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A CRIMINAL LAW WE CAN CALL OUR OWN?

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ABSTRACT—This Essay sketches an ideal of criminal law—of the kind of criminal law that we can call our own as citizens of a democratic republic. The elements of that ideal include a republican theory of liberal democracy, as the kind of polity in which we can aspire to live; an account of the role of criminal law in such a polity, as defining a set of public wrongs and providing an appropriate formal, public response to the commission of such wrongs through the criminal process of trial and punishment; and a discussion of how the citizens of such a polity will relate to their criminal law and of the various active roles that they will be ready to play in the law's enterprise. This account does not aim to describe, or to justify, our existing systems of criminal law. Instead, it offers a normative ideal against which we can judge our existing institutions, and towards which we can strive to reform them.

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INTRODUCTION

What follows is a sketch of an ideal of criminal law—criminal law understood not as an abstract body of doctrine, but as a set of institutions and practices focused on the definition of crimes and the detection, prosecution, and punishment of those who commit them. This, I will argue, is the kind of criminal law that we ought to aspire to achieve: a criminal law that we can call, and treat as, our own as citizens of a democratic republic. The aim is not to describe or justify the criminal law we actually have, but rather to provide a model of what criminal law ought to be. That model can then serve both as a focus for our reformative aspirations and as a basis on which to identify and critique the manifold deficiencies and injustices of our existing systems.[1]

Any normative theory of criminal law depends on a political theory. Criminal law is part of the political structure of a society: if we are to understand what criminal law should be or what it should do (what aims or functions it should serve), we must have some idea of the kind of polity in which it is to operate, of the guiding aims and values of such a polity, and of how a system of criminal law can serve those aims and embody those values. Part I sketches the kind of political theory on which I rely—a republican theory of a liberal democracy. Part II discusses the role of criminal law in such a polity, and Part III then deals with the ways in which the citizens of such a polity will relate to their criminal law. Given constraints of space, I cannot argue for this political theory here, and will only be able to sketch the conception of criminal law that it can ground;[2] but I hope to be able to say enough to show that it is a conception that is worth taking seriously as an ideal.

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[1] These deficiencies and injustices have been thoroughly documented in recent scholarly writings. For two useful starting points, American and English, see WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE (2011) and Andrew Ashworth, *Is the Criminal Law a Lost Cause?*, 116 LAW Q. REV. 225 (2000).

[2] For more developed arguments, see R A DUFF, ANSWERING FOR CRIME: RESPONSIBILITY AND LIABILITY IN CRIMINAL LAW (2007); R A DUFF, THE REALM OF CRIMINAL LAW (forthcoming 2018); and R A Duff, *Towards a Modest Legal Moralism*, 8 CRIM. L. & PHIL. 217 (2014).

I. A LIBERAL REPUBLIC

Like any long-established tradition of political thought, republicanism comes in many forms.[3] For present purposes, we can say simply that a liberal republic is a polity of free and equal citizens who recognize each other as fellow members of a political community. They owe each other "equal concern and respect": equal concern that they should have the resources needed to pursue their distinctive conceptions of the good; equal respect for their freedom, their rights, and their privacy.[4] They will have a robust conception of the *res publica*: of the aims and values by which their shared life as citizens—the polity's public realm—is structured; though they will often differ about the proper interpretation or application of those aims and values, they are able to work through these differences in an ongoing process of public deliberation.

That *res publica* can also be described as the polity's "civil order." It consists of a structure of institutions, practices, shared expectations, and norms concerning our civic interactions, which together help define the polity as a political community.[5] These include the various institutions of government and law, but also the wider range of institutions that we recognize as public, together with all those shared social practices and norms that embody our understanding of what we owe to each other—down to such matters as how we behave in the street and conventions such as queuing. Law, including criminal law, helps both to structure and to sustain this civil order: it helps both to determine the shape and content of our civil order, and to protect it against different kinds of damage or threat.[6] I will return to this below, in relation to criminal law, but we must first note another crucial aspect of the civil order of a liberal polity.

