London School of Economics and Political Science

What We Do to Each Other

Criminal Law for Political Realists

Stephanie Classmann

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DECLARATION

I certify that the thesis I have presented for examination for the PhD in Law degree of the London School of Economics and Political Science is solely my own work.

I declare that my thesis consists of 78,190 words.

ABSTRACT

This thesis contributes, and critically responds, to what has been dubbed the 'political turn' in criminal law theorising: the turn away—or so its protagonists claim—from the paternalistic notions of 'legal moralism', which have dominated the debate since the early 1970's, and towards a more rigorous understanding of criminal justice as a set of institutions operating under public law. Drawing and expanding upon the key themes and insights emerging from the realist revival in contemporary political thought, a line of research trying to re-claim the ground lost to 'political moralists' like John Rawls, it makes two distinct and original interventions in this evolving literature:

(i) it exposes the conceptual continuities that run between openly moralist accounts of criminal law and those of liberal descent, and

(ii) it puts forth a genuine alternative, based on a conception of legal legitimacy that is embedded within, not external to, the conflictual practice of politics.

Viewed through this new, realist lens, the criminal law and the consequences which may attach to its violation reveal themselves not as timeless, inevitable expressions of what is 'good' or 'right' or 'reasonable', as vehicles for condemnation and punishment, but as a series of contingent political settlements—compromises designed to facilitate collective action—and thus but one means (among many) for governments to respond to difference, disagreement, change, and the ongoing struggle for representation.

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CONTENTS

INTRODUCTION AND OVERVIEW

In 1966, 'on a scalding, soggy-aired Fourth of July',[1] Edward Albee, giving an interview to the *Paris Review*, revealed the meaning behind the title of his, perhaps, most celebrated play: *Who's Afraid of Virginia Woolf?* (1962). It is a crafty pun on the song 'Who's Afraid of the Big Bad Wolf?' from Walt Disney's 1933 cartoon adaptation of *The Three Little Pigs*, a fable commonly read as a lesson in hard work and dedication ('Don't build a house out of straw and sticks!') but anchored more deeply in the need to face up and respond to conditions of conflict and adversity. The extraordinary Virginia Woolf, somewhat undeservedly, one might say, takes the place of the prowling wolf coming after the (now four) little pigs: Albee's George and Martha, a miserable couple, and their two marginally less miserable visitors, Nick and Honey. The danger she exerts, of course, is not that of aggression. It is her unrivalled ability to gently lift the veil on 'games' of social pretence and self-deception. And so, as Albee himself put it in the interview, the question 'who's afraid of Virginia Woolf means who's afraid of the *big bad* wolf… who's afraid of living life without false illusions.'[2]

The absence of 'real-life' conflict, or, rather, its righteous remediability, is one of the most intractable illusions plaguing contemporary criminal law theory—and this thesis

[1] William Flanagan, 'The Art of Theater No. 4: Edward Albee' (1966) 10(39) *The Paris Review* 93, in Philip C. Kolin (ed), *Conversations with Edward Albee* (University Press of Mississippi, 1988) 45, 45.
[2] Ibid 52 (emphasis in original).

is an effort to lift the veil. More than that, it is an effort to show that the veil itself and the pretence it upholds are far more frightening than what it seeks to conceal, and that we, as legal scholars and as political actors, can and should do without it. But enough with the metaphors. *Who's afraid?* The answer to this question leads into two, rather different, or seemingly different, directions. The first, more brightly lit than the other, is called 'legal moralism' and it is lined with theorists who approach the criminal law, its rules and operations, as a matter of applied moral philosophy, a set of interpersonal practices of censure, condemnation and blame, whose aim is to realise and protect the values that a—or any—given society would deem key to maintaining the foundations of a shared 'moral identity'.[3] Though arguing, fiercely, among themselves about how those values ought to be contoured, enforced, etc.,[4] these theorists and the position for which they stand are, and for nearly half a century now have been, the dominant force in the field.[5] One may wonder why that is, of course. Especially since most moralists, apart from basing their accounts on an assumption of substantial social homogeneity, have virtually nothing to say about social context; and the distinct role and features of the state's institutional structures and processes, which drive and control every aspect of the modern criminal justice enterprise, are depicted as little more than an 'official' articulation of a set of pre-existing obligations, and a neat way to ensure the infliction of ('deserved') punishment upon their breach.[6] The 'why' will not be the focus of this thesis, though. I am interested in the response of those who have tried to object.

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[3] Some of the most prominent exponents of this approach are R. A. Duff, *The Realm of Criminal Law* (Oxford University Press, 2018), often together with S. E. Marshall, see 'Criminalization and Sharing Wrongs' (1998) 11(1) *Canadian Journal of Law & Jurisprudence* 7, 'Crimes, Public Wrongs, and Civil Order' (2019) 13(1) *Criminal Law and Philosophy* 27; James Edwards and A. P. Simester, 'What's Public About Crime?' (2017) 37(1) *Oxford Journal of Legal Studies* 105; 'Prevention with a Moral Voice' in A. P. Simester, Antje du Bois-Pedain and Ulfrid Neumann (eds), *Liberal Criminal Theory: Essays for Andreas von Hirsch* (Hart Publishing, 2014) 43; Douglas Husak, *Overcriminalization: The Limits of the Criminal Law* (Oxford University Press, 2008); Michael S. Moore, *Placing Blame: A Theory of the Criminal Law* (Oxford University Press, 1997), 'Liberty's Constraints on What Should be Made Criminal' in R. A. Duff et al (eds), *Criminalization: The Political Morality of the Criminal Law* (Oxford University Press, 2014) 182; and Victor Tadros, *Wrongs and Crimes* (Oxford University Press, 2016); *The Ends of Harm: The Moral Foundations of Criminal Law* (Oxford University Press, 2011).

[4] As will be seen in chapter 1, one can distinguish between two main views, one arguing for an objective determination of value, grounded in a conception of private 'right', and one arguing for a contextualised assessment, grounded in a communitarian 'ethos'. Both views, though, are also internally struggling to restrict that which would, on the face of it, be a very expansive definition of the criminal law.

[5] One might not want to go so far as to suggest that 'legal moralism' is in fact the orthodoxy in criminal law theory. H. L. A. Hart is too much of a towering figure, and *Punishment and Responsibility: Essays in the Philosophy of Law* (Oxford University Press, 2nd ed, 2008 [1968]) too great of an influence still, to safely assert that. But Hart did not single-handedly prevent the moralist turn in the early 1970's, and his emphasis on freedom may well have spurred the (liberal) 'political turn', which will be addressed in just a moment, see Malcolm Thorburn, 'Criminal Law as Public Law' in R. A. Duff and Stuart P. Green (eds), *Philosophical Foundations of Criminal Law* (Oxford University Press, 2011) 21, 24-31.

[6] The state's alleged 'right to punish', and its moralist (and liberal) roots, will be discussed in chapter 6.

Those who have tried to object are found in the other direction; they have contributed, more or less consistently, to what is now called the 'political turn':[7] an erudite body of scholarship—still evolving—that seeks to re-conceptualise the criminal law as a set of institutions operating under public law, as an instrument (arguably, the most intrusive instrument) of state authority, properly understood.[8] I firmly second this agenda. Yet, as will be seen shortly, none of the proposals put forth so far do, or can, meaningfully deliver on it. Grounded in various versions of liberal idealism—be it G. W. F. Hegel's ruminations on 'public reason', or the Pettitian conception of 'non-domination', John Rawls's 'overlapping consensus', or the capability approach by Martha Nussbaum and Amartya Sen—instead of a genuine account of the conflictual practice of politics, the 'political turn' and those who claim to have taken it are readily replicating, rather than renouncing, the structure of the moralist argument. (The structure, to be very clear, not the argument itself.) And at the heart of that structure lies the proposition that at least the primary sources of political, and thus legal, legitimacy ought to be located outside the political sphere and have antecedent authority over it. On the moralist view, again, those sources are the precepts of ordinary, interpersonal morality. On the liberal view, they flow from a more abstract but similarly rich, perhaps even richer, idea of freedom and personhood, of autonomy, equality, rights, etc., which gives value to the status of the individual and their relationship with others, and transposes the issue of legitimate state intervention, and thus of legitimate criminal law, onto a 'higher', supposedly, less controversial, 'reasonably' incontestable level of normative evaluation.

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[7] The label ('political turn') was first assigned as part of an international and interdisciplinary criminal law workshop to be held in March 2020 in Santiago de Chile. Postponed due to the Covid-19 pandemic, the workshop was turned into a weekly—now monthly—online seminar, of which I have been fortunate enough to be a continuous member: https://www.virtual-workshop.info/ [last accessed 10 March 2023]. As was pointed out during one of our first sessions already, it is more accurate to speak of the 'political turns' instead of a single, unified 'political turn', though. Several scholarly sub-fields concerned with questions of criminalisation, policing, punishment, etc., have witnessed an increased, and increasingly critical, engagement with the political dimension of social control, broadly construed. The focus here is on the 'political turn' in criminal law theory, though I will draw on criminological research as well.

[8] The main authors in this regard are John Braithwaite and Philip Pettit, *Not Just Deserts: A Republican Theory of Criminal Justice* (Clarendon Press of Oxford University Press, 1992); Corey Brettschneider, 'The Rights of the Guilty: Punishment and Political Legitimacy' (2007) 35(2) *Political Theory* 175; Alan Brudner, *Punishment and Freedom* (Oxford University Press, 2009); Vincent Chiao, *Criminal Law in the Age of the Administrative State* (Oxford University Press, 2018); Richard Dagger, 'Social Contracts, Fair Play, and the Justification of Punishment' (2011) 8(2) *Ohio State Journal of Criminal Law* 341; Sharon Dolovich, 'Legitimate Punishment in Liberal Democracy' (2004) 7(2) *Buffalo Criminal Law Review* 307; Matt Matravers, 'Political Theory and the Criminal Law' in R. A. Duff and Stuart P. Green (eds), *Philosophical Foundations of Criminal Law* (Oxford University Press, 2011) 67; Peter Ramsay, 'A Democratic Theory of Imprisonment' in Albert W. Dzur, Ian Loader and Richard Sparks (eds), *Democratic Theory and Mass Incarceration* (Oxford University Press, 2016); and Malcolm Thorburn, 'Criminal Punishment and the Right to Rule' (2020) 70(5) *University of Toronto Law Journal* 44. The various angles from which they approach this task will be discussed in detail in chapter 2.

In search of a much-needed alternative, this thesis, then, is essentially about taking the 'political turn' not taken. And it will do so by drawing and expanding upon the 'realist revival' in contemporary political thought. Political realism,[9] as a theoretical outlook, is traditionally associated with the study of international relations but it has, for almost two decades now, been gradually intruding upon the domestic terrain, as well.[10] Which is not to say that the latter is a simple continuation of the former. International realists, for the most part, see themselves engaged in descriptive or analytical work, seeking to explain and predict the motive and behaviour of state and inter-state actors;[11] whereas the 'new' domestic realists defend a set of normative political commitments designed not only to roll back the image of brute *Realpolitik* frequently attributed to their international forerunners, but, connectedly and indeed much more importantly, to re-claim the ground lost to neo-Kantian philosophers, like Jürgen Habermas and John Rawls.[12] Realism is not like realism, in other words. But then, why speak of the 'realist revival' in contemporary political thought? Because notwithstanding their divergence in terms of theoretical ambition, both camps share a strong and dazzlingly diverse intellectual heritage—including the writings of Thucydides,[13] Niccolò Machiavelli,[14] and Thomas Hobbes,[15] David Hume,[16] Max Weber,[17] and Carl Schmitt[18]—and as a result of that, a conception of politics that places difference, historicity and conflict at its core.

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[9] Brian Leiter, 'Some Realism about Political and Legal Philosophy', in his opening plenary address at the 30th International Association of Legal and Social Philosophy (IVR) World Congress in Bucharest, Romania, on 4 July 2022, pointed out some important commonalities among legal and political realists; commonalities that will not be explicitly addressed in this thesis but, certainly, will have to be added to the research programme emerging from its completion. The full text of Leiter's address has been made available online at: https://ssrn.com/abstract=4137804 [last accessed 10 March 2023].

[10] For an excellent overview of the key themes and debates animating the literature, see the recent essay collection by Matt Sleat (ed), *Politics Recovered: Realist Thought in Theory and Practice* (Columbia University Press, 2018); and, in more condensed form, the surveys by William A. Galston, 'Realism in Political Theory' (2010) 9(4) *European Journal of Political Theory* 385; as well as Enzo Rossi and Matt Sleat, 'Realism in Normative Political Theory' (2014) 9(10) *Philosophy Compass* 689.

[11] Compare, e.g., John J. Mearsheimer, *The Tragedy of Great Power Politics* (W.W. Norton, 2001); Randall L. Schweller, *Unanswered Threats: Political Constraints on the Balance of Power* (Princeton University Press, 2006); and Kenneth N. Waltz, *Theory of International Politics* (McGraw Hill, 1979).

[12] Some of the initial drivers of this movement have been Raymond Geuss, *Philosophy and Real Politics* (Princeton University Press, 2008); Mark Philp, *Political Conduct* (Harvard University Press, 2007); and, most prominently, at least in terms of inspiration for this thesis, Bernard Williams, *In the Beginning Was the Deed: Realism and Moralism in Political Argument* (Princeton University Press, 2005).

[13] *History of the Peloponnesian War* (Rex Warner trans, Penguin, revised ed, 1972 [404 BC]).

[14] *The Prince* (George Bull trans, Penguin, 2003 [1532]).

[15] *Leviathan* (Wordsworth, 2014 [1651]).

[16] *Enquiries Concerning Human Understanding and Concerning the Principles of Morals* (Clarendon Press of Oxford University Press, 3rd ed, 1975 [1777]).

[17] *Economy and Society: An Outline of Interpretive Sociology* (Ephraim Fischoff trans, University of California Press, 1978 [1922]); 'The Profession and Vocation of Politics' in Peter Lassman and Ronald Speirs (eds), *Political Writings* (Cambridge University Press, 1994) 309.

[18] *The Concept of the Political* (George Schwab trans, University of Chicago Press, expanded ed, 2007 [1932]); *Constitutional Theory* (Jeffrey Seitzer trans, Duke University Press, 2008 [1927]).

Now, to be quite sure, none of the political thinkers just mentioned actually identified as 'realists'; and one may puzzle over why the 'new' realists would insist on this label when, at the same time, trying to distance themselves from their international counterparts (who do wear it proudly).[19] But again, that is not a puzzle that needs to be solved here. I am interested in the realist project, its normative commitments, and the insights that it can offer for a genuinely political criminal law theory. So, then, what exactly is the realist project? Some—not those who seriously pursue it—have claimed that it is a methodological one, concerned with issues of feasibility, and thus, perhaps, a more radical but not at all 'new' way of engaging in non-ideal theory.[20] Such claims are the result of a misunderstanding and, more often than not, intended to deflect, rather than address, the realist critique. In a nutshell, non-ideal theorists worry that ideal theorists pay too little attention to 'the facts' of our—obviously, very non-ideal—world. They worry that ideal theorists provide us with a dreamy vision of a just, equal, etc., society and no 'real' guidance on how to get there, how to initiate appropriate reforms, design institutions, etc. For some, that is not itself a failing but an indication that a division of labour is required: figuring out how to get from *A* (non-ideal starting point) to *B* (ideal end point) becomes the purview of the non-idealist. Others are more suspicious. They think that while certain 'basic' commitments to justice, equality, etc., must, of course, stay in place, the aim needs to be to make them more practicable and, thus, relevant to the particular contexts to which they are meant to apply. And the way to do that, they say, is to incorporate the 'saliant facts' of our very non-ideal world into the project of ideal theorising itself. Thus, on both sides, non-ideal theory is, and is understood to be, more of a gentle amendment to, rather than a proper departure from, ideal theory. The focus remains on the implementation of a set of commitments derived from (ordinary or 'political') morality, and being more 'realistic' or less utopian about how to do that is but a necessary step in the process of converting them into workable solutions.[21]

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[19] An additional question, of course, is whether such distancing is, in fact, needed. As Alison McQueen, 'The Case for Kinship: Classical Realism and Political Realism' in Matt Sleat (ed), *Politics Recovered: Realist Thought in Theory and Practice* (Columbia University Press, 2018) 243 has shown, mid-century international realists, like E. H. Carr, *The Twenty Years' Crisis, 1919-1939* (Harper and Row, 1964) and Hans J. Morgenthau, *Politics Among Nations: The Struggle for Power and Peace* (Knopf, 1948), shared many of the concerns, including a hesitation to rely on rationalist predictions, and the overtly normative ambitions of the 'new' realists. Compare also William E. Scheuerman, 'The Realist Revival in Political Philosophy, or: Why New Is Not Always Improved' (2013) 50(6) *International Politics* 798.

[20] See, e.g., Laura Valentini, 'Ideal vs. Non-ideal Theory: A Conceptual Map' (2012) 7(9) *Philosophy Compass* 654; and Federico Zuolo, 'Realism and Idealism' in Antonella Besussi (ed), *A Companion to Political Philosophy: Methods, Tools, Topics* (Routedge, 2016) 75.

[21] See Matt Sleat, 'Realism, Liberalism and Non-ideal Theory Or, Are there Two Ways to do Realistic Political Theory?' (2014) 64(1) *Political Studies* 27, 28-30.

Realists do not simply seek to incorporate 'the fact' of conflict into an otherwise ideal (and ideally, liberal) framework. They do not think of it as a shortcoming, either to be accommodated or to be overcome.[22] Instead, they start from an acknowledgement that conflict is a central, constitutive feature of politics and, as such, determinative of what political theorising is, in fact, about. So, in other words, and to clearly refute the above claim, they take issue not with the methods of inquiry currently used, but with how the object of inquiry is being construed;[23] or, rather, how it is being *mis*construed. In both the moralist and the liberal world, the practice of politics is either conspicuously absent or limited by a conception of 'reasonable pluralism' that brackets off conflicts most in need of managing—not for the sake of implementing a particular set of values, moral or 'political', but for the sake of generating a sustainable degree of collective action, a prospect which itself is predicated upon a sustainable degree of contested order. That is the realist project. It is a practical project rooted in an unvarnished understanding of political association, a condition marked by difference, disagreement, change, as well as a need (more so than a willingness) to cooperate; and it is concerned with providing effective guidance on how to successfully navigate that condition.[24]

So, then, when realists speak of their normative political commitments, they speak not of their own substantive views on what is 'good' or 'right' or 'reasonable', etc., which, no doubt, they do and can have.[25] Nor do they think, as is often suggested, that politics is some sort of autonomous sphere where those views miraculously cease to matter.[26]

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[22] Nor, however, do they celebrate it, or elevate it to a quasi-moral principle, as some agonistic theorists have done, see critically Carlo Burelli, 'A Realistic Conception of Politics: Conflict, Order and Political Realism' (2021) 24(7) *Critical Review of International Social and Political Philosophy* 977, 991-92.

[23] In a similar vein, see Sleat, 'Realism, Liberalism and Non-ideal Theory Or, Are there Two Ways to do Realistic Political Theory?', above n 21, 35-39; and compare also Enzo Rossi, 'Can Realism Move Beyond a Methodenstreit?' (2016) 44(3) *Political Theory* 410.

[24] Burelli, above n 22, 987 neatly illustrates this point when he writes: 'The problem is not so much that principles devised without keeping in mind conflict and order are unlikely or impossible to implement … Imagine an engineer who designs the most desirable plane abstracting away the constraint of gravity. One might well conclude that—absent gravity—a cubic-shaped aircraft would ideally maximize both the number of passengers and their comfort. Such a cubic plane could, indeed, be built, but it would not be able to fly. As such, it is not unfeasible, but undesirable: a plane that does not fly is a 'bad' plane, a plane that people who want to fly somewhere would avoid… [One might even suggest, it is no plane at all.] A 'good' plane is one that solves the challenge of gravity, not one that ignores it. Other desiderata like comfort and capacity are only relevant once this is secured. Similarly, a good political theory [or, a 'political' theory, full stop] is one that designs institutions that deal with the unavoidable recurrence of conflict and secure order' (references omitted). As will be seen in chapter 2, this example is a reflection on what Bernard Williams meant by describing order as the 'first political question'.

[25] Many realists are open about their commitment to liberal politics (instead of liberal theory). See, e.g., Matt Sleat, *Liberal Realism: A Realist Theory of Liberal Politics* (Manchester University Press, 2013).

[26] Cf. David Estlund, 'Methodological Moralism in Political Philosophy' (2017) 20(3) *Critical Review of International Social and Political Philosophy* 385; Jonathan Leader Maynard and Alex Worsnip, 'Is There a Distinctively Political Normativity?' (2018) 128(4) *Ethics* 756.

Quite the contrary. They argue that given that we, as political actors, regularly and, at times, violently clash over what is 'good' or 'right' or 'reasonable', etc.; in fact, more generally, given that we clash over what ought and ought not to be done, based on our moral views, certainly, but also our resources, priorities, etc., the task of the normative political theorist, a theorist interested in how to design the institutions of government, is not to ponder which, if any, of these views are 'correct', and (or) how to implement them, but what sort of mechanisms are needed to coordinate them at a level sufficient to stabilise compliance with collective decisions.[27] In short, realists ask, what happens if we admit that the sources of political legitimacy, competing, changing claims about what ought and ought not to be done, are, in fact, located within the political sphere to which they are meant to apply?[28] And I ask, what happens if we think of the criminal law as integral to such a framework? What happens if we think of the criminal law not as an expression of the authority of morality,[29] however defined, but as an expression, messy, fallible, and utterly contingent, of the authority of government?

The answers will unfold along six chapters and a somewhat stylised contrast between the moral perspective—by which, after a separate assessment of their basic normative commitments in chapters one and two, I will generally mean both the moralist and the liberal position—and the (or, better, a) realist political alternative.[30] I begin by setting out, more thoroughly than I have here, the circumstances of politics, that is, difference, disagreement, conflict, and the need for cooperation; and then with Hobbes turn to the mechanism of representation to explain both its role in creating capacity for collective action, and its implications for a political conception of authority (chapter one). Based on these insights, I provide a critical analysis of the main proposals associated with the 'political turn' and put forward a realist counterproposal (chapter two). I show that the idea of Bernard Williams's 'basic legitimation demand' helps us articulate that which is at stake when governments try to coordinate competing representational claims, and argue that the vehicle for successfully doing so is best understood in terms of political compromise—a concept whose exact features and institutional requirements I then go

[27] Compare Burelli, above n 22, 984-87.
[28] Matt Sleat, 'Realism and Political Normativity' (2022) 25(3) *Ethical Theory and Moral Practice* 465; Adrian Kreutz and Enzo Rossi, 'How I Learned to Stop Worrying and Love Political Normativity' (2022) (online first) *Political Studies Review*.
[29] See, e.g., Stephen P. Garvey, *Guilty Acts, Guilty Minds* (Oxford University Press, 2020) chapter 1.
[30] Like the canon of thinkers from whom they draw inspiration, modern realists are not a unified group, see Elizabeth Frazer, 'What's Real in Political Philosophy?' (2010) 9(4) *Contemporary Political Theory* 490. I will actively insert myself into that literature, add to it, and make judgments about what does and does not serve to address the fundamental political concerns outlined in this introduction.

on to develop in quite some depth (chapter three). Once this basic framework is firmly in place, the second half of the thesis will be given over to the task of explaining how it construes, or transforms, the three core dimensions of criminal law: conduct, (non-) compliance, and consequences. I start out by looking at what kind of prohibitions can, at a given time, in a given place, be the outcome of a political compromise, and present two case studies, on abortion and the criminalisation of 'hate', to illustrate the realist's commitment to the regulation of political behaviour over and against the repression of political opinion (chapter four). To corroborate the claim that such a commitment does, in fact, foster compliance, I turn to the empirical research on the (positive) correlation between perceived legitimacy (a product of successful representation) and behavioural response; and I offer a realist re-formulation of the concept of political obligation that reflects this correlation (chapter five). So conceived, each instance of non-compliance signals not only a behavioural failure on the part of the offender, but a representational failure on the part of the government laying claim to authority, an important change in perspective which casts doubt not just on current models of accountability attribution, but on the administration—and, frankly, the point—of punishment (chapter six).

I hope it makes for a good read.

CHAPTER ONE

LEGAL MORALISM AND POLITICAL REPRESENTATION

INTRODUCTION

Analysing, and criticising, the 'political turn' presupposes an understanding of what it is that those who are claiming to have taken it are turning away *from*: the predominant approach to contemporary criminal law scholarship—'legal moralism';[1] but also, and crucially, what it is that makes this approach so very unsuitable. While the former is a matter of mere description, which can and will be done here in deliberately brief (and deliberately pointed) fashion, the latter poses a more intricate challenge. Surely, there is something 'odd' about framing the criminal law, its foundations and limits, in terms of private, interpersonal morality when the institutions and practices that govern it are so distinctly public in nature. But pointing this out, as it has been, over and over,[2] will not furnish the grounds for a convincing rebuttal. One, because moralists are unlikely to falter in the face of facts; and two, because none of them strictly deny that criminal justice is a state enterprise—they just look at it in a 'curiously apolitical'[3] way. Showing what that means, exactly, is the goal of this first chapter, and it requires venturing into a, for criminal theorists, remarkably virgin territory: the logic of representation.

[1] As will be seen in section I., this label lumps together a lot of different approaches. But it does fit.
[2] Most recently, Vincent Chiao, *Criminal Law in the Age of the Administrative State* (Oxford University Press, 2018) chapter 1; and Markus D. Dubber, *The Dual Penal State* (Oxford University Press, 2018).
[3] Vincent Chiao, 'Two Conceptions of Criminal Law' in Chad Flanders and Zachary Hoskins (eds), *The New Philosophy of Criminal Law* (Rowman and Littlefield, 2016) 19, 21.

Focusing on representation, how it works and what it is for, is a neat way of engaging with the moralist argument without engaging *in* moralist argument. (A dilemma which those focusing on institutional aspects or the criminal law's historical emergence from a system of private prosecutions, no doubt, have sought to avoid.) It also guides to the gravity of the problem: a deeply distorted vision of legitimate government. As will be seen shortly, 'legal moralism', as a political proposition,[4] is based on the assumption that the entity of 'the state' is no more than a functional extension of civil society, its task being to facilitate the effective communication and implementation of a 'shared' understanding of what is and is not 'wrongful'. Representation, on this assumption, is a dyadic mechanism (state represents society) designed to transmit the preferences of a morally unified constituency into, by this logic, morally legitimate laws, criminal or other. There is nothing inherently objectionable about such a conception, but it is unfit for the circumstances of real politics. These circumstances, based on observation, not on postulates, are: (i) difference and disagreement, culminating in (potentially violent) conflict; and (ii) the need for coordination to facilitate a degree of collective action in the face of mutual interdependence. The mechanism of representation catering to these circumstances is triadic (government represents society *as* state) and best understood with Thomas Hobbes.[5] A unified 'people' capable of collective action, he explains, is a 'fiction' predicated upon and ultimately residing in the successful authorisation of a body of government stabilising conflict at a level conducive to cooperation. The entity of 'the state', in other words, is a construction, the result of a (continuous) exercise of constituent power, and representation is the vehicle to bring it to life.[6]

The majority of this chapter will be spent unpacking this mechanism, step by step. To point out the flaws of the moralist position, but more importantly, to create conceptual clarity and move the 'political' debate into a more genuinely political register. To this end, the chapter closes with reflections on the relationship between representation and authority, and its implications for the project of normative theorising, and then, finally, based on these findings, formulates an agenda for the remainder of the thesis.

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[4] Possibly, many moralists do not consider themselves to be making any political claims at all, but they are making claims about a political instrument—law—and thus need to be read accordingly.

[5] *Leviathan* (Wordsworth, 2014 [1651]) chapters 16-18.

[6] In an effort to reduce some of the complexity, the discussion of 'constructivism' here is centred around Hobbes's account. A more contemporary exponent, whose work will inform the argument in chapter 3, is Frank R. Ankersmit, e.g., *Aesthetic Politics: Political Philosophy Beyond Fact and Value* (Stanford University Press, 1996). For background and variations, see Lisa Disch, Mathijs van de Sande and Nadia Urbinati (eds), *The Constructivist Turn in Political Representation* (Edinburgh University Press, 2019).

I. Legal Moralism

All brands of 'legal moralism', and one struggles to keep count of them,[7] operate on a particular conception of political representation. Exposing this conception involves a degree of generalisation that is both concealing and revealing. Concealing, because it takes away from the intellectual nuances and subtleties that animate the richness and continued flourishing of the moralist literature;[8] revealing, because it diverts the gaze from individual models onto their foundational commonalities whose vulnerability to criticism has become increasingly obscured. Capitalising on the potential of the latter while staying mindful of the former, it makes sense to begin with an articulation of the moralist hypothesis, and to then go on and dissect it into its political components.

In very basic terms, 'legal moralism' is founded on the idea that the criminal law does (or at least ought to)[9] realise the demands of interpersonal morality by prohibiting and punishing conduct that is (pre-legally) 'wrongful'.[10] What kind of conduct is 'wrongful' in the required sense is determined with reference to values that are considered to be either (i) 'true' regardless of their actual acceptance within a given society (call this the objectivist view)[11] or (ii) 'shared' within a particular society, at a particular time (call this the communitarian view).[12] Now obviously, if taken at their word, both of these views would end up making fairly sweeping claims about the scope of the criminal law, which is why even their most enthusiastic advocates have conceded the need

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[7] For the major subspecies, see R. A. Duff, 'Towards a Modest Legal Moralism' (2014) 8(1) *Criminal Law and Philosophy* 217; *The Realm of Criminal Law* (Oxford University Press, 2018) chapter 2.

