Criminal Justice and the Liberal Polity

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There are several reasonable conceptions of liberalism. A liberal polity can survive a measure of disagreement over just what constitutes liberalism. In part, this is because of the way a liberal order makes possible a dynamic, heterogeneous civil society and how that, in turn, can supply participants with reasons to support a liberal political order. Despite the different conceptions of justice associated with different conceptions of liberalism, there are reasons to distinguish the normative focus of criminal justice from other aspects of justice in a liberal polity. Given the fundamental commitments of liberalism—of whatever variant—there are reasons for criminal justice not to be assimilated to wider conceptions of justice overall. Such assimilation risks undermining some of liberalism’s distinctive commitments concerning the standing of individuals as voluntary, responsible agents. Criminal justice is not independent of other aspects of justice but has a distinct focus in a liberal polity.

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Introduction

Several fundamental issues concerning criminalization and criminal justice remain stubbornly disputed. The issues, and the connections between them, are complicated by the questions concerning the relations of law and morality to which a liberal order in particular gives rise. This discussion argues in favor of a certain way of approaching some of the issues concerning criminalization and criminal justice in a liberal polity.

Given the scope and the complexity of the topic, this treatment can be, at best, only programmatic and preliminary. I will raise a number of considerations meant to support the following claims, which I take to be connected to each other. They are (i) that there are good reasons for the liberal polity to be restrained with regard to criminalization, and (ii) that there are reasons to avoid fully absorbing criminal justice into a more comprehensive conception of justice in a liberal polity. Overall,
criminal justice should have a narrow rather than a broad or comprehensive normative focus.

Much of the discussion concerns the normative significance of some considerations of moral psychology. Those are important to ethical and political thought because the plausibility of putative principles of right action and claims about what agents or institutions ought to do can depend upon facts about people’s attitudes, motivational tendencies, perspectives, and so forth. Unless a normative conception is supported by a plausible moral psychology, that conception is at risk of being unsuited to what people are actually like. In other words, what we might call “political anthropology” is nearly always implicated in moral and political theorizing. It is, at the very least, explanatorily relevant. This does not mean that normative theory cannot include aspirations or ideals or that it can do no more than accurately describe the facts of political life and political institutions. But aspirations and ideals must have a recognizable connection with a descriptively plausible conception of the agents who are to inhabit the political context and contend with the issues.

Given the general character of a liberal polity, and given some of the most general characteristics of civil society in a liberal political order, there are, I shall argue, reasons for restraint in criminalization and reasons to acknowledge criminal justice as distinct from other aspects of justice in an important respect. The first section of this essay introduces some considerations of moral psychology important to making the case for those claims. The second section surveys respects in which the basic character of liberalism is contested. There are several important, differing conceptions of liberalism. This fact is important to the view defended. The third section of the essay indicates some of the main implications for criminalization and criminal justice of the considerations raised up to that point. The fourth section presents reasons why it is important for a liberal polity not to absorb criminal justice into a more comprehensive conception of justice.

I

It is important to recognize that, whether or not there are objective human goods, and whether or not there are objective moral values, it is a fact of political life that different individuals and different groups will have different, and often conflicting, values. This is true whether or not there is a plurality of objective values. It is true whatever our most cogent axiology and metaethics tell us, and it is especially evident in liberal polities. This does not mean that philosophical theorizing about the nature and status of values is “merely” academic or that it has no real relevance to actual moral and political life. The more we encourage and expect the employment of good reasons for political commitments and positions, the stronger the possibility that good reasons will inform political life and activity.

However, I think it is important to acknowledge that, apart from very stable, ethnically and religiously homogeneous communities, diversity and disagreement regarding value should be expected whatever the
truth is concerning what kinds of value there are. We should expect that some of the diversity of values will be grounded in reflective, intellectually responsible commitments, and some will be less thoughtful, and more or less ideological. The chances are that much will be in between and that the actual debates concerning values will be very uneven in respect of including philosophically respectable elements. That is probably an unavoidable fact of political life in a liberal polity.

We might say that, in a sense, Hobbes was right about a key feature of the civil condition and political life. As far as politics is concerned, it is almost as though “whatsoever is the object of any mans Appetite or Desire; that is it, which he for his part calleth Good.”1 This is not because subjectivism or relativism about values is true. It is because many different things matter to people in many different ways, whatever the metaphysical status of values. There is a pluralism of values in the dual sense that (i) any given individual or group may be committed to numerous values that are not ordered in some fixed, definite way, and are not derivable from some single fundamental value; and in the sense that (ii) there is a diversity of values across individuals and groups. As a political matter of fact, pluralism of values obtains. That is something with which a liberal polity must come to grips.

Part of Hobbes’s wisdom about modern politics was the recognition that diversity of values—and some measure of friction and contest between proponents of different values—are very nearly, if not certainly, unavoidable features of modern politics. Politics can address this by repressing and coercively controlling it in all sorts of ways but the liberal polity takes a different approach. In fact, the liberal polity itself is endorsed for many different reasons, and there are numerous conceptions of the liberal polity, a point we will come to shortly. Altogether, there are multiple respects in which the pluralism of values bears on the grounds for, and the character of, the liberal polity.

Some proponents of liberalism may be led to support it because they hold that there are no objective values and they also hold that, for that reason, the state should not coercively enforce any particular conception of human good. In that respect, skepticism regarding values could be part of a case for liberalism. This view is that the coercive power of the state should not be employed to impose some particular conception of human good if the state is not able to exercise that power in a manner underwritten by a true view of objective values.