Because it is a liberal polity, its citizens share a commitment to such liberal values as freedom, pluralism, and privacy. Of particular importance here is the relationship between these values. Freedom includes, crucially, the freedom to pursue our own conceptions of the good: a liberal polity does not just tolerate but also welcomes and fosters a plurality of ways of

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[3] For a useful overview, see Frank Lovett, *Republicanism*, *in* STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., rev. ed. 2014), http://plato.stanford.edu/archives/spr2016/entries/republicanism/ [https://perma.cc/9FWG-H3HE].

[4] On equal concern and respect, see RONALD DWORKIN, A MATTER OF PRINCIPLE 190 (1985), which concerned only what a state owes its citizens, but we can describe what liberal citizens owe each other in the same terms. On republican freedom, see PHILIP PETTIT, ON THE PEOPLE'S TERMS: A REPUBLICAN THEORY AND MODEL OF DEMOCRACY (2012).

[5] *See* LINDSAY FARMER, MAKING THE MODERN CRIMINAL LAW: CRIMINALIZATION AND CIVIL ORDER (2016) (especially Chapter 2); *see also* NEIL MACCORMICK, INSTITUTIONS OF LAW: AN ESSAY IN LEGAL THEORY (2007) (especially Chapter 12 on "civil peace").

[6] *See generally* FARMER, *supra* note 5.

life, of conceptions of the good life.[7] This requires us to draw a firm distinction, or a firm set of distinctions, between the "public" and the "private." The public realm is the civic realm in which we live together and interact as citizens; it is the realm of matters that compose our collective business as citizens. But in a liberal polity, this realm is limited, because "citizen" is only one among other roles that we play. For most of us, other roles are more important in terms of their significance in, and contribution to, what we take to be a good life. We find our most important goods and goals not in our civic lives but in a range of more particular, often more personal, activities and relationships—for instance, our families, our friendships, or our membership in charitable, work-related, and leisure-related associations. These are, as far as the polity is concerned, private realms, in the sense that our conduct within them is not the business of our fellow citizens as such, or of the polity as a whole.[8] More precisely, the civil order makes room for these private realms: it makes it possible for us to form and sustain such noncivic associations. It also defines the limits and constraints within which they can operate. Most obviously, the criminal law defines limits on how we may behave towards each other in our private lives as much as in our public lives: murder, wounding, and assault are just as much crimes when committed against a spouse as when committed against a stranger.[9] Within those limits, however, what we do in our private lives is not the business of the polity.

These distinctions between public and private are often controversial. To mention just a few recent examples, there is controversy about whether all consensual sexual conduct should be seen as a private matter, or whether the polity has the right to pass judgment on such conduct and to bring it within the reach of the criminal law.[10] The history of legislation concerning various kinds of discrimination is also in part the history of debates about the scope of the public realm. Should decisions about whom I employ, whom I serve in my shop or restaurant, or whom I rent my hotel

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[7] *See, e.g.*, RICHARD BELLAMY, LIBERALISM AND PLURALISM: TOWARDS A POLITICS OF COMPROMISE (1999).

[8] On the "public" and the "private" see further Christine Sypnowich, *The Civility of Law: Between Public and Private*, *in* PUBLIC AND PRIVATE: LEGAL, POLITICAL AND PHILOSOPHICAL PERSPECTIVES 93 (Maurizio Passerin d'Entrèves & Ursula Vogel eds., 2000).

[9] This is something that was only slowly recognized in the case of domestic violence, which was often dismissed by the police as a private matter into which they should not or need not intervene. This example shows the importance, and the difficulty, of the distinction between the public and the private. On *mala in se*, see *infra* note 18.

[10] *See* Lawrence v. Texas, 539 U.S. 558 (2003) (consensual homosexual conduct); R v. Brown (Anthony Joseph) [1994] 1 A.C. (H.L.) 212 (consensual sado-masochism). Also relevant here is the question of whether evidence of a rape complainant's prior sexual conduct should ever be admissible at trial. *See* FED. R. EVID. 412; R v. Evans [2016] EWCA (Crim) 452 (Wales).