[8] For a long time, criminal law scholarship, particularly in the Anglosphere, focused almost exclusively on the conditions of individual responsibility and the justification of punishment—both of which areas that lend themselves to moral theorising. The question of which conduct shall be prohibited in the first place, though equally, if not more, important, has only recently started to attract more serious attention, and gathered considerable speed with the publication of the *Criminalization* series edited by R. A. Duff et al. (Oxford University Press, 2010-18), but was quickly taken over by moralists, as well.

[9] Malcolm Thorburn, for one, has shown that modern criminal law and its general part, in particular, do not easily map onto the moralist position, see especially 'Justifications, Powers, and Authority' (2008) 117(6) *The Yale Law Journal* 1070; and 'Criminal Law as Public Law', 'Criminal Law as Public Law' in R. A. Duff and Stuart P. Green (eds), *Philosophical Foundations of Criminal Law* (Oxford University Press, 2011) 214, 29-36.

[10] Following Thorburn, 'Criminal Law as Public Law', above n 9, 26, it is worth pointing out that today's 'legal moralism' is not equivalent to Patrick Devlin's *The Enforcement of Morals* (Oxford University Press, 1965). Devlin, in Durkheimian fashion, was not so much concerned with protecting morality for its own sake as with using its imperative force to secure social cohesion, Nicola Lacey, 'Patrick Devlin's *The Enforcement of Morals* Revisited: Absolutism and Ambivalence' (2022) 1 *LSE Law Working Paper Series*, available online at: https://ssrn.com/abstract=4062258 [last accessed 10 March 2023].

[11] It is hard to find a pure objectivist. Michael S. Moore, *Placing Blame* (Oxford University Press, 1997) and 'Liberty's Constraints on What Should be Made Criminal' in R. A. Duff et al (eds), *Criminalization: The Political Morality of the Criminal Law* (Oxford University Press, 2014) 182, comes close, though.

[12] Its most prominent proponents are R. A. Duff and S. E. Marshall, e.g., 'Crimes, Public Wrongs, and Civil Order' (2019) 13(1) *Criminal Law and Philosophy* 27.

for further qualification. The proposals are numerous. S. E. Marshall and R. A. Duff, for instance, maintain that only 'public wrongs', that is, those that threaten or violate 'goods in terms of which the community identifies and understands itself',[13] can warrant official state intervention; an idea that finds reflection in Antje du Bois-Pedain's account of 'other-regarding wrongs', as well.[14] By contrast, those gravitating towards an objectivist view, among them, most notably, John Gardner[15] and A. P. Simester,[16] together with James Edwards,[17] tend to demarcate a private moral sphere by recourse to the Millian 'harm principle'.[18] Again others, like Victor Tadros, seek to balance the 'wrongdoer's' self-incurred 'duty' to advance the goal of general deterrence (a thought to be revisited in chapter six)[19] with a more basic interest in 'being free… from state interference';[20] or, like Douglas Husak,[21] aspire to flexibly combine considerations of 'public wrong', 'harm', and 'desert', and add proportionality constraints derived from constitutional theory. In fact, even Michael S. Moore—who (in)famously claims that, in principle, there are good reasons to criminalise *any* kind of 'wrongdoing'[22]—calls for caution, not just with a view to epistemological concerns regarding the content of morality,[23] and the costs of criminalisation, but the value of liberal autonomy.[24]

There is no need to explore these proposals in any detail. While complex and certainly the locus of some lively debate, they all are attempts to bridge the glaring gap between

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[13] 'Criminalization and Sharing Wrongs' (1998) 11(1) *Canadian Journal of Law & Jurisprudence* 7, 20. See also R. A. Duff, *Answering for Crime* (Hart Publishing, 2007), 140-46.
[14] See Antje du Bois-Pedain, 'The Wrongfulness Constraint in Criminalisation' (2014) 8(1) *Criminal Law and Philosophy* 149. For critical discussion, see James Edwards and A. P. Simester, 'Wrongfulness and Prohibitions' (2014) 8(1) *Criminal Law and Philosophy* 171.
[15] See, e.g., *Offences and Defences* (Oxford University Press, 2007) 118-20.
[16] *Crimes, Harms, and Wrongs* (Hart Publishing, 2011) Part II (with Andreas von Hirsch, who defends 'Harm and Wrongdoing in Criminalisation Theory' (2014) 8(1) *Criminal Law and Philosophy* 245).
[17] Compare John Gardner and James Edwards, 'Criminal Law' in Hugh LaFolette (ed), *The International Encyclopedia of Ethics* (Wiley Blackwell, 2013); James Edwards and A. P. Simester, 'Prevention with a Moral Voice' in A. P. Simester, Antje du Bois-Pedain and Ulfrid Neumann (eds), *Liberal Criminal Theory: Essays for Andreas von Hirsch* (Hart Publishing, 2014) 43; and see also James Edwards, 'An Instrumental Legal Moralism' in John Gardner, Leslie Green and Brian Leiter (eds), *Oxford Studies in Philosophy of Law: Volume 3* (Oxford University Press, 2018) 153.
[18] Note that J. S. Mill's 'harm principle' did not concern the reach of criminal laws specifically but any kind of state interference. It owes much of its modern usage within criminal law theory to Joel Feinberg and his extensive work on *The Moral Limits of the Criminal Law* (Oxford University Press, 1984-88).
[19] It has to do with Tadros's justification of the state's 'right to punish', see chapter 6 at 141.
[20] *Wrongs and Crimes* (Oxford University Press, 2016) 131-32; and in a similar vein, Jacob Bronsther, 'The Corrective Justice Theory of Punishment' (2021) 107(2) *Virginia Law Review* 227.
[21] *Overcriminalization* (Oxford University Press, 2008).
[22] As he puts it in *Placing Blame*, above n 11, 80: 'legislatures should criminalize all immoral behaviour because it is immoral.'
[23] The reverse argument is made by Robert E. Goodin, 'An Epistemic Case for Legal Moralism' (2010) 30(4) *Oxford Journal of Legal Studies* 615.
[24] Moore, *Placing Blame*, above n 11, Part III.

the primary, and profoundly 'alegal',[25] category of 'moral wrong' and the inescapably public phenomenon that it is supposed to explain, and no matter which, or how many, of them are deemed necessary or true, the principal political assumption on which they operate remains unchanged. That assumption holds that there exists (on the communitarian view) or at least can—and has to be—forged (on the objectivist view) a 'shared' understanding in every civil(ised) society of what constitutes (pre-legally) 'wrongful' conduct. To be quite sure, this understanding need not be comprehensive. Nor need it be shared by every single member. On the objectivist view, it is conceivable that only a few members, at least at first,[26] recognise and accept the 'right' values, while others are dependent on guidance by the law. And on the communitarian view, as well, there are, and likely always will be, dissenters or 'recusants', as they are sometimes called, who simply do not identify, and refuse to act in accordance with, the values that have emerged as dominant. Still, for there to be a sufficiently established moral practice, an understanding capable of being transmitted into law, these members have to make up a small and thus, perhaps, somewhat negligible minority of moral outliers.[27]

Now on to representation, the process of 'transmission', which, curiously, and despite being featured at least latently in every moralist account, is rarely explicitly addressed: how does the 'moral voice, expressing community disapproval'[28] come to be mediated by the institutions of the state? The answer is by no means straightforward. Especially when taking the objectivist view. Tadros, for one, finds it perfectly 'plausible that the criminal law is part of a package of government measures to tackle systematic wrongdoing that is not widely recognized as such.'[29] Legislators, that is, are allowed, if not obligated, to respond to 'wrongdoing' even, and especially, if the decision to do so is 'underpinned by values that the community *fails* to accept.'[30] The hope, of course, is

[25] To the point, Markus D. Dubber, 'Criminal Law between Public and Private Law' in R. A. Duff et al (eds), *The Boundaries of the Criminal Law* (Oxford University Press, 2010) 191, 206.
[26] Arguably, even a very pure objectivist would run into difficulty, if the 'right' moral values remained inaccessible and (or) unacceptable to a majority of those who are expected to comply with them.
[27] See Duff, *The Realm of Criminal Law*, above n 7, 127-37, and 225-30. Of course, one should always 'hope that ... [they] will identify themselves as citizens, and find part of their good in the polity's good', and one might urge them to do so, but if they refuse—and refuse to leave—Duff suggests offering them 'the option of becoming long-term guests, or resident aliens' instead, ibid 227. That does not mean that they will cease to be held to the same standards as citizens, however. As will be discussed in chapter 5, Duff, in line with his communitarian commitments, is a proponent of associate ('political') obligations, which can be involuntarily incurred, as a result of membership, see chapter 5 at 112-14.
[28] Lindsay Farmer, *Making the Modern Criminal Law* (Oxford University Press, 2016) 26.
[29] *Wrongs and Crimes*, above n 20, 127.
[30] Ibid 126 (emphasis added). In a similar vein, James Edwards and A. P. Simester, 'What's Public About Crime?' (2017) 37(1) *Oxford Journal of Legal Studies* 105, 129: 'There need be nothing disrespectful about trying to get people to explain themselves when they fail to value that which is of value.'

that 'the act of public debate and criminalization might result in the political community coming to recognize the relevant values',[31] but the legitimacy of the intervention will not depend on it. For someone claiming to write about criminal law in democratic societies, that is a remarkable statement.[32] For who is to assess the urgency and moral correctness of an intervention if not the members themselves? The idea here seems to be that there are some members whose 'moral compass' is more accurately calibrated than others', and that it is these members who ought to be selected for public office or, at the very least, hold those who are to account. Either way, though, if it is the state's role to identify, and act on, the 'right' values, regardless of whether they are actually shared or not, then the political process, however construed, can have little more than an auxiliary function in defining the content and scope of the criminal law. Tadros is keen to emphasise that this does not entail a lack of representation, however. The state, he insists, 'speaks on behalf' of all members, even if some or many of them do not, or not yet, recognise and accept the 'right' values as their own. After all, these values are 'right' precisely in virtue of them being 'truly' shared by all members of society.[33]

On the communitarian view, the representational arrangement does not look markedly different, although it is easier to find a coherent articulation of its terms. Duff's work is particularly illuminating in this regard. He writes, '[a]s members of a liberal democracy, we are related to each other, to the state, and to the laws that bind us not as simply subjects (for we are meant to be self-governing)… but as citizens of the polity.'[34] That means, '[t]he law and the whole apparatus of the state supposedly speak and act in our [the citizens'] name, on our behalf: they are not the organs of a separate sovereign, but the formal institutional manifestations and instruments of our shared political lives.'[35] Now, of course, it has to be kept in mind here that the 'we' that Duff keeps referring to stands for (at least a solid majority of) 'real' rather than 'ideal' members of society, who Tadros, like other objectivists, needs to appeal to (whether that distinction holds up in practice is another question, and one that will be addressed in section II.1.), but

[31] *Wrongs and Crimes*, above n 20, 127-28.
[32] And not at all uncommon. See, e.g., Stephen P. Garvey, *Guilty Acts, Guilty Minds* (Oxford University Press, 2020) chapter 1, who claims that the state—any state—has a 'moral permission' or 'liberty right' to implement and enforce a set of 'basic rules' relating to 'core crime', which need not be democratically enacted and cannot be democratically abolished, since their enforcement 'is necessary to... achieve some good... [that] everyone or most everyone recognises and wants' (quite possibly, without recognising and wanting it, though, or else enforcement is not necessary and democracy not dangerous), ibid 47, 60-62.
[33] *Wrongs and Crimes*, above n 20, 127-28.
[34] *Answering for Crime*, above n 13, 49.
[35] Ibid.

their envisioned relationship with the state is structurally the same. To repeat, on both moralist views, the criminal law is but an official articulation of a set of values which are deemed constitutive of a—or any—given society's 'moral identity'. So, regardless of whether these values are actually or 'truly' shared by its respective members, they are antecedently established, and the political process, however construed, boils down to one of norm clarification and implementation. What this really indicates, though, is that the institutional domain, instead of serving as a distinctive and genuinely creative platform for the mediation *between* state and civil society,[36] is seen as the conceptual and practical equivalent of an administrative 'organ' or a mere functional extension of the latter. A reflexive mouthpiece that allows 'us', the members of society, or at least a majority thereof, to 'speak to ourselves'[37] of the values that 'we', by some measure, collectively, already hold. The logic of representation that caters to this understanding is dyadic:[38] the representative (here: 'the state') acts on behalf of an entity (here: 'civil society') that is constituted prior to and independent of the act of representation.

The merits of this understanding will be examined in the next section. But first, what does it reveal about the moralist conception of authority? Duff's work, again, proves highly instructive on this. He writes, '[i]f we ask who has the standing to call citizens to account… or to whom they must answer… for their public (i.e. civic) wrongs, the answer must be 'the polity', that is, *their fellow citizens*.'[39] Returning to the image of a 'shared moral voice', he continues, more explicitly: '[b]oth his [the 'wrongdoer's'] trial and his punishment, as communicative endeavours, must speak to him in the voice of his fellow citizens, since only in that voice'—and this is important—'can they have the appropriate meaning that renders them legitimate; trial and punishment must… be administered *by or with the authority of* his fellow citizens.'[40] Now, keeping in mind the difference in the 'real' and 'ideal' configuration of 'the citizen', this statement can safely be extended to the objectivist view. Edwards and Simester, for instance, contend that, rather than being a conceptual and practical necessity, the involvement of public officials overall 'depends heavily on empirical facts.'[41] Undeniably, they say, 'putting

[36] Compare Farmer, above n 28, chapter 1 and 2.
[37] *Answering for Crime*, above n 13, 49. On the position of dissenters and 'recusants', see above n 27.
[38] Compare Thomas Fossen, 'Constructivism and the Logic of Political Representation' (2019) 113(3) *American Political Science Review* 824, 828-30.
[39] 'Relational Reasons and the Criminal Law' in Leslie Green and Brian Leiter (eds), *Oxford Studies in Philosophy of Law: Volume 2* (Oxford University Press, 2013) 175, 206 (emphasis added).
[40] Ibid.
[41] Edwards and Simester, 'What's Public About Crime?', above n 30, 126.

officials in control of proceedings can help to solve problems of duplicated effort, unreliable detection, intimidation and manipulation'; in fact, it might even help 'remove some of the temptation to seek revenge.'[42] But whenever these advantages cannot be achieved, there exists no compelling reason to stop ordinary members of society from taking matters (back) into their own hands and 'getting answers for themselves.'[43] On both views, then, authority is, unsurprisingly, moral in nature, but in light of what has been established over the course of this section, that must mean two distinct, if closely interrelated things. First, authority resides with members of society; it can and should, generally, be channelled through the institutional architecture of the state, but it need not be the product of successful representation. And second, that is because authority or, rather, its legitimate exercise[44] is content-dependent; it derives from, and 'moves' with, the ('right' or dominant) set of values that are ('truly' or actually) shared by (all 'ideal' or, at least, a majority of 'real') members of society. Having pinned down this basic framework—and it is basic, no doubt, but again, very deliberately so—it is now possible to re-examine each of its political components in turn.

II. Political representation

As was seen, the moralist conception of representation, the idea that the state and its institutional arrangements are straightforwardly representative of the 'moral identity' of a—or any—civil society, is based on the idea that societies are, in fact, united in the relevant sense.[45] Thus, not only do these ideas have to be re-examined together; they have to be re-examined starting from an account of difference and disagreement, then turn to the relationship between state and civil society, and finally revisit the role that (criminal) law can and should play in mediating the terms of this relationship.

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[42] Ibid 126.

[43] Ibid 127. Similarly, R. A. Duff, 'What's Wrong with Vigilantism? Citizens as Agents of the Criminal Law' (2020, workshop paper, on file), has reservations when it comes to extreme ('top end') vigilantism seeking to inflict punishment without due process, but claims that moderate ('bottom end') vigilantism, such as 'paedophile hunting', can be a legitimate expression of the fact that '[t]he state and its officials are not our masters, but our servants', and that 'we' are 'the owners of the criminal law' (at 11-15).

[44] As will be seen below in section III., from a genuinely political perspective, the (standard) distinction between 'legitimate' and 'illegitimate' authority makes no sense. Authority and legitimacy are two sides of the same coin, with 'illegitimate authority' being no authority at all but a simple expression of power.

[45] To be sure, an objectivist can be fairly aspirational about that, but as was mentioned in above n 26, it is not clear how such a stance can be sustained, in theory and, even more so, in practice, without at least a considerable portion of society—the one with superior epistemic access—being, in fact, in agreement on what the 'right' values are. And of course, a separate question, addressed at the end of this section, is whether it is politically advisable for these members, be they in the majority or not, to aspire towards a united 'moral identity' at all or, rather, use the law as 'their' chosen instrument in getting there.

1. Difference, disagreement, and the 'person' of the state

There is only so much that can be said in the abstract about the state of 'unity' in any given society, but one is hard-pressed, also and especially in modern democracies with increasingly diverse populations, to find an issue, notably one relating to questions of fundamental value, that is not the object of genuine controversy. And these controversies, as Vincent Chiao rightly notes, do not stop at the gates of criminal justice. 'Reasonable people', he writes, 'have widely divergent views about the legal construction of consent in sexual assault, the right to "stand your ground," capital punishment, the use of mandatory minimums, the so-called war on drugs, racial profiling, preventive detention, and so on.'[46] They disagree 'about the importance of defending their "honour," of giving people what they pre-justicially deserve, of how much punishment is proportionate for a given offence, about the significance of "victimless" crimes, of the moral salience of bad character as opposed to bad acts, and so on.'[47] Now, to be clear, this is not to say that there is no 'right' way of resolving these issues. There may well be one. It is to say that questions of value, including those of value (in)compatibility, once raised outside the philosophical arena—and, frankly, also within—are the object of human judgment. Judgment that is inexorably and profoundly shaped by personal, social and historical context, such as one's standing in terms of education, wealth and professional achievement; cultural, racial and spiritual affiliations; family upbringing and the strength of personal relationships; gender and generational influences; the state of the environment; the state of diplomatic relations; the state of one's mental health. And as Chiao rightly concludes, '[u]nless and until there is a mutually acceptable and epistemically respectable way of convincing those on the other side of any given issue that it is in fact *your* side that has correctly discerned the true state of the moral world, the existence of an objective fact of the matter is more or less irrelevant.'[48]

Is that enough? Not quite. What Chiao describes here is standardly, including by him, referred to as 'reasonable pluralism',[49] that is, 'disagreement among people motivated to cooperate with each other.'[50] While sufficient to deflate the moralist position, there remains a sense in which members of a ('reasonably plural') society still are assumed

[46] Chiao, 'Two Conceptions of Criminal Law', above n 3, 29.
[47] Ibid.
[48] Ibid (emphasis in original). Jeremy Waldron, *Law and Disagreement* (Oxford University Press, 1999) chapter 8, makes a similar argument, though not specifically in reference to the criminal law.
[49] A Rawlsian invention to be returned to in more detail in chapter 2.
[50] Chiao, 'Two Conceptions of Criminal Law', above n 3, 29.

to be huddling around the bases of 'a common life'[51] and disagreeing 'in good faith'[52] about how to make it work.[53] That will often be the case, of course. But in view of the 'actual pluralism'[54] that permeates modern societies, it does not capture the full extent of what one might call the realities of political conflict. Carlo Burelli has made some progress on this front.[55] The defining characteristic of political conflict, as he explains, is not only disagreement, a difference in preferences—over values, certainly, but also, interests, convictions, priorities, resources, etc.; it is the (intended) imposition of those preferences on people whom one disagrees with.[56] There are several parts to this idea. First, politically relevant disagreement presents as 'a relation of political opposition, rather than, in itself, a relation of intellectual or interpretive disagreement.'[57] That is, a clash of preferences (over values, interests, or other) matters if, and only if, there are 'political carriers',[58] exercising judgment, making it manifest. At times, this might be considered a welcome opportunity to 'reason together'[59] and figure out a solution that carries on both sides. At times, it will not. At times, it will escalate into conflict, which means at least one actor, an individual or a group, will seek to impose their preference on the other side.[60] And that, in turn, means that, while disagreement, by definition, is mutual in nature, political conflict can and regularly does emerge unilaterally. In such a situation, Burelli writes, a willingness to engage in deliberation, and a motivation to cooperate, does not get one very far—the other side will 'find themselves in a conflict, whether they like it or not.'[61] Conflict can trigger a variety of dynamics, from 'explosive' arguments, to slander, lies, and disinformation, gridlock, and utter avoidance. Or it can, and this is the third and last observation, transform into violence, the 'ultimate' power to settle a clash of preferences that defies the power of reason.[62]

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[51] Ibid 28.
[52] Waldron, above n 48, 151.
[53] The distinctly 'liberal' values underpinning this assumption will be explored in chapter 2. For now, the emphasis is on the willingness to cooperate.
[54] Compare Glen Newey, 'Metaphysics Postponed: Liberalism, Pluralism, and Neutrality' (1997) 45(2) *Political Studies* 296, 306-10.
[55] See 'A Realistic Conception of Politics: Conflict, Order and Political Realism' (2021) 24(7) *Critical Review of International Social and Political Philosophy* 977.
[56] Ibid 981-84.
[57] Bernard Williams, 'From Freedom to Liberty: The Construction of a Political Value' (2001) 30(1) *Philosophy & Public Affairs* 3, 7.
[58] Burelli, above n 55, 981.
[59] Chiao, 'Two Conceptions of Criminal Law', above n 3, 28.
[60] See Max Weber, *Economy and Society: An Outline of Interpretive Sociology* (Ephraim Fischoff trans, University of California Press, 1978 [1922]) 38.
[61] Burelli, above n 55, 983.
[62] Burelli, ibid, puts it thus: 'There is a certain "ultimacy" to violence: it is the "extrema ratio" not only because all other options should be tried first, but also because there is no other to be pursued thereafter.'

Many criminal offences, committed on a daily basis no less, which moralists consider expressive of a—or any—society's 'moral identity' are, in fact, an expression of such conflict.[63] An expression not only of deep-running disagreement (think of racially motivated violence, for instance)[64] but of an unwillingness to cooperate. The 'reasonable pluralism' paradigm widens the scope of ('reasonable') disagreement and thus softens the distinction or, rather, shifts the line between 'real' and 'ideal' members of society somewhat. But to quote Burelli one last time, '[a]s long as everyone is not consistently prevented from either having different views or trying to impose them on others, then our society will always be conflictual and at risk of violent outbreaks.'[65] Some might wish it was different, but wishing it *away* is a grave mistake for any theorist concerned with government and law. Especially since 'reasonable pluralists' are onto something. The absence of a willingness to cooperate or, better, the empirically-based recognition that spontaneous cooperation is, at best, unreliable,[66] does not negate the empirically-based recognition that cooperation is necessary for collective action, and that a certain degree of collective action is key to a great deal of pursuits, including, most centrally, individual survival.[67] So, really, the pressing question is how to foster collective action in conditions not just of disagreement but of actual, potentially violent conflict?

Answering this question starts with a revised and more complex understanding of the mechanism of representation. For if disagreements are, in fact, pervasive, the disposition to impose one's preferences more than likely, and a complete breakdown and (or) obstruction of cooperation an ever-present possibility, then the state cannot simply be an administrative 'organ' for the effective communication and implementation of a set of 'shared' values. It has to be a more sophisticated, political construct able to ensure that some degree of collective action is generated and maintained despite the 'absolute chaos of differences'[68] that mark the political condition.[69] Hobbes understood this; and

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[63] Garvey, above n 32, thinks here of the—uncontroversial—'basic rules' governing 'the standard litany of common law crimes: murder, rape, manslaughter, robbery, larceny, ason [sic], mayhem and burglary, to which one might add assault', which, he claims, require no political legitimation (at 50, 300).
[64] 'Hate crime' and the recording thereof make for a particularly 'vivid' and traceable example of realist conflict, which is why it will be discussed in more detail as a case study in chapter 4. On racial violence, however, it is worth noting here already that in societies like the UK, for instance, it tops the list of 'hate crimes' committed each year and shows no signs of regression, see chapter 4 at 106.
[65] Burelli, above n 55, 984.
[66] As seen above, and against common stereotypes, political realists need not be of particularly cynical disposition or buy into an overly negative account of human anthropology.
[67] For a sweeping social evolutionary account, compare Peter Turchin, *Ultrasociety: How 10,000 Years of War Made Humans the Greatest Cooperators on Earth* (Beresta Books, 2016).
[68] Hannah Arendt, *The Promise of Politics* (Schocken Books, 2005) 93.
[69] Arendt would call it the 'human' condition, but opposition emerges only in the presence of others.

one need not be a keen supporter of every aspect of his political theory to acknowledge that his account of representation serves as an excellent starting point for recovering the idea of the state as a political entity in its own right. Hobbes's reasoning is overall quite difficult, though, so it is helpful to begin with a (his own) basic definition of 'the state' and then to gradually unpack the representational logic on which it is based. The state, in Hobbes's words,[70] is the 'one person, of whose *acts* a great multitude… have made themselves every one the author.'[71] Now, even without knowing anything about the meaning of its elements, it is clear already from this definition that Hobbes's focus is on the state's *capacity to act* for the 'multitude', not the substantive purposes which such action ought to pursue.[72] Keeping in mind this focus is vital to understanding both why the state is identified as a 'person' at all and what kind of 'person' it is.

Hobbes uses the term 'person' in a juridical sense.[73] That is, decisive is not the human quality of the person but the fact that '[his] words and actions are considered either as his own, or as representing the words and actions of another man, or of any other thing to whom they are attributed, whether truly or by fiction.'[74] In case of the former, the person is a 'natural' one; natural persons both perform their actions and 'own' them, as well.[75] 'Artificial' persons, by contrast, are those whose actions are 'owned by those whom they represent.'[76] That means, the person to whom the action is attributed—or, in Hobbes's words, the 'author'[77]—is a natural[78] person other than the representative. This can be either a person unwilling[79] to act himself, or the 'owners or governors' of

[70] To be precise, Hobbes talks about 'the commonwealth', but, for present purposes, that is 'the state'.
[71] Hobbes, *Leviathan*, above n 5, 135 (emphasis added).
[72] This approach is similar to that taken by Max Weber. He, too, rejects defining the state in terms of its (changing) substantive aims, and instead sees it as a 'political association' with the distinct capacity for, potentially coercive, action. See 'The Profession and Vocation of Politics' in Peter Lassman and Ronald Speirs (eds), *Political Writings* (Cambridge University Press, 1994) 309, 310-11; *Economy and Society*, above n 60, 54-55.
[73] For broader (aesthetic, dramatical, and theological) interpretations of Hobbes's account, see Mónica Brito Vieira, *The Elements of Representation in Hobbes* (Brill Publishing, 2010).
[74] Hobbes, *Leviathan*, above n 5, 124.
[75] Ibid.
[76] Ibid.
[77] Ibid.
[78] There is some ambiguity here but unless they are a natural person, they are neither able to 'authorise' the representation nor 'own' the action performed.
[79] Persons who are *incapable* of acting in a meaningful way, by contrast, are technically no 'persons' at all. Hobbes makes this clear when he gives the example of 'children, fools, and madmen that have no use of reason.' These people may (and must, of course) be 'personated' (that is, represented) by guardians, etc., but the responsibility for actions taken by those (by his logic, artificial) persons lies with him 'that hath right of governing them', *Leviathan*, above n 5, 126; this point will also be returned to further below. To avoid an unfortunate equation with 'things', however, it seems appropriate to classify these persons as 'non-persons' instead, compare David Runciman, 'What Kind of Person is Hobbes's State? A Reply to Skinner' (2000) 8(2) *Journal of Political Philosophy* 268, 269-70.

a thing that cannot act at all.[80] In light of this elementary typology, Hobbes's definition of the state as the 'one person, of whose acts a great multitude… have made themselves every one the author'[81] appears to suggest that the state is, in fact, a 'purely artificial'[82] person, and individual members of society the natural persons represented. If that were so, the dyadic logic underpinning the moralist position would only need minor adjusting: instead of acting on behalf of a (more or less 'ideal', and more or less substantial) subset of members whose preferences—allegedly—prevail, the state would be acting on behalf of *all* members, regardless of their preferences. That seems intuitively plausible. Closer examination of Hobbes's argument points in a different direction, though, and for very good reason. The 'multitude' of which he speaks are indeed the members of society, but these members 'are a *crowd*.'[83] That is, going back to the circumstances of difference, disagreement and conflict, they are a huge number of natural persons 'directed according to their particular judgments, and particular appetites'[84] who may, of course, be individually represented, but cannot all be represented, at the same time, by the same artificial person,[85] unless—and the wording here is crucial—they 'appear' as *one* person. Thus, to solve the collective action problem, state and civil society have to be connected through a more intricate representational logic.