A quite different rationale for liberalism maintains that there are objective goods for human beings, and, accordingly, certain kinds of dispositions and activities are uniquely suited to realizing those goods. But this view also holds that those facts do not imply that the state should order society in ways intended to encourage those dispositions and to discourage others. The view is that even if there are objective considerations of human good, there are weighty reasons against the state imposing or enforcing laws shaped by those considerations. It is, we may suppose, part of this view that it is crucial that human goods should be realized by voluntary, self-determined activity with a
minimum of involvement of the state. According to this view, the agency of persons has an especially significant role. Liberalism is the political order that best protects and preserves the sort of freedom that agents need in order to exercise the kinds of agency through which objective goods can be realized.

Another approach to liberalism holds that debates about fundamental political principles tend to be inconclusive or worse; they tend to be divisive and to create friction and distrust. Hence, for pragmatic reasons, liberalism is to be commended. The reasoning might be that it is the political form least likely to aggravate valuative differences into socially damaging tensions and conflicts. People will hold non-agreeing and possibly conflicting values. Rather than the state enforcing some specific conception of good, it should preserve a political order that minimizes destabilizing and destructive conflict. This view does not depend upon metaethical considerations in the manner of the previous views.

Another possible view is that there is a powerful historical case for liberalism, at least in some societies. Basically, liberal forms have served some societies extremely well and that fact, in its own right, is highly significant. In this view there is no need for a “first philosophy” or for agents to hypothesize an “original position” in which a social contract is fashioned. The view is that, in those societies in which there is a significant history of liberalism succeeding, that success supplies reasons to maintain the liberal political culture, despite the case resting on contingent, empirical grounds. Liberalism is right for some societies and only the remotest possibility for others. That does not reflect some societies having better political order and some worse; it is a matter of what is suited to different and quite complicated cultural, social, and economic conditions.

Thoughtful persons with diverse axiological and metaethical views could agree that there are good reasons in favor of liberalism while disagreeing over what those reasons are. That is not to say that it is a futile or fatuous enterprise to try to elaborate a principled case for liberalism. As noted above, much can be gained by encouraging a habit of offering good reasons for fundamental political commitments. Moreover, liberalism is a political form in which the weight of good reasons has a genuine opportunity to actually matter. The openness of a liberal polity can acculturate people to seeking and expecting good reasons, and that can be one of its strengths. Nonetheless, it is probably unrealistically optimistic to expect a stable consensus on the grounds for liberalism and its specific form. There are diverse reasonable arguments for liberalism and diverse reasonable conceptions of it.

At the same time, those facts do not imply that a liberal order is attainable and sustainable no matter what value-commitments and dispositions people have. The liberal order depends upon people having certain valuative commitments, along with dispositions and attitudes reflecting them. Participants in a liberal political order need to recognize individual liberty as having fundamental value, they need to acknowledge that others each have like liberties, and they need to believe that the rule of law has among its primary concerns the protection of persons against being harmed and wronged (in
ways that require careful specification). In addition to agreement on some fundamental matters, there needs to be effective dispositions on the part of people in general to act in ways that realize those widely shared values. A liberal order cannot be sustained by accident.³

Given the different conceptions of liberalism, there are also different views about what constitutes civic virtue. That is to be expected if there is room for people having somewhat different ideals and room for meaningful debate and disagreement over policy’s aims and methods. Still, the members of a liberal political community need to have an effective concern for it to remain a liberal community even if there are different bases for the commitment to liberalism. Someone who values liberalism because he was a survivor of the Warsaw Ghetto has come to that endorsement differently than a person who values liberalism because he is a staunch defender of the free market. They can both have effective dispositions to sustain a liberal order.

A disposition of restraint in regard to imposing one’s conception of good on others is important to a liberal order, whatever one’s specific conception of civic virtue. The willingness not to insist that one’s own values should be institutionally imposed and enforced can be especially important in the absence of full agreement on a set of principles for the liberal polity. Discussions and defenses of liberalism often emphasize the importance of “public reason” or the sort of concern registered by Robert Audi’s notion of the “principle of civically adequate reasons.”⁴ He writes: “civically virtuous citizens in a liberal democracy have a prima facie obligation to have, and under appropriate conditions to be willing to offer, publicly comprehensible and evidentially adequate reasons for their support of laws and public policies.”⁵ While participating in public discourse in ways that are intelligible and by way of reasons that are accessible to others is to be strongly encouraged, it is important to accept that others may have reasons, concerns, and interests that defy, at least to some extent, being rendered in the idiom of a single common “civic voice.”⁶ That acceptance, without simple disqualification of what is not fully assimilated to public reason, can be an important virtue in a liberal polity. Striving to speak in such a voice may be necessary to a sustainable, coherent liberal order. But it is almost surely unrealistic to insist that only such a voice deserves a hearing or the freedom to speak.

In a heterogeneous, dynamic civil society it is likely that, even where there is agreement on important moral matters, people are led to that agreement by different pathways. As Audi observes in his discussion of civic virtue, “an extensive agreement on moral practice is compatible with absence of agreement or even sharp disagreement in moral theory.”⁷ Motives for the willingness to respect a moral framework sufficient to uphold the liberal rule of law need not derive from some specific, ultimate commitment to political principles common across persons.

