character turns not on the kind of moral judgment we could rightfully make "all things considered." It is a distinct judgment from that of God's eye view, weighing one up in one's entirety. Instead, assessment of one's civil character explicitly considers one's actions and the character from which they spring insofar as they reflect on one's willingness to respect and support the civic rights and duties that are critical to the continued project of living together as equals. In Aristotelian terms, one's civic character does not measure one's ethical success; whether one is courageous, prudent, temperate or generous. Rather, it measures whether one is "grasping;" that is whether one unjustly seeks more than is one's fair due at law and avoids contributing one's fair share (Yankah 2012: 72). In criminal law, in particular, this focuses on whether one respects the laws that secure the conditions in which we can all live together as civic equals. Criminal responsibility is not identical to the ethical judgment of whether Barbara is greedy even if her greed is plain for all to see. Barbara's greed is only relevant when it is evidenced in her civic character in a way that leads her to undermine the project of our living together as equals by observing the shared laws that make such a

community possible, say by committing theft or violating our settled rules on insider trading.

Lest the distinction seem purely formulaic, notice how the distinction between moral character and civic character explain the punishment practices undergirding recidivism and hate crime. It is easy to recognize that measuring the complete moral character of a recidivist is too nuanced and fact sensitive to be reduced to the mere fact that they committed a second crime. Our normal moral intuitions will take into account their motivations, their opportunities, their upbringing and countless other features. But in restricting ourselves to measuring what their character reveals about their relationship to the law's role in our continued project, we find in the case of the recidivist a fair concern about their hostility to our civic equality and flourishing. "Civic character" gives us the depth to which we ought to inquire about a fellow citizen's character; it reveals the extent to which we cannot avoid peering and cabins the borders we ought not transgress. What we as a society ought to measure is the extent to which an offender establishes firm hostility or contempt for the laws that provide the structure that makes possible our living together as civic equals.

Similarly, a person who has a deep and irrational believe in the inherent inferiority of tall people may exhibit all the deformities of character we associate with racists. Yet, without more, a crime committed for this reason does not, at least in our polity, qualify for enhanced punishment. Republican responsibility is concerned not with one's total moral merit but with the fault lines along which our civic bonds are vulnerable and our civic society may fracture. Hate crime legislation, on this republican view, is justified by the polity's recognition that its particular history or circumstances have rendered the civic equality of certain groups particularly vulnerable and that certain crimes risk communicating a message both to the individual victim and to their related community that they are not full members of the polity (Duff 2007: 120). To the extent that this is in part the goal of one's crime, it constitutes a wrong over and above the already disturbing violation of civic equality that an identical non-bias crime represents. As Aristotle asserted, it is not one's complete virtue that measures the extent of state goods or burdens but only one's virtue in so far as it imposes on the composition of the state (Aristotle (1941a), *Politica*: bk. III, ch.12). It is only to the extent that one's character, or as I put it "civic character", reveals the impulse to undermine our civic equality that a republican justifies enhanced punishment.

Though I have focused here on how a republican theory justifies the extension of criminal law in controversial areas, one should by no means assume that a republican theory of law will be aggressively criminalizing. As mentioned, because this theory of law views criminal law as justified to the extent it protects our civic bonds, a republican theory will be more sensitive to the fact that criminal punishment is a blunt instrument that often does more harm than good. No reasonable observer could view the insatiable American appetite for incarceration as well as its cruel distribution along racial and class lines and not realize that it exacts a heavy price by rupturing the bonds between citizen and state (Fagan 2014).

In truth, a republican theory of criminal law is likely to have a much greater impact in every day prosaic criminal law activities. In particular, when one realizes that the point and justification of criminal law is the preservation of civic equality rather than visiting retributivist justice on offenders, many of our current criminal law priorities change immediately. A republican criminal law will not focus on punishment to the exclusion of the myriad way crime can harm its victims. So for example, a republican criminal law reminds us that while punishing criminal actors is critical to upholding civic equality, our responsibilities to the victims of crime do not end with punishing the offender. A well

functioning civic society will also devote appropriate resources to counseling rape victims, attending to the healing of people assaulted and addressing the fears of family and neighbors of crime victims.

Further, realizing that the primary role of criminal law is preserving civic bonds should highlight the ways in which a civic polity must work to restore offenders after they are rightfully punished. Our current retributivist theories of punishment can spell out the grounds on which one ought to be punished but do little to motivate reasons to reincorporate those who commit crimes. I once thought that focusing on punishing for acts alone, as opposed to criminal character, was the best way of seeing that a person had “paid for their crime,” undermining the kind of collateral punishments that can follow offenders long after their sentences and exclude them from work, education and social reengagement (Yankah 2004: 1058–1062). I now see that such a view at best can show why ex-offenders should not be actively excluded. Focusing on the justification of criminal law as embedded in our civic bonds highlights that the very justification we have to punish those who commit crimes that make it impossible for us to live together also gives us reason to invest in reincorporating offenders after punishment. Seeking punishment to the exclusion of all else attends to only a small portion of our civic responsibilities.

There are many more questions to be answered about a republican theory of criminal responsibility. One that immediately comes to mind is the question of how such a theory addresses those outside our civic polity, for example in the critical intersection of criminal law and immigration law. Such questions will have to await future work. For now, it is a beginning to show that how a republican theory points us to a theory of criminal responsibility that is very different than the dominant retributivist theories of criminal punishment. A republican theory grounds criminal responsibility in our civic virtue and civic equality. Because human beings are social by their nature and rely on each other for material, economic and social support, the preservation of a civic community is a matter of public concern. Thus, political communities must attend to wrongs that are of such a serious nature that they show hostility to the goods and values that make civil communities possible. It is to the extent that one’s acts reveal a dedicated hostility to our civic project that we take interest in measuring one’s “civic character.” And in so doing, we recontextualize an offender as a social person embedded in a political community.

Given this, a republican theory of criminal law, like any plausible theory, will criminalize attacks on the person and gross impositions on liberty and afford some protection to property. While many of the core criminal law obligations would be recognized under a republican criminal law system, many areas in Anglo-American criminal law, justified by the elevation of autonomy above all other political virtues, would be importantly altered. Though this is easily highlighted in controversial areas, a republican theory of law will force us to re-inspect many of our core practices of criminal law as well. Both in the lack of rehabilitative support given to victims of crime and the lack of restorative steps offered to offenders, a republican system of criminal punishment illustrates a very different vision of what our civic responsibilities entail than the retributivist urge to punish.

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