rooms to be seen as private matters; or should they be subjected to public rules that prohibit certain kinds of discriminatory choices?[11] Such controversies must be worked out through a process of public deliberation, and different polities will resolve them in different ways; but an important point to note here is that the controversies are not just, or even initially, about whether the conduct in question is morally right or wrong. The first and primary question to be resolved is whether it is a public matter at all—whether it is the polity's business: only if it is in that sense a public matter does it become necessary and appropriate to discuss whether it is wrong. Someone could with complete consistency believe (as some people indeed do believe) that abortion is morally wrong—except under very limited circumstances—even within the first weeks of pregnancy, but also believe that it should not be criminalized because it is a private, rather than a public, matter.[12]

We should note one further feature of a liberal republic understood as a political community of citizens. Communities can be inclusionary or exclusionary in spirit. They can, that is, be ready to welcome new members and be very reluctant to exclude or expel existing members; or they can make citizenship difficult to acquire and be quick to expel existing members who violate their values. One depressing feature of our existing polities is that they tend too often to be exclusionary in both these ways: we are reluctant to admit, let alone welcome, new members (as our responses to refugees from war-torn parts of the world make all too clear), and we are all too ready to portray and to treat those who violate our criminal laws as outsiders who have forfeited their status as citizens—to exclude them from our shared civic life. Our enthusiasm to disenfranchise those serving prison sentences, during and even after their punishment, gives vivid expression to this kind of exclusion, as does the wide range of further "collateral consequences" to which those convicted of criminal offences are liable.[13] But we should aspire to a more inclusionary spirit. First, although we may resist a cosmopolitanism that denies any fundamental significance to national citizenship,[14] we can be welcoming rather than hostile towards

[11] For a nice example, see *Hall v. Bull* [2013] UKSC 73, which considered whether it constitutes unlawful discrimination for a hotel keeper to refuse, on religious grounds, to let a double room to a same-sex couple.

[12] Note that in the landmark case of *Roe v. Wade*, 410 U.S. 113 (1973), the U.S. Supreme Court's argument about the constitutionality of legal prohibitions on abortion was based primarily on the issue of privacy.

[13] *See generally* MARGARET COLGATE LOVE ET AL., COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTIONS (2013).

[14] For a useful survey of cosmopolitan arguments, see Pauline Kleingeld & Eric Brown, *Cosmopolitanism*, *in* STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., rev. ed. 2014),

fellow human beings who seek to become our fellow citizens.[15] Second, we can and should be slow to exclude fellow citizens from the polity. I have no demonstrative argument to offer for these claims: what underpins them is, rather, an appeal to an idea(l) of solidarity—to a recognition of each other as fallible fellow beings to whose well-being membership of a polity is crucially important.[16]

Our next question concerns the role of law, and in particular of criminal law, in a republican polity of this kind.

II. A LIBERAL REPUBLIC'S CRIMINAL LAW

What are the distinguishing features of criminal law, as a distinctive mode of law? There are, I think, two such features, which give it a distinctive place in a polity's civil order: both reflect the way in which the criminal law is essentially concerned with public wrongs—with, that is, morally wrongful conduct that falls within the public sphere.

First, the substantive criminal law defines a range of offenses. In doing so, it defines a set of public wrongs—kinds of conduct that are to be formally and publicly condemned as wrong.[17] Although the substantive criminal law is often described as a set of prohibitions—that is, prohibitions on the kinds of conduct it defines as "criminal"—this is misleading, because it implies that the law's purpose is to issue commands or orders that the citizens are to obey; and that in thus prohibiting conduct the law claims the power to make wrongful conduct that was not or might not have been already wrongful. The criminal law does not claim any such power or authority. Rather, it claims the authority to declare certain preexisting wrongs (wrongs, that is, which exist and can be understood as wrong independently of the criminal law) to be public wrongs that formally

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http://plato.stanford.edu/archives/fall2014/entries/cosmopolitanism/ [https://perma.cc/GN7Q-DX8E]. For an extended argument against outright cosmopolitanism, see DAVID MILLER, CITIZENSHIP AND NATIONAL IDENTITY (2000).

[15] See, for instance, the aspiration expressed in the Preamble to the Constitution of the Argentine Nation: "con el objeto de . . . asegurar los beneficios de la libertad, para nosotros, para nuestra posteridad, y para todos los hombres del mundo que quieran habitar en el suelo argentino" ("in order to . . . secure the blessings of liberty to ourselves, to our posterity, and to all men of the world who wish to dwell on argentine soil"). Pmbl., CONSTITUCIÓN NACIONAL [CONST. NAC.] (Arg.).