That the liberal rule of law makes possible a heterogeneous, dynamic civil society is one of its chief merits, and, at the same time, participation in the multitude of associations, undertakings, institutions, and practices that constitute civil society can supply people with reasons to value the
liberal polity. The enjoyment of a wide range of voluntary activities and the freedom to pursue one’s own conception of what is desirable and worthwhile can help develop capacities for rational self-determination and respectful regard of others. The appreciation of that, in turn, is a reason to want to preserve a liberal order. The freedom of action made possible by liberty enables people to think of themselves and others as accountable, self-determining agents in more rather than fewer ways. That can motivate a concern to preserve the liberal order under the rule of law.

The more openness and spontaneity there is in civil society (including all manner of voluntary associations, economic activity, educational institutions, religious life, leisure activities, the arts, and so forth) the more occasions there are for persons to encounter each other as agents, as accountable, voluntary actors, acting for reasons. There is no assurance that this will create strong bonds of mutual respect and civility but there is greater potential for persons to regard and treat each other as rational agents when there are many opportunities and occasions for persons to have and to take responsibility. Also, the gratification attainable by leading lives well stocked with such opportunities can strengthen the interest in liberalism. Diversity of valuative commitments can be a source of friction, dispute, and alienation. At the same time, it can be appreciated for the possibilities it presents, for the encounter with different types of interest and concern, which otherwise one might not have imagined.

The relations between the liberal polity and civil society are especially significant with respect to the claims to be made concerning criminal justice. Before turning to that significance I want to comment briefly on the fact that, not only does liberalism involve acceptance of valuative diversity (regarding many things but not everything), but there are several different conceptions of liberalism itself.

II

Without purporting to provide an exhaustive taxonomy, we can distinguish (at least) five conceptions of liberalism. Some of their chief characteristics are indicated by their names. This is not intended to be a complete survey of the variants of liberalism. It is instead a way to make a general point about the variety of reasonable conceptions of liberalism. The types are libertarian liberalism, republican liberalism, non-utilitarian welfarist liberalism, neutralist liberalism, and perfectionist liberalism. In each conception of liberalism, the individual has significant political status as a bearer of rights and as a self-determining agent, and the polity has a limited role in enforcing morality or comprehensive conceptions of human good. Each view regards the protecting of the rights and liberties of individuals under the rule of law as having primary importance. Yet, each view requires different institutional arrangements and policies in order to honor its commitment to liberalism. Furthermore, each is associated with a different concept of the justice of the
distribution of benefits and burdens, and with different views of the character and responsibilities of at least some political institutions.

Briefly, in the libertarian conception, a minimal state is to provide security, ensure the rule of law, protect people from being harmed by others, and otherwise leave the issue of what values to realize up to individuals and voluntary associations as fully as possible. Economic activity is to be shaped by market exchanges and individuals’ decisions concerning the disposition of private property. Apart from their role in defense of the society and protection of individual rights and liberties, the institutions and agencies of the state are to be minimal.

Republican liberalism puts greater weight on shared values. Philip Pettit and John Braithwaite have elaborated an important contemporary conception of republicanism, one in which the notion of dominion has a key role. They note that their view owes a considerable debt to Montesquieu as well as to classical liberals such as Locke. They write, “we hope that it [‘dominion’] can suggest to modern ears what libertas must have suggested to the Romans, ‘franchise’ to the medievals.” They then go on to explain, “Dominion, freedom in the republican sense, requires more than the bare fact of exemption from interference by others: more than the liberal notion of freedom.” The individuals in a society might have formally equivalent rights and liberties yet differences in their circumstances and positions in the society materially affect the power each has to act freely. According to the republican view, real and significant differences in power may go unacknowledged by libertarianism.

According to the republican view of liberalism, society is to promote dominion as a social status, one enjoyed in relation to the status of others. As Richard Dagger remarks, “The republican public must be a community of interest.” This need not include a strongly shared sense of identity and a thickly communitarian way of life. But republicanism involves a more extensive role for the state than libertarianism because of the more complex understanding of what is required to be a free and equal citizen. (I realize that proponents of republicanism might want to contrast their view with liberalism. Still, there are some significant respects in which republicanism can be interpreted as a form of liberalism.)

Non-utilitarian welfarist liberalism is strongly concerned with both the separateness of persons and the rights and liberties that reflect respect for that, as well as the ways in which inequalities of wealth and opportunity bring with them impediments to the exercise of liberties and rights. Thus, inequalities are to be minimized. This view has a key concern with justice in distribution, and thus it may require considerable exercises of state power in order to attain and maintain the guiding conception of distributive justice to which it is committed. The state can preserve liberty by redressing inequalities caused by unearned differences due to luck regarding natural endowments and social circumstances. The institutions and exercises of state power are to ensure equal conditions of liberty and opportunity for individuals.

Neutralist liberalism is well known through John Rawls’s recent elaboration of it. In arguing that the liberal polity should not favor or
endorse any specific, comprehensive conception of the good, he asserts that, “the idea of the reasonable is more suitable as part of the basis of public justification for a constitutional regime than the idea of moral truth. Holding a political conception as true, and for that reason alone the one suitable basis of public reason, is exclusive, even sectarian, and so likely to foster public division.”

Neutralist liberalism is the view that an overlapping consensus on basic principles can be arrived at in a way that does not involve specific substantive elements of comprehensive conceptions of the good. The notion of “public reason” is intended to supply an idiom adequate to fashioning principles for addressing issues of public concern in a situation of value-pluralism. A political conception of liberalism, acceptable to reasonable persons, can be elaborated without being anchored in or dependent upon a comprehensive conception of the good.