Consider once more the definition of the 'artificial' person.[86] Artificial persons represent others (that is, things or persons) either 'truly or by fiction'. As touched on above, this refers to the idea that the represented can (then: 'truly') but does not have to (then: 'by fiction') also be the 'author' of the action performed on its or his behalf. Churches, hospitals, and bridges, Hobbes explains, can be represented but, given their inanimate

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[80] Hobbes, *Leviathan*, above n 5, 124, 126.
[81] Ibid 135.
[82] This phrase was coined by Quentin Skinner, 'Hobbes and the Purely Artificial Person of the State' (1999) 7(1) *Journal of Political Philosophy* 1, but note that Skinner relied primarily on passages from *De Homine*, and ascribed the term (somewhat confusingly and in contradiction to Hobbes's own definitions in *Leviathan*) not to the state as 'the representative' but as 'the represented'. He later revised his assessment in 'Hobbes on Representation' (2005) 13(2) *European Journal of Philosophy* 155, 177-78.
[83] Hobbes, *On the Citizen* (Cambridge University Press, 1998 [1647]) 137 (emphasis in original).
[84] Hobbes, *Leviathan*, above n 5, 132.
[85] With David Runciman, 'Hobbes's Theory of Representation: Anti-democratic or Proto-democratic?' in Alexander S. Kirshner et al (eds), *Political Representation* (Cambridge University Press, 2010) 15, 22-23, it appears useful here to draw attention to Hobbes's language in chapter 16 of *Leviathan*, where he explains the action 'to personate' with the metaphor of wearing a 'mask' (at 124). Recent pandemic experiences will have illuminated that one cannot wear several different masks at the same time—or at least not without all but one mask being obscured and effectively disappearing from view. (There is also a risk of suffocation, but Hobbes did not consider that.) Applied to the idea of government, the problem remains the same, regardless of the whether the representative is a single person (e.g., a monarch) or an assembly where every member is in charge of representing a particular constituency.
[86] The argument here follows Runciman, 'What Kind of Person is Hobbes's State?, above n 79, 271-72.

nature, cannot be 'authors'. The same is true for (otherwise) natural persons who, due to their age or a mental condition (etc.), cannot act responsibly.[87] The 'fiction' in these cases is that, through the mechanism of representation, there emerges a 'person' fully capable of action without bearing any of the attributes necessary to 'own' them.[88] This 'appearance' can successfully be summoned, and upheld, only within a triadic system comprising of: (1) *ownership* between one or more persons (the owner) and an entity incapable of action; (2) *authorisation* between the owner and a designated third person (natural or artificial) to act on the entity's behalf; and (3) *representation* between the third person (the representative) and the entity itself (the represented). The only person acting meaningfully in relation to the outside world, then, is the 'person' represented 'by fiction'. Now, how does this map onto Hobbes's definition of the state? As seen, for members of society to all be represented and act collectively, they have to 'appear' as *one* person. This, Hobbes argues, can be achieved only if they authorise 'one man, or… one assembly of men, that may reduce all their wills, by plurality of voices, unto one will', and they all acknowledge 'to be the author of whatsoever he that so beareth their person, shall act.'[89] So, put more plainly, the state, as an entity capable of action, is the 'one person' (the represented) that emerges 'by fiction' out of the institution of a common representative.[90] This common representative can be called the government and the members of society in their 'multitude' its political subjects.

2. The sovereignty of 'the people'

One need not be a particularly spirited democrat to be at least somewhat disappointed with this picture. After all, it appears that, if the state is truly a 'person by fiction', and thus can act only through the government as its representative, then any actions taken are attributable to the subjects as 'authors' without them being able to properly restrict the representational mandate beforehand, or object to any violations thereof once they occur—in fact, there can be little doubt that this is precisely how Hobbes intended it.[91]

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[87] Hobbes, *Leviathan*, above n 5, 124; compare also the comment in above n 79.
[88] Runciman, 'What Kind of Person is Hobbes's State?, above n 79, 272.
[89] Hobbes, *Leviathan*, above n 5, 134.
[90] Brito Vieira, above n 73, 170-73; Runciman, 'What Kind of Person is Hobbes's State?, above n 79, 272-73; Skinner, 'Hobbes on Representation', above n 82, 177-78.
[91] Which, to be sure, does not mean that one cannot still have a passionate debate about Hobbes's general intellectual relationship with the 'democratical gentleman', as is, perhaps, most vividly exemplified by the exchange between Richard Tuck, 'Hobbes and Democracy' in Annabel Brett and James Tully (eds), *Rethinking The Foundations of Modern Political Thought* (Cambridge University Press, 2006) 171, and Kinch Hoekstra, 'A Lion in the House: Hobbes and Democracy' in Annabel Brett and James Tully (eds),

The 'authorisation' of government,[92] as he envisions it, is not only singular in its constituent nature but unlimited in its effects.[93] Clearly, neither of these two qualities sits even remotely well with modern notions of democratic accountability. Still, does this mean that Hobbes's account of representation is inaccurate? The answer must be 'no'. The emergence of the state, as an identifiable entity capable of action, follows from an act of 'authorisation' (which need not be strictly Hobbesian), but it is not reducible to it.[94] Hobbes is profoundly, and rightly,[95] sceptical of any metaphysical conception of 'the people'. As he points out, by definition, 'a people is a *single* entity, with *a single will*; you can attribute *an act* to it. None of this can be said of a *crowd*.'[96] Collective political agency, the very existence of a *demos*, in other words, is predicated upon and ultimately resides with the successful institution and maintenance of a representative body of government.[97] The 'multitude' of subjects is never 'united' in any real sense; it is the recognition of a common representative that creates the 'fiction' of their unity and its political manifestations in the 'real' world.[98] However, this does not mean that 'ownership' has to be construed as radically as Hobbes intended it. As a matter of fact, even *with* Hobbes or, rather, when taking seriously his logic of representation,[99] there is an important—if purposely limited—dimension in which governments of all stripes are, or certainly need to be, accountable to their political subjects.[100]

Rethinking The Foundations of Modern Political Thought (Cambridge University Press, 2006) 191. But whatever the best version of this history, Hobbes's formal account of 'authorisation', as developed most fully in *Leviathan*, is unequivocally undemocratic by modern standards.

[92] Hobbes is very clear about the fact that within society (that is, among subjects and only once the state has been formally instituted) the authorisation of representatives can be limited by contract, since those limits can subsequently be enforced by 'the sovereign' (the government), see *Leviathan*, above n 5, 125-26. By contrast, the political contract, the 'authorisation' by which 'the sovereign' is 'given the right to present the person of them all' (ibid 136), can be enforced by no one other than 'the sovereign' himself, which makes him the 'representative unlimited' (ibid 175); see also ibid 136-39.

[93] Note that Hobbes does recognise exceptions in cases where the reason for the 'authorisation' (collective action, also and most fundamentally for the purpose of self-preservation, ibid 131) would be negated or, as he puts it, rendered 'absurd'; a subject, for instance, does not have to comply with an order to kill themselves or let themselves be killed by others, ibid 168-69.

[94] Runciman, 'Hobbes's Theory of Representation', above n 85, 20.

[95] Compare Nadia Urbinati, *Democracy Disfigured* (Harvard University Press, 2014) chapter 3.

[96] Hobbes, *On the Citizen*, above n 83, 137 (emphasis in original).

[97] Hobbes truly stands out in this regard. Contrast, e.g., John Locke, *The Second Treatise of Government* (Dover Publications, 2002 [1690]), who (at § 95) argues that individuals 'by nature, all free, equal, and independent' first of all (can) agree to form themselves into a political community and then, in a second step, establish a body of government. Similarly, Jean-Jacques Rousseau, *The Social Contract* (Maurice Cranston trans, Penguin, 1968 [1762]) 64-65, considers the state to be (in Hobbes's terms) an 'artificial' person, that is, a political entity capable of autonomous action.

[98] Brito Vieira, above n 73, 178; Runciman, 'What Kind of Person is Hobbes's State?, above n 79, 276.

[99] Cf. Hanna F. Pitkin, *The Concept of Representation* (University of California Press, 1967).

[100] The argument here, then, and the 'constructivist' argument, more generally (see Fossen, above n 38, 835), is not tied to democratic commitments, least of all in the substantive sense. But, of course, as will be seen in chapter 3, democratic institutions can be helpful in realising *representative* commitments.

To see how, revisit the triadic system of *ownership*, *authorisation*, and *representation* that underpins Hobbes's account of representation 'by fiction'. The state, it was noted, is 'a person by fiction of a particular kind'[101] insofar as it is literally non-existent prior to being represented,[102] but it is modelled off the 'multitude' of individual members of society in whose political power it lies to create it. Thomas Fossen, making a broader, 'constructivist' claim about the mechanism of representation[103] rather than a narrowly Hobbesian one, as developed here, helpfully breaks down this idea by introducing the distinction between 'referent' (the person or thing denoted; here: 'the multitude') and the 'object' of representation (the person thereby constituted; here: 'the state').[104] The referent does not and cannot 'own' the object that they are being represented as—the 'fiction' of the state, the unified 'people' capable of action—prior to that object being constituted by an act of representation. They do afterwards; that is the point. However not in the unlimited sense that Hobbes may have wished they did. As Fossen writes, it would be absurd, indeed, those *are* Hobbes's words,[105] to speak of a representation of the people (plural) as 'the people' (singular) without acknowledging that it is, in fact, '*their* interests [that] are fundamentally at stake in representative agency, not those of the representative'[106] (the government). Now—a crucial caveat, but Fossen gets this right, as well—this 'does not mean that the representative should operate like a one-way conveyor belt, transforming... [the subjects'] preferences into actions.'[107] Mostly, because it *cannot* do so. Representation 'by fiction' is a necessary, if (and this will be clear by now) complicated, move precisely because there are no 'unified' preferences to be transformed. Political representation, in other words, has a creative element, but the referent ('the multitude'), as per their act of 'authorisation', moves into a position of 'ownership' over the object ('the state') that they are being represented *as*.[108]

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[101] Runciman, 'What Kind of Person is Hobbes's State?, above n 79, 274.
[102] In contrast to churches, hospitals, bridges, 'children, fools, and madmen', see above n 79 and 87.
[103] Much of Fossen's work is dedicated to reviving Hanna F. Pitkin's ideas on the concepts of political representation and political obligation (the latter will be discussed in chapter 5), and to showing how, though often dismissed, they are not only compatible with but indeed conducive to more contemporary, critical scholarship. There is no need here (or later, in chapter 5) to follow him in this pursuit; in fact, it would only distract. But it has to be acknowledged regardless that what follows is, for him, an attempt to show how Pitkin's idea of 'responsiveness' (above n 99, 140)—considered, by her, to be at odds with Hobbes's account, and considered, by others, at odds with 'constructivism' altogether (see, e.g., Lisa Disch, 'Democratic Representation and the Constituency Paradox' (2012) 10(3) *Perspectives on Politics* 599, 606)—is in fact a necessary ingredient of the 'constructivist' logic of political representation.
[104] See Fossen, above n 38, 829-30, 832-35.
[105] See above n 93. As will become transparent now, this point and his point are closely connected.
[106] Fossen, above n 834 (emphasis in original).
[107] Ibid.
[108] Runciman, 'Hobbes's Theory of Representation', above n 85, 22-26 makes a similar argument based on the ideas of 'dominion'(of the subjects *over* the state) and 'membership' (of every subject *within* the

The creative element will be returned to in a moment, and then run through this entire thesis, but first, be sure on what this conception of 'ownership' actually entails. There is inherent in Hobbes's own logic a critical constraint on the representational mandate of the government. This constraint, though, and any demand for accountability arising from its infringement, is restricted to the appropriate representation of 'the state'. The significance of this point bears emphasising. *Ownership* and *representation*, as in any other ('regular') case of representation 'by fiction', remain two distinct relationships. What happens in a moment of 'authorisation', however construed, is that the subjects (as owners) can hold the government (as representative) to account for failing to keep up the 'appearance' of the state (the represented) as a 'person' capable of action—that is, for portraying it as anything other than a 'single entity'.[109] Insofar and only insofar can one speak of the sovereignty of 'the people':[110] the government, while superior to every individual subject, is inferior to 'the fiction' of the state 'as a whole'.

But then, in light of the creative leeway necessary, what, if anything, counts as a mis-representation? Recall here that the successful 'appearance' of any 'person by fiction' is determined by the quality, or, rather, the lack of qualities, which prevent them from acting relevantly themselves. This quality, though, is at no point actually acquired by the referent. (The child does not all of a sudden come of age; nor does the 'madman' (re)gain lucidity, or the hospital its own willpower and resources.) Rather, whichever quality is missing or impaired becomes *attributable* to the 'person by fiction' through the actions taken by their representative. This—with Hobbes—can authentically[111] be achieved only if the representative directs their actions towards compensating for the relevant quality, not 'fixing' it, or superimposing others of their own.[112] The 'proper' representation of the state as a 'single entity', accordingly, hinges on the suitability of governmental measures (actions taken by the representative) to forge an 'appearance' of unity (compensation quality) in spite of the differences and disagreements (action-impairing quality) that prevent the 'multitude' from moving as a collectivity.

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state). In light of the availability of the original concept of 'ownership', this seems to complicate things unnecessarily, and it diverts from the strength of the original logic of representation 'by fiction'.

[109] Ibid 23. Notably, if 'authorisation' is understood as an iterative political process, it is appropriate, then, to think of the mechanism of representation as an ongoing exercise in 'state-building', see Martin Loughlin, *The Idea of Public Law* (Oxford University Press, 2003) 61-64 and chapter 6.

[110] Compare Loughlin, above n 109, 58-59.

[111] The 'person by fiction' must still be recognisable; a hospital, for instance, cannot suddenly 'act' like a pub or a church. It has to retain its character, its purpose, even.

[112] Both of which, one might add, would fall outside the scope of *any* kind of representation, political or other, but especially a mechanism aiming to create of a 'person by fiction'.

Now, final step—and a tricky one; at least, at first blush: how to forge an 'appearance' of unity without effectively erasing differences and disagreements? In answering this question, it is helpful to briefly turn to the work of Carl Schmitt. Schmitt, infamously, takes the idea of difference and disagreement to the extreme; conceived in antagonistic terms of 'friend' and 'enemy', he describes its potential[113] for violence and even war. Neither the initial distinction nor its (devastating) effects, however, are being elevated to normative principles or charged with moral evaluations. For Schmitt, '[t]he political [condition] does not describe its own substance, but only the intensity of an association or dissociation of human beings.'[114] That is, the 'political enemy need not be morally evil… [b]ut he is, nevertheless, *the other*… so that in the extreme case conflicts with him are possible.'[115] The source of this 'otherness' and, hence, the object of potential conflict, as was seen earlier, can be virtually anything.[116] Decisive is the specifically political—the imposing—behaviour to which it gives rise,[117] and that the government of the day keeps those forces in check, which, Schmitt argues, can be achieved only if the 'friend-enemy distinction' is wholly externalised.[118] To be sure, he later goes on to advocate a far more 'substantial homogeneity'[119] than is compatible with an empirical account of political opposition. At heart, though, his understanding proves to be highly illuminating and it does lend itself to a more moderate interpretation.[120]

Externalising the 'friend-enemy distinction', or the 'first order' of the political,[121] does not require eliminating the potential for conflict altogether; Schmitt himself recognises that.[122] What it does require is making sure this potential stays below the friend-enemy *threshold*.[123] (In Schmitt's account, this category is reserved for antagonistic conflicts

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[113] Schmitt repeatedly stresses that escalation is 'an ever present possibility' but by no means 'common, normal, something ideal, or desirable', *The Concept of the Political* (George Schwab trans, University of Chicago Press, expanded ed, 2007 [1932]), 33.
[114] Ibid 38.
[115] Ibid 27 (emphasis added). Schmitt finds that 'religious, moral, and other antitheses can intensify the political ones and can bring about the decisive friend-or-enemy constellation.' Yet, once this is the case, 'the relevant antithesis is no longer purely religious, moral, or economic, but political', no matter 'which human motives are sufficiently strong to have brought it about', ibid 36.
[116] Ibid 38, 43-44.
[117] Ibid 34, 37.
[118] Compare ibid 28, 32, 38-39, 45-46.
[119] *Constitutional Theory* (Jeffrey Seitzer trans, Duke University Press, 2008 [1927]) 116; 206-7, 289.
[120] As Chantal Mouffe has noted and repeatedly proven in her own work, it is perfectly possible to think 'with Schmitt against Schmitt', *On the Political* (Routledge, 2005) 14.
[121] The following distinctions are borrowed from Loughlin, above n 109, chapter 3.
[122] On 'secondary political' groupings within the state, see Schmitt, *The Concept of the Political*, above n 113, 39, 47-48; on domestic politics, generally, ibid 30-32.
[123] Mouffe, above n 120, 16; compare also Ernst-Wolfgang Böckenförde, 'The Concept of the Political: A Key to Understanding Carl Schmitt's Constitutional Theory [1988]' in Mirjam Künkler and Tine Stein

likely to 'destroy the political association',[124] so the threshold appears rather high.) To return to Burelli, that means the government, in fulfilling its representational mandate, has to design and implement laws and other institutional arrangements in a way that is going 'to block conflicts from unilaterally escalating… and to secure compliance with collective decisions.'[125] It has to establish a degree of order, that is to say;[126] or, better, it has to engage in continuous, contestable efforts of coordination.[127] For, as was seen, judgments on what ought to be done, on what 'order' should look like, will differ; the political opponents who form these judgments are not hard-wired for cooperation; and any collective decisions taken can, and will, turn into new sources of potential conflict if deemed uncompelling.[128] Managing these dynamics, learning how to transform them into 'second order', ordinary politics,[129] is what representative government—and this thesis—is all about. And so, in closing, it should be very evident now that the moralist position (either view) is aiming for the exact opposite, and remarkably so, by recourse to the most invasive enforcement mechanism that any government has at its disposal: the criminal law.[130] The issue, again, is not that moral values are not universally true; it is that they are not universally held. Therefore, if anything, their official imposition is likely to exacerbate antagonism,[131] declare the Schmittian 'internal enemy',[132] and thus gradually push towards the dissolution of 'the people' as a 'political unit'.[133]

(eds), *Constitutional and Political Theory: Selected Writings by Ernst-Wolfgang Böckenförde* (Oxford University Press, 2017) 69, 71.

[124] Mouffe, above n 120, 20, drawing on Schmitt, *The Concept of the Political*, above n 113, 27, where he talks about the existential character of antagonistic conflict, and how it arises only where the 'enemy' threatens 'to *negate* his opponent's way of life' (emphasis added).

[125] Or, rather, they need to be robust enough to withstand non-compliance, Burelli, above n 55, 986-87.

[126] Compare Farmer, above n 28, 193, who writes, with a liberal inflection, that 'criminal law'—all law, really—'is fundamentally concerned with the question of securing civil order: the interaction of self-directed, autonomous individuals in a modern society.'

[127] As Alice Ristroph, 'Criminal Law as Public Ordering' (2020) 70(Supplement 1) *University of Toronto Law Journal* 64, 65-66, rightly notes: 'there is no *a priori* conception of order that we assume (public) law will vindicate. Instead, law is itself the ongoing activity of constructing, maintaining, and revising an order or multiple orders. Under this conception, order (the noun) is the always contingent product of a process of ordering.' Or, within the present framework, of 'state-building', see above n 109.

[128] Burelli, above n 55, 985-87.

[129] See above n 121.

[130] Perhaps the most remarkable statement in this regard has recently been made by Tadros, above n 20, 156: 'the scope and content of core crimes… [is] not determined by the ambition to ensure that the law is acceptable to those with different basic moral views [sic]. Those who reject… the law because of their mistaken views [sic]… have no objection to state interference…They may feel alienated from their state, but any disvalue in their alienation is outweighed or negated [sic] by the importance of ensuring that serious wrongdoing does not occur.'

[131] See Mouffe, *On the Political*, above n 120, 76 ('when opponents are defined not in political but in moral terms, they cannot be envisaged as an 'adversary' but only as an 'enemy'… [to] be eradicated'); Judith N. Shklar, *Legalism: Law, Morals, and Political Trials* (Harvard University Press, 1986) 38.

[132] Schmitt, *The Concept of the Political*, above n 113, 46.

[133] See ibid 38, 47; Böckenförde, above n 123, 71. This line of thought will be returned to in chapter 4.

III. Political authority, and the road ahead

Before launching into the final remarks on the relationship between representation and authority, it is helpful here to pause for a moment and recap, in a couple of sentences, the rather lengthy and rather complex argument of the preceding section. It was seen, first, that the moralist conception of 'the state' as a vehicle for the communication and implementation of a set of (actually or 'truly') 'shared' values, which, in turn, rests on the assumption that civil societies are, in fact, united in the relevant sense, swiftly and inevitably disintegrates under a careful analysis of the circumstances of 'real' politics, which are: difference, disagreement, and (potentially violent) conflict. Second, it was seen that, taking seriously these circumstances and the need for collective action, 'the state' must instead be a 'vehicle for conflict management'[134] and, as such, assert itself not only as an entity in its own right (to be represented by a body of government, once 'authorised') but as a sphere conceptually and practically hostile to the implementation of (quasi) metaphysical claims about 'right' and 'wrong'. Law and public institutional arrangements, third, are tools for the mediation of those (and other) claims, tools that have to keep open the space for difference, disagreement and even a degree of conflict, on whose reality the 'fiction' of 'the people' as a unified political entity rests.

Having fleshed out these relationships between state, government, and civil society, it is clear now that the moralist conception of authority and its legitimate exercise, too, proves to be unsound. The authority to criminalise, prosecute, etc., in fact, the authority to do anything on behalf of 'the state' necessarily resides with the body of government whose actual 'job' it is to act on behalf of 'the state'; and that, importantly, means that the legitimacy of any action so taken, too, is defined not in moral but in political terms, as the contingent and contested product of *successful* representation. The remainder of this thesis, generally, and with a view to criminal law, in particular, will be dedicated to exploring what that involves, exactly; and the second chapter, building on the work of Bernard Williams, will go on to unpack the concept of 'legitimacy' as a genuinely political measure. But it was seen already towards the end of the preceding section that successful representation requires an ongoing coordination of competing claims about what ought and ought not to be done (call those representational claims) at a level that is sufficient to stabilise compliance with collective decisions. The project of legitimate government, accordingly, and any theorisation thereof, will have to be situated within

[134] Loughlin, above n 109, 36.

a social science framework. And this chapter, to complete its mission of setting up for a critical discussion of the 'political turn', has to wrap up with a few, basic reflections on how to do normative theory within such a framework—starting with getting a fresh grasp on what 'authority' actually is or, rather, what it is not. A question that leads to the work of Max Weber, and has been echoed, cogently, by Hannah Arendt.

Weber interprets 'authority' ('Herrschaft')[135] in relation and in opposition to 'power' ('Macht').[136] Power describes an interpersonal phenomenon; it 'is the probability that one actor within a social relationship[137] will be in a position to carry out his own will despite resistance, regardless of the basis on which this probability rests.' Authority, by contrast, refers to 'the probability that a command with a given specific content will be obeyed by a given group of persons', and, therefore, is usually associated with the impersonal or official structures of institutional rule.[138] The more decisive distinction between both concepts, however, lies in Weber's observation that 'authority' aims for obedience, whereas 'power' purposely overcomes resistance. To be sure, this does not mean that an exercise of power cannot be *based* on a relationship of authority. (Weber indicates this at the end of the definition: 'regardless of the basis…') Rather, it means that power can never be an *expression* of authority; for to borrow from Arendt, 'where force is used, authority itself has failed.'[139] Inherent to the idea of authority, therefore, is not only a commanding relationship between ruler and ruled, but the recognition of that relationship on the part of the ruled.[140] This, as Weber puts it, requires 'a certain minimum of voluntary submission…; an *interest*… in obedience.'[141]

How do these considerations bear on the project of political criminal law theory? For one and most fundamentally, they determine the *direction* of normative inquiry. Legal moralists, in particular, though not exclusively,[142] have a tendency to substantiate their

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[135] 'Herrschaft', in English-speaking literatures, is often translated as 'domination', which, especially in light of its (neo-)republican connotations, is rather unfortunate: 'domination' is closely associated with Weber's understanding of 'power' and thus undercuts the conceptual distinction he was aiming for.
[136] Here and in the following Weber, *Economy and Society*, above n 60, 53.
[137] Weber, as a sociologist, was not only concerned with the relationship between government and subjects, but, as has just been established, that relationship, too, has to be understood in sociological terms.
[138] Weber, *Economy and Society*, above n 60, 53, 212. Compare also Loughlin, above n 109, 78-80.
[139] *Between Past and Future: Six Exercises in Political Thought* (The Viking Press, 1961) 93.
[140] Ibid.
[141] Weber, *Economy and Society*, above n 60, 53, 212 (emphasis in original). Similar, though without the—important—distinction between authority and power, David Beetham, *The Legitimation of Power* (Palgrave Macmillan, 2nd edition. ed, 2013) 19.
[142] Chiao, *Criminal Law in the Age of the Administrative State*, above n 2, chapter 2, for instance, starts from the game theoretic tit-for-tat strategy (readiness for immediate retaliation) to develop his account of criminal law as a stabilising force for cooperation with public institutions.

answers to the initial question of 'what should be criminalised' by implicit or explicit reference to an account of 'justified punishment'. In part, this is understandable; after all, who would deny that the extraordinary hardship imposed[143] by most modern penal systems compels the idea that a subject must have done something 'wrong' in order to 'deserve' such treatment? But it is nonetheless methodologically misguided: the mere fact that a government retains the option of coercion[144] to forcefully re-assert its claim to authority in cases of non-compliance,[145] says little, if anything, about whether or not it can legitimately lay claim to compliance in the first place. That is, 'punishment', as an exercise of power can and, arguably, should be based on an overall relationship of authority between government and subjects, but it is neither conclusive evidence of its existence nor indicative of its content. Political criminal law theory, therefore, rather than thinking ('backwards') from the consequences of criminalisation, so as to derive conclusions about the purpose of the initial intervention, has to start with the purpose of the initial intervention and can then consider the conclusions that this yields for the nature and administration of its consequences. This reasoning will underpin both the overarching structure and the internal priorities of all chapters to come.

The second implication builds on the first, but concerns more directly the *locus* of the inquiry. If from the perspective of a government seeking compliance with its criminal laws, orders, etc., the decisive difference between being in a position of authority and being in a position of power is that, in the former case, the subjects have an 'interest' in complying, then the focus of normative theory must logically be on specifying the conditions under which such interests are likely to arise. Now, if political authority is the product of a *successful* representation of 'the state' as a 'political unit' capable of action, and if this outcome hinges on the coordination of diverging claims about what that ought to look like, then the conditions or, as Weber puts it, the 'grounds of legitimacy'[146] and, by extension, the legitimate purposes of the criminal law are intelligible only in light of the normative expectations of those very subjects by and (or) in whose

[143] Chapter 6 will look at the practice of punishment, notably the scale and conditions of incarceration.
[144] Whether that option is 'rightful', morally, and (or) requires a monopoly (as Weber, 'The Profession and Vocation of Politics', above n 72, 310-11, believes) are separate questions. The former is discussed in chapter 6 at 140-42; the latter, arguably, and with Schmitt, has to be answered in the negative: all that is required is a 'monopoly to decide', *Political Theology: Four Chapters on the Concept of Sovereignty* (George Schwab trans, University of Chicago Press, 2005 [1922]) 13.
[145] The terms 'obedience' and 'disobedience' (see chapter 5 at 111 (n 10)) are generally associated with moral obligations, so Weber's use of them notwithstanding, the terms used here are and remain 'compliance' and 'non-compliance'.
[146] Weber, *Economy and Society*, above n 60, 53, 215 ('Legitimationsgründe').

interests the respective government has been 'authorised' in the first place.[147] Political authority, an expression of legitimate government, in short, is 'dialogic and relational in character':[148] it has to recognise representational claims and, in turn, be recognised as doing so. Overall, the research agenda for a political theory of criminal law is clear, then. First, it must be determined what the (any) subjects' normative expectations are. Second, it must be determined how these expectations have to be coordinated in order to stabilise compliance with collective decisions. And third—and only then—can it be determined which, if any, consequences can and should attach to non-compliance.

CONCLUSION

'Fiction is art, and art is the triumph over chaos.'[149] John Cheever, quite certainly, did not have the logic of political representation in mind when he uttered these words, yet they are surprisingly fitting in describing its essence. 'The state', the very idea of 'the people', is a complex political artefact, a product of 'fiction', created and maintained by an irreducibly plural and inchoate 'multitude', whose fragmented nature it mirrors but ultimately transcends. This first chapter has been about giving shape, not content, to what it means for the criminal law (or any law, really) to be part of the institutional architecture designed to negotiate the terms of this relationship. And although '[i]t is daunting—overwhelming, even', as Alice Ristroph puts it, 'to think that to explain and evaluate the criminal law, one must be able to explain and evaluate the behemoth that is the modern state', it is also, by far, preferable to the 'simplicity born of myopia' that afflicts the moralist position.[150] Having exposed its weaknesses, and re-appropriated the concept of political authority, it is now possible to move forward into the critical analysis of the 'political turn' and see whether ambitiously liberal theories of criminal law are, as they claim to be, any more able or willing to meet the challenge.

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[147] Fossen, above n 38, 835.

[148] Again, without distinguishing between authority and power, Anthony Bottoms and Justice Tankebe, 'Beyond Procedural Justice: A Dialogic Approach to Legitimacy in Criminal Justice' (2012) 102(1) *Journal of Criminal Law & Criminology* 119, 129: 'those in power (or seeking power) in a given context make a claim to be the legitimate rulers; then members of the audience respond to this claim; the power holders might adjust the nature of the claim in light of the audience's response; and this process repeats itself.' Of course, classifying political subjects as an 'audience' is quite problematic, compare Urbinati, above n 95. See also Anthony Bottoms and Justice Tankebe, 'Procedural Justice, Legitimacy, and Social Contexts' in Denise Meyersen, Catriona Mackenzie and Therese MacDermott (eds), *Procedural Justice and Relational Theory: Empirical, Philosophical, and Legal Perspectives* (Routledge, 2021) 85.

[149] John Cheever, 'The Death of Justina' in *The Stories of John Cheever* (Knopf, 1978) 429.

[150] See Alice Ristroph, 'Responsibility for the Criminal Law' in R. A. Duff and Stuart P. Green (eds), *Philosophical Foundations of Criminal Law* (Oxford University Press, 2011) 107, 112.