[16] Compare the "right to a nationality" declared in Article 15 of the Universal Declaration of Human Rights. G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 15 (Dec. 10, 1948), http://www.un.org/en/universal-declaration-human-rights/ [https://perma.cc/F998-MF4H]. I should note that whatever account of citizenship we give, a polity's criminal law will still have to deal with some, perhaps many, who are not citizens: to allay well-founded fears that a focus on citizenship might disadvantage them, we should emphasize the importance of the normative category of guest, and of the rights and responsibilities of hospitality.

[17] The substantive criminal law also, of course, defines the range of defenses through which one who commits an offense can avoid conviction.

concern the whole polity and to provide, when necessary, authoritative definitions of those wrongs as criminal wrongs.

This declaratory authority is most clearly seen in the case of so-called *mala in se*: crimes consisting in conduct that is (the law claims) wrongful independently of its legal regulation. When the criminal law defines murder, rape, assault, theft, criminal damage, and so on as crimes, it is not *prohibiting* the kinds of conduct that it defines as criminal, or making them wrong: it takes for granted that they are wrong, and declares them to be public wrongs.[18] But the same is also true of so-called *mala prohibita*—offenses consisting in conduct that is not or might not be wrongful independently of its legal prohibition. Here, it is true, we are dealing with legal prohibitions, but it is not, strictly speaking, the criminal law that does the prohibiting. What we have is, rather, a two-stage process of criminalization. A statute lays down a regulation proscribing or prescribing a type of conduct: for instance, regulations specifying speed limits that all drivers are to obey or requiring drivers to have driving licenses and to carry insurance. Assuming (as the law must) that such regulations have a legitimate claim on our obedience, we then do wrong if we break them; and the criminal law, in making it an offense to break the speed limit or to drive without a license or without insurance, declares the wrong to be a public wrong.[19] The criminalized wrong is thus still a "preexisting wrong" in the sense that the conduct is wrongful prior to and independently of the *criminal* law, although it might not be wrongful independently of its legal regulation. Thus the criminal law functions not to create the wrong, but to declare its public character—and to provide an appropriate response to it.[20]

Second, the criminal law gives effective force to such declarations of public wrongs by providing a criminal process of trial and punishment. To criminalize a type of conduct is thus not merely to declare that it is a public wrong; it is to make it the case that the conduct is liable to be *treated* as a public wrong, in that those who engage in it are liable to be called to public

[18] Although in declaring them to be public wrongs, the law must also provide relatively clear definitions that can be applied by the courts. This is likely to involve some divergence from our prelegal conceptions of the relevant wrongs—some degree of reconstruction, or more precise determination, or even stipulation.

[19] This logical distinction between regulation and criminalization might not be reflected in the chronology or the substance of criminal legislation: that is, the same statute might both create the regulation and criminalize the breach of it. Nonetheless, the distinction is crucial to the logical (and normative) structure of the processes of criminalization; it is exhibited clearly when, as is quite often the case, a statute first creates or provides for the creation of a set of regulations governing some activity and then adds a provision making it an offense to break any of those regulations.

[20] This is not to justify the vast and variegated range of *mala prohibita* that contemporary criminal laws contain; it is only to show how an account of criminal law dealing with public wrongs can make room for a category of *mala prohibita*.

account for it through a criminal trial and to be punished for it if convicted at trial.

The significance of the criminal trial is often downplayed both in the practice of criminal law and in criminal law theory. In jurisdictions that operate pervasive practices of plea bargaining, there are very few contested trials;[21] theorists often portray the trial—and the criminal process as a whole—in essentially instrumental terms, as a procedure that connects crime to punishment by identifying those who, having committed crimes, are liable to be punished. But we can build a rather different account of the proper aims of the criminal trial if we think more carefully about some central aspects of the structure and rhetoric of our existing institutions—for instance, about the importance attached to the defendant's presence, to whether a defendant is "fit to plead" or "competent to stand trial," to the entering of a plea of guilty or not guilty, to confrontation in court between the defendant and witnesses or accusers, and to the formality of the verdict.