There are numerous forms of perfectionist liberalism. In some, liberty is important to the realization of objective human goods. This is the view that the exercise of rational self-determination is not only an instrumental means to living well, it is a constitutive means inasmuch as an individual’s own agency is the core cause of a well-led life. Liberty is highly important because there is a causal/normative connection with attaining perfectionist ends. Without the liberty to exercise agency aimed at realizing what one values, human beings could not attain the perfection distinctive of them. This might be conceptualized, in broad terms, as human perfection; or, in more agent-relative terms, as each individual using reason to fashion and actualize a conception of perfection for his or her own life.

In other versions, the conception of perfection is less rationalistic and there is an emphasis on the wholeness of the human personality and its integrated development, conceived in terms reflecting affective and aesthetic considerations. Consider the differences between Aristotelian perfectionism and some of the nineteenth-century conceptions formulated in response to Kant’s rationalistic account of moral personality. These different overall views of perfectionism share the notion that rational agents lead flourishing, gratifying lives through exercising their capacities for self-realization. Autonomy is sometimes highly important to perfectionist anthropologies and their associated conceptions of politics. Theorists who take autonomy to be centrally important are led to liberalism because liberty preserves conditions for the exercise of autonomy, whether that is interpreted in terms of rational self-determination or in terms of self-making or self-creating.

Depending upon the level of specification, additional conceptions of liberalism could be described. Nevertheless, in practical terms, in the context of concrete political and social life, it is not crucial that there should be a consensual conception of liberalism. The realities of political culture are far too messy to support consensus on the matter, and it is not required. A liberal polity can be doctrinally “impure” and survive disagreements concerning what exactly its doctrine should be or what “public reason” supports. It is perhaps more important to liberalism that people restrain the inclination to impose their values on others than that they all have a fundamental commitment to a specific doctrine of
liberalism. There are several reasonable conceptions of liberalism and in any given liberal polity there may be proponents of each.

III

With all this as background, I turn to some issues concerning criminal justice. My chief claim is that the liberalism of a liberal polity is well served by criminal justice having a narrow rather than broad normative focus. I will explicate that claim by highlighting certain distinctive features of criminal justice and its relation to other aspects of justice. Guarding against the assimilation of criminal justice into a more comprehensive conception of justice helps preserve the proper normative focus of criminal justice. Assimilation into a comprehensive conception of justice would almost certainly lead to enlargement of the state’s interventions into people’s lives, specifically, more and more contexts of activity being directed by state policy and institutional agencies of the state in ways that involve risks to liberalism. (If one is unbothered by sacrificing liberalism, then my argument may not address a strongly felt concern.)

In the sections above, I emphasized the fact that politics must come to grips with the plurality of people’s conceptions of good and I commented briefly on there being several different conceptions of liberalism. These considerations will figure prominently in the remaining argument but, at the same time, we should not overlook the fact that with regard to many important matters of criminalization there is a high level of agreement. As Andrew von Hirsch has noted:

There are some basic principles of criminal law acceptable to any reasonable conception of liberalism, both in regard to the justification of criminalizing certain behaviors and in regard to procedural requirements of criminal justice. There indeed remain areas in which there is dissensus. Still, liberalism requires some distinctive limits and requirements concerning criminal justice in ways that are clearly distinguished from what might be acceptable in a polity unconcerned with liberal commitments.

Before addressing the issue of the relation between criminal justice and other aspects of justice I want to comment on criminalization. One of the risks of expansive criminalization is that, as the law intrudes on more departments of life, its normative authority can become perceived as weaker and its normative focus blurred. While serious crimes will seem no less serious, if the state is perceived as having overreached in criminalizing, the perceived significance of some offenses may be diminished. Sanction may be less efficacious at motivating remorse or
shame or efforts of ethical self-correction. Even if those are not among the aims of punishment they can make a difference to the culture of criminal justice.

Douglas Husak writes, “The two primary reasons to be worried about overcriminalization... are, first, its effects on rates of punishment, and, second, its tendency to erode the rule of law.” If many types of conduct are criminalized in the absence of agreement that they are morally wrong, the moral authority of criminal law is likely to be less definite, its legitimacy seeming dubious. This is significant because, “[s]imply put, the criminal law is different. What is different about the criminal law is that it subjects persons to state punishment. Subjecting persons to punishment requires a much more powerful defense than other types of sanction.” Using criminalization as a strategy for realizing a preferred conception of civil society can swiftly become an illiberal approach to politics and it can weaken respect for the law.

Distinguishing his view from Michael Moore’s legal moralism, Husak writes (in regard to private wrongs such as lying to one’s spouse):

[Moore] holds that this wrong, like all wrongs, gives the state a reason to punish Jones, but this reason is outweighed by one or more of the principles he invokes to supplement his legal moralism. By contrast, I do not believe that Jones’s wrong establishes a presumptive case for state punishment that then needs to be rebutted. We need not appeal to supplementary principles to show why the government should not punish private wrongs, because the commission of these wrongs does not create a prima facie ground for state punishment in the first place.