CHAPTER TWO

FALLACIES, FALSE PROMISES, AND LIBERAL THEORIES OF CRIMINALISATION

INTRODUCTION

The purposes which a given political regime and, by extension, its criminal laws may legitimately pursue are tied to the normative expectations of its subjects—not because of some moral principle but because its authority, its ability to lay claim to compliance arises from, and rests upon, successful representation. That was established in chapter one. It was also established that the moralist view scores rather poorly when it comes to implementing these insights. Refusing more or less openly to recognise and respond to the circumstances of political association, they actively limit, if not wholly prevent, the criminal law's alignment with structural deliberations essential to the existence of representative government. The present chapter aims to deepen and further consolidate this claim by zooming in on the question of how subjects' normative expectations and, by extension, the legitimate purposes of the criminal law can be defined. It does so by, first, providing an analysis of the proposals offered by liberal theorists—those driving the 'political turn'—and by exposing the extent to which they, too, fail to meaningfully depart from the moralist hypothesis; and then second, by constructively harnessing this critique to put in place the groundwork for a robustly realist counterproposal.

As explained in the main introduction, the 'political turn' in criminal law theory centres around the work of a handful of prominent scholars who have found themselves

similarly baffled by the moralist view and sought to develop accounts of the criminal law that capture its identity as an inherently political phenomenon. They have done so by drawing on a variety of well-established theories of government, such as Rawlsian liberalism, Pettitian republicanism, and the capability approach as put forth by Martha Nussbaum and Amartya Sen. As will be seen, each of their accounts starts from a set of subtly different premises,[1] and thus may reach subtly different conclusions as to the appropriate scope of the criminal law, but their common denominator lies in how they construe the idea of 'freedom' as the (any) subjects' most basic interest or expectation and, thus, a fundamental prerequisite to legitimate government and law. Leaving aside for the moment the specific configurations that are being proposed, the claim, in other words, is that criminal law, as an expression of political authority, should address not the failure to comply with the demands of morality but with the demands of freedom. A claim that does not immediately give rise to any violent objections. Yet, what goes unnoticed is that the ostensibly neutral standards derived from the latter (freedom) are in fact strikingly similar to the disciplinary and marginalising universalism attributed to the former (morality). So, while laudable in intent, liberal—'political'—theories of criminal law only end up reinforcing the very categories from which they supposedly withdrew, glossing over and perpetuating the moralists' own failure to appreciate and protect the foundations on which any legitimate government needs to operate.

Under a realist paradigm, by contrast, the legitimate purposes of any government and, by extension, of its criminal law emerge organically and dynamically from within the process of representation instead of being dogmatically imposed from without. Or, put differently, legitimate government turns out to be profoundly inward-looking: it seeks to create and protect the socially and historically contingent conditions in which it can successfully stabilise compliance with its own decisions. And considering that, as was seen in chapter one, these conditions arise only if and insofar as subjects remain truly the 'authors' of their own institutional arrangements, this means responding to actual, not ideal normative expectations, actual representational claims about what ought and ought not to be done, thereby securing an acceptable, if never uncontested, degree of order. Properly construed, then, it will be argued, criminal law is no more, but also no less, than a highly sophisticated instrument of political self-preservation, a means for governments to maintain the foundations of their own authority.

[1] 'Subtly' indeed; as will become apparent in section I.1., they all bear the mark of German idealism.

I. Approaching the 'political turn'

Liberal theorists set up their conceptual framework in much the same way as has been done here: if the criminal law is to be an expression of genuine political authority, then its purpose, scope, rules, and operations must—invariably and exclusively—be bound by the very same constraints as are attached to legitimate government, generally.[2] The question that presents itself then is: 'what are those constraints?'; and as was indicated in the introduction just now, the answers given in return unfold largely and with steady reference to familiar narratives along the lines of 'freedom', as the most fundamental, most crucial ('political') value that any subject does, or ought to, want and see realised by their own government.[3] The aim of this section is, first, to unpack those narratives, and then, second, to expose the friction they generate when fed into the mechanism of representation, a mechanism on whose formal integrity they all depend.

1. Liberal freedom

The liberal idea of 'freedom', or rather its many variations, defy any effort at definite systematisation. Clarity of analysis, therefore, is best served by acknowledging, from the start, a certain cross-pollination and partial convergence between them. What can be said with some confidence, though, is that their modern manifestations as criteria for legitimate criminalisation have all been shaped, to a greater or lesser extent, by the philosophies of Immanuel Kant and G.W.F. Hegel. And so, it makes sense to begin by looking, in some detail, at the proposals of two scholars, Malcolm Thorburn and Alan Brudner, who have positioned themselves most clearly on either side.

Thorburn's account of criminal law is firmly embedded within the Kantian paradigm of freedom as independence, a political ideal that strongly depends on, but is not quite equivalent to,[4] Kant's conception of ethical obligation. As Thorburn explains it, 'law

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[2] See, e.g., Vincent Chiao, *Criminal Law in the Age of the Administrative State* (Oxford University Press, 2018) 32: 'we ought not pretend that *ex ante* social welfare and *ex post* punishment are morally unrelated phenomena, answering to completely independent standards of fairness, such as those suggested under the traditional headings of "distributive" versus "retributive" justice'; or, similarly, Malcolm Thorburn, 'Constitutionalism and the Limits of the Criminal Law' in R. A. Duff et al (eds), *The Structures of the Criminal Law* (Oxford University Press, 2011) 85, 87: 'The moral justification of the criminal justice system's coercive practices begins with the justification of the state's coercive powers more generally.'

[3] Indeed, Malcolm Thorburn boldly asserts that '*any* plausible modern account of authority must take the claim of all persons to equal freedom as a starting point', 'Punishment and Public Authority' in Antje du Bois-Pedain, Magnus Ulväng and Petter Asp (eds), *Criminal Law and the Authority of the State: Studies in Penal Theory and Penal Ethics* (Hart Publishing, 2017) 7, 29 (emphasis added).

[4] A detail, as will be seen later on, that has been lost on many, including John Rawls.

and the state… [are] required in order to solve a particular sort of moral problem about life in community with others. The problem is this: …when I decide unilaterally to act according to the demands of morality… I have no assurance that anyone else will.'[5] It is suggested, in other words, that the government's task and, by extension, the purpose of criminalisation is 'to put in place a *rightful context* for our actions',[6] a system that carves out equal space for all citizens to live morally, if they so choose.

Now, there are two distinct dimensions to this proposition which require careful attention. The first one relates to what it means for an individual to live 'morally'. Thorburn notes that, with Kant, this notion must be understood in a formal rather than a substantive sense.[7] Decisive is not the content or outcome of our choices but that our choices are determined by the concept of duty. Kant articulates this standard in the 'categorical imperative': 'act only on that maxim through which you can at the same time will that it become a universal law.'[8] The operative word here is 'maxim'. For the categorical imperative does not prescribe a particular kind of action (to anyone); it is a tool for the individual to evaluate her *motivation* for action in a particular situation. The terms of this evaluation, however, are not contextually defined. Motivations are 'ethical' only if they can, without contradiction, be recast as 'a universal law of nature',[9] applicable to all rational human beings regardless of the circumstances.[10] Yet given that, according to Kant (and, presumably, Thorburn), every person *qua* person is not only aware of the unconditional validity of this reasoning procedure but entitled *not* to engage in it, any directive resulting from its application remains entirely self-imposed.[11]

The question, then, is how government, through law, can guarantee that this space for elective moral agency is available to all subjects. The answer lies in Kant's distinction

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[5] 'Criminal Law as Public Law' in R. A. Duff and Stuart P. Green (eds), *Philosophical Foundations of Criminal Law* (Oxford University Press, 2011) 21, 42.
[6] Thorburn, 'Constitutionalism and the Limits of the Criminal Law', above n 2, 88 (emphasis added).
[7] Ibid 103.
[8] Immanuel Kant, *Groundwork of the Metaphysics of Morals* (Mary J. Gregor and Jens Timmermann trans, Cambridge University Press, 2012 [1785]) 34 (4:421).
[9] Ibid.
[10] The contradiction, it is worth noting here, can become apparent in two ways. First, the maxim turned into a universal law can contradict itself. Kant gives the example of a man who sets out to borrow money knowing that he will not be able to pay it back (ibid 35 (4:422)). If his motivation were to become a universal law, promises to repay one's debts would never be safe. His maxim, however, depends on a world in which they are, otherwise it would be impossible for him to convince anyone to lend him the money he needs. The second way in which a contradiction can manifest itself is when a maxim can be conceived of as a universal law but cannot possibly be 'willed' as one. Kant gives the example of a man who, aware of his talents, chooses to neglect them (ibid 35 (4:423), and argues that 'as a rational being he necessarily wills that all capacities in him be developed.'
[11] Kant, above n 8, 43 (4:431); 'duty', in other words, is a principle for rational 'self-legislation'.

between 'inner' and 'outer' freedom,[12] a distinction which he draws as follows: while no subject can be compelled (including by other subjects) to act *from* duty that is, with 'ethical' motivations, they can be compelled—externally—to conform their actions *to* duty,[13] so as to ensure that 'the free use of [their] choice can coexist with the ['inner'] freedom of everyone in accordance with a universal law.'[14] Thus, political obligation, or what Kant considers as such,[15] neither presupposes nor entails a matching 'ethical' obligation on the part of the individual. It is determined, objectively, by what is 'right', and 'right' is that which allows everyone ('independently') to set their own purposes.[16] The second dimension of Thorburn's account, therefore, comes down to the idea that, contrary to the moralist position, government, by means of (criminal) law, may define (only) 'the appropriate starting points for the operation of ordinary individual morality, not its conclusions.'[17] A crucial difference, he maintains, which allows for consistency with a larger commitment to respect for every subject's 'personhood'.[18]

It is this deliberate discrepancy between internal motivation for action and (coercible) external conformity to law that Brudner, siding with Hegel, objects to. He argues that, for Kant, individual self-determination effectively ends where political obligation begins.[19] Subjects, as shown, are answerable to universal principles of 'right', based on some formal conception of free choice, without a corresponding 'positive entitlement vis-à-vis the sovereign to the [actual] conditions of an autonomous life.'[20] Hegel's idea of freedom, then, and its use within Brudner's theory of criminal law, departs from the Kantian ideal of independence in two (interrelated) ways. For one, the 'empty rhetoric of *duty for duty's sake*',[21] Kant's equation, that is, of the concept of 'duty' with reason

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[12] See Immanuel Kant, *The Metaphysics of Morals* (Mary J. Gregor trans, Cambridge University Press, 2017 [1797]) 176-77 (6:406-7).
[13] Ibid 23-25, 27-28 (6:218-21, 6:231).
[14] Ibid 27 (6:231); this is what Kant calls the 'universal law of right'.
[15] How 'political' liberal political obligations actually are is a question that needs to be left to chapter 5.
[16] See Arthur Ripstein, *Force and Freedom: Kant's Legal and Political Philosophy* (Harvard University Press, 2009) 33-34, who gives an excellent explanation of this concept: 'your right to freedom protects your purposiveness—your capacity to choose the ends you will use your means to pursue—against the choices of others, but not against either your own poor choices or the inadequacy of your means to your aspirations.' Kant describes this kind of freedom as a person's 'innate right', 'belonging to every human being by virtue of his humanity', *The Metaphysics of Morals*, above n 12, 34 (6:237).
[17] Thorburn, 'Constitutionalism and the Limits of the Criminal Law', above n 2, 103. See also his claim (at 99) that the state's purpose, as 'a matter of moral necessity', is to 'set in place a framework within which our conduct can have a certain *meaning*' (emphasis added).
[18] See ibid 97.
[19] 'A Reply to Critics of Punishment and Freedom' (2011) 14(3) *New Criminal Law Review* 495, 501-4.
[20] Ibid 503.
[21] Georg Wilhelm Friedrich Hegel, *Elements of the Philosophy of Right* (H. B. Nisbet trans, Cambridge University Press, 1991), 162 (§ 135) (emphasis in original).

as a method of rational abstraction, is complemented by an account of 'particularisation' or 'objective determination'.[22] The argument is relatively straightforward: 'A will which… wills only the abstract universal', Hegel writes, 'wills nothing and is therefore not a will at all… [I]n order to be a will, [it] must in some way limit itself.'[23] The idea, in other, simpler words, is that Kant's categorical imperative can produce meaningful evaluations only if the measure by which it is assessed whether the individual's maxim can or cannot, without contradiction, be recast as a universal law is *fixed*. For as Hegel observes, 'where there is nothing, there can be no contradiction either.'[24] Accordingly, freedom is not simply to will anything; it is 'to will something determinate'[25] and that, for Hegel, are the ends, the 'actual' ends that reason itself prescribes.

The question that arises then, of course, is how these ends themselves are determined, and although Hegel's argument here is less clear,[26] there can be little doubt that it has to lead yet another step away from Kant. The 'content' of reason, concrete norms and duties, that is, cannot be conceived of in pure abstraction. Nor, however, would it be consistent with his overall logic to abandon them to empirical contingency. 'The will in its truth', as Hegel puts it, 'is such that what it wills, i.e. its content, is identical with the will itself, so that freedom is willed by freedom.'[27] Or, less convoluted, 'free' is the will whose ends secure the external conditions of its own existence.[28] And these conditions, for Hegel as for Brudner, materialise fully only within the normative order of the state,[29] where institutionally mediated practices of 'mutual recognition' nurture and reinforce the interests that all subjects, 'by virtue of their being the kind of beings they are',[30] share. On Brudner's view, then, it is these necessarily shared interests, as an expression of 'public reason', that the criminal law ought to protect.[31]

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[22] Ibid 37-42 (§§ 5-7).
[23] Ibid 40 (§ 6).
[24] Ibid 163 (§ 135).
[25] Ibid 42 (§ 7).
[26] Scholarly interpretations tend to diverge on this point. Compare, e.g., Robert B. Pippin, *Idealism as Modernism: Hegelian Variations* (Cambridge University Press, 1997) chapter 4 (arguing for a historical conception of reason); Charles Taylor, *Hegel* (Cambridge University Press, 1975) chapter 14 (arguing for a metaphysical conception of reason, embedded within Hegel's larger system of 'spirit').
[27] Hegel, above n 21, 53 (§ 21).
[28] Compare ibid 54 (§ 22): 'The free will is truly infinite, for it is not just a possibility and predisposition; on the contrary, its external existence is its inwardness, its own self.'
[29] For discussion of the role that community and the institutions of the state play in constituting Hegel's 'free' individual, see Alan Patten, *Hegel's Idea of Freedom* (Oxford University Press, 1999) chapter 4.
[30] Alan Brudner, *Punishment and Freedom* (Oxford University Press, 2009) 22.
[31] These interests include formal Kantian 'agency' and, more importantly, various 'agency goods'. For discussion, see Peter Ramsay, 'The Dialogic Community at Dusk' (2014) 1(2) *Critical Analysis of Law* 316, who himself draws on Hegel's logic to define the rights 'necessary' for democratic citizenship.

With these two Kantian and Hegelian cornerstones in place, it is easier to see now that other accounts on the liberal criminal law theory spectrum hover, more or less easily, between them. However, it is neither feasible within the constraints of this chapter nor essential to its argument that they all be addressed individually. Their affiliations fall mainly within one of three groups: (i) Rawlsian, (ii) neo-republican, or (iii) democratic egalitarian (based on the capability approach), though it is difficult, and futile, to draw any definite boundaries among them. The Rawlsian route, certainly, has been the most popular one, and curiously, while it starts from premises thoroughly Kantian in nature, it ends up in territory not all that dissimilar to Hegel's. As will be seen now, the reason behind this lies in its two-tiered approach and a somewhat creative application of the 'categorical imperative procedure',[32] the gist of which can be explained as follows.

John Rawls and his supporters,[33] more so than many others, are consciously grappling with the question of how to secure stable cooperation in modern, democratic societies which, he suggests, are themselves grappling with a pluralism of 'reasonable'[34] moral, religious, spiritual, etc., views.[35] In answering this question, Rawls argues, one has to take seriously the Kantian demand that all subjects be offered assurance of their being 'free and equal' vis-à-vis others subjects. Yet, instead of settling the issue on the basis of formal considerations consistent with the categorical imperative in its intended use, as a tool for rational self-legislation only, he repurposes it as a procedure to generate a set of substantive principles for the entire political community. This procedure, as he envisions it, consists of two stages:[36] (i) a 'freestanding' and 'impartial' elaboration of a political conception of 'justice' from 'public reason'[37] (where, predictably, Rawls's own proposals regarding the subjects' fundamental rights, liberties, and opportunities

[32] John Rawls, *Lectures on the History of Moral Philosophy* (Harvard University Press, 2000) 162-81.
[33] There are too many to be named, but see Corey Brettschneider, 'The Rights of the Guilty: Punishment and Political Legitimacy' (2007) 35(2) *Political Theory* 175; Sharon Dolovich, 'Legitimate Punishment in Liberal Democracy' (2004) 7(2) *Buffalo Criminal Law Review* 307; Matt Matravers, 'Political Theory and the Criminal Law' in R. A. Duff and Stuart P. Green (eds), *Philosophical Foundations of Criminal Law* (Oxford University Press, 2011) 67; 'Political Neutrality and Punishment' (2013) 7(2) *Criminal Law and Philosophy* 217; and Emmanuel Melissaris, 'Toward a Political Theory of Criminal Law: A Critical Rawlsian Account' (2012) 15(1) *New Criminal Law Review* 122.
[34] John Rawls, *Political Liberalism* (Columbia University Press, 1993) 36-7.
[35] It has to be noted here that Rawls considers Western democratic, if not US American, political culture to be the backdrop of his entire theory, ibid 13, 15, 175, 223. In his later work he even writes (sounding a lot like Hegel) that his work is meant to 'reconcile' subjects of liberal democratic communities to their 'social world', compare *The Law of Peoples* (Harvard University Press, 1999) chapter 18.
[36] *Political Liberalism*, above n 34, 64-5, 140-41.
[37] This conception takes into account the distinctly liberal values already implicit within the democratic culture that is the starting point of Rawls's theory (see above n 35). On the role of the 'original position', see *A Theory of Justice* (Belknap Press of Harvard University Press, 2005 [1971]) chapter 3.

fare especially well);[38] and then (ii) the justification of this conception from within the 'reasonable comprehensive doctrines that endure in the society regulated by it.'[39] The latter describes what Rawls has termed an 'overlapping consensus': endorsement of a single conception of justice from multiple perspectives and for multiple reasons.

The upshot for the project of political criminal law theory is simple. If a government is to promote and give effect to freedom as a set of equal rights, liberties, etc., which are (i) defined by the principles of a 'just' institutional order and (ii) 'stabilised'[40] by a convergence of 'reasonable' comprehensive views, then the purpose of the criminal law is to address the individual subject's failure to comply with the rules of that order (which amounts to a meta-violation of freedom and equality as such)[41] while simultaneously allowing her to 'also understand her failure in the terms dictated by her own comprehensive conception of the good.'[42] Substantive criminal laws, then, must never directly appeal to moral (etc.) views, but they have to consider, and accommodate, all those which are 'reasonably' held. The Rawlsian approach, one could say therefore, is Hegelian in that it relies on a substantive conception of 'public reason' to construct the basic framework of political obligation,[43] and Kantian in that it permits, but does not require,[44] a corresponding moral obligation on the part of the subject.

Despite differences in the details of its implementation, this two-part justification has mostly been extended, rather than radically re-imagined, by those working in the neo-republican[45] and democratic egalitarian traditions. For neo-republicans,[46] government

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[38] Ibid chapter 2. For a brief restatement of the principles, see *Political Liberalism*, above n 34, 5-6.
[39] *Political Liberalism*, above n 34, 12.
[40] Arguably, for Rawls, any political order based on the 'right' conception of justice is, or at least ought to be, stable already by virtue of its being the 'right' order—but only where an 'overlapping consensus' does exist, as well, are the arrangements stable 'for the *right* reasons', ibid 391 (emphasis added).
[41] See Matravers, 'Political Neutrality and Punishment', above n 33, 221.
[42] Ibid 222; provided, of course, that the respective conception is 'reasonable'.
[43] The substance, of course, is somewhat different. Whereas for Rawls, the content of 'public reason' is determined by a specific political conception of justice 'characteristic of a democratic people' (*Political Liberalism*, above n 34, 213, 253), for Hegelians, such as Brudner, it is 'hospitable to any plausible conception of non-contingently shared human interests' (Brudner, *Punishment and Freedom*, above n 30, 22 (n 1)). But compare the comments in above n 35.
[44] Rawls's theory is grounded in the idea of an 'overlapping consensus' but it leaves open the possibility of instances where a 'just' political order will clash with 'unreasonable' comprehensive views—and, at times, even 'reasonable' comprehensive views (e.g., particular religious practices of minority groups). That is, the primary line of justification is and remains the political conception of justice itself, compare Matravers, 'Political Neutrality and Punishment', above n 33, 222, 224-25.
[45] Quentin Skinner, *Liberty before Liberalism* (Cambridge University Press, 1998).
[46] In the criminal law context, the lead belongs to John Braithwaite and Philip Pettit, *Not Just Deserts: A Republican Theory of Criminal Justice* (Clarendon Press of Oxford University Press, 1992); Philip Pettit, 'Criminalization and Republican Theory' in R. A. Duff et al (eds), *Criminalization: The Political Morality of the Criminal Law* (Oxford University Press, 2014) 132. For a more Rousseauian position,

and (criminal) law are essential to realising the ideal of freedom as 'non-domination', an ideal which Philip Pettit describes as a condition of 'security against interference… on an arbitrary basis.'[47] Now, while the elements of interference and security are quite readily grasped,[48] the element of arbitrariness—especially since, clearly, it constitutes the heart of the entire concept—has to be looked at in a bit more detail. Pettit, at first, gives 'arbitrariness' a very broad and somewhat intuitive meaning. He writes, '[a]n act is perpetrated on an arbitrary basis… if it is subject just to the *arbitrium*, the decision or judgement, of the agent… [And] since interference with others is involved, … [t]he choice is not forced to track what the interests of those others require according to their own judgements.'[49] This definition is instantly qualified, however; its individualistic tinge notwithstanding, it is said to refer only to those interests that are 'relevant', and by that he means only 'those that are shared in common with others.'[50]

Now, Pettit is keen to stress that the question of whether or not a particular interest is, in fact, 'shared' in this sense must be established through public discourse and remain open to continuous contestation.[51] Yet, similar to Hegel's and Rawls's idea of 'public reason', it is constrained by a subtle premise of normative re-configuration. For state interference to be defensible, he argues, it 'must be triggered by the shared interests of those affected *under an interpretation* of what those interests require that is shared.'[52] And this interpretation, in turn, is anchored to a set of 'basic liberties'[53]—fundamental standards enmeshed in, and reinforced by, a collective practice of 'civic virtue or good citizenship'[54]—that is deeply encoded within the ideal of 'non-domination' itself. On the neo-republican view, too, therefore, freedom has 'a two-dimensional aspect.'[55] It involves both the 'objective' safeguarding of a subject's choice situation and that this safeguarding be registered as a matter of 'common recognition'.[56] And criminal law is seen as a, if not the, central political mechanism to achieve just that.

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see Richard Dagger, 'Republicanism and the Foundations of Criminal Law' in R. A. Duff and Stuart P. Green (eds), *Philosophical Foundations of Criminal Law* (Oxford University Press, 2011) 44.

[47] *Republicanism: A Theory of Freedom and Government* (Oxford University Press, 1997) 51.

[48] Interference, in Pettit's account, has two elements: it is (i) deliberate and (ii) negatively affects another agent's choice situation. Pettit is careful to point out, however, that it need not involve a 'wrongful' act; whether or not a choice situation has been worsened is determined solely by its context, ibid 53-4.

[49] Ibid 55 (emphasis in original).

[50] Ibid 55, 56.

[51] See generally Philip Pettit, *On the People's Terms* (Cambridge University Press, 2012).

[52] *Republicanism: A Theory of Freedom and Government*, above n 47, 56 (emphasis added).

[53] Pettit, 'Criminalization and Republican Theory', above n 46, 137-39.

[54] Pettit, *Republicanism: A Theory of Freedom and Government*, above n 47, 245.

[55] Ibid 246.

[56] Ibid 71-3. Here, in particular, the parallels to Hegel's logic are quite striking.

Vincent Chiao picks up precisely on this point, and neatly illustrates the symmetry in Rawls's and Pettit's reasoning, when he defends criminalisation as a tool to promote freedom as 'effective access to central capability.'[57] Given that the concept of 'capability' itself remains rather elusive throughout his account,[58] however, it is sensible to first take a look at its theoretical origins and then turn to the argument proper. The so-called 'capability approach' was developed by Martha Nussbaum and Amartya Sen[59] and intended as an internal critique of or, rather, an analogue to Rawls's conception of 'primary goods'—rights, liberties, opportunities, income, wealth, and the social bases of self-respect[60]—which, Rawls has claimed, 'a rational man wants whatever else he wants',[61] and thus have to be (re-)distributed equally for the sake of 'justice'.[62] What Nussbaum and Sen argue, in a nutshell, is that while the fair allocation of 'resources', no doubt, is important, it does not guarantee that all subjects will also be able to effectively convert those resources into 'valuable' activities or modes of being ('functionings').[63] 'Capabilities', for them, in other words, stand for real opportunities vis-à-vis the state to achieve 'functionings', and are meant to allow subjects to actually exercise their 'freedom to choose between alternative lives (functioning combinations).'[64] Yet, whereas Nussbaum thinks that one can, and should, provide at least a preliminary list of 'central capabilities' applicable to all socio-political contexts,[65] Sen insists that they have to be determined and weighed in accordance with democratic procedures.[66]

Chiao appears to gravitate towards Sen's version of the approach when he writes that criminal law, like public institutions generally, have to contribute 'to the construction of an egalitarian society… by securing for each person effective access to the capabilities that articulate, *in a given social context*, equal social status.'[67] But this statement

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[57] Chiao, *Criminal Law in the Age of the Administrative State*, above n 2, 73.
[58] He only defines it as required 'to lead a decent and independent life', to live 'as a peer', ibid 74-5.
[59] See Martha C. Nussbaum, *Women and Human Development: The Capabilities Approach* (Cambridge University Press, 2000); Amartya Sen, *Development as Freedom* (Oxford University Press, 1999).
[60] Rawls, *A Theory of Justice*, above n 37, 62.
[61] Ibid 92.
[62] Ibid 62, and chapter 5.
[63] Both Nussbaum and Sen have been hesitant to specify eligible 'functionings' in too much detail, as any such specification runs counter to the pluralistic commitment that underpins their approach.
[64] Amartya Sen, 'Justice: Means versus Freedoms' (1990) 19(2) *Philosophy & Public Affairs* 111, 118.
[65] *Frontiers of Justice: Disability, Nationality, Species Membership* (Harvard University Press, 2007) 76-8. Nussbaum lists: life, bodily health, bodily integrity, senses, imagination, and thought, emotions, practical reason, affiliation, other species, play, political and material control over one's environment.
[66] See, e.g., 'Capabilities, Lists, and Public Reason: Continuing the Conversation' (2004) 10(3) *Feminist Economics* 77. Whether Sen can, without undermining his argument, refrain from drafting such a list is another question, of course; arguably, he cannot, see Eric Nelson, 'From Primary Goods to Capabilities: Distributive Justice and the Problem of Neutrality' (2008) 36(1) *Political Theory* 93, 106.
[67] Chiao, above n 2, 73 (emphasis added); similar statements are made at 72, 74-5.

does not quite capture the full extent of what he is, in fact, arguing. At various points, Chiao emphasises, in almost Rawlsian fashion, that 'public [criminal] law… rests on a principle of universal *entitlement*', that it ought to 'promote everyone's *basic* rights and interests', and that, accordingly, his account 'starts by assuming that people are willing co-operators who share *a sense of justice*.'[68] Now, if all of these features form part of the 'capability' concept (and they have to, even on Sen's account),[69] then, no matter which context, there exists some deontological threshold that all governments ought to meet or, at least, approximate.[70] 'Capabilities', as reasons for criminalisation, then, cannot simply be a flexible criterion for the legitimation of political decisions.[71] In line with Chiao's broader allegiance to the neo-republican tradition,[72] they have to 'stabilise social cooperation in a manner that is consistent with the equal status of each person relative to every other person';[73] a standard of freedom, as was seen over the course of this section, that is enshrined within the Pettitian ideal of 'non-domination' (or, as Chiao uses it, 'anti-deference'),[74] foundational to Rawls's political conception of 'justice', and traceable all the way back to Kant and Hegel.

2. Political representation

It turns out, recounting even the 'highlights' of the 'political turn' adds up to a lengthy exercise, but it could not be avoided. Only when considered in parallel does it become salient that each proposal relies on a similar blueprint for designing the government's role in setting the boundaries of permissible conduct. This blueprint includes:

(i) a commitment to pre-political standards of evaluation,
(ii) a consensus-oriented model of politics, and
(iii) a conflation of justice and legitimacy.

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[68] Ibid 4, 34, 42, respectively (all emphases added).
[69] See again Nelson, above n 66, 103-7.
[70] Chiao himself admits to this at above n 2, 167.
[71] To be sure, Chiao—like Pettit, from whom he draws much inspiration—is committed to political and, particularly, democratic decision-making. The point is that the concept of 'central capability'—like the concept of 'non-domination'—necessarily has to come with a baseline for evaluating the legitimacy (or, at least, normative desirability) of such decisions. Chiao makes this clear when he divides the concept of democratic equality into (i) equal access to relevant procedures ('political equality') and (ii) the requirement that all participants share equally in the outcome of those procedures ('substantive equality'). On Chiao's view, if the former is met, but significantly infringes on the latter, then 'democratic values themselves speak in favour of overriding an ostensibly democratic decision', ibid 73-75.
[72] Ibid 72.
[73] Ibid 86.
[74] Ibid 76-101.