On this alternative account, the trial is understood as a process of calling to account or to answer—as a process through which the polity calls those accused of committing public wrongs to answer to their fellow citizens.[22] More precisely, the defendant is called first to answer *to* the charge, which is done by pleading either guilty, thus admitting the culpable commission of a criminal wrong, or not guilty, thus challenging the prosecution to prove its case. The importance of the plea is shown in part by the significance of a refusal to plead: a defendant who rejects the authority of the court, or of the law under which she is tried, can display that rejection in a refusal to enter a plea, or to play any part in the trial. If the prosecution proves that the defendant committed the offense charged (or the defendant admits its commission), the defendant is called to answer *for* that offense: this can be done either by offering a defense, which seeks to justify or to excuse the commission of the offense, or by accepting one's guilt. The formal verdict then either condemns the defendant's conduct as a criminal wrong, thus holding the defendant to public account for that wrong; or declares that the defendant's guilt has not been proved, so that the presumption of innocence, to which all citizens are entitled, remains undefeated. In thus answering before the court to the charge and for her conduct, the defendant is answering to her fellow citizens in whose name

[21] *See, e.g.*, MARK MOTIVANS, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, FEDERAL JUSTICE STATISTICS, 2011 – STATISTICAL TABLES 17 (2015), https://www.bjs.gov/content/pub/pdf/fjs11st.pdf [https://perma.cc/55UF-M4E5] (showing 97% of federal criminal convictions to be the result of guilty pleas, and thus typically of plea bargains).

[22] For a detailed development of this account, see ANTONY DUFF, LINDSAY FARMER, SANDRA MARSHALL & VICTOR TADROS, THE TRIAL ON TRIAL: VOLUME 3: TOWARDS A NORMATIVE THEORY OF THE CRIMINAL TRIAL (2007).

the court acts—and in whose name the court then condemns her or acquits her.

This enterprise of calling alleged criminal wrongdoers to formal public account can play an important, noninstrumental role in the polity's civil order. It gives appropriate concrete form to the citizens' collective commitment to the polity's self-defining values, as they are expressed in the substantive criminal law, and to their recognition of each other as fellow members of the normative political community. For to be committed to a value is to be ready, *inter alia*, to respond appropriately to violations of it: to remain silent in the face of the violation would be to condone it. What makes it appropriate to respond by seeking to call the violator, the wrongdoer, to account is that in this way we do justice not only to the victim of the wrong (when there is an identifiable victim), but also to the wrongdoer as a responsible agent. If I have wronged you, other members of our community can display their recognition of that wrong, and thus offer you the kind of support you should be able to expect from them, by calling me to account for what I have done. But in doing so, they also display their recognition of me as a responsible member of that community; for to be a responsible agent is to be answerable for one's conduct to those who have a proper interest in it—to fellow members of the relevant normative community. A system of criminal law and criminal trials is thus part of the polity's civil order in the sense that it gives institutional form to the polity's commitment to its shared public values and to its recognition of and concern for its members as responsible citizens. It also helps to sustain that civil order by providing for an appropriate response to kinds of conduct that violate it.

It might seem that I have been ignoring the most significant feature of a system of criminal law—that it involves the infliction of punishment on those convicted of committing crimes. For, according to many theorists, both the substantive criminal law and the criminal process must be understood as preludes to criminal punishment.[23] That is, we define crimes in the substantive criminal law, and maintain a criminal process through which we can identify those who commit those crimes, in order to provide for their punishment. The aims of that punishment might be retribution—the imposition of a deserved quantum of suffering on wrongdoers[24]—or the prevention of kinds of conduct that cause harm or that disturb the conditions of social life by deterring or incapacitating those who might

[23] *See, e.g.*, DOUGLAS HUSAK, OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW 78 (2008); MICHAEL MOORE, PLACING BLAME: A GENERAL THEORY OF THE CRIMINAL LAW ch. 1 (1997); Vincent Chiao, *What Is the Criminal Law For?*, 35 L. & PHIL. 137 (2016).

[24] *See, e.g.*, MOORE, *supra* note 23, at 33.

engage in such conduct.[25] But whatever the aims of criminal punishment, the most salient and normatively significant feature of criminal law is that it involves punishment.