While it is true that in a liberal polity protection against being wronged by others is crucially important, its importance is not an entirely stand-alone matter. There may be good reasons for not criminalizing even reprehensible acts if, for instance, it is clear that they are private wrongs. There may be good moral grounds for moral agents to rebuke and to censure each other; there may be good moral grounds for agents to adjust their relations with each other and attitudes toward each other on account of wrongs done, planned, or encouraged. Those features of moral life are not automatically less important for not being the business of the state.

Criminal justice involves the state’s power to impose sanction and its reproductive connotation. That is one reason it is important not to presume that the moral wrongfulness of behavior is a prima facie ground for criminalization. In a liberal polity it is important that criminal law and criminal justice should reflect moral values, but we should not presume that criminalization is appropriate in regard to what is judged immoral. Malcolm Thorburn argues that the legal moralist’s conception of ourselves simply as responsible moral agents was not the right one upon which to found a theory of criminal justice, for three reasons: because it imports an illiberal conception of the role of the criminal law; it is unable to justify the use of state coercive force through the institutions of criminal justice; and it fits very poorly with the structure of Anglo-American criminal law doctrine.

In place of the legal moralist’s formulation of the issue of justifying punishment, Thorburn argues that, “The state guarantees us all that we can focus on the morality of our own choices without having to worry
about whether this will undermine our status as moral equals of those around us.”

Criminal law has to do with the way “the state promises to enforce the limits of jurisdiction in the name of us all.” This is an alternative to the moralist’s conception of the state as having a proper interest in the moral rightness and wrongness of our conduct tout court.

There is a morally significant role for criminal law, and there are respects in which criminal law can be informed by moral considerations without implying that criminal law should have a role in regard to immorality in general. As difficult as it is to draw the line between law and morality, it should be quite clear that much of each concerns little of the other. This lack of coextension is not to be corrected by the law. Thorburn describes his view as focused on “the protection of jurisdiction.” The jurisdiction in question concerns the individual’s liberty to “decide how to use his body and property as he sees fit and the public jurisdiction of the state to deal with the preconditions of individual freedom through binding laws and coercive enforcement.”

Both the distinction between public and private wrongs, and the distinction between conditions in which there is an appropriate state interest in sanctioning and when there is not, are relevant to criminalization. As Husak says, “Criminal wrongs are public wrongs. In the case of criminal wrongs, my response is owed to the state, a point that is crucial in understanding why it has the authority to punish us for our penal offenses.”

The notion that some moral wrongs are to be addressed, as it were, informally, without the involvement of a particular authority may be familiar to many people from contexts of moral life into which the state’s authority does not extend. For example, members of some faith communities understand moral life to require the rebuke of wrongdoers and the encouragement of repentance, apology, and forgiveness, even if there is not also an official role for the church or a specific authority in all such cases and contexts. The faith community’s tradition might be such that highly important aspects of moral life depend upon how members regard and treat other, including certain practices of rebuke, independent of the involvement of any persons in official capacities. I mention this only to highlight the point that the “privacy” of morality is not a reliable indicator of the lesser importance of the moral issues in question, and that moral wrongness is not necessarily a ground for official public censure and sanction.

**IV**

We turn now to the question of the relation between criminal justice and justice more comprehensively understood. Those who maintain that criminal justice should be fully absorbed into more comprehensive conceptions of justice often argue that if we are to address criminal behavior in a morally decent and effective manner, we must acknowledge the ways in which it is often symptomatic of complex social ills (and not the evil of offenders). For example, David Bazelon has argued that,
"[t]here can be no truly just criminal law in the absence of social justice." His claim is emblematic of an important position concerning the relation of criminal justice to justice in a more comprehensive sense. Even if one does not share Bazelon’s view of the substance of social justice one might insist that there can be no truly just criminal law independent of a substantive conception of justice. Of course criminal justice is connected with a more comprehensive conception, because criminal law depends upon what the society takes to be just states of affairs. Conduct that disturb those states of affairs—however they are explicated—invites the attention of criminal justice. In this way criminal law is unavoidably connected with more comprehensive conceptions of justice, whatever their content happens to be.28

In an important sense that is true. What is criminalized depends upon what a society takes to be just. For that reason, criminal justice cannot be isolated and it cannot be kept fully separate from other aspects of justice. It is not as though there is a fully independent, generic liberal conception of criminal justice, one that “fits” into each of the versions of reasonable liberalism that can be described and yet is separate from all of them. Because the libertarian liberal and the welfarist liberal have different views of what is just, they will also have—in some important respects—different views of criminal justice. They have different views about what states of affairs count as just and different views about the justice of how states of affairs are brought about. That must be conceded.

Nonetheless, my point is that, whatever one’s conception of the liberal polity (whether it is libertarian, perfectionist, etc.), criminal justice has a distinct normative focus, which has primarily to do with an individual’s accountability as a voluntary, intelligent agent. There are aspects of criminal justice that are not properly subject to political bargaining and the political process in the ways that many other types of issues are. Other aspects of justice, such as those concerned with the distribution of benefits and burdens, involve multiple types of considerations. Such aspects can be articulated at multiple levels of description, in fine grained detail or by sweeping generalities, and involve the interaction of possibly quite large numbers of factors. Depending upon the level of resolution we wish to attain and the causal questions or policy concerns or normative questions we are trying to answer, we could find that many different kinds of considerations are relevant. A great deal of political argument in a liberal polity reflects different concepts of what justice requires regarding distribution of wealth, access to opportunities, entitlements, and so forth, and different levels of description of the issues.29

It is one of liberalism’s merits that it can accommodate some such disagreements without disintegrating, but this also creates a difficulty for liberalism. It is doubtful that, within a liberal polity, there will be conclusive settlement of what justice requires. A diverse, dynamic civil society can fuel ongoing disputes about what justice requires. And, because the social and economic issues can be formulated and addressed at multiple levels of generalization and complexity, there isn’t likely to be a lasting settlement of just what representation of the issues is to be explanatorily and
normatively basic. Nonetheless, criminal justice in a liberal polity includes certain fixed elements and those are the basis for regarding criminal justice as having a distinct normative focus.