As will be seen shortly, both the second and third element are a necessary implication of the first. It is critical, therefore, to start from a clear articulation of what is meant by the claim that liberal standards of evaluation are 'pre-political'. The discussion in the preceding section has shown that, for liberal theorists, the Kantian idea of subjects as 'free and equal' moral agents, though couched in varying terms, not only gives rise to the problem that political authority poses but, crucially, delivers the normative criteria for its solution—a premise whose significance is further amplified by the fact that it is largely taken to be axiomatic.[75] Now, while this formulation already hints at a certain circularity, which will be returned to at a later stage, what it demonstrates, first of all, is that the liberal idea of 'freedom' (and the currency in which it is expressed; rights, capabilities, etc.) is prior to the project of government in two distinct ways. First, the idea itself 'float[s] free from the forces of politics'[76] in that it is derived entirely from a particular interpretation of the (permanently) 'shared' interests of subjects as human beings. Or, as Andrea Sangiovanni helpfully puts it, it is 'practice-independent'; that is, '[n]o reference is made to existing institutions or practices, and the content, scope, and justification… in no way depend on the underlying structure or functioning of such practices and institutions.'[77] And secondly, these interests, and the specific norms they yield for the evaluation of horizontal relations between human beings, are considered determinative of the purposes that any government and, by extension, the criminal law may legitimately pursue in relation to its own subjects. And again, that is so regardless of how suited they actually are to the circumstances of a particular context.[78] Already here, then, an interesting—or, rather, troubling—parallel to the moralist view presents itself. The sources of political (and therefore legal) normativity are located *outside* the political sphere, and claimed to have *antecedent* authority over it.

What does this mean for political representation? As was explained in chapter one,[79] political representation is the mechanism by which governmental authority is instituted and maintained. It rests on a complex, and necessarily triadic, system of (1) *ownership*

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[75] See, e.g., Thorburn, 'Punishment and Public Authority', above n 3, 29.
[76] Enzo Rossi and Matt Sleat, 'Realism in Normative Political Theory' (2014) 9(10) *Philosophy Compass* 689, 689.
[77] Andrea Sangiovanni, 'Justice and the Priority of Politics to Morality' (2008) 16(2) *Journal of Political Philosophy* 137, 139-40.
[78] Raymond Geuss has coined this the 'ethics-first' approach to politics, *Philosophy and Real Politics* (Princeton University Press, 2008) 9. Bernard Williams speaks of 'political moralism', *In the Beginning Was the Deed: Realism and Moralism in Political Argument* (Princeton University Press, 2005) 2. Here, the term 'pre-political' will be used, as it seems to more accurately capture the nature of the problem.
[79] Revisit the discussion at 25-33.

between a multitude of subjects and 'the state' as a 'fictional' political entity capable of action; (2) *authorisation*, however construed, between those subjects and a body of government; and (3) *representation* between that body of government and 'the state'. Both the communitarian and the objectivist version of 'legal moralism' were seen to be at odds with this mechanism since neither can summon a constituency large enough not to considerably distort the full spectrum of moral (and other) judgments available or altogether withdraw the matter of criminalisation from political debate. The liberal camp seems to be labouring under a similar illusion. They recognise and take seriously the realities of difference, disagreement, and conflict when it comes to interpretations of the 'good', but appear to ignore the fact that these realities extend, just as potently, to interpretations of the 'right'. In other words, committed, as they certainly are, to the practice of political discourse, they think of it as 'an activity that takes place against the backdrop of consensus about the fundamentals of political life.'[80] This consensus, of course, is very rarely taken to be more than merely hypothetical,[81] but that does not soften its sting. Arguably, it only makes it worse. The liberal idea of freedom and the institutional requirements to which it gives rise—be it the demarcation of the 'starting points' of interpersonal morality, the protection of 'basic' liberties, or the provision of some kind of 'agency goods', 'primary goods', or 'capabilities'—are as contested and mercurial as any other aspect of political association. Or to put it even more pointedly, they are integral, not prior, to the conflictual practice of politics.[82]

A liberal framing of subjects' normative expectations, then, leaves only limited room for the effective exercise of 'ownership' over the representation of the state, in regards to the purposes of the criminal law and matters of public law, generally.[83] Preferences, actual interests and needs, opinions, motivations, and beliefs, etc., are 'relevant' only

[80] Matt Sleat, 'Liberal Realism: A Liberal Response to the Realist Critique' (2011) 73(3) *The Review of Politics* 469, 473.
[81] The prime example here, of course, is Rawls, *Political Liberalism*, above n 34, 137: 'Our exercise of political power is fully proper only when it is exercised in accordance with a constitution the essentials of which all citizens as free and equal may reasonably be expected to endorse in light of principles and ideals acceptable to their common human reason. This is the liberal principle of legitimacy.' Others, such as Pettit, start from an '*assumption* that the guiding interests and ideas really are shared' and allow for the 'permanent possibility' to contest it, see *Republicanism: A Theory of Freedom and Government*, above n 47, 63 (emphasis added).
[82] In this vein, see, e.g., Chantal Mouffe, *On the Political* (Routledge, 2005), who takes a more agonistic view (possibly, too agonistic in light of chapter 1); and Williams, above n 78, chapters 1 and 7.
[83] David Dyzenhaus, himself relying on Hobbes's mechanism of political representation, makes similar observations more specifically in regards to Joseph Raz's account of authority, see 'Consent, Legitimacy and the Foundation of Political and Legal Authority' in Jeremy Webber and Colon M. Macleod (eds), *Between Consenting Peoples: Political Communities and the Meaning of Consent* (University of British Columbia Press, 2010) 163, 179-85.

insofar as they are deducible from, or at least 'reasonably' conform to, pre-conceived norms and value systems. One need not go so far as to suggest, with Raymond Geuss, that liberal political theory, therefore, is itself an expression of ideology, and whatever the merits of this proposition, it will not be developed here.[84] It is perfectly sufficient, for the objective of this chapter, and the realist endeavour more generally, to point out that those who rely on it turn against their own subject matter.[85] '[T]he [liberal] search for legitimacy', as Thomas Nagel notes, 'is a search for unanimity';[86] the principle that government be designed in line with the 'freedom and equality' of those subject to it invariably demands this conclusion.[87] But it rests on a deep misreading of the realities for which it seeks to provide. Politics is an ongoing, 'functional response'[88] to conflict and the socially and historically contingent challenges for collective action to which it gives rise—even, and especially, on the level of basic institutional design.[89] Not something that one can get 'right, over and done with'[90] by implementing a set of principles whose 'correctness', 'fairness', etc., is ascertainable from a rational point of view, or hidden in the 'true virtues' of community membership. So, to borrow a lovely phrase from Hannah Arendt, '[t]he *raison d'être* of politics is freedom.'[91] No doubt. But that freedom is open-ended.[92] Subjects, if they are to be, and remain, the 'authors' of their own institutional arrangements, must be in a position not only to contest a given act of representation, but to sculpt, change and rewire the framework in which it takes place. To be sure, this is not to say that a subject shall be free to '[impose] his own favourite terms of interaction on the rest of us.'[93] That would be to escalate conflict. It is to say that, 'his own favourite terms', whatever they be, have to be taken into account.

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[84] See Raymond Geuss, 'Liberalism and Its Discontents' (2002) 30(3) *Political Theory* 320; *Philosophy and Real Politics*, above n 78, especially Part I.
[85] Brilliantly along these lines, Glen Newey, *After Politics: The Rejection of Politics in Contemporary Liberal Philosophy* (Palgrave Macmillan, 2000); and, of course, Williams, above n 78, chapter 1.
[86] *Equality and Partiality* (Oxford University Press, 1991) 33 (emphasis added).
[87] Charles Larmore, 'The Moral Basis of Political Liberalism' (1999) 96(12) *The Journal of Philosophy* 599, 607, in relying on the Kantian idea of agency, writes that 'without requiring reasonable agreement about the rules to be enforced… we shall be treating persons merely as means, as objects of coercion, and not also as ends, engaging directly their distinctive capacity as persons' (emphasis in original).
[88] Marc Stears, 'Liberalism and the Politics of Compulsion' (2007) 37(3) *British Journal of Political Science* 533, 545.
[89] See Mark Philp, *Political Conduct* (Harvard University Press, 2007) 95.
[90] Bonnie Honig, *Political Theory and the Displacement of Politics* (Cornell University Press, 1993) 2. See also Newey, above n 85, 7 who lucidly observes that liberal political theory is '*anti-political*, to the extent that it aims at deriving philosophically a set of principles… which if implemented would herald the end of politics' (emphasis in original).
[91] *Between Past and Future: Six Exercises in Political Thought* (The Viking Press, 1961) 146.
[92] See Williams, above n 78, 85: 'We should take seriously the idea that if… people think that there is a cost in liberty, then there is… [for this means] taking our political opponents themselves seriously.'
[93] Thorburn, 'Punishment and Public Authority', above n 3, 9.

It should be clear now why, for liberal theorists, 'justice' and 'legitimacy' are virtually interchangeable standards of political evaluation. Recall, first, that political authority is dialogic in character:[94] it arises from an ongoing—successful—representation of the state as a 'political unit' capable of action, which, in turn, requires the coordination of diverging representational claims, expectations about what ought to be done, at a level sufficient to stabilise compliance with collective decisions. The criterion of legitimacy, in other words, speaks to the question of if and in how far a given political regime has authority; it does not speak to the content of specific representational claims.[95] Now, for liberal theorists, the idea of letting normative expectations be swayed by empirical contingencies prompts some serious discomfort; at least, the very 'basic' expectations in favour of instituting a body of government and, by extension, the ('core') purposes of criminal law, thus, have to lie outside the political sphere, and be specified without reference to the 'messy' realities to which they apply. As a consequence, though, these expectations (capabilities, rights, etc.), as fundamental expressions of the demands of justice, become part of the test of legitimacy itself—that is, a political regime and its criminal laws are legitimate (only) if and insofar as they pursue justice.[96]

Two important implications attach to such an account. For one, if political legitimacy is tied to pre-political standards of evaluation, then the outcome of its assessment in a given political context, too, will be pre-political in nature.[97] In matters of criminal law this effect is particularly obvious, and it radiates in two directions: both the (potential) victim and the (potential) offender are addressed by the law not as political actors who encounter each other in a realm of difference, disagreement, and conflict, but rather as moral 'persons' who do, or at least ought to, 'share' a set of abstract, yet rich, qualities and interests—the capacity for reason, autonomy, etc.—whose vulnerability[98] to interference by others is what grounds the political mandate in the first place. In parallel to

[94] See the discussion in chapter 1 at 34-37.
[95] Compare Chandran Kukathas, *The Liberal Archipelago: A Theory of Diversity and Freedom* (Oxford University Press, 2003) 5; and Enzo Rossi, 'Justice, Legitimacy and (Normative) Authority for Political Realists' (2012) 15(2) *Critical Review of International Social and Political Philosophy* 149, 150, 156-7, who notes that these are the kinds of questions which then fall within the realm of genuine politics.
[96] On the problem of conflation, John Horton, 'Political Legitimacy, Justice and Consent' (2012) 15(2) *Critical Review of International Social and Political Philosophy* 129, 134-5; see also A. J. Simmons, 'Justification and Legitimacy' (1999) 109(4) *Ethics* 739, 756-60; Matt Sleat, 'Justice and Legitimacy in Contemporary Liberal Thought: A Critque' (2015) 41(2) *Social Theory and Practice* 230, 231-39.
[97] Compare Matt Sleat, 'Legitimacy in Realist Thought: Between Moralism and "Realpolitik"' (2014) 42(3) *Political Theory* 314, 321.
[98] Peter Ramsay, *The Insecurity State: Vulnerable Autonomy and the Right to Security in the Criminal Law* (Oxford University Press, 2012); 'Overcriminalization as Vulnerable Citizenship' (2010) 13(2) *New Criminal Law Review* 262.

the moralist position, therefore, the 'liberal' failure to comply with the criminal law is also, if not predominantly, a 'personal' failure to live up to one's moral capacity. This explains why the vast majority of liberal theorists,[99] similar to their moralist counterparts, consider criminalisation to be an act of 'condemnation',[100] a way to communicate 'censure',[101] and mark out 'meta-wrongs';[102] liberal criminal '[l]aw gives persons their due as persons.'[103] But there is a second, even more profound difficulty with this reasoning, which leads back to remarks made at the start of this section. On the liberal view, again, the dilemma that a claim to political authority poses and the criterion for its solution (legitimacy) derive from the same set of pre-political considerations—the freedom of the 'person' makes criminalisation both problematic and necessary. The unfortunate result of this circularity is that liberal theories, like moralist theories, are at a loss when it comes to explaining their own scope.[104] Unconstrained by an account of the political and unimpeded by its contingencies, the question of where government and, by extension, criminal law may legitimately reach is played out within the infinite realms of normative intuition and it will, as Enzo Rossi aptly puts it, almost inevitably be 'characterised in a way that is biased towards the envisaged solution.'[105]

In summary, therefore, it is hard to see how a distinctly liberal 'political turn' should provide any real counterweight to the moralist approach:[106] pre-political commitments, the relative absence and remediability of politics, and the avowed primacy of the ideal all suggest that, in regards to the most pressing questions, substantial progress has yet to be made. So, what is to be done? Expanding upon Bernard Williams's conception of the 'basic legitimation demand', the next and final section of this chapter will flesh out the groundwork for an account of political legitimacy that sheds the criminal law's conceptual dependence on pre-political evaluations, and yet avoids stripping authority of its normative significance. Call this the realist approach to criminalisation.

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[99] A (if not the) exception is Chiao, above n 2; sceptical also Brudner, *Punishment and Freedom*, above n 30, 41; although in both accounts the emphasis on ('legal') retribution remains strong.
[100] Compare, e.g., Matravers, 'Political Neutrality and Punishment', above n 33, 221-22; and also Pettit, 'Criminalization and Republican Theory', above n 46, 142-44.
[101] See, e.g., Thorburn, 'Constitutionalism and the Limits of the Criminal Law', above n 2, 85, 89, 97.
[102] Matravers, 'Political Neutrality and Punishment', above n 33, 221; also Dagger, above n 46, 50-1.
[103] Markus D. Dubber, 'Regulatory and Legal Aspects of Penality' in Austin Sarat, Lawrence Douglas and Martha Merrill Umphrey (eds), *Law as Punishment/Law as Regulation* (Stanford Law Books, 2011) 19, 37.
[104] Compare Peter Ramsay, 'Democratic Limits to Preventive Criminal Law' in Andrew Ashworth, Lucia Zedner and Patrick Tomlin (eds), *Prevention and the Limits of the Criminal Law* (Oxford University Press, 2013) 214, 222-23 on the expansive potential of the liberal idea of autonomy.
[105] 'Justice, Legitimacy and (Normative) Authority for Political Realists', above n 95, 156.
[106] Victor Tadros, *Wrongs and Crimes* (Oxford University Press, 2016) chapter 8 illustrates this point.

II. Taking the 'political turn'

Williams recognises that if difference, disagreement, and conflict—in both moral and political matters—are ubiquitous and perennial features of political association, then the 'first political question', as he puts it, has to be to secure 'order, protection, safety, trust, and the conditions of cooperation.'[107] Not as independent 'super-values', but as prerequisites of collective action. That is why it is the first question ('solving it is the condition of solving, indeed posing, any others');[108] and it is political because it arises 'all the time', it cannot be solved once and for all but must be addressed in light of an interpretive understanding of politics, and thus will always '[be] affected by historical circumstances'.[109] Offering a solution is a necessary condition of legitimacy but not a sufficient one. For if government is supposed to be 'a solution… and not itself part of the problem, *something* has to be said to explain…what the difference is between the solution and the problem.'[110] Political authority, that is, cannot simply be an instance of successful oppression. Contrary to the liberal view, however, this restriction arises not out of a pre-political conception of subjects as 'free and equal' moral agents which dictates the shape and content that government and law can take;[111] rather, as Williams rightly puts it, it 'is inherent in their being such a thing as politics'.[112] Or, better, it is inherent in there being such a thing as 'authority'. For as was seen in chapter one, the defining characteristic of authority, as opposed to power, is that it is a product of successful representation; it denotes not simply a commanding relationship between ruler and ruled, but a recognition thereof on the part of the ruled.[113] This recognition, with Williams, requires that the government of the day offer an 'acceptable' solution to the first political question and, importantly, that it do so in relation 'to each subject'. This is what Williams calls responding to the 'basic legitimation demand'.[114]

Now, what will and will not be deemed an 'acceptable' solution cannot be determined through *a priori* theorising; and, indeed, it will vary from subject to subject. Williams is keen to stress that acceptance induced purely by compulsion is always insufficient,

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[107] Williams, *In the Beginning Was the Deed*, above n 78, 3.
[108] Ibid. See also again Carlo Burelli, 'A Realistic Conception of Politics: Conflict, Order and Political Realism' (2021) 24(7) *Critical Review of International Social and Political Philosophy* 977, 984-87.
[109] Williams, above n 78, 3 (emphasis suppressed).
[110] Ibid 5 (emphasis in original).
[111] Note that an immediate implication of this is that there can, without a doubt, be non-liberal forms of government that are legitimate; a conclusion which liberal theorists can hardly embrace, see ibid 4, 8.
[112] Ibid 5, 8.
[113] See chapter 1 at 29-30, 34-37; compare also Philp, above n 89, 55-6.
[114] Williams, above n 78, 4 (emphasis suppressed).

but apart from such cases—and he admits that, on occasion, this line may be difficult to draw[115]—the answer will be profoundly contextual and scalar. He writes, '[t]he idea is that a given historical structure can be (to an appropriate degree) an example of the human capacity to live under an intelligible order of authority.'[116] The only thing that matters, therefore, is that the order under consideration 'makes sense' to the individual subject '*as such a structure*.'[117] The wording here is deliberate and will help anticipate two possible objections. First of all, the 'makes sense' criterion has normative content only for the subjects in question. That is, they are the ones who have to decide whether they 'should' accept a particular set of arrangements, whether these arrangements 'ring true'[118] in the circumstances in which they find themselves. But, as Williams himself points out, this does not mean that it is descriptive in nature.[119] It would be erroneous to conclude that only because a theory does not generate substantive principles, it does not perform an evaluative function. Judgments of what 'makes sense', as Edward Hall emphasises, '*do not* characterise the timeless conditions of legitimacy';[120] the concept itself, though, *does*. For as should be evident by now, legitimacy cannot be achieved simply by 'implementing' a set of pre-political commitments. It has to be recognised by the political subjects themselves. And so, as Hall rightly notes, Williams's account is 'purposefully abstract and indeterminate',[121] but not anything goes.[122]

The second concern relates to the threshold implicit within the 'makes sense' criterion. When Williams writes that legitimate government has to offer an 'acceptable' answer to the first political question to 'each subject', he does not claim that the answer must articulate each—or any—subject's 'favoured' arrangement; nor indeed that each subject must in fact accept it.[123] To commit to either claim would be to commit to the sort of utopianism which Williams, for good reason, rejects. His account of legitimacy, in

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[115] Ibid 6.
[116] Ibid 10.
[117] Ibid (emphasis in original).
[118] See Edward Hall, 'Bernard Williams and the Basic Legitimation Demand: A Defence' (2015) 63(2) *Political Studies* 466, 468.
[119] Williams, above n 78, 11.
[120] Hall, above n 118, 469 (emphasis in original).
[121] Ibid. Williams, in his remarks on toleration writes that 'it is important, indeed, essential… to reflect that in the end no theorist has any way of advancing beyond [this position]', above 78, 136.
[122] William A. Galston, 'Realism in Political Theory' (2010) 9(4) *European Journal of Political Theory* 385, 390, providing an otherwise solid analysis, seems to misread Williams on this point.
[123] Williams, above n 78, 6, 135-36. Realist criticism in this vein has been voiced by Jonathan Floyd, 'From Historical Contextualism, to Mentalism, to Behaviourism' in Jonathan Floyd and Marc Stears (eds), *Political Philosophy versus History? Contextualism and Real Politics in Contemporary Political Thought* (Cambridge University Press, 2011) 38; and Michael Freeden, 'Interpretative Realism and Prescriptive Realism' (2012) 17(1) *Journal of Political Ideologies* 1.

line with the reality for which it seeks to provide, is inevitably and (in contrast to much liberal theory) consciously imperfect. That is, at least on its most internally consistent reading,[124] it refrains from imposing a consensus requirement. The fundamental task of any political regime is not to find ways in which diverging representational claims can be *converged*, but to find ways in which they can be *coordinated* so as to generate collective action. Achieving this will require governments to identify, on an ongoing basis, what these claims actually are, and then use these insights to adjust institutional arrangements and relevant processes, design laws and issue policies so as to maximise congruence with them.[125] Subjects' judgments of what 'makes sense' in their political settings, then, will be an expression or, as John Horton puts it, an 'acknowledgment of the state as having authority… in terms that are taken to be salient within the context in which such authority is exercised and affirmed';[126] or to be even more precise, they will manifest as individual 'assessments of the degree of congruence'.[127]

Maximising overall congruence in conditions of difference, disagreement and conflict inevitably imposes limits on individual congruence. The goal, in other words, cannot, and that means should not, realistically be to pass laws, etc., that every single subject will wholeheartedly endorse, but rather, to find solutions which, at least, 'a substantial number'[128] will deem 'for the time being… the best achievable *approximation* of their preferred outcome.'[129] The degree of overall congruence and, accordingly, the degree to which a particular political regime approaches[130] legitimacy will thus be highest in contexts where laws and other institutional arrangements realise a broad compromise among diverging representational claims. The exact features of such compromise, how it is built, and how it transforms the project of criminalisation, will be investigated in detail over the course of subsequent chapters. But it is possible now to give a coherent

[124] Williams, unfortunately, had no opportunity not develop this aspect much further. The argument here follows Horton, 'Political Legitimacy, Justice and Consent', above n 96, 141-42; and Sleat, 'Legitimacy in Realist Thought: Between Moralism and "Realpolitik"', above n 97, 325-27.
[125] In the literature on political representation, 'congruence' and 'constructivism' are often pitted against each other, see Thomas Fossen, 'Constructivism and the Logic of Political Representation' (2019) 113(3) *American Political Science Review* 824, 832. Yet, as seen below and even more so in chapter 3, taking seriously the logic of representation 'by fiction', the responsiveness to representational claims which it requires, and the creativity involved in designing political compromises, there truly is no reason to.
[126] Horton, above n 96, 141.
[127] Sleat, 'Legitimacy in Realist Thought: Between Moralism and "Realpolitik"', above n 97, 326.
[128] Williams, above n 78, 136. This issue will be returned to in chapter 3 at 68-70.
[129] See Enzo Rossi, 'Consensus, Compromise, Justice and Legitimacy' (2013) 16(4) *Critical Review of International Social and Political Philosophy* 557, 564 (emphasis added).
[130] A clear advantage of this position, as Williams himself points out, is that it jettisons the 'binary cut' between verdicts of 'legitimate' and 'illegitimate', above n 78, 10. For a similar assessment, see Sleat, 'Legitimacy in Realist Thought: Between Moralism and "Realpolitik"', above n 97, 326.

answer to the question with which this chapter began. The only purpose which a given political regime may legitimately pursue by means of (criminal) law is to approximate the *actual* normative expectations of those whom it seeks to govern. Seeing as these expectations are determined by factors intrinsic to the practice of politics itself—and, as such, not only plural and conflicted, but always 'under construction'—this purpose is conceptually equivalent to, and fully exhausted by, a sustained effort to preserve the functional integrity and effective operation of the mechanism of representation, and, by extension, 'the state' itself. Criminal law, like legitimate government generally, that is to say, both depends on and aspires towards the recognition of authority,[131] an effect whose magnitude directly corresponds to the converse recognition of difference.

One last point or, rather, a clarification seems to be worth making here, albeit briefly. Morality, ordinary and political, is not being separated from politics, made irrelevant, or left behind, on this view. It is being put in its place, which is *within* the increasingly vast pool of normative expectations which any legitimate government through law and policy will have to manage. The implications and opportunities of opening the concept of criminalisation to the full range of these expectations are manifold and, again, will be developed step by step over subsequent chapters. The strongest, most fundamental shift, however, cannot be stressed early enough. The criminal law, in its entirety,[132] is a coordinative, not a condemnatory, enterprise. If it is to 'make sense' to the broadest possible swathe of subjects, and promote compliance as a result,[133] it cannot occupy a higher moral plane than those to whom it is addressed; it is just as fallible, provisional, a 'product of historical conditions',[134] and it needs to be designed and communicated accordingly. The decision to criminalise, in short, is a distinctly political decision; and as Williams has rightly observed, 'such a decision does not in itself announce that the other… was morally wrong or, indeed, wrong at all. What it immediately announces is that *they have lost*'[135] right here, right now. And 'oddly enough', as he goes on, this '[shows] more respect for them as political actors than treating them simply as arguers —whether as arguers who are simply mistaken, or as fellow seekers of the truth.'[136]

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[131] Compare Dyzenhaus, above n 83, 181-84.
[132] The (moral) distinction between *mala in se*, 'true crimes', 'core offences', etc., on the one hand, and *mala prohibita*, regulatory/public welfare offences, etc., on the other, will be returned to in chapter 4 at 84. The only liberal theorist discussed here to have successfully abandoned it is Chiao, above n 2.
[133] The empirical connection between representation and compliance will be addressed in chapter 5.
[134] Williams, above n 78, 13.
[135] Ibid 13 (emphasis in original).
[136] Ibid 13. See also Galston, above n 122, 397.

CONCLUSION

It is always easier to hold an established line of defence than it is to build one up. This chapter has taken the first steps in articulating the urgency for a new, a *realist* way of thinking about criminal law and government. It has done so by revealing the obscure continuities that run between openly moralist approaches to criminal law and those of liberal descent—pointing out, most notably, their shared commitment to pre-political standards of evaluation—and by showing that, as a result, the so-called 'political turn' is no 'political turn' at all. The third chapter will build on the groundwork laid so far, and begin the task of fleshing out the concept and practice of political compromise, as an alternative (or, rather, an antidote) to the consensus-driven proposals that permeate the current debate and increasingly distort the political, both as a conflictual sphere of human interaction and its own source of normativity.[137] Chapters four, five, and six, then, will return to criminal law proper, addressing its content and scope, the issue of (non-)compliance, and, importantly, its potential for coercion.

[137] See the introductory remarks at 12-13. Compare also Matt Sleat, 'Realism and Political Normativity' (2022) 25(3) *Ethical Theory and Moral Practice* 465; Adrian Kreutz and Enzo Rossi, 'How I Learned to Stop Worrying and Love Political Normativity' (2022) (online first) *Political Studies Review*.

CHAPTER THREE

POLITICAL COMPROMISE

INTRODUCTION

Compromise carries an aftertaste, and not a good one. After all, it seems to '[involve] compromising—in the negative sense which we still retain—one's principles or beliefs without being convinced of their erroneousness.'[1] This sense of 'moral discomfort', as Chiara Lepora describes it,[2] may well be among the reasons why, until rather recently, compromise has often been overlooked, or directly dismissed, as a normative concept deserving of serious attention.[3] The aim of this chapter is to show that such treatment is unfounded and, importantly, that it robs the project of criminal law theory of one of its most valuable resources. The argument itself proceeds in two parts. While the first tries to distil, from an unusually patchy and somewhat confused literature on the topic, a coherent—and suitably realist—account of what it means to think of compromise in evaluative political terms, the second begins the task of transposing these conclusions

[1] Francis E. Devine, 'Hobbes: The Theoretical Basis of Political Compromise' (1972) 5(1) *Polity* 57, 59.
[2] 'On Compromise and Being Compromised' (2012) 20(1) *Journal of Political Philosophy* 1, 17-19; see also Alin Fumurescu, *Compromise: A Political and Philosophical History* (Cambridge University Press, 2013), who develops a conceptual genealogy of compromise, and explores how its 'built-in ambiguity' (at 4) has, over time, shaped political attitudes and institutional practices in France and in the UK.
[3] To be sure, the empirical political science literature—introduced in the second half of this chapter and returned to in the abortion case study in chapter 4—has long been interested in explaining how different institutional designs and electoral systems, in particular, can deliver effective compromises. Normative theoretical engagement did not take off until the late 2000's. For an overview, see the edited collections by Jack Knight, *Compromise* (New York University Press, 2018) and Christian F. Rostbøll and Theresa Scavenius, *Compromise and Disagreement in Contemporary Political Theory* (Routledge, 2018).

into the realm of political process. Together, they seek to integrate and round off the theoretical frame drawn up in chapters one and two, substantiating further that which has been deemed key to legitimate criminal law: the mechanism of representation and the coordination of difference and disagreement on which it thrives.

Now, like contemporary political theory, generally, most of the emergent work on the concept of compromise, too, understands itself primarily as a response to Rawls. Having said that, Rawls, of course, was by no means the first to consider the concept,[4] or, indeed, to bemoan its inadequacy,[5] but his critical assessment, though rendered almost in passing, has cast a long shadow from which, to date, only a handful of scholars have managed to fully escape. For Rawls, infamously, political compromise or, as he terms it, a *modus vivendi*[6] constitutes a 'mere' balance of power that, unlike an 'overlapping consensus' on a set of higher-level 'political' principles of justice (and preferably, his own), can never be stable 'for the right reasons';[7] a precarious and morally deficient product of circumstance and bargaining, social 'accidents' and fierce competition that 'fails to establish an ordering in the required sense';[8] a tactical 'calculus'[9] that defies the demands of 'public reason' and risks carelessly to '[abandon] the hope of political community'[10] in favour of a fortunate, but fleeting, reconciliation of interests.