We need not engage here in the argument about whether punishment is a necessary or defining feature of criminal law—whether a system that defined "offenses" and provided a system of "trials" at which those accused of committing offenses were called to formal public account and condemned if proved guilty, but that imposed no further sanctions, should count as a system of "criminal law."[26] We need simply note that punishment is indeed a salient feature of our systems of criminal law, and that it is normatively problematic given the hardships that it imposes on those subjected to it. Any normative account of criminal law must therefore either offer an explanation of what kinds of punishment, serving what ends, a system of criminal law can properly provide for; or explain how criminal law is possible, how it can hope to achieve its justifying aims, without punishment. I will not try to offer such explanations here, but will emphasize two points.

First, as this Part has already shown, the substantive criminal law and the criminal process each have independent significance that goes beyond their role as a prelude to criminal punishment. There is, I have argued, a value in the formal definition of public wrongs that the substantive criminal law provides—as a declaration of the kinds of wrong of which the polity will take formal note, and thus of the values that those wrongs violate. There is also a value in the formal process of calling alleged wrongdoers to public account through the criminal trial—as a suitable way of responding to the commission of public wrongs that shows respect for the values at stake, for the victims of those wrongs, and for their perpetrators. These values are independent of criminal punishment: they would subsist even if no further formal consequences followed from a criminal conviction.[27]

Second, the challenge that criminal punishment presents to a republican account of the kind I have espoused here is to work out whether punishment (and what kinds of punishment) can play a role in an inclusive

[25] *See, e.g.*, Chiao, *supra* note 23, at 138 (mentioning deterrence and incapacitation as two functions of the criminal law).

[26] *Cf.* HUSAK, *supra* note 23, at 78 (positing that a "law simply is not criminal unless persons who break it become subject to state punishment").

[27] One objection might be that citizens would not take the criminal law or the criminal process seriously if they did not usually lead to the punishment of the guilty, in which case they would lose the value ascribed to them here. That might be true of systems in which punishment is regularly attached to crimes; it is not clear that it would also be true of systems that eschewed punishment from the start.

polity of citizens who are to show each other "equal concern and respect."[28] To put the point starkly, could criminal punishment be something that citizens impose on each other, and that they can undergo or undertake for themselves, without denying or negating their status as citizens? Punishment in our present systems is often exclusionary in both its impact and its meaning. Imprisonment, for example, treats and portrays those on whom it is imposed as something less than full citizens—as if in committing their crimes they have forfeited their civic standing.[29] The question then is whether this is, normatively or practically, inevitable, or whether we can (re)imagine criminal punishment as a genuinely civic enterprise. Can we imagine a system of criminal law and punishment, one radically transformed from what we now have, in which we could plausibly say that convicted offenders have a civic duty not just to accept, but to undertake their punishment, as a debt that they owe as citizens to their fellow citizens? As far-fetched as it may seem from our current vantage point, I think that we can do this for at least some modes of punishment (although I cannot develop that argument here), in which case punishment can play a proper role in an inclusive republican system of criminal law.[30] Imprisonment, however, remains—and should remain—problematic as a mode of punishment. It is not clear that we can conceptualize imprisonment as being consistent with a recognition of those whom we imprison as full fellow citizens.[31]

I have so far sketched an account of the role that criminal law can play in a liberal republic of equal, and mutually recognizing, citizens—a role that makes it a common law in the sense that it belongs to the citizens as an expression and implementation of their shared public values. We should now attend briefly to the ways in which the citizens of such a polity will relate to their criminal law.

III. CITIZENS AND THEIR CRIMINAL LAW

Theoretical accounts of law in general, and of criminal law in particular, often portray it as something external to the citizens over whom

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[28] *See* DWORKIN, *supra* note 4, at 190. On inclusionary rather than exclusionary community, see *supra* notes 13–16 and accompanying text.

[29] This is a feature both of the practice and political rhetoric of criminal punishment in our existing systems, and of some normative theories of punishment. For extreme examples of the latter, see Alan H. Goldman, *Toward a New Theory of Punishmen*t, 1 L. & PHIL. 57 (1982); Christopher W. Morris, *Punishment and Loss of Moral Standing*, 21 CANADIAN J. PHIL. 53 (1991).