Given the basic character of a liberal polity, it is appropriate that, with respect to criminal justice, the activity of individuals as agents, as origins of action, should have a significant role. We do not require a metaphysical account of causation to make this point. The liberal polity acknowledges persons as distinct, accountable agents. That acknowledgment does not depend directly upon a prior, independent theory of causation. The accountable agency of persons and the separateness of persons as subjects of rights are part of the anthropology of liberalism, part of how it conceptualizes persons as political creatures. What we discover about the causality of various specific behaviors is certainly relevant to criminal justice. But the conception of persons as agents and the normative significance of that for politics and law are not based upon a particular theory of causation that is then applied to political and moral life.

Even though criminal justice cannot be isolated from wider conceptions of what is just, there are respects in which—at least for a polity with a genuine commitment to liberalism—key elements of criminal justice do not exhibit the same types of plasticity exhibited by some of the other aspects of justice. Criminal justice in a liberal polity involves (i) a focus on individuals as agents accountable for wronging and harming others, (ii) taking care in specifying the scope of state power with respect to prohibiting voluntary activity through criminalization, and (iii) the need to legitimize the exercise of state power to punish. If a state is genuine in its commitment to liberalism it will maintain a focus on preserving and protecting individuals’ “jurisdiction” (as Thorburn puts it), doing so in a way that is restrained with regard to criminalization and sanction because of the respect in which criminal justice is “different” (as Husak puts it).

Thickly connecting criminal justice with a comprehensive conception of justice risks eroding the normative clarity that criminal justice can have in a liberal polity. My argument here is not blind to the ways in which social conditions of many kinds have causal/explanatory relations to crime. It is not blind to the ways in which wealth, education, race, ethnicity, social connections of various kinds, and other factors have a real and often unjust impact on the operation of the criminal justice system. The involvement of those factors frequently constitutes improper interference, and this judgment reflects the acknowledgment that criminal justice has a primary concern with individual agency and culpability; that is the center of normative attention. In a liberal polity the jurisdiction of individuals has basic importance and the standing of individuals as responsible origins of action is fundamentally important. That an individual is a locus of voluntary activity, i.e. self-motion explicable in terms of how the individual is invested or engaged in it, is a crucial element of the liberal conception of politics. The focus on that feature of human beings and the standing it supports is a proper focus of the normative idiom of criminal justice.
To fully assimilate criminal justice into wider conceptions of justice could mean that instances of offending would become an occasion for a moral-luck audit of the offender’s life and circumstances. Such an audit would determine whether accountability for the offense is to be shared with (or located in) the conditions of an unjust society. It could mean that offending is to be interpreted more as an event precipitated by, or an intersection of, social factors rather than an episode of accountable self-motion. This is because of the large number of social factors relevant to behavior and because of the complex ways in which they interact. We are then confronted with the full range of questions concerning levels of description, the types of relevant considerations, the selection of explanatorily relevant causal relations, and so forth.

Granted, this does not disable a liberal polity for making decisions and taking action concerning issues of economic and social justice, for example. Through a process of political bargaining, much of which can concern the relevant level of description of the issues, policy decisions are made and laws and regulations are written and enforced. But it is especially important in a liberal polity that criminal justice should not be susceptible to absorption into the complex welter of factors involved in, say, distributive justice. Absorption would risk the dissolution of agency inasmuch as conduct would be explicated in terms of a multitude of factors for which the individual is not accountable. There is the risk of replacing judgments of accountability with causal-factor audits of moral luck.

Defenders of absorption into a comprehensive conception of justice might reply that they want to guard against criminal justice ignoring relevant considerations of justice, considerations that it currently fails to acknowledge adequately. Still, there are good reasons for a narrower rather than wider normative focus for criminal justice in a liberal polity. The conceptual idiom of agency and voluntariness is an important way of sustaining the standing of individuals and both their “jurisdiction” and responsibility. Crime understood as the voluntary commission of a public wrong, and as thereby liable to opprobrium and sanction, does make criminal law “different.” It has a distinctive place in the liberal polity because of how it is connected with the standing of persons and the state’s authority to impose suffering via punishment.

Several possible approaches to integrating or absorbing criminal justice into justice more comprehensively have been suggested, at various levels of completeness. When a poor person steals from a wealthy person, especially if the stealing is done in order to obtain something genuinely needed, we might think that we fail to do justice to the thief if we evaluate the act only in terms of a violation of law, without attending to the larger moral context in which the act is more fully intelligible. The overall condition of the poor person, including the account of how this individual came to be impoverished and why he or she remains impoverished, is necessary, one might insist, to evaluate properly the act of stealing. Jeffrey Reiman remarks that, “it is necessary to distinguish between committing a crime in the legal sense, meaning violating a criminal law, and committing a crime in the moral sense,
meaning *doing a moral wrong*. One might argue that criminal justice should be more fully responsive to other aspects of justice, and that making it more responsive requires including multiple explanatory considerations other than—and possibly explaining away—voluntary agency in the more “narrow” sense of criminal law.