It is very tempting, and has tempted many,[11] to try and resist these (admittedly, rather gloomy) remarks. Still, the point here is quite the opposite. Political compromises *are* unconstrained by 'principled' moral considerations, although they lend themselves to moral evaluation.[12] They *are* strategic and contested and subject to change. What must

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[4] One of the earliest accounts, probably, is John Morley's *On Compromise* (Chapman and Hall, 1874). Compare also T. V. Smith, 'Compromise: Its Context and Limits' (1942) 53(1) *Ethics* 1; and *The Ethics of Compromise and the Art of Containment* (Starr King Press, 1956).

[5] See, e.g., John H. Hallowell, 'Compromise as a Political Ideal' (1944) 54(3) *Ethics* 157; Oliver Martin, 'Beyond Compromise' (1948) 58(2) *Ethics* 118.

[6] *Modus vivendi* ('way of living') is used to refer to 'an arrangement or agreement allowing conflicting parties to coexist peacefully, either indefinitely or until a final settlement is reached', Oxford Dictionary of English (Oxford University Press, 2010). On its relationship with compromise, see below n 23.

[7] See *Political Liberalism* (Columbia University Press, 1993), 145-49, 201-2, 391-2. The 'right' reasons, for Rawls, are moral reasons, since they need to support a conception of justice which 'is itself a moral conception' (at 147). See chapter 2 at 44-45.

[8] That is, a pre-political 'ordering based on certain relevant aspects of persons and their situation which are independent from their social position', John Rawls, *A Theory of Justice* (Belknap Press of Harvard University Press, 2005 [1971]) 134. For the term 'pre-political', revisit chapter 2 at 49.

[9] *Political Liberalism*, above n 7, 147.

[10] Ibid 146.

[11] As will become apparent over the course of this chapter, most compromise theorists are overall more concerned with appeasing Rawls than they are with the political practice itself.

[12] This difference is an important one, and one that is often misunderstood. As was shown in chapter 2, moral judgment is relevant only if and to the extent that it is rendered by the subjects themselves.

and will be resisted, though, is the idea that this realisation ought to propel us towards liberal consensus instead. True compromise is a tremendous political achievement. In fact, it marks the edge of what is feasible, and prudent. Like the 'fiction' of 'the state' in whose service it is deployed, it is a method designed to facilitate collective action, by keeping the conversation and the argument going, even and especially among those who rather would not speak at all. And that is not an easy enterprise. One cannot expunge political conduct of its real motivations;[13] nor, arguably, should one set out and try. One can only control, and repeatedly re-adjust, the procedural settings in which it is played out and embedded—and 'insofar as the use of power is inevitable', as Jack Knight and Melissa Schwartzberg rightly observe, 'institutions ought to incorporate it rather than ignore it.'[14] Of course, how this ought to be done exactly is as contextually dependent and scalar a matter as the force of legitimacy to which any suitable arrangement will ultimately contribute. Without a particular system in mind, and an in-depth analysis of its particular political environment, there is no point in asserting particular rules and recommendations.[15] What can be asserted, though, and this shall make for a neat transition into the second, more applied part of the thesis, are the main functions which any such rules and recommendations ought to promote. And those are: access, recognition and, no less importantly, the perennial prospect of change.

I. 'In politics we have an art.'[16] — freedom and fiction revisited

A good, if perhaps somewhat pedestrian, place to start is with a definition of the constituent elements of compromise. The basis for this definition was laid in chapters one and two. There it was shown that political authority and, by extension, the authority of the criminal law rests on the idea of congruence. Congruence between the purposes to which government has been put and the (actual) normative expectations—irrespective of their (alleged) 'desirability'—of all those whom it seeks to address. And it was also established that seeing as these expectations are many, conflicting, and ever-evolving,

[13] Interestingly, as will be seen below in section II.1., the bulk of the literature seems to operate precisely on that assumption, because it focuses almost exclusively on the 'right' reasons and the 'right' mindsets for compromise rather than its institutional preconditions.
[14] 'Institutional Bargaining for Democratic Theorists (or How We Learned to Stop Worrying and Love Haggling)' (2020) 23(1) *Annual Review of Political Science* 259, 273.
[15] To be sure, doing so is an important task, but one that falls outside the scope of this chapter. Particular rules and institutional arrangements will be referred to in the final section, but solely for illustrative, not for prescriptive purposes.
[16] Morley, above n 4, 175.

maximising overall congruence (that is, designing arrangements in a way that responds to as many subjects' expectations as possible)[17] necessarily imposes limits on individual congruence.[18] In short, no one will be entirely happy; and that is exactly what it is. Compromise, in theory as in political practice, is a vehicle for representation, not of a diffuse 'multitude' and their particular preferences, but their apparent unity within the normative order of 'the state'.[19] Instituting and maintaining this order requires continuous conflict settlement, and not just any settlement but: *settlement reached by way of mutual concession*.[20] As will be clear from this definition, compromise, as envisaged here, describes both a particular kind of outcome and a process by which that outcome is being achieved. Since a proper understanding of the former is critical in developing the parameters of the latter, however, it makes sense to discuss the exact nature of the intended outcome first and leave the procedural implications to the next section.

1. No 'moral minimum'

Borrowing from Élise Rouméas, 'compromise as outcome refers to a decision situated in the zone between the conflict point and the aspiration point'[21] of those who are party to it. Which means, it turns on the element of *concession*. This may be 'a truism about compromises',[22] but as with most truisms, it is easily and often misunderstood. A brief review of the literature guides to the problem. As mentioned in the introduction, it was Rawls who categorised—and dismissed—every arrangement falling short of a ('overlapping') consensus as a 'mere' *modus vivendi*, an 'unprincipled' balance of interests.

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[17] The all-important question of how much congruence (numerically speaking) is 'enough' congruence is a problem inherited from Williams (revisit the discussion in chapter 2 at 56) and will be touched on again below in section II.
[18] Revisit chapter 2 at 55-57.
[19] Revisit chapter 1 at 25-33.
[20] For a similar approach, see Amy Gutmann and Dennis F. Thompson, *The Spirit of Compromise: Why Governing Demands It and Campaigning Undermines It* (Princeton University Press, 2014) 10: 'compromise is an agreement in which all sides sacrifice something in order to improve on the status quo from their perspective, and in which the sacrifices are at least partly determined by the other sides' will.' It has recently been proposed, without much justification, that concessions need not, in fact, be mutual, see Alexander S. Kirshner, 'Compromise and Representative Government: A Skeptical Perspective' in Jack Knight (ed), *Compromise: NOMOS LIX (Yearbook of the American Society for Political and Legal Philosophy)* (New York University Press, 2018) 280, 283. Within the present framework, at least, this view is unsustainable. If only one, or all but one, party ends up making concessions, the situation is one of capitulation, not compromise. Like here, Peter Jones and Ian O'Flynn, 'Can a Compromise be Fair?' (2013) 12(2) *Politics, Philosophy & Economics* 115, 119.
[21] 'The Procedural Value of Compromise' (2021) 47(2) *Social Theory and Practice* 377, 380.
[22] See Fabian Wendt, *Compromise, Peace and Public Justification: Political Morality Beyond Justice* (Palgrave Macmillan, 2016) 14.

Quite a few theorists have since, and increasingly so in the last decade, set out to challenge not only the traditional liberal paradigm, as canvassed in the preceding chapter, but the Rawlsian prophecy attached to its desertion. Those challenges come in different packages, at times with confusing labels,[23] and most of them do not separate carefully enough between outcome and process.[24] While this makes it hard to see the commonalities and discords between them, it should not distract from the fact that they all seek to answer the same question; and that question is, provided that consensus is an overly ambitious and, indeed, distortive political goal, what are the criteria, if there are any, to determine what does and does not qualify as compromise? Or, sharper, are there any limits to what can, in a given political context, be claimed and, in turn, conceded?

The answer, overwhelmingly, is 'yes'; a few examples will make the point. Take, first, David McCabe's model for a new 'modus vivendi liberalism (MVL)'.[25] MVL takes as its point of departure the observation that, if the 'liberal project' is to make good on its own claim that 'the fundamental principles structuring the political realm must be such as can be rationally vindicated to [all reasonable][26] citizens subject to it',[27] then it must come to terms with the fact that its arguments are 'not compelling enough to persuade the thoughtful critic.'[28] This figure of the 'thoughtful critic' plays an important role in McCabe's account. It shifts the focus away from the liberal 'enthusiast', for whom the liberal order signifies 'a harmonious extension'[29] of the norms and values which they champion in their own private lives, as well, to members of the public 'who have identified serious drawbacks to that model', and so 'either endorse some illiberal vision of political association or are unsure of the appeal of the liberal account.'[30] Securing these

[23] The confusion is between *modus vivendi* ('MV') and 'compromise', and one can distinguish (at least) three camps: (i) those who refer to 'MV' and 'compromise' interchangeably to supplement or help reinterpret the liberal position, (ii) those who refer to 'MV' and 'compromise' interchangeably but in an effort to clearly distance themselves from the liberal position, and (iii) those who refer to 'compromise' as an autonomous, third, category which demands *more* than a 'MV' (however construed) but *less* than a 'consensus'. Now, while it would be wrong to completely ignore this terminological turmoil, it is not the primary purpose of this chapter to clean it up. The confusion, as will be seen shortly, is conceptual, and thus the focus of the discussion here, too, will be on concepts, not labels.
[24] Indeed, the only factor setting apart the positions defended by camps (i) and (iii), as outlined in ibid, is the way they imagine the compromising *process* should be carried out. In the interest of maintaining some degree of systematisation, this matter will therefore be returned to below in section II.
[25] *Modus Vivendi Liberalism: Theory and Practice* (Cambridge University Press, 2010) 126.
[26] In line with the liberal tradition, McCabe is clear in that 'the important question' is whether political arrangements 'merit the assent of *reasonable* citizens', ibid 5 (emphasis added).
[27] Ibid 5.
[28] Ibid 9.
[29] Ibid 7. Note, again, the extraordinary resemblance between the moralist and the liberal conception of representation, as drawn out in chapter 1 at 19-21 and 2 at 48-53.
[30] Ibid 7-8.

members' allegiance, McCabe argues, requires adjusting the state's legitimatory story. In a first step, he submits, liberals should reduce their position to a set of core concerns or, as he calls it, a 'minimal moral universalism.'[31] This includes 'a basic commitment to moral equality'[32] and to the protection of human rights which 'rule out such evils as slavery or severe and permanent bodily harm, while guaranteeing access to such things as education, basic physical and psychological needs, and security.'[33] If, the argument goes, a given regime is based on and enforces these standards, it will, or at least ought to,[34] and this is the second step, find acceptance—as a second-best—also among those who, in light of their own political agenda, cannot 'reasonably' endorse it as their preferred option. The reason behind this, McCabe emphasises, is not that the liberal state, of the kind he envisions, is morally superior (which it still is)[35] but that it 'offers terms for peaceful social coordination'[36] whose instrumental value not even the 'thoughtful critic' can plausibly deny.[37] What that means is that concessions, in McCabe's MVL, serve a very specific purpose, and that is to manage and include the 'reasonably' illiberal within the liberal state, so as to overall increase its legitimatory constituency.[38]

Now, even if one was to go along with McCabe's premises here—which, for obvious reasons, the realist cannot[39]—there exists a fundamental difficulty with this approach. Political subjects for whom the 'minimally' liberal order represents a compromise solution (ought to) not only *accept* it as a second-best but, much more importantly, *take second place* in its construction; these are very different things: McCabe's 'thoughtful critics' are partially accommodated for by their liberal counterparts, but they are also, and to a considerable degree, stripped of their political agency to bring about change

[31] Ibid 16, 136-43.
[32] Ibid 7, also at 138.
[33] Ibid 138.
[34] McCabe does not have an actual political process but only a hypothetical legitimation in mind.
[35] After all, it is based on 'moral values that *any morally decent person* must endorse', McCabe, above n 25, 138 (emphasis added).
[36] Ibid 133.
[37] The idea of MVL, in short, 'rests on a wager: that citizens will tolerate others' having broad liberties and accept that state power will not be used to advance their particular normative framework' (ibid) in exchange for them being afforded the same liberties, to claim and enjoy, within the—caveat—'minimal' moral constraints that are imposed by the liberal order. Importantly, however, individual acceptance of this wager need not be motivated by moral reasons; it can be purely pragmatic, ibid 159-60.
[38] For a similar attempt, see Roberta Sala, 'Modus Vivendi and the Motivations for Compliance' in John Horton, Manon Westphal and Ulrich Willems (eds), *The Political Theory of Modus Vivendi* (Springer, 2019) 67. Sala, in response to Rawls, argues that, while 'reasonable' people endorse, and 'unreasonable' people categorically reject, liberal institutions, a third category of 'non-reasonable' people can subscribe to them as a *modus vivendi*, if only to enjoy the basic benefits of social cooperation.
[39] In light of chapter 2, it should be clear that the proposed 'trimming' of the liberal position does not in fact change the liberal position (see above n 35); moreover, acceptance cannot be hypothetical.

in accordance with their own preferred frameworks.[40] In other words, they are, again, or, rather, still expected to conform to a set of pre-political standards which lie beyond that which can 'reasonably' be contested—that these standards are, by some measure, considered 'minimal' is, frankly, beside the point. John Gray seems to pick up on that when he urges liberals to face 'the fact' that 'universal goods'[41] are plural, conflicting, and incommensurable. They are 'compatible with many moralities,' he writes, '*including* liberalism as it has been understood by recent philosophers who take their cue from Locke or Kant; but'—and this is key—'they underdetermine them all.'[42] No ranking, no metric for comparison, Gray argues, can deliver certainty as to which value(s) ought to prevail at any given place and time.[43] And so, conflicting demands, inside the individual and the community, 'can be resolved only by making a decision.'[44] Not *a priori*, but from within 'the ironies and tragedies of politics',[45] which echoes 'the truth'[46] that 'universal goods' lend themselves only to contingent settlement, compromise, that is, between different ways of life, 'some of them no doubt yet to be contrived.'[47]

Gray is not alone in invoking the notion of value pluralism to explain the need for and, as will be seen later, the practice of political compromise.[48] Attractive as this approach may seem, though, it is mistaken. The reason for this was touched on in chapter one,[49] but it should strike home more forcibly now. Anchoring the experience of human difference and disagreement to a meta-thesis about the composition of the moral domain does not in fact abandon the commitment to moral truth; it simply exchanges one truth for another.[50] And this is nowhere more obvious than when it comes to articulating the terms of what can and cannot, on this particular view, be *conceded*. After all, doing so

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[40] One might add that this holds true also for those who defend a *liberal* view that exceeds or undercuts McCabe's 'minimalism'. In light of the analysis presented in chapter 2, however, it seems overall more likely that his criteria, broad and unspecific as they are, will simply 'absorb' diverging views.
[41] John Gray, *Two Faces of Liberalism* (Polity Press, 2000) 8.
[42] Ibid 67 (emphasis added).
[43] As he puts it, '[d]isputes about which regime is everywhere best are without sense', ibid 67.
[44] Ibid 65.
[45] Ibid 139.
[46] Ibid 5.
[47] Ibid 5.
[48] Compare especially Richard Bellamy, *Liberalism and Pluralism: Towards a Politics of Compromise* (Routledge, 1999), and Martin Benjamin, *Splitting the Difference: Compromise and Integrity in Ethics and Politics* (University Press of Kansas, 1990).
[49] Revisit the discussion in chapter 1 at 23-24.
[50] See John Horton, 'John Gray and the Political Theory of Modus Vivendi' (2006) 9(2) *Critical Review of International Social and Political Philosophy* 155, 159-61 who responds directly to Gray; and more generally, the account by Patrick Overeem, 'Compromise, Value Pluralism, and Democratic Liberalism' in Christian F. Rostbøll and Theresa Scavenius (eds), *Compromise and Disagreement in Contemporary Political Theory* (Routledge, 2018) 115.

requires those who hold it to take a stance on what *is* valuable to begin with. As Horton aptly puts it, '[t]his is the dog that fails to bark' in most pluralist accounts,[51] but it waits quietly in the shadow of a negative contrast. Gray's 'universal goods', for instance, are defined against the backdrop of a set of 'evils that forestall anything recognizable as a worthwhile human life.'[52] Torture, genocide, and humiliation, poverty, ill health, and being 'separated from one's friends, family or country',[53] are among the examples that he offers.[54] Others, like Richard Bellamy, go so far as to suggest that 'claims based on self-serving bias or prejudice'[55]—he appeals to 'those of sexists or racists'[56] and other kinds of 'fanatics'[57]—should be 'treated as *prima facie* unacceptable.'[58] Yet, no matter the moral baseline, the problem remains that there *is* a moral baseline.[59] And so, while somewhat sympathetic to the realist critique,[60] these accounts, too, are unable to fully emancipate the concept of political compromise from the liberal position.

If it is not 'the intrinsic worth or reasonableness'[61] of the concessions made, however, what determines whether or not an arrangement constitutes a compromise at all? Judging from the foregoing, one may well conclude that compromise is simply the outcome of whatever the practice of politics happens to throw up—and, in a way, that is entirely accurate. To take some of the sting out of it, though, recall that the practice of politics, as conceptualised here, and thus the normative grounding of political compromise, too, is built on Williams's 'basic legitimation demand'.[62] In line with that understanding,

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[51] And quite understandably so, for 'to suggest that this is a question that the theorist of value pluralism is in a privileged position to answer would be to introduce a theoretical hubris on par with that of the liberal philosophers', Horton, above n 50, 160-61.

[52] Gray, above n 41, 138. His claim 'rests on the fact that the experiences to which these evils give rise are much the same for all human beings, whatever their ethical beliefs may be… [It] reflects a constancy in *human nature*', ibid 66 (emphasis added). In a similar vein, Avishai Margalit, *On Compromise and Rotten Compromises* (Princeton University Press, 2010) who rules out every compromise whose terms, in his opinion, are 'unfit for humans' (at 89).

[53] Gray, above n 41, 66; see also 106-7, where he appeals to 'the satisfaction of basic needs to all.'

[54] Gray admits that it is impossible to provide an exhaustive list of 'evils', but their content 'is a matter of knowledge, of *true belief* founded on experience', ibid 66-7 (emphasis added).

[55] Bellamy, above n 48, 138.

[56] Ibid.

[57] Ibid 107. 'Paedophiles, for example, are a justly oppressed minority group', ibid 128.

[58] Ibid 138.

[59] To be fair, Gray acknowledges that '[e]ven minimal standards can be met in different ways', above n 41, 67, but that does not change the fact that, on his view, there are 'universal evils' which every person and, by extension, every 'acceptable' political regime needs to recognise.

[60] This is especially true for Gray, who has repeatedly called out the liberal camp for promoting 'projects of collective self-assertion, which seek to entrench and privilege a specific identity by legal and political means', see *Post-Liberalism: Studies in Political Thought* (Routledge, 1993) 14. Bellamy, on the other hand, gravitates rather openly towards a communitarian or neo-republican position. For him, politics is and has to be 'a forum of principle', above n 48, 101, 116.

[61] Bellamy, above n 48, 125.

[62] Revisit the discussion in chapter 2 at 54-56.

the question to ask is not whether a particular outcome, and the concessions that led to it, are acceptable from 'a roughly *moral* point of view',[63] as the liberal camp continues to insist, but whether they are acceptable from the *actual* point of view of those living under the arrangement.[64] What that means, then, first of all, is that the 'conflict point' mentioned at the beginning of this section is an empirical, not a moral one—no value, no opinion, no interest,[65] and no belief is *per se* and always off the table. Rather, '[t]o say that an issue *is* properly subject to compromise is to say that, as a matter of fact, it is one on which two or more parties present conflicting claims.'[66] The same is true for the 'aspiration point'. It has become curiously common even among otherwise fervent political realists to link the element of concession to a substantive quest for 'peace'.[67] That gets things the wrong way around. Relative 'peace' is a perceived by-product of an effective coordination of diverging representational claims, whatever their content; it has no overriding, no independent value.[68] That is, compromises may, of course, but they need not be, accepted with a special view to promoting 'peace'.[69] And similarly, the observation alone that, by some measure,[70] political arrangements *are* promoting 'peace' is no conclusive evidence of their being the outcome of a compromise.

What follows is that there can only be two *normative* conditions: (i) concessions have to, in fact, be mutual (not: 'equal'),[71] or else it is capitulation; and (ii) they have to, in fact, lie between the 'conflict point' and the 'aspiration point' of those who commit to making them. Where that is, exactly, cannot be determined *a priori*. It will differ from context to context, from time to time, and, most importantly, from agent to agent.

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[63] Bellamy, above n 48, 110 (emphasis added).
[64] In other—Williams's—words, the arrangement has to 'make sense' for those subject to it, for moral reasons or other. Horton gets this right, see, e.g., 'Realism, Liberal Moralism and a Political Theory of Modus Vivendi' (2010) 9(4) *European Journal of Political Theory* 431, 438-40; 'Political Legitimacy, Justice and Consent' (2012) 15(2) *Critical Review of International Social and Political Philosophy* 129, 141-45; 'Modus Vivendi and Political Legitimacy' in John Horton, Manon Westphal and Ulrich Willems (eds), *The Political Theory of Modus Vivendi* (Springer, 2019) 131, 140-43.
[65] Due to liberalism's extraordinary focus on questions of value, interests have long been treated as the ugly stepchild. A realist account of political legitimacy, by contrast, can acknowledge and deal with the fact that conflicts of interest are no less prevalent than and, indeed, meticulously entangled with those of value, compare Horton, 'John Gray and the Political Theory of Modus Vivendi', above n 50, 161.
[66] Jones and O'Flynn, above n 20, 124 (emphasis added).
[67] See, e.g., Chandran Kukathas, *The Liberal Archipelago: A Theory of Diversity and Freedom* (Oxford University Press, 2003); and Fabian Wendt, 'Peace Beyond Compromise' (2013) 16(4) *Critical Review of International Social and Political Philosophy* 573.
[68] Revisit the discussion in chapter 1 at 32-33, and chapter 2 at 54.
[69] Even Horton, if slightly more sceptically than others, asserts that 'peace and security… have at least instrumental value to almost everyone', 'Realism, Liberal Moralism and a Political Theory of Modus Vivendi', above n 64, 438; but see 'Modus Vivendi and Political Legitimacy', above n 64, 135 (n 11).
[70] The value of 'peace' (like that of 'justice', 'equality' or 'rights') is subject to different interpretations.
[71] The relevant 'exchange rates', too, are agent-specific, see Rouméas, above n 21, 385-86.

2. Continued conflictuality[72]

With Horton, it is fair to say that the account of compromise developed here 'lacks the theoretical glamour (and moral self-righteousness)'[73] of its liberal competitors. It does remain true to the mechanism of representation, though, and an important part of that mechanism is captured in the idea of compromise as political *settlement*. In approaching this idea, return for a moment to the conceptual interplay between 'state' and 'civil society' as set out in chapter one.[74] The main take-away from that discussion was that the emergence of 'the state' as an identifiable political entity, the 'fiction' of a unified 'people' capable of collective action, is predicated upon and ultimately resides in the successful institution and maintenance of a representative body of government—with 'representative' being the operative word. A government, however constituted, cannot act on behalf of a fractured 'multitude' (civil society). Its task lies in recognising and responding to that 'multitude' by forging an appearance of unity (state) instead. And the way to achieve that, paradoxically, is not to eliminate or suppress differences and disagreements, but to keep them alive as much as practically possible while engaging in sustained efforts of de-escalation.[75] The 'fiction' of 'the state', then, arises not from the construction of a social organic whole but from an ongoing transformation of 'first order' political conflict into 'second order'—ordinary—politics.

Now, declaring compromise, as has been done here, a crucial facilitator[76] of this transformation may prompt two objections, from two starkly opposite directions. The first, recently and, perhaps, most forcefully made by Alexander Ruser and Amanda Machin, is that compromise, too, if not to the same extent as a hypothetical consensus, 'covers up' positions that failed to be included, and 'waters down' those that were.[77] To begin with the latter, Ruser and Machin are quite right, of course, in saying that compromise

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[72] This phrase has been coined by Christian Arnsperger and Emmanuel B. Picavet, 'More than Modus Vivendi, less than Overlapping Consensus: towards a Political Theory of Social Compromise' (2004) 43(2) *Social Science Information* 167, 194.
[73] See 'John Gray and the Political Theory of Modus Vivendi', above n 50, 167. For a more conciliatory comparison, see Arnsperger and Picavet, above n 72, 175-80.
[74] See chapter 1 at 25-33.
[75] Frank R. Ankersmit puts the point thus: 'the political challenge… [is] not how to create consensus out of disagreement but how to square the political circle—how to take action meant to prevent civil war that would not lead to civil war in and of itself', see 'Representational Democracy: An Aesthetic Approach to Conflict and Compromise' (2002) 8(1) *Common Knowledge* 24, 27, and also at 31.
[76] As noted before, the focus of this thesis is on the foundations and limits of *government* intervention. It does not dismiss the fact that regulation, in the sense of normative ordering, can and does operate on a broad spectrum of social modalities, not all of which will (need to) take the shape of a compromise.
[77] See Alexander Ruser and Amanda Machin, *Against Political Compromise: Sustaining Democratic Debate* (Routledge, 2017) 44.

requires all those who are party to it to yield some ground—possibly even fundamental ground—to the other side(s), thus adjusting their original position. Properly construed, however, and that should have become clear over the course of the preceding section, this requirement makes sense only against the backdrop of persistent disagreement. It is perfectly accurate, in other words, to describe compromise as a form of cooperative political behaviour.[78] But it does not strive to, in fact, it cannot, without contradiction, generate substantive agreement on the issue in dispute.[79] Its rationale is one of conflict confinement and strategic suspension, of limited and, most importantly, subject-driven depoliticisation that allows for settlement on *a particular course of action*.[80] None of the parties renounce their individual preferences and beliefs, and precisely because no view can claim 'victory' over the rest, the outcome will bear the imprint of all of them in complex and myriad, though not necessarily equal, ways.[81] Compromise, therefore, occupies the volatile space between open and disruptive ('first order') political conflict and moral consensus based on its normative and (or) ontological denial. A space which Christian Arnsperger and Emmanuel B. Picavet call 'continued conflictuality'.[82]

Turning to Ruser and Machin's second concern, this notion becomes even more compelling. Their claim, again, is that not only do compromises '*inevitably* exclude certain positions';[83] they render opposition mute. Half of this claim is misleading whereas the other half overshoots. Compromises are, it seems fair to suggest, more inclusive, more open to multiplicity and difference than an unworldly pursuit of 'reasonable pluralism' could ever be,[84] but that does not mean that it is at all likely for any one policy or piece of legislation to attract even grudging support (for whichever reason) by all those who eventually become subject to it.[85] So, of course, Ruser and Machin are absolutely right in saying that compromises, too, are not 'universally' acceptable and, indeed, to argue

[78] The parameters of which will be discussed in section II.
[79] If it did, the situation would be one of correction or revision, not of compromise. As Simon Căbulea May explains, 'compromise occurs when a political agent invokes the fact of disagreement as a reason to accept an alternative that she perceives to be worse on its own merits than her initial position… [it] involves no recognition of any error', 'Principled Compromise and the Abortion Controversy' (2005) 33(4) *Philosophy & Public Affairs* 317, 318-319; similar, Jones and O'Flynn, above n 20, 127-28.
[80] Compare Ankersmit, above n 75, 27, 45; Arnsperger and Picavet, above n 72, 174-5, 182-85, 190-91, 195-98; and Manon Westphal, 'Agonistic Compromise' in Sandrine Baume and Stéphanie Novak (eds), *Compromises in Democracy* (Springer, 2020) 95, 98, 101-4.
[81] Ankersmit, above n 75, 45-46; Arnsperger and Picavet, above n 72, 174-78.
[82] See above n 72; compare also Westphal, above n 80, 98.
[83] Ruser and Machin, above n 77, 38 (emphasis in original).
[84] Compare Ankersmit, above n 75, 39-43; Arnsperger and Picavet, above n 72, 198.
[85] This was touched on already in the discussion of Williams's 'basic legitimation demand' in chapter 2 at 54-56, and it will be central in moving forward on the implications of thinking 'realistically' about substantive criminal laws, compliance issues, and consequences (chapters 4-6).

otherwise would be to gravely misunderstand, and misconstrue, the realist project. Yet it follows not, as they go on to submit, that compromise will therefore 'suture political debate.'[86] Every decision, once in place, creates a thread of dynamics affirming its own validity, and political decisions are no exception to that. The essence of decision, however, is choice; the exercise of judgment in the face of competing alternatives. And in a compromise—where there is no 'truth', no single version of the 'good', or the 'right', or the 'supreme' interest of all, to be proclaimed[87]—even the most radical alternatives are hard to fully discard. That is, put more positively, things could and always can be *different*. The notion of 'continued conflictuality', thus, extends beyond the internal relationship of the compromising parties to those who (for whichever reason) feel that they cannot live with the ensuing outcome at all.[88] And so, in clear distinction from a hypothetical consensus on a set of higher-level principles, political compromise makes the reality of opposition a conceptual element,[89] the need for re-configuration an ever-present possibility, and the inevitable act of exclusion a reversible contingency.

In light of these considerations, the second objection from the opposite end of the critical spectrum should be fairly evident—and evidently unconvincing. Along Rawlsian lines, many liberal philosophers dismiss the concept of political compromise for a lack of neutrality and its perceived threat to stability.[90] Both of these observations are true and neither is particularly worrying. The previous analysis, from chapter one onwards, has established that the representative state, by definition, is not a neutral state. Unlike its liberal counterpart(s), though, it does not pretend to be one either. It is 'a regulated

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[86] Ruser and Machin, above n 77, 38.