[30] *See* R. A. Duff & S. E. Marshall, *Civic Punishment*, *in* DEMOCRATIC THEORY AND MASS INCARCERATION 33 (Albert W. Dzur et al. eds., 2016).

[31] *See, e.g.,* Peter Ramsay, *A Democratic Theory of Imprisonment*, *in* DEMOCRATIC THEORY AND MASS INCARCERATION, *supra* note 30, at 84.

it claims authority. H. L. A. Hart's well-known account of the necessary and sufficient conditions for the existence of a legal system nicely illustrates this tendency.

A legal system, according to Hart, involves a structure of "primary" and "secondary" rules.[32] The primary rules are "rules of behaviour" that are supposed to guide the conduct of ordinary citizens. The secondary rules authorize and guide the conduct of the officials who make and apply the law: the "official creation, the official identification, and the official use and application of law."[33] A legal system exists, as law, only if those secondary rules are "effectively accepted as common public standards of official behaviour by [the] officials."[34] As far as the primary rules are concerned, however, it is only necessary that they are "generally obeyed" by the citizens whose conduct they are to guide—they need not be "accepted" as standards of conduct.[35] A system that satisfied only these "minimum" necessary and sufficient conditions would not, Hart allows, be a "healthy" system[36]: it "might be deplorably sheeplike."[37] For a "healthy society," something more is needed: that the private citizens generally "accept these [primary] rules as common standards of behaviour and acknowledge an obligation to obey them."[38]

What matters about this account for our present purposes is not the difference between a healthy and a sheeplike system, but the fact that even in a healthy system the law is in an important sense external to the citizens. It is made, interpreted, applied, and enforced by the "officials"; the lay citizens' role is simply to obey the primary rules that the officials create for them and impose on them—or, of course, to disobey those rules and risk suffering the punitive consequences of doing so. Their obedience might, if it is nothing more, reflect only a prudent fear of the law's power; or it might, in a healthy society, reflect a respect for the law's authority. But in either case it is an obedience to law that is made for them and imposed on them.

Now this model of law might often be descriptively accurate. In many societies, including our own, many people might see the criminal law as an institutional structure that is external or alien to them, that demands their obedience and that enforces those demands by the threat of punitive

[32] H. L. A. HART, THE CONCEPT OF LAW 114 (3d ed. 2012).
[33] *Id.* at 113.
[34] *Id.* at 116.
[35] *Id.* at 112, 114.
[36] *Id.* at 116.
[37] *Id.* at 117
[38] *Id.* at 116.

sanctions. But it is not a normatively attractive picture of how criminal law should figure in the life of a liberal democratic republic as I have sketched it, or in the lives of its citizens. Nor do we provide a normatively satisfactory picture simply by adding to the Hartian picture the kind of democratic dimension that characterizes representative versions of democracy—by requiring that the officials who make and administer the law be accountable to the citizens over whom they claim authority, whether by elections or by other possible modes of accountability. Much of the work of lawmaking and law-applying must, for a variety of familiar reasons (competence, efficiency, predictability, the rule of law, etc.) be performed by duly appointed and professionally qualified officials. But, especially in the context of criminal law, it is important that lay citizens also have active roles to play in the law's enterprise—and be willing to play those roles.

This is important partly as an implication of the republican idea of self-governance: if we are to be or become a self-governing polity of citizens, we must be able and willing to play an active role in the enterprise of governance, which is to say that our democracy should be participatory rather than merely representative.[39] It is of particular importance in relation to the criminal law, because on the conception I have sketched here, the criminal law speaks in our collective voice of the values that structure our polity. It defines what we collectively count as public wrongs, and calls those who perpetrate such wrongs to answer to us as their fellow citizens. We should therefore all be ready and able to play an active part in that collective enterprise; we should see ourselves as agents, not merely as obedient subjects, of the criminal law. This is not to suggest, as critics might fear, that we should be ready to collaborate actively in unjust or oppressive practices of criminal law. For, first, we can have such a civic duty to collaborate only with a tolerably just system of law, in a tolerably just society.[40] Second, although in such a society we should indeed respect, and be ready to help to enact, the law as our law, that respect must be critical rather than merely deferential. We must be ready, that is, to interrogate the law, to use discretion in applying it—and if need be to disobey it if its requirements are unjust.[41]

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[39] For a useful discussion of participatory democracy and some of its implications for the criminal process, see ALBERT W. DZUR, PUNISHMENT, PARTICIPATORY DEMOCRACY, AND THE JURY (2012).