The case has also been made for extensive reconsideration of criminal justice so that social conditions play a regular, significant role in assessments of criminal conduct in a manner that forges “a connection between a welfare-state conception of social justice and the social conditions approach to excuses,” as William Heffernan has put it. (He was not endorsing that connection.) There are more radical approaches, some of them pointing in the direction of a transformation of criminal justice into restorative justice, as in Braithwaite’s view. He writes, “The social movement for restorative justice is important because it provides a fresh practical programme for combating injustice and stigmatization.” The variety of approaches to integration or absorption is as great as the variety of conceptions of justice and conceptions of relevant explanatory factors. If liberalism is to be preserved, that plasticity needs to be resisted. Or, putting the point differently, if the kinds of considerations relevant to criminal justice are susceptible to an indefinite range of plasticity of that kind, involving any number of kinds of explanatory considerations, then we need to be willing to give up liberalism.

Some of the elements of the normative point and character of criminal justice in a liberal polity (both from the perspective of the citizen and from the perspective of the state) are not dependent on a more comprehensive conception of justice, although the significance of criminal justice is not utterly separate from more comprehensive conceptions. What Heffernan calls “theory-specific connections” between social justice and criminal justice are not requirements for criminal justice having a significant, recognizable normative point. There are, so to speak, fixed features of criminal justice in a liberal polity. Determinations of agency, accountability, and culpability can be nuanced and calibrated by considerations of provocation, mitigation, degree, aggravation, duress, and so forth. Perhaps revisions of these or additions to them are needed. This suggestion is not precluded by the narrower view. It is anchored in the presumption that human beings are individual agents—subjects of rights capable of knowingly initiating actions, able to anticipate many of the consequences of those actions, and able to understand the ways in which their actions can harm and wrong others. This anchoring presumption is crucially important for the liberal polity, even though more fully empirically informed explanations of human action may give us reason to revise our understanding of voluntariness and agency in some cases.

R. A. Duff argues that “we can best understand the authority and claims of criminal law in a liberal polity by understanding it as a law for citizens: a law to which citizens subject each other and themselves, under which they call public wrong-doers to account for what they have done, and are themselves ready to answer to their fellows.” This view reflects the significance of individual agents as accountable. Yet,
accountability is not confined to those who violate the law. “Those who impose judgment and punishment are responsible for their actions, but more broadly, those who criminalize and those who demand criminalization and enforcement bear responsibility for those decisions and demands. Thus various public officials, and members of the general community, may be rightly held responsible for the criminal justice system.”36 As Duff observes, “[w]e must ourselves be collectively ready to be called to account, and indeed show that we hold ourselves to account, for the injustices such defendants have suffered at our collective—and typically passive—hands.”37

Accountability for the system of criminal justice and how it works is surely a matter that merits more attention than it typically receives in many discussions of crime and punishment. My argument is not that the only accountability that matters has directly to do with criminal acts; it is not the view that offenders alone are accountable and that those who shape the social order and influence conditions and institutional arrangements—sometimes by just leaving them as they are—are exempt from attention that locates accountability. The explication of an action and the state of affairs in which it occurred can involve multiple aspects of accountability and have multiple dimensions of normative significance. However, that there are several relevant types of accountability does not imply that the way that the focus of criminal justice has been characterized here must be too narrow.

Proponents of the absorption of criminal justice into more comprehensive conceptions are likely to insist that seeing criminal justice as part of justice overall is what justice requires. Unless criminal justice is connected integrally with other aspects of justice, the integrity of criminal justice is threatened. In response to this, I return to some points introduced at the start.

Liberalism requires widely agreed upon moral principles constituting a framework within which individuals are at liberty to choose goods, pursue interests, and lead their lives in accord with their own concerns. The liberal polity is neither a moral free-for-all nor morally neutral. The framework is vitally important, and it is crucial that it be widely endorsed. It is within that framework of moral agreement that wide scope for a diversity of interests, commitments, and conduct is made possible. The relevant norms reflect the society’s judgment of what is wrongful in ways that constitute public wrongs. The norms should be morally intelligible and conformity to them should be practicable. These are plausible features of any reasonable liberalism.

Serious and persistent disputes about what is to be criminalized can be very threatening to liberalism, undermining confidence in the criminal justice system. That is because of how individuals’ standing, jurisdiction, and liability to sanction are all connected through the core notion of individuals as voluntary agents capable of intelligent self-motion. Serious, persistent disputes create confusion regarding those fundamental elements of the liberal political order, and, in consequence, what justice requires is rendered unclear. Criminal justice in a liberal polity cannot be isolated as a stand-alone issue, but some of the conceptions
integral to it and distinctive of it are also partly constitutive of a liberal order and not merely associated with it.

Notes

[I would like to thank the Social Philosophy & Policy Center at Bowling Green State University for hosting me as a Visiting Scholar in Spring 2011. Discussions there were very helpful to the completion of this article though I am solely responsible for any of its defects.]


2 A theory of this type has been elaborated by Douglas Den Uyl and Douglas Rasmussen in Norms of Liberty: A Perfectionist Basis for Non-Perfectionist Politics (University Park, PA: Pennsylvania State University Press, 2005).