[87] Once again, if only for fear of being misunderstood, the concept of political compromise developed here is not dependent on a theory of moral relativism, or any other moral theory, for that matter. There may or may not be a set of norms, values, or higher-level principles governing every question of human co-existence, or at least the most 'basic' ones. But the problem remains that as long as these 'truths' are not universally and uniformly held, real governments will have to figure out how to *legitimately* answer those questions anyway. Which does not mean, and this, too, has been stressed before, that moral claims are somehow doomed to become irrelevant. Political compromise will always, and among other things, be driven by (the subjects') moral claims. Due to its conflictual nature, though, none of these claims is likely to take precedence over all others: '[c]ompromise, like representation itself, organizes knowledge rather than discovers and defends it', Ankersmit, above n 75, 39. See also Arnsperger and Picavet, above n 72, 184, who rightly note that, in real politics, 'ethics… is relevant from an individual point of view, concerning matters which can be collective by nature.'

[88] It is worth pointing out here that compromising can also be crucial in building oppositional coalitions to challenge and eventually overtake an incumbent political regime, see Westphal, above n 80, 100-4.

[89] Hans Kelsen defends this point in 'On the Essence and Value of Democracy' in Arthur Jacobson and Bernhard Schlink (eds), *Weimar: A Jurisprudence of Crisis* (University of California Press, 2002) 84, 100-3, where he describes compromise as the outcome of a clash of political wills, reduced to a majority and a minority, whose continued recognition is mutually constitutive.

[90] To be fair, this criticism is mostly, and most strongly, levelled at a 'realist' *modus vivendi*, as opposed to a 'liberal' compromise. As was seen in section I.1., though, only the former is, in fact, a compromise.

sphere for the continuation of disagreement, and for the constant renewal and circulation of mutually incompatible claims.'[91] And as Hans Kelsen notes, 'that cannot mean a "higher", absolute truth, an absolute value above group interests… but [only] a compromise.'[92] Now, to be sure, all of this makes the art of governing more difficult, more complex and unpredictable than it would be if everyone agreed, or could be converted to agree on a few basic, moral principles, ready for implementation. But it also makes it, and this is so rarely acknowledged,[93] a genuinely creative endeavour, grounded and expressed in the unfettered potential of human agency. It seems very strange, therefore, to conclude, as Charles Larmore, like others, does, that subjects in pursuit of political compromise are 'hostage to the shifting distribution of power'[94]—between themselves and their fellow 'hostages'—and that, inevitably, they 'will lose their reason to uphold the agreement if their relative power or bargaining strength increases significantly.'[95] Of course, no *legitimate* political arrangement is immune to change; yet equally, there is no reason to believe that compromises are inherently unstable.[96] Properly embedded in the institutional landscape, they may well inspire a culture of flexibility and political accommodation.[97] But these are questions to be addressed in the next section.

II. The politics of compromise

To think about the politics of compromise is to think about how, in everyday political practice, the normative requirements of the concept of compromise can be realised and secured. Before moving on to this task, therefore, it seems useful to briefly recap what these requirements are. Compromise, the way it has been defined here, is a *settlement* reached by way of *mutual concession*. As such, it describes a contingent, and always

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[91] Arnsperger and Picavet, above n 72, 175 (emphasis suppressed), 180, 197-98. Compare also Chantal Mouffe, *On the Political* (Routledge, 2005), 29-34; *The Democratic Paradox* (Verso, 2000), 15 and 33; and the discussion on difference, disagreement and conflict in chapter 1 at 23-25.
[92] Kelsen, above n 89, 102-3 (emphasis suppressed).
[93] Ankersmit, above n 75, 39, for one, elegantly captures this sentiment when he asks: 'What mechanism in the complex machinery of representative democracy [note that Ankersmit, rightly, differentiates between representation and democracy, see ibid 32] stimulates political creativity most? The best answer, I believe, is political compromise… and the politician who formulates the most satisfactory and lasting compromise in a political conflict is the political artist par excellence.'
[94] 'Political Liberalism' (1990) 18(3) *Political Theory* 339, 346.
[95] Ibid.
[96] As Horton points out, precisely because compromises are based on reasons that are, in fact, acceptable to those who are subject to them, they 'may [and have often proven to] be quite robust and persist for a considerable period of time', 'John Gray and the Political Theory of Modus Vivendi', above n 50, 162.
[97] Horton, 'Realism, Liberal Moralism and a Political Theory of Modus Vivendi', above n 64, 440; on motivational impact, see Patrick Neal, *Liberalism and its Discontents* (Macmillan Press, 1997), 194-95.

alterable, decision on a particular course of action, which none of the parties consider to be ideal. What is and is not ideal is determined exclusively by the individual parties themselves, that is, the substantive criteria which the outcome has to approximate (but can never fully satisfy) are context-, time- and agent-specific, and that includes, but is in not limited to, moral criteria of any kind. Thus construed, political compromise is firmly rooted in the mechanism of representation, as a 'mode of conflict processing',[98] a continuous construction of 'the state' as an entity capable of collective action.

One way to implement these requirements in practice would be to promote a particular *mindset* or *motivational disposition* of the parties by conveying the 'right' reasons for concessions, the 'proper' attitude towards other parties, etc. And indeed, this approach has become very popular.[99] Amy Gutmann and Dennis Thompson, for instance, lament the loss of 'the compromising mindset' in US politics and urge legislators to embrace a 'constructive attitude towards, and willingness to engage in good faith',[100] with their political opponents. Compromising, they argue, is based on 'mutual respect', 'a virtue that makes debate more civil and relations more collegial',[101] and that must as a matter of principle exclude all efforts 'to degrade, humiliate, or otherwise demean.'[102] Daniel Weinstock echoes these concerns. For him, 'real' compromise (unlike a 'mere' *modus vivendi* which he, with Rawls, thinks is 'rhetorically induced' by 'bad arguments' and 'skilful manipulation')[103] can result only 'from the operation of deliberative practices embodying a moral concern with one's fellow citizens.'[104] It has to be geared towards respect and genuine reciprocity and for the most part, at least, 'based on the exchange of reasons.'[105] Bellamy seconds this plea for 'civic friendship'[106] but expresses it even

[98] Westphal, above n 80, 105.
[99] The literature on political negotiation or bargaining is extensive; a few examples will have to do. Note also that the terms 'negotiation' and 'bargaining' are generally taken to mean the same thing; when not, as will be seen shortly, the difference is largely tied to a difference in attitude (see below n 103).
[100] Gutmann and Thompson, above n 20, 34.
[101] Ibid 111.
[102] Ibid 34; see 101-9 for their account of 'principled prudence'. Similarly, compare Mark E. Warren et al, 'Deliberative Negotiation' in Jane Mansbridge and Cathie Jo Martin (eds), *Political Negotiation: A Handbook* (Brookings Institution Press, 2016) 141, 160.
[103] 'Compromise, Pluralism, and Deliberation' (2017) 20(5) *Critical Review of International Social and Political Philosophy* 636, 639, 648. As briefly discussed in above n 24, it is has become quite common to distinguish compromise and *modus vivendi* not with reference to the outcome but the attitude of the participating parties, the latter often being characterised as 'brute' bargaining. For Weinstock, a *modus vivendi* 'results from the playing out of purely strategic and tactical dynamics'; the parties, he writes, 'are motivated by the wish to sue whatever advantage they can' (ibid 639). Similar suggestions have been made by Arnsperger and Picavet, above n 72, 185-88; and Bellamy, above n 48, 124-25.
[104] Weinstock, above n 103, 647.
[105] Ibid 644. Weinstock admits that it may be hard to fully 'sanitise' political debate in this way.
[106] Ibid 643.

more demandingly. A 'just and long-lasting'[107] compromise, in his opinion, is 'part of a search for… a shareable good… with the interests and values of others being matters to be met rather than constraints to be overcome.'[108] 'True' negotiators,[109] he contends, frame their position with some degree of impartiality and public-mindedness, tapping into 'civic virtues such as civility, charity, courage and honour.'[110] That adopting such 'an alarmingly purist posture'[111] may not always be possible, though, and, indeed, not strictly advisable either, is noted by Eric Beerbohm.'[N]egotiation on the way to compromise', he writes, 'is a competitive exchange of speech acts, some aimed at persuading, others at urging.'[112] Bluffing, threats, and other 'unsavoury tactics', therefore, are just as or more common, and can be just as useful in improving one's own bargaining position and reaching mutually acceptable results, as is a single-minded dedication to truth and virtue.[113] More importantly, however, *not* allowing for any recourse to these tactics will leave parties who choose to act 'honourably' vulnerable to those who skirt the rules.[114] To address this problem, Beerbohm submits, one need not give up on motivational forces altogether, but the compromising mindset has to be a 'thinner' and a more flexible one, contoured only by 'the value we place in deciding *together*.'[115]

There is no question. All of these proposals are sincere and well-intentioned attempts to rein in the often divisive and emotionally charged dynamics of political argument, and they all have some merit. Compromise, by definition, is impossible whenever one side simply rides roughshod over the other. Still, trying to counter these tendencies by appeal to the parties' personal disposition towards their opponents is both normatively inconsistent and practically unpromising. The first part of this claim, it stands to hope,

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[107] Bellamy, above n 48, 102.
[108] Ibid 101.
[109] Bellamy, like Weinstock and others, strictly distinguishes between (respectable) 'negotiators' and (strategic) 'traders', the latter being associated primarily with the practice of *modus vivendi*, ibid 96-102, and compare above n 99 and 103.
[110] Ibid 111; see also 106, 138.
[111] See Eric Beerbohm, 'The Problem of Clean Hands: Negotiated Compromise in Lawmaking' in Jack Knight (ed), *Compromise: NOMOS LIX (Yearbook of the American Society for Political and Legal Philosophy)* (New York University Press, 2018) 1, 17.
[112] Ibid 4.
[113] Ibid 7-12.
[114] Ibid 12-18.
[115] Ibid 30 (emphasis added); Beerbohm construes this 'value' as a distinctly democratic one, and that for him, means that it comes with 'certain [unspecified] procedural and substantive conditions', ibid 29. Michele M. Moody-Adams, 'Democratic Conflict and the Political Morality of Compromise' in Jack Knight (ed), *Compromise: NOMOS LIX (Yearbook of the American Society for Political and Legal Philosophy)* (New York University Press, 2018) 186; and Christian F. Rostbøll, 'Democratic Respect and Compromise' (2017) 20(5) *Critical Review of International Social and Political Philosophy* 619 have made similar proposals based largely on attitudinal considerations.

needs little explanation. To argue that political agents in pursuit of compromise ought to find themselves motivated through 'virtue', 'value', or 'moral concern'—no matter how 'thin' or 'thick'—would be to introduce through the back door all that which has previously (in section I.) been ejected through the front door. With the only difference now being that the constraint on what ought to be 'done' (political action) is revealed for what it truly is: a constraint on what ought to be 'willed' (political opinion).[116] The larger point, however, is this. Neither the concept of making (mutual) concessions nor the practice of doing so can be severed from the conflict which makes them necessary in the first place. On the conceptual level, as was seen earlier, this means that the limits of what can and cannot be conceded are determined by the issue in dispute, a *de facto* clash of normative expectations articulated at a particular time in a particular place, as well as the assessment of the relative validity and importance of these expectations by the affected parties themselves. Now, to advocate that, in practice, those parties ought to 'positively respect the views of others, recognise alternative identities to be equally valid as their own, or remould their conceptions of the good to be "inclusive" rather than "exclusive", or even to mandate indifference to them', to quote Horton, would be to artificially detach the content and assessment of these expectations 'from associated *negative* evaluations of beliefs and ways of life with which they conflict, and accompanying attitudes towards the people who embrace them.'[117] Real-life arguments, that is to say, and particularly those involving issues that are deemed moral in nature, tend to give rise to strongly held positions whose defence—at least to some degree—entails judgments of disapproval or condescension, an unequivocal rejection of what is considered 'wrong' or undesirable, and at times flat-out contempt for those who 'wilfully, indeed, self-righteously and unapologetically'[118] choose to think differently.

This does not mean, of course, that there cannot also be occasions where at least some of the parties involved are inclined to see the other side in a more favourable light. It means that the practice of compromise, if it is to have any grip on political reality and the conflicts most in need of attention,[119] cannot for its success depend on these occasions being the norm. At the same time, there is no getting around the fact that the idea

[116] As a consequence, and here the parallel to a liberal consensus that cannot 'reasonably' be rejected is particularly stark, the failure to reach and (or) accept a compromise is, once again, a *personal* failure, a *dispositional* defect. Revisit the discussion in chapter 2 at 52-53.
[117] See John Horton, 'Why the Traditional Conception of Toleration Still Matters' (2011) 14(3) *Critical Review of International Social and Political Philosophy* 289, 289-99 (emphasis added).
[118] Ibid 300; see also 290, 298-302.
[119] Notably, those about to cross the 'friend-enemy' threshold, see chapter 1 at 32-33.

of mutual and mutually acceptable concessions relies for its effective implementation on a certain capacity for 'toleration'. From a realist perspective, however, this capacity cannot be understood in terms of genuine 'respect',[120] 'active engagement',[121] or 'deliberative tolerance'.[122] It must be derived from the notion of compromise as political settlement, and its rationale of conflict confinement and strategic suspension. Becoming party to such a settlement, as was seen earlier, does not require that one relinquish one's own preferences, convictions, or beliefs. It requires that one accept (politically negotiated and always re-negotiable) limits to which one can *act* on them.[123] The kind of toleration needed to engage in concessions, thus, is no more, but also no less, than 'a deliberate exercise of self-restraint, a willed refusal to interfere'[124] with opponents whom one—perhaps, very strongly—disagrees with.[125] Considering that compromise, properly construed, comes with no restrictions as to the motivational resources which can be drawn on in support of a given arrangement (morality, (self-)interest, religious beliefs, compassion, raw opportunism, cost-benefit calculations, etc.), it seems fair to suggest that this capacity will generally be within reach.[126] Yet, it is also true, as Glen Newey has pointed out, that 'the circumstances [of toleration] only arise where at least one party (and usually each) is not prepared to act tolerantly'[127] *notwithstanding* their capacity to do so. The basic problem remains, in other words. A politics of compromise cannot solely, or even predominantly, rely on the parties' charitable dispositions.

A second, arguably more promising way to approach it, then, is to put in place a set of *institutional mechanisms* that encourage or even push reluctant parties to tap into their capacity for toleration and consider making concessions.[128] Before it can be discussed

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[120] Rainer Forst, *Toleration in Conflict: Past and Present* (Cambridge Universty Press, 2012).
[121] Ingrid Creppell, *Toleration and Identity: Foundations in Early Modern Thought* (Routledge, 2003).
[122] James Bohman, 'Reflexive Toleration in a Deliberative Democracy' in Catriona McKinnon and Dario Castiglione (eds), *The Culture of Toleration in Diverse Societies: Reasonable Tolerance* (Manchester University Press, 2003) 111.
[123] Recall that the same is true for all those who feel unable (for whichever reason) to accept the respective settlement at all (see section I.2. above). The restrictions on their range of congruent action will be more severe, however. This is a crucial point when it comes to understanding the exclusion caused by (coercive) legal intervention, and it will be fleshed out more fully over the following three chapters.
[124] Horton, 'Why the Traditional Conception of Toleration Still Matters', above n 117, 290.
[125] Again, individual parties may and often will embrace a more positive, and perhaps even principled, attitude of 'toleration' towards their political opponents. The point, though, is that they do not have to.
[126] Horton, 'Why the Traditional Conception of Toleration Still Matters', above n 17, 294-98; 'Toleration and Modus Vivendi' (2021) 24(1) *Critical Review of International Social and Political Philosophy* 45.
[127] Newey is excellent on this, see *Virtue, Reason and Toleration: The Place of Toleration in Ethical and Political Philosophy* (Edinburgh University Press, 1999) 134.
[128] Knight and Schwartzberg, above n 14, 272; Melissa Schwartzberg, 'Uncompromising Democracy' in Jack Knight (ed), *Compromise: NOMOS LIX (Yearbook of the American Society for Political and Legal Philosophy)* (New York University Press, 2018) 167.

what these might look like, though, it needs to be acknowledged that there is a bit of a chicken-or-egg situation here: whoever is designing institutions conducive to building compromise has to themselves already be committed to building compromise. So, even if these institutions, once established, go on to iteratively develop and take on a life of their own, the 'right' motivations will be indispensable to getting them off the ground. Granting this is not to negate that which has been argued before but it makes necessary two clarifications. First, the 'right' motivations, for the realist, still have nothing to do with the 'right' motivations, as demanded by liberals. They are much more pragmatic, oriented towards processes rather than people, and concerned with creating conditions conducive to generating collective action rather than the implementation of a particular set of ('shared') values. Psychologically, that means the bar to reach is a lot lower, and the commitments to make a lot different.[129] Second, at no point has it been suggested that a realist politics comes without the need for actual, political work. In many ways, the grievance that has inspired this thesis, and the realist agenda, more broadly, lies in the fact that liberal theorists, across disciplines, seem to be unaware or refuse to admit that instead of proclaiming some fundamental agreement or universally held 'truths', they are engaged in serious and, in part, highly successful, political advocacy. (If that were out in the open, the conversation would unfold rather differently.) The realist, by contrast, is and can be clear about making a prudential argument. An argument whose success will depend on its being carried into and proven 'right' by real politics.[130]

Now back to institutions. As was mentioned in the introduction, this is not the place to embark on an in-depth, possibly also comparative analysis of existing mechanisms, or

[129] Take the example of someone harbouring feelings of deep antipathy towards transgender people. For them, the idea that gender identities are fluid and can be different from biological sex is 'unnatural' and repulsive. The prospect of getting someone like this engaged in the practice of political compromise is pretty dire—if what is required of them is to adopt an attitude of 'respect' and 'civic friendship' towards transgender people and those who take more progressive views on the matter. In fact, asking them to do so may further harden their resentment, and alienate them from the political process, as the integrity of their own belief system is being attacked (an issue to be returned to in chapter 4). The more traditional conception of toleration defended here does not mount such an attack. It merely asks that in the interest of making some progress on collective issues, including more mondain ones unrelated to the ideological conflict, antipathies, however deep, are not to be acted upon (in violent ways or in the workplace, etc.); to accept that other, conflicting views are part of the mix and that keeping them there is likely to generate broader support. This is a considerably less demanding proposition—capitalising on a considerably less 'explosive' rationale (collective action, also as a matter of self-interest)—and a lot easier to get behind, especially when it comes to thinking about the fundamentals of institutional design.

[130] Scholarship can make a valuable contribution to that effort, and this thesis understands itself as one such contribution. Ultimately, as Horton notes, however, the realist project is 'a function of the political process... and of the political imagination, ingenuity, flexibility and adeptness of those much-maligned figures in contemporary political theory, politicians' who need to be urged—and empowered—to act as genuine representatives, 'Why the Traditional Conception of Toleration Still Matters', above n 117, 296.

to venture proposals for their improvement or replacement; some of this will be done, selectively, in subsequent chapters. Yet, before moving into this second, more applied part of the thesis, it is important to at least lay out, in general terms, the main functions which a set of mechanisms conducive to generating compromise will have to safeguard and promote (in ways appropriate to the political context in question). And a good way to narrow in on these functions is to turn to the work of Stuart Hampshire. Hampshire, an oft-neglected realist in disguise,[131] acutely aware both of the vitality of continuous conflict and the necessity of continuous conflict management,[132] construes the politics of compromise in purely procedural terms. As he puts it, it needs to be 'removed from the shadowy mental realm into the open world of institutions and practices.'[133] He also points out, however, that there is no 'one size fits all' solution to how these institutions and practices ought to be designed. Procedural rules and conventions 'come and go in history',[134] and they will always themselves be influenced by the very conflicts which they seek to address.[135] Still, 'one most general feature of the processes of decision is preserved as the necessary condition… that contrary claims are heard.'[136] *Audi alteram partem*—hearing and, possibly, being made to hear the other, the opponent's side; this, for Hampshire, is the foundation of ('second order') adversarial politics.[137]

And it is a foundation to build upon.[138] First, and considering that there are diverging interpretations of this requirement, though, it is worth re-emphasising that its purpose is not to nudge political opponents into 'discursive deliberation', a quasi-Habermasian 'ethic' of communicative openness, shared concern and 'dialogical learning'.[139] That,

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[131] The tide is turning, however. See, e.g., Edward Hall, *Value, Conflict, and Order: Berlin, Hampshire, Williams, and the Realist Revival in Political Theory* (University of Chicago Press, 2020) chapters 3-4.
[132] See *Justice is Conflict* (Princeton University Press, 2000), 33, 36: 'Neither in a social order nor in the experience of an individual is a state of conflict the sign of a vice, or a defect, or a malfunctioning… There normally is in any modern society a chaos of opinions and of moral attitudes. A reasonable person knows that there is this chaos, and those with strong opinions, or with fanatical hearts, deplore the chaos and hope for a consensus: usually a consensus in which their own opinions and attitudes are dominant… I expect a continuing political fight… This is the proper domain of politics.'
[133] Ibid 16.
[134] Ibid 16-18, 54.
[135] Procedures, too, that is to say, are unlikely to be uncontested: 'Like substantial conceptions of justice, the vehicles of dispute are expected to change as the untidy upshot of regular political conflicts… [They] are themselves compromises', ibid 29, 40. An added challenge, therefore, is to make sure that they are both flexible enough to change and robust enough to resist capture by any one party or group of parties.
[136] Ibid 16-17.
[137] In the interest of full disclosure, Hampshire grounds this idea in a contentious conception of 'universal' practical reason (see ibid 42), which opens him up to realist critique, and rightly so. It is not clear, though, why any such grounding should be necessary.
[138] However, not in the sense of supplying it with substantive content; cf. Hall, above n 131, 102-11.
[139] In this vein, James Tully, 'Recognition and Dialogue: The Emergence of a New Field' (2004) 7(3) *Critical Review of International Social and Political Philosophy* 84.

as was seen above, would be to advocate an overly demanding conception of political toleration, and one that can be very counter-productive.[140] The purpose of *audi alteram partem*, as understood here, is literal. It is to ensure a deliberately 'noisy' confrontation of competing representational claims, a surfacing of differences and disagreements, so as to make the practice of mutual concessions more likely and the (grudging) 'exercise of self-restraint'[141] an institutional necessity. To achieve this, *audi alteram partem* has to apply broadly throughout the political process; and while there is no single 'correct' way of doing this,[142] it seems plausible to pin down three functions associated with its successful implementation: *access*, *recognition*, and the prospect of *change*. As for the first, *access*, the very idea of 'hearing' competing claims, of course, presupposes that competing claims are 'politically audible'[143] to begin with. The institutional apparatus of the state, however constituted, thus has to allow for diverging opinions to find outlets for expression.[144] Be that through polling, elections, and assemblies,[145] the media, lobbyism, and pressure groups, or the formal foundation of and association in political parties.[146] *Recognition* ensures that these opinions, once 'audible', are in fact 'heard', that their existence is registered, if only by dismissal. Vote counting, majority rule,[147] and the duty to give reasons, especially for controversial decisions, are good examples of that. And lastly, the prospect of *change* stands for the idea that neither any of these practices themselves nor the outcomes they produce are set in stone, that decisions are recursive, can be altered, or even entirely reversed. Think here of (procedural) judicial and administrative review, term limits confining the mandate of elected and unelected representatives, and the periodic completion of consultation and voting processes.

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[140] See above n 129; and compare Schwartzberg, above n 128, 177, who, taking the filibuster rule in the US Senate as an example, notes that procedures requiring an almost consensus or very broad coalitions are less likely to foster constructive negotiation and elicit compromises, as individual actors or parties have more power to delay or block particular decisions and, thus, collective action altogether.
[141] See again Horton, 'Why the Traditional Conception of Toleration Still Matters', above n 117, 290.
[142] This also means that institutions need not necessarily be *democratic*; they need to be *representative*, which is not the same, compare Ankersmit, above n 75, 24-25, 32. That said, democratic institutions, of course, are usually well-placed to 'hear the other side', although there are important differences, as well. Arend Lijphart, *Patterns of Democracy: Government Forms and Performance in Thirty-Six Countries* (Yale University Press, 2nd ed, 2012) has shown that (poorly labelled) 'consensus democracies', those with cooperative, 'power-sharing' institutions and a proportional electoral system, outperform the more competitive and clear-cut majoritarian Westminster model used in most Anglophone jurisdictions.
[143] Hall, above n 131, 98.
[144] Hampshire himself emphasises this dimension, above n 132, 40-41.
[145] See Manon Westphal, 'Institutions of Modus Vivendi Politics' in John Horton, Manon Westphal and Ulrich Willems (eds), *The Political Theory of Modus Vivendi* (Springer, 2019) 255, 265-69.
[146] Kelsen, above n 89 argues that parties are 'the organizational conditions for… compromises' (at 93); after all, 'the isolated individual has no real political existence whatsoever' (at 92).
[147] Majority rule means no one can claim consensus where clearly there is none, Schwartzberg, above n 128, 178-83; Jeremy Waldron, *Law and Disagreement* (Oxford University Press, 1999) 107-16.

Now obviously, this is only a rudimentary sketch, but it should illustrate what is meant by saying that a politics of compromise, properly understood, is institutional, not dispositional. It is about making sure that political actors—whoever they are—encounter each other (emphasis on 'counter') in 'a system of ruled open-endedness, or organized uncertainty';[148] and, crucially, that they become *un*comfortable with being in it for the long run. As was seen, most theories of compromise and toleration seem to assume, or at least hope to create, a 'cushy' environment where no one is ever challenged on their most fundamental beliefs (provided they are the 'right' ones). The realist sees that, if toleration is to serve any genuine political purpose, it must start precisely where, these days, generally, it is about to end. Which should help address one final objection. The mechanisms referred to above are deeply familiar, essential elements of most modern democratic systems. Although not all of them are developed to their full potential,[149] and some, no doubt, are in decline.[150] But most modern democratic systems, too, resist the idea of them being used for the circulation of unpopular opinions (more on that in chapter four). So, while, perhaps, there is nothing quite new about the realist approach as it presents on paper, there is a long way to committing to it in political practice.

CONCLUSION

Undoubtedly, what has been offered here is no more than a gesture in the direction of a complete theory of political compromise, but it is, or so it was argued, a gesture in a better direction. Whereas most contemporary accounts harbour at least some residual commitment to the liberal paradigm, and thus entail, at best, a mild modification to the consensual structures from which they sought to depart, compromise as realist political settlement takes seriously the experience of difference and disagreement, and remains faithful to the mechanism of representation. With the conceptual framework thus fully contoured, it is time now to switch gear and explain how, in a given political context, this framework will translate into the practice of criminalisation. To this end, the next three chapters are designed as a sequence, with each exploring one specific aspect of criminal law as political compromise: the coordination of conduct (four), the quest for compliance (five), and the design and administration of consequences (six).

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[148] This beautiful phrase is borrowed from Adam Przeworski, *Democracy and the Market: Political and Economic Reforms in Eastern Europe and Latin America* (Cambridge University Press, 1991) 13.
[149] Think of the UK's electoral system (*recognition*) or the composition of the House of Lords (*change*).
[150] Think of the various forms of legal and extra-legal voter suppression in the US (*access*).

CHAPTER FOUR

COMPROMISE AND COORDINATION

INTRODUCTION

In search of a long-lost language of political normativity, the first three chapters have moved from a reckoning with the inconveniences of reality (difference, disagreement, conflict), to the purpose of legitimate government (the generation of collective action despite and because of an ongoing struggle for political representation), to the vehicle for its proper realisation: *compromise*. The second half, starting with this chapter, will be given over to the task of illustrating the implications of applying this framework to the politics of criminalisation. In particular, and rather pressingly, it will attend to the charge, levelled by liberal and moralist theorists alike, of giving free rein to excess and oppression when releasing the concept of state authority, and the law as its most powerful instrument, from deference to superseding values. This charge is unwarranted. It overlooks the fact, established in the preceding discussion, that political compromise, properly understood, is always and inevitably limited—by context, by history, and by the sheer multitude of human interests and ideas wrestling for accommodation. More importantly, though, it deflects attention, and much needed scrutiny, from the fact that it is precisely within the realms of moral conviction and immutable truth that the mantra of 'anything goes' lives up to its name; that it is not the institutional negotiation of difference but the systematic ('principled') removal of selected viewpoints from contestation that ought to be feared and vigorously challenged.

As indicated at the end of the last chapter, these arguments will be pursued along three distinct dimensions: coordination (this chapter), compliance (chapter five) and consequence (chapter six).[1] In line with the methodological remarks made at the very beginning,[2] however, it is the first dimension (coordination) which carries the most weight, normatively speaking. After all, the concept and practice of compliance and the design and administration of consequences each presuppose a firm understanding of what it is, exactly, that may, at a given time, in a given place, be the object of legitimate state intervention. To cultivate this understanding, this chapter begins with an abstract exposition of the basic tenets of criminal law as political compromise, and then presents two case studies—abortion and the criminalisation of 'hate'—for illustration and further discussion. The case studies draw on specific legislative experiences and associated developments from across a variety of jurisdictions, but they should not be read as exercises in pure comparativism nor, indeed, as efforts to provide a 'rational reconstruction' of existing criminal laws.[3] The aim is simply to highlight the ideas at work in the creation of different offences and to advocate for a new way of engaging in their evaluation—as part of a larger, regulatory project, a complex web of decisions taken, over and over, to keep the practice of politics alive and well.