[40] This of course raises a host of questions about what makes for a "tolerably just" society or system of law—questions on which we cannot embark here.

[41] *Cf.* William A. Edmundson, *The Virtue of Law-Abidance*, 6 PHILOSOPHERS' IMPRINT 1 (2006) (discussing the difference between "abidance" and "obedience").

If republican citizens are to be agents of their criminal law, we must ask what forms that agency should take. We can answer this question, and thus develop a fuller picture of the role of the criminal law in a democratic republic, by attending to the various roles that lay citizens might play in relation to the criminal law. Roles are structured sets of rights and responsibilities: they constitute particular modes of participation in institutions or practices, and are defined in terms of their contribution to the relevant institution or practice. Thus we can, for example, define such roles as doctor, nurse, and patient within the practice of medicine; of professor, student, and administrator within the practice of university education. In each case we define the role's rights and responsibilities by reference to the proper aims of the practice.

In the practice of criminal law, many of the roles are professional roles, to be filled by agents who are supposed to bring appropriate expertise to them: these include such roles as legislator, police officer, prosecutor, defense attorney, judge, and correctional officer. There is much to be said about how people should acquire such roles (whether, for instance, by appointment or by election) and about just what their rights and responsibilities should be,[42] but we should also attend to the various roles that lay citizens can play. One set of questions concerns the role they should play in the initial enactment of criminal laws—in legislation. Another set of questions concerns the kinds of role they can play as authoritative agents of the criminal law—for instance, as jurors or as lay judges. A third set of questions concerns the roles that we may find ourselves playing (voluntarily or not) in relation to particular crimes: these include such roles as witness, victim, and perpetrator; suspect and defendant; and convicted offender. It is, on the conception of a republican polity and its criminal law advocated here, important to see all of these as civic roles: as, that is, roles that citizens can be called on to play (or can take on), each of which involves a distinctive set of rights and responsibilities, and each of which makes a distinct contribution to the enterprise of the criminal law.

We cannot embark on the discussion of these roles here.[43] However, a detailed normative study of them, a study that asks both what criminal law roles should be recognized in a republican polity and how the rights and responsibilities of those roles should be defined, would help to give more concrete shape to this conception of criminal law—a conception of

[42] *See generally* Kimberley Brownlee, *Responsibilities of Criminal Justice Officials*, 27 J. APPLIED PHIL. 123 (2010).

[43] *But see* Duff & Marshall, *supra* note 30.

criminal law that can truly be seen as the common law of the citizens of such a polity. That, however, is a task for another occasion.

CONCLUSION

The criminal law of a liberal republic (a democratic polity of free and equal citizens) will, I have argued, have two central purposes: to define a set of public wrongs—wrongs that properly concern the whole polity— and to provide an appropriate formal response to such wrongs through a criminal process in which alleged perpetrators are called to answer to their fellow citizens. It will also provide punishments for those convicted of criminal wrongdoing, but in punishing offenders it will still treat them inclusively, as full members of the polity who are entitled to the equal concern and respect of their fellows. The citizens of such a polity will be able to see such a criminal law as their law: as a law that reflects the civic values that they share or aspire to share and helps to secure the civil order in which they live together; as a law in whose enterprise they can play an active part.

As I made clear at the start of this Essay, and as should have been clear throughout it, this is not offered as either a description or a justifying theory of our existing systems of criminal law; it is offered as an ideal—one that I hope we will find persuasive. As an ideal, it provides us with a standard by which to judge, and criticize, our existing legal and political institutions, as well as a (distant) goal towards which we can aspire and work. It is certainly a distant ideal. Indeed, the distance from here to there is so great that it might seem more like a philosophical fantasy than a practicable goal towards which we could realistically strive. But efforts at reform, whether legal, social, or political, need a goal; and although the immediate goals of practical efforts at reform will need to be relatively modest if they are to be feasible, we need to begin with some idea of the final end or aim of our endeavors. That is why ideal theory, of the kind in which this Essay has engaged, has an important role to play.