3 Defenders of the historical case for liberalism could agree that a liberal political order is not maintained by accident. Even if there is an empirical, historical case for liberalism (in at least some places) rather than a philosophical case for it, its character and durability depend upon various sorts of commitments guiding and orienting political life in those states. In Ethics and the Quest For Wisdom, Robert Kane writes of the contemporary free and pluralist state: “For the rights and freedoms in question are not self-sustaining and do not exist in a vacuum. They require the existence of a moral sphere; and that moral sphere is a vulnerable thing, depending for its preservation on the virtues and character of those who participate in it.” Kane, Ethics and the Quest For Wisdom (New York: Cambridge University Press, 2010), 258–59. He makes this point in a somewhat different context than that of my discussion. However, we share the sense that it is important to emphasize how crucial are the features of civil society to maintaining a liberal political order.


5 Ibid., 157.

6 Ibid., 164.

7 Ibid., 155.

8 As an observation, I would argue that Adam Smith is especially important for his insights into the character of social and economic life in the then-emerging modern world. He saw—and emphasized—the significance of how persons are regarded by others and how that regard figures in an individual’s self-conception. He also saw that where there is at least some measure of mobility and civil society is open and diverse, social and economic life depend increasingly on voluntary interactions and exchanges, and this can make a difference to how individuals regard themselves and others as agents. There is increased opportunity for acquiring prudence and individual accountability. That, I believe, is an important point of connection between his accounts in The Theory of Moral Sentiments and in An Inquiry Into the Nature and Causes of the Wealth of Nations. Adam Smith, The Theory of Moral Sentiments (Indianapolis, IN: Liberty Fund, 1994), ed. D. D. Raphael and A. L. MacFie (Indianapolis, IN: Liberty Fund, 1984), An Inquiry Into the Nature and Causes of the Wealth of Nations, ed. William Playfair (London: W. Pickering, 1995).

9 Both non-utilitarian welfarist liberalism and neutral liberalism can be attributed to John Rawls, the former clearly represented by A Theory of Justice and the latter by Political Liberalism. There are some important continuities between them in Rawls’s thought, but it is, I believe, worthwhile to distinguish their different emphases. John Rawls, A Theory of Justice (Cambridge, MA: Harvard University Press, 1971), John Rawls, Political Liberalism (New York: Columbia University Press, 1993).

11 Ibid., 203.


15 My views on public reason (which are only hinted at here, and not elaborated) have been influenced by published and unpublished work by Nicholas Wolterstorff. He has presented what I take to be important objections to the notion of public reason, highlighting the way in which it involves more substantive and specific commitments than expounders and defenders of it typically admit. See Nicholas Wolterstorff, *Justice: Rights and Wrongs* (Princeton, NJ: Princeton University Press, 2008). See also Robert Audi and Nicholas Wolterstorff, *Religion in the Public Square* (Lanham, MD: Rowman and Littlefield Publishers, 1996).


18 Ibid., 124.

19 Ibid., 121.


21 Ibid., 42.

22 Ibid.

23 Ibid., 43.

24 Ibid.


26 For examples of this view in the Jewish and Christian faith traditions see, for example, Moses Maimonides, “Laws Concerning Character Traits,” in *Book of Knowledge*, Book One of *Mishneh Torah*; and Thomas Aquinas, “On Fraternal Correction,” *Summa Theologica*, III, Q. 49, Art. 1. Both Maimonides and Aquinas maintained that part of what it is to have concern for the created order and for our fellowman is to rebuke those who sin. This is to be done without humiliation and it is a way of caring for the good of the community, not an assumption of moral superiority over the other. In taking this position, Maimonides and Aquinas were really just reporting on an already completely familiar aspect of their respective faith traditions.


28 The force of the objection that the conception of criminal law cannot be wholly detached from a more comprehensive conception of justice, and that there is not a fixed conception of criminal law that can be simply fitted into each of the different reasonable conceptions of liberalism, was made evident to me by Eric Mack. I would like to thank him for his numerous and incisive critical remarks and observations. His remarks (in private correspondence) regarding the significance of the fact that there are multiple reasonable conceptions of liberalism have been especially helpful.

29 The contrast between the relative fixity of some of the core considerations of criminal justice and the way in which other aspects of justice often involve a multiplicity of types of considerations, sometimes at a number of levels, was suggested to me by Daniel Feldman, a colleague at John Jay College. He is not responsible for any flaws in the specific way in which the point is elaborated here.


33 Heffernan, p. 53.

34 Stephen Morse argues for a verdict of “Guilty But Partially Responsible” to be “available in appropriate cases in addition to guilty, not guilty, and not guilty by reason of insanity. The criteria for the mitigating excuse would be, first, that the defendant’s capacity for rationality was substantially diminished at the time of the crime, and, second, that the defendant’s diminished rationality substantially affected his or her criminal conduct.” Morse, “Diminished Rationality, Diminished Responsibility,” *Ohio State Journal of Criminal Law* 1 (2003): 300. In suggesting this approach Morse was not addressing the issues at the center of the present discussion but we can see how a partial defense strategy could appeal to theorists and defendants anxious to enlarge connections between criminal justice and other aspects of justice. There could be very good reasons in favor of such an approach even if there are grounds for skepticism about whether it applies to defendants because of how they have been ill served by society. Morse remarks, “Defendants will certainly seek to take advantage of an innovative partial defense, but if justice demands its creation, the criminal justice system ought to bear the costs of some increase in threat.” Ibid., 305.