I. A fresh start: realism, representation, regulation

Difference and disagreement are not curable flaws but endemic features of the political. Generating capacity for collective action requires that they be 'tamed' to a degree which prevents conflicts from emerging in an antagonistic mode. This task falls to the office of government, however constituted. It is the task that public laws are meant to perform. And it is, as a result, the point of entry for normative criminalisation theory. Or so it was argued. It was also argued that representation, a coordinative mechanism best understood with Hobbes,[4] is the key to legitimate de-escalation. Not every measure will do, in other words, least of all a blatant imposition of power.[5] Relatively stable

[1] More on the relationship *between* these three dimensions below under section I.
[2] See chapter 1 at 35-37.
[3] A curiously popular approach, given the subject matter. For criticism, see Nicola Lacey, 'Contingency, Coherence, and Conceptualism: Reflections on the Encounter between 'Critique' and 'the Philosophy of the Criminal Law'' in R. A. Duff (ed), *Philosophy and the Criminal Law: Principle and Critique* (Cambridge University Press, 1998) 9; for a passionate defence, see Neil MacCormick, 'Reconstruction after Deconstruction: A Response to CLS' (1990) 10(4) *Oxford Journal of Legal Studies* 539.
[4] For the full account, revisit chapter 1 at 25-33.
[5] On the conceptual distinction between power and authority, see chapter 1 at 35-36.

cooperation with institutional arrangements depends on their being congruent with the actual normative expectations of those to whom they are addressed.[6] Of course, seeing as these expectations are many and continually in flux—changing from context to context, from time to time, and from subject to subject—the degree to which they *can* be met is limited, and necessarily so. Representative government, therefore, is much like chasing after a moving target: an ongoing, potentially tiring, and inevitably imperfect process of approximation. Political compromise helps facilitate this process. It maximises partial congruence by way of mutual concession, enabling settlement on a particular course of action while leaving underlying disagreement and, by extension, the practice of politics intact.[7] It is this characteristic, the negotiated, and always alterable, restriction of the range of congruent action[8] that constitutes the heart of criminal law as political compromise and it prompts three interrelated conclusions for its normative evaluation: (i) it is a *decision*; (ii) it is a *regulatory* decision; and (iii) it is *a* regulatory decision on a wide and varied spectrum of possible regulatory decisions.

The first point may seem obvious; for how else to think about criminalisation if not as a decision,[9] taken by humans,[10] triggered by what is, right here and now, perceived to be a 'problem' of sufficient concern[11] as to merit government intervention? Indeed, is it not precisely this pattern of thinking which underpins the modern malaise of 'over-criminalisation'? It is not. And looking back at the discussions led in chapters one and two, it should be clear why. The vast majority of criminal law theorists approach their subject—more or less consciously, and with varying intensity—from what might well be described as akin to a natural law perspective. That is, criminalisation as a political practice is made answerable to a set of 'higher' principles derived from either ordinary interpersonal morality or an account of 'public reason'.[12] Unsurprisingly, these visions stand in tension with an empirical reality that resorts to criminalisation erratically and, often, without any apparent logic. Even less surprisingly, however, this tension is read

[6] In other (Williams's) words, they have to 'make sense'—for moral reasons or other—to those who are subject to them. For the full account, revisit the discussion in chapter 2 at 54-57.
[7] On the idea of 'continued conflictuality', see chapter 3 at 68-71, 74-75.
[8] To repeat, congruent action refers to the overlap between a subject's preferences, convictions, beliefs, etc., and the extent to which they can (legally) act on them. It can differ greatly from subject to subject.
[9] To be clear, the focus here, in line with the methodological remarks made at the end of chapter one, is on the initial decision to criminalise as taken, for instance, by a democratic legislature. But this decision, of course, opens the gate to a long criminalisation process that will involve further, arguably even more delicate, decision-making on the part of various political actors, such as police and prosecutors.
[10] In the near future, quite possibly, assisted by artificial intelligence.
[11] The question of *what* that is will be returned to in a moment.
[12] Revisit chapter 1 at 17-22 and chapter 2 at 40-48, respectively.

as confirmation that there is, there must be a way to get it 'right'.[13] What 'right' would look like, exactly, depends on the preferred narrative, and there is no need to rehearse them here,[14] but it will be recalled that they all come in the shape of an imperative: the state *ought to* proscribe pre-legal 'wrongs'; it *ought to* protect its subjects' autonomy, equality, dignity, etc., from threat and violation, or else it will fall below the threshold of what can, justifiably, be called a 'liberal' republic, a 'free' state. Criminal law, thus conceived, is uniquely important to the project of government, quite independently of what it actually accomplishes. And this holds true, as Alice Ristroph sharply observes, regardless of whether the narrative in question is packaged in retributivist or in consequentialist terms: these approaches may technically be pitched against each other, 'but in operation they function as two pistons in one pump.'[15] They carry intuitions for why criminal law is necessary and, since the realms of normative intuition are infinite, and infinitely self-referential, why, in case of doubt, more needs to be done, not less.[16]

Now, far from being misguided or irrelevant, it was argued here that claims about the 'right' substance of criminal laws, like any other claim about how political association ought to be configured, need to be located within, not hover outside, the arena of contested politics. And that is more than simply a matter of shifted emphasis. Once criminal law, as a concept, is purged of determinative content, and tied into the process of representation, every outcome of that process qualifies as a genuine decision based on and among competing alternatives. It may be a better (more legitimate) one, or a worse (less legitimate) one, depending on one's individual viewpoint and the overall congruence that is being achieved.[17] But it neither masks the concrete conflict that it is meant to control, nor the historical context in which it is situated. 'History', if appreciated as such,[18] 'shows us that laws are made and unmade and that nothing about our criminal

[13] Alice Ristroph, 'An Intellectual History of Mass Incarceration' (2019) 60(7) *Boston College Law Review* 1949, 1951 neatly captures this thought when she notes that 'crisis discourse about criminal law has an ideological mission: it implicitly asserts that the ugliest aspects of criminal law are exceptional and temporary… [It] asserts the possibility of egalitarian, just, and effective criminal law.'
[14] For reference, see above n 12.
[15] See Ristroph, above n 13, 1986, also at 1985, 2002-3.
[16] Accordingly, one should expect no genuine enlightenment from—and certainly no end to—the debate about the 'free' in freedom, the 'harm' in harmful, or the 'wrong' in wrongful.
[17] On the interplay between individual and overall congruence, see chapter 2 at 56-57.
[18] It can be tempting to think of history and intellectual history, in particular, as taking place on a linear path of progression. By that reasoning, modern—and that is, predominantly Western—ideas of freedom and justice are necessarily superior to those of earlier times and other places. (Interestingly, the impending future rarely seems to have a humbling effect.) Viewing these ideas as contextual judgments about what 'makes sense' (or, rather, made sense) in their own time appears preferable. It allows to trace and recognise the political struggle that went, and often still goes, into defending them, and to retain a sense of their fragility. Like here, Amanda Glasbeek, 'History Matters' in Deborah Brock, Amanda Glasbeek

law, the practices of criminalization, or the definitions of crime is inevitable.'[19] They are but 'snapshots' of continuous and dynamic government activity; and they can look a little messy, especially from up close. Which ties in neatly to the second point: construing public (criminal) laws as responsive to 'higher' principles, rather than the fluctuating, and maddeningly inchoate, expectations of those to whom they are addressed, has led many theorists to imagine a barrier between 'the law' and what are believed to be less sophisticated, managerialist attempts at 'regulation'. Markus D. Dubber nicely summarises, and regrettably reinforces, the problem when he writes that 'the distinction between regulation and law is… [that] between two aspects of the study of police: one that focuses on the actual activity of administration as it occurs and evolves constantly in the complex system of government that is the modern state, and the other that concentrates on the marginal procedural constraints[20] that the rule of law attempts to place on the practice of regulation.'[21] In regards to criminalisation, specifically, the alleged distinction is somewhat fuzzier but in the end no less pronounced: 'regulatory' offences and 'normal' public laws, the argument goes, are functionally analogous, and politically negotiable, in that they seek to coordinate activities that are 'of value' to the community;[22] but 'truly criminal' offences, often referred to as *mala in se*, surely, are distinct in that they 'must', as a matter of law, be prohibited.[23]

The account of political compromise developed here consolidates law and politics in one singular project: representative government. Which means that politics is checked by law no more than law is checked by politics. And there need be nothing scary about it; apart from the realisation, perhaps, that what truly requires checking is that politics is 'doing well'. Politics is 'doing well', it was argued, as long as disagreements (of any kind, including the 'unreasonable' ones) are kept alive and audible. That is, as long as

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and Carmela Murdocca (eds), *Criminalization, Representation, Regulation: Thinking Differently about Crime* (University of Toronto Press, 2014) 29, 30; Nicola Lacey, *In Search of Criminal Responsibility: Ideas, Interests, and Institutions* (Oxford University Press, 2016) 7-8.

[19] Glasbeek, above n 18, 30.

[20] The 'constraints' that Dubber refers to here are placeholders for notions such as autonomy, equality, and rights, all of which are inspired by even broader notions of freedom and personhood that, as will be clear by now, are neither 'procedural' nor 'marginal' (footnote added).

[21] 'Regulatory and Legal Aspects of Penality' in Austin Sarat, Lawrence Douglas and Martha Merrill Umphrey (eds), *Law as Punishment/Law as Regulation* (Stanford Law Books, 2011) 19, 37. Compare also chapters 3 and 4 in *The Dual Penal State: The Crisis of Criminal Law in Comparative-Historical Perspective* (Oxford University Press, 2018).

[22] See, e.g., Anthony Ogus, 'Regulation and Its Relationship with the Criminal Justice Process' in Hannah Quirk, Toby Seddon and Graham Smith (eds), *Regulation and Criminal Justice: Innovations in Policy and Research* (Cambridge University Press, 2010) 27, 28-29.

[23] See, e.g., Susan Dimock, 'The *malum prohibitum – malum in se* Distinction and the Wrongfulness Constraint on Criminalization' (2016) 55(1) *Dialogue* 9, 18-22.

diverging representational claims, opinions about what ought to be done, have *access* to a process of confrontation and contestation, are *recognised* for what they are, if only by dismissal, and can, time and again, *change* both the decisions that come out of that process and the specific rules by which they are being reached.[24] As was discussed in chapter three, decisions that fit the normative criteria of political compromise are more likely—and likely more congruent—where the above conditions are widely embedded within the institutional landscape of the state.[25] Conversely, however, every compromise decision itself makes sure that underlying representational claims and their continued articulation are not relevantly inhibited. Because again, compromise generates collective action by restricting the range of what ought to be done based on individual viewpoints, not by suppressing individual viewpoints on what ought to be done.[26] The line between the two can be a delicate one to draw, and it should become clearer once mapped onto actual offences, but the gist can be readily summarised. Criminal law as political compromise is concerned with behaviour modification.

Now, in light of these conclusions, it is indeed perfectly accurate, but more so, highly illuminating, to define the criminal law, in its entirety, as a coordinative or regulatory enterprise.[27] Which, to be quite sure, is not the same as saying that 'law' and 'regulation' are coextensive social phenomena. Regulation, as Julia Black points out, is best understood in terms of its function, not its form: it describes an 'intentional, problem-solving activity,[28] distinguished from other problem-solving activities (like maths) in that it attempts to alter the behaviour of others.'[29] A variety of techniques can be used to do that. Law, certainly, is one of them, but so are education programmes, incentive

[24] On the institutional requirements of *audi alteram partem*, see chapter 3 at 77-79.
[25] On the conceptual and practical difficulties associated with relying on the parties' intrinsic motivation to act tolerantly towards their political opponents, see chapter 3 at 72-75. The requirements of the realist conception of toleration will be returned to below under section III.
[26] Recall that this is true regardless of whether one accepts the respective settlement or not. The difference lies in the range of congruent action that becomes available. For those who feel they cannot accept the settlement at all, the range is virtually non-existent. This underscores the political exclusion caused by criminalisation, and will help re-think the allocation of both accountability and consequences.
[27] A step few have taken, see, e.g., Rachel E. Barkow, 'Criminal Law as Regulation' (2014) 8(2) *New York University Journal of Law and Liberty* 316; Malcolm M. Feeley, 'Criminal Justice as Regulation' (2020) 23(1) *New Criminal Law Review* 113; Nicola Lacey, 'Criminalization as Regulation: The Role of the Criminal Law' in Christine Parker et al (eds), *Regulating Law* (Oxford University Press, 2004).
[28] Black emphasises that, consistent with the goal of at least medium-term behaviour alteration, the activity needs to be 'sustained and focused' rather than one-off; by insisting on a degree of intentionality, she differentiates 'regulation' from other systems of 'social control' (technology, market forces, etc.) and an even broader notion of Foucauldian 'governmentality'. For a different approach, see John Braithwaite, *Regulatory Capitalism: How It Works, Ideas for Making It Work Better* (Edward Elgar Publishing, 2008) who (at 1) equates 'regulation' with 'steering the flow of events' (footnote added).
[29] 'Critical Reflections on Regulation' (2002) 27 *Australian Journal of Legal Philosophy* 1, 26-27.

structures, public awareness campaigns, and even architectural design. Similarly, regulation is not, and need not be, confined to government activity, or any particular area thereof.[30] It can involve both state and non-state actors, individuals and organisations, in different constellations and to different degrees, and it can address problems arising from any aspect of social co-existence.[31] Finally, however, there is no assumption, as Black emphasises, 'that problems are *correctly* identified, that decisions are *rationally* reached, or indeed that attempts [to alter behaviours] are *successful*.'[32] Regulation or, rather, the many modalities in which it can manifest are all intensely human practices, flawed and complex, and there will be variance, great variance, among techniques and across times and places, in how effectively they manage to operate. Looking at criminalisation through this lens should reinforce the themes developed over the course of this section, but it also helps frame the argument in the pages and chapters to come.

For one, it underscores the importance of thinking about criminal law as both optional and ordinary. Like public law generally, its mission is a functional one; it is not tied to any particular (least of all, a philosophically determined) subject-matter but a concrete clash of normative expectations; and it is not *per se* the best, let alone the only, means available to tackle that which is perceived to be the problem. Second, and this has been stressed from the start, criminal prohibitions are oriented towards compliance, not enforcement.[33] Sanctions, as will be discussed further in chapter six, can be necessary to compensate for (primary)[34] regulatory failure—and, given the political 'ordinariness' of criminal law, there will be plenty of reason to re-evaluate the 'extraordinariness' of contemporary penal measures—but activating them will always be a symptom of governmental failure; *governmental* being the key word. As will start to become apparent

[30] See Julia Black, 'Decentring Regulation: Understanding the Role of Regulation and Self-Regulation in a 'Post-Regulatory' World' (2001) 54(1) *Current Legal Problems* 103.
[31] Traditionally, regulation has been associated with economic policy and the correction of market failures. This may explain why many, both legal and regulatory, scholars continue to insist that regulatory intervention, unlike criminal intervention (see Ogus, above n 22), targets only activities that are considered to be 'of value' to the community or in the so-called 'public interest'; see Karen Yeung, *Securing Compliance: A Principled Approach* (Hart Publishing, 2004) 5, who in turn draws on Philip Selznick, 'Focusing Organisational Research on Regulation' in Roger Noll (ed), *Regulatory Policy and the Social Sciences* (University of California Press, 1985) 363. Black's approach, which is followed here, not only expands the field of vision—making regulation a possible response to any problem that needs controlling in some way—but is also sensitive to the fact that the 'value' of a regulated activity is likely to be controversial, or else it would not be in need of regulating. Once the 'value' criterion is dropped, there is no reason to separate criminal justice policy from other regulatory policy areas.
[32] 'Critical Reflections on Regulation', above n 29, 27 (emphasis added).
[33] Revisit chapter 1 at 34-37.
[34] Enforcement mechanisms themselves can have (secondary) regulatory effects, the grounds and limitations of which will be the focus of chapter 6.

in chapter five, criminal law as political compromise does not dispose of the idea of individual accountability. But it re-configures it so as to reflect a collective or, rather, a political dimension; after all, when force is necessary, authority and, which amounts to the same, representation are *lacking*. To be clear, from a realist perspective, there is no such thing as a perfectly legitimate state. But deficits can be more or less extensive and therefore more or less worrisome. Which prompts a third consideration. As societies diversify and grow ever more fragmented, the need for coordination, unavoidably, increases, too. Consequently, 'more' criminal law—as opposed to more enforcement, and contrary to much scholarly assessment—is not automatically a cause for concern. What is a cause for concern, and serious concern indeed, is 'moral' criminal law. The kind that seeks to alter minds instead of behaviours, replaces politics with punishment and thereby simultaneously fails to meet and actively oversteps its mandate to govern. The following two case studies, on abortion and on the criminalisation of 'hate', will explore the ways in which this drift can, or already has, taken place.

II. Reproductive politics and the politics of reproduction

Picking the regulation of abortion as a case study to illustrate the workings of political compromise may seem unoriginal, and to some extent it is; compromise theorists have latched onto the topic for years.[35] Mostly, however, from a distinctly 'liberal' perspective, that is, to 'prove' a substantive point about how in certain cases, where disagreements are (by some measure) considered 'reasonable', entering a compromise can be both 'practically necessary and morally acceptable.'[36] As was seen in chapter three, a genuinely *political* compromise is characterised precisely by the fact that it is up to the affected parties themselves, and no one else, to determine what is and is not acceptable to them—morally or otherwise—and so there will be made no attempt here to venture down a similar path.[37] Instead, the interest of this study is in demonstrating the various

[35] For three different arguments, see Richard Bellamy, *Liberalism and Pluralism: Towards a Politics of Compromise* (Routledge, 1999) 112-13; John Horton, 'John Gray and the Political Theory of Modus Vivendi' (2006) 9(2) *Critical Review of International Social and Political Philosophy* 155, 164-65; and, perhaps most dedicatedly, Simon Căbulea May, 'Principled Compromise and the Abortion Controversy' (2005) 33(4) *Philosophy & Public Affairs* 317.
[36] Bellamy, above n 35, 113.
[37] To repeat, there are two normative conditions that an arrangement needs to meet if it is to constitute a political compromise: (i) concessions have to, in fact, be mutual (not: equal)—or else it is capitulation—and (ii) they have to, in fact, lie between the conflict point and the aspiration point of those who commit to making them; where that is cannot be fixed *a priori*. Revisit chapter 3 at 62-67.

legal mechanisms used to regulate the practice of abortion, and in analysing how well they fare in terms of protecting the practice of politics. Of course, neither can be done without paying attention to different national contexts and conditions, wider historical developments, and associated challenges. Yet, for lack of space, if nothing else, rather than comprehensively surveying all of these aspects, they will be drawn on selectively to support, but also to flag up potential limitations of, the argument presented.

Now, it will hardly come as a surprise that abortion is among the most contentious and emotionally fraught policy issues faced by governments around the world—it involves 'a clash of absolutes, of life against liberty', as Laurence H. Tribe described it, somewhat dramatically, many years ago.[38] Though, to be more accurate, it involves a clash of *claims* about life and liberty, deeply conflicting claims, derived from the demands of morality, of religious commitment, of gender equality, of physical safety, of mental health, and of the standing and scope of what are believed to be the fundamental ('human') rights of a foetus and (or) of a woman[39] seeking to terminate a pregnancy.[40] In view of this, one might well assume that conflicts about abortion must be significantly more difficult to settle via political compromise than other, less entrenched social disagreements;[41] when, in reality, it is by far the standard approach.[42] Compromise is not like compromise, however. 'There are multi-faceted shades of grey between the poles of prohibition and permission',[43] and there are multi-faceted ways in which they can

[38] *Abortion: The Clash of Absolutes* (Norton Publishing, 1992) 3.

[39] Note that gendering the pregnant body is itself a political issue. There are voices in the literature trying to de-feminise abortion so as to include gender diverse people and men in the debate about reproductive choices, see, e.g., Barbara Sutton and Elizabeth Borland, 'Queering Abortion Rights: Notes from Argentina' (2018) 20(12) *Culture, Health & Sexuality* 1378; and Michael Toze, 'The Risky Womb and the Unthinkability of the Pregnant Man: Addressing Trans Masculine Hysterectomy' (2018) 28(2) *Feminism & Psychology* 194. Some jurisdictions have already adopted gender neutral language in their abortion legislation. In Australia, s 5(1) of the Abortion Law Reform Act 2019 (NSW) allows for the 'termination on a person who is not more than 22 weeks pregnant.'

[40] For an incisive overview of the philosophical debate, see Kate Greasley, *Arguments about Abortion: Personhood, Morality, and Law* (Oxford University Press, 2017) Part I.

[41] Compare Christopher Z. Mooney and Richard G. Schuldt, 'Does Morality Policy Exist? Testing a Basic Assumption' (2008) 36(2) *Policy Studies Journal* 199, 207-10; Christopher Z. Mooney and Mei-Hsien Lee, 'Legislative Morality in the American States: The Case of Pre-*Roe* Abortion Regulation Reform' (1995) 39(3) *American Journal of Political Science* 599, 600-1.

[42] At the time of writing, there are 24 jurisdictions in the world where abortions are prohibited without exception (necessity principles may apply): Andorra, Aruba, Congo, Curaçao, Dominican Republic, Egypt, El Salvador, Haiti, Honduras, Iraq, Jamaica, Laos, Madagascar, Malta, Mauritania, Nicaragua, Palau, Philippines, San Marino, Senegal, Sierra Leone, Suriname, Tonga, West Bank and Gaza Strip; see the real-time map by the Centre for Reproductive Rights, available online at: https://maps.reproductiverights.org/worldabortionlaws?category[294]=294 [last accessed 10 March 2023].

[43] Christian Adam, Steffen Hurka and Christoph Knill, 'Conceptualizing and Measuring Styles of Moral Regulation' in Christoph Knill, Christian Adam and Steffen Hurka (eds), *On the Road to Permissiveness? Change and Convergence of Moral Regulation in Europe* (Oxford University Press, 2015) 11, 17, emphasising that regulatory intervention operates on a continuous spectrum.

be created. But as a general trend—even though, as will be seen shortly, there are some powerful counter-trends—one can say that from the late 1960's onwards, abortion law has progressively become less restrictive.[44] Which, it should be re-emphasised at this point, is not equivalent to saying that it has progressively become 'better'. The verdict of 'better' or 'worse' is a contextual one. It entails an empirical evaluation of the degree of congruence achieved between a specific legal arrangement and the normative expectations of those to whom it is addressed. 'Restrictiveness', on the other hand, is an analytical category. It describes the behavioural boundaries set by the arrangement in question, and the consequences, if any, that attach to non-compliance.[45] Restrictive abortion laws, then, can be highly congruent, and permissive ones highly incongruent, and vice versa; and what 'makes sense' in one place need not 'make sense' at all or to the same degree in another place or at another time. What matters is how well concrete political pressures are, and can be, transmitted into concrete regulatory decisions.[46]

With these preliminaries out of the way, the legal mechanisms used to secure compromise about abortion can be looked at more closely. One can distinguish between three main types, although most governments resort to at least two of them in combination. The first is criminalisation or, more precisely, *default criminalisation*. That is, the deliberate termination of a pregnancy (by whichever method) is made liable to criminal sanctions, unless certain conditions are met. Both the available sanctions and the conditions of impunity vary greatly across jurisdictions. Sanctions can run from criminal fines, especially in Western Europe, through to (mandatory) imprisonment, including for life, such as in some states of the US.[47] Conditions of impunity are more intricate. They generally involve several, often layered requirements, both substantive and procedural, and the substantive ones can again be subdivided in those that are situational

[44] Towards the end of the 19th century, most jurisdictions around the world—be it under civil, common, or Islamic law—had banned abortion in all cases but those in which the woman's life was at risk (this exception was either statutory or provided for under considerations of necessity), see the report by the United Nations Population Division, 'Abortion Policies: A Global Review' (2002), Section I: Major Dimensions of Abortion Policy, available online at: https://www.un.org/en/development/desa/population/theme/policy/AbortionPoliciesAGlobalReview2002_Vol3.PDF [last accessed 10 March 2023].
[45] Adam, Hurka and Knill, above n 43, 12-13.
[46] See Christian Adam, Christoph Knill and Steffen Hurka, 'Theoretical Expectations Regarding Sources and Directions of Morality Policy Change' in Christoph Knill, Christian Adam and Steffen Hurka (eds), *On the Road to Permissiveness? Change and Convergence of Moral Regulation in Europe* (Oxford University Press, 2015) 45, 52-54.
[47] Sanctions are much more severe for, or apply exclusively to, the physician who procures or assists in procuring the abortion than for the woman who obtains it. Alabama's Human Life Protection Act 2019 (HB 314) is a case in point: it makes abortion (virtually from the point of conception) a Class A felony, which attracts up to 99 years of imprisonment, but excepts the woman from liability.

and those that are temporal. Situational requirements range from restrictive to permissive: the most restrictive abortion compromises allow for exception from liability only on medical grounds, that is, in cases where it is attested that continuing the pregnancy would pose a threat to the woman's life or health;[48] less restrictive laws include cases where the pregnancy was itself the outcome of a criminal act, especially a rape (sexual assault), or where the foetus exhibits serious or fatal abnormalities;[49] more permissive compromises make abortions legal in cases where the woman is considered or considers herself unable to carry to term and (or) raise a child for personal or socio-economic reasons;[50] while the most permissive laws make it available upon request.[51] Different temporal restrictions can and usually do apply to all of these conditions. They are tied to gestational age and associated viability considerations, and reach from the detection of a foetal heartbeat,[52] which is possible as early as five weeks into the pregnancy, into the second and third trimester.[53] And finally, there are procedural conditions, including mandatory counselling, waiting periods, (multiple) physician approval, spousal or parental consent, and the requirement to perform the abortion in a designated clinic.[54]

It is important to understand that compromises can be struck not only *on* the sanctions dimension and (or) *on* the impunity conditions dimension, but *across* the two. Kerstin Nebel and Steffen Hurka, in their study of the development of abortion laws in Europe between 1960 and 2010,[55] found that 'countries often moved towards permissiveness

[48] Note that, at this level, 'health' is usually taken to mean 'physical health'; compare below n 50.
[49] This remains the standard approach in many Central and South American jurisdictions, where reform movements have caught on comparatively late, but see Merike Blofield and Christina Ewig, 'The Left Turn and Abortion Politics in Latin America' (2017) 24(4) *Social Politics* 481.
[50] This is where mental health concerns come into play and (or) tend to be given more weight. In Great Britain, for example, s 1(1)(a) of the Abortion Act 1967 holds that procuring an abortion is legal where 'the continuance of the pregnancy would involve risk, greater than if the pregnancy were terminated, of injury to the physical or mental health of the pregnant woman or any existing children of her family.' Whether this is in fact the case will be determined by medical professionals who are free to interpret the clause widely, thus effectively implementing an upon-request model, see Greasley, above n 40, 204.
[51] Examples with very similar provisions in this regard are Germany, Austria, and (now) Spain.
[52] Several US states, most of them in the 'bible belt', have passed, or tried to pass, so-called 'heartbeat bills' in 2018 and 2019 after Justice Brett Kavanaugh had been appointed to the US Supreme Court.
[53] Generally, late second and all third trimester abortions need to be medically indicated.
[54] Accessing clinical abortion procedures during the Covid-19 pandemic has been a challenge for many women around the world. Developments at the height of the first wave of infections were reported by the International Planned Parenthood Federation, online at: https://www.ippf.org/news/covid-19-pandemic-cuts-access-sexual-and-reproductive-healthcare-women-around-world [last accessed 10 March 2023]. Some jurisdictions have responded by (temporarily) lifting or at least amending respective requirements. Others, such as several states in the US, have declared abortion a 'non-essential' healthcare service, and thus limited access further, see Barbara Baird and Erica Millar, 'Abortion at the Edges: Politics, Practices, Performances' (2020) 80 *Women's Studies International Forum* 1, 2.
[55] 'Abortion: Finding the Impossible Compromise' in Christoph Knill, Christian Adam and Steffen Hurka (eds), *On the Road to Permissiveness? Change and Convergence of Moral Regulation in Europe* (Oxford University Press, 2015) 58.

in a stepwise fashion, adjusting rules [that is, behavioural boundaries] while leaving sanctions untouched, or vice versa.'[56] These compensation patterns are typical policy reactions in contexts where representational claims are morally charged and unambiguously pulling in opposite directions. They do not respond to any specific claim fully, but manage to increase the degree of partial congruence and thus, at least temporarily, lower the temperature of the entire conflict.[57] And temperatures were running high in 1960's Europe and across the (primarily) Anglophone West. Concerns about post-war economic recovery had given way to demands for profound social change; one 'began to hear calls for the legalization of drugs, for free sex, abortion, no-fault divorce, the liberalization of restrictions on pornography and any kind of censorship of free expression, women's liberation, minority rights, environmental protection, world peace and one world government, and the separation of church and state, taking moral education out of the schools.'[58] Abortion, however, was an especially 'hot' topic. Women's organisations and other equality advocates soon rallied for aggressive policy reforms, and the medical profession found itself alarmed by, and actively sought to challenge, the thriving practice of illegal 'backstreet' abortionists.[59] The predictable outcome of this mobilisation, of course, was a counter-mobilisation of conservative forces. 'Pro-life' interest groups and the Catholic Church, in particular, cemented and became very vocal about their strict stance on political efforts to relax existing bans.[60]

To be sure, not all jurisdictions were affected equally by these struggles; nor did they all respond to them at the same time or in the same manner. Switzerland, for instance, despite being situated in the heart of Europe, 'managed to absorb[61] external pressures towards a more permissive style of regulating abortion for a very long time', as Nebel and Hurka observe.[62] Almost 40 years, to be exact—Switzerland introduced a medical

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[56] Ibid 68.
[57] See Adam, Knill and Hurka, above n 46, 52-54.
[58] Scott C. Flanagan and Aie-Rie Lee, 'The New Politics, Culture Wars, and the Authoritarian-Libertarian Value Change in Advanced Industrial Democracies' (2003) 36(3) *Comparative Political Studies* 235, 251.
[59] In Great Britain, these challenges were highly successful and eventually nudged the government to leave the interpretive power over the new Abortion Act 1967 provisions to the physician instead of the pregnant woman; see Melanie Latham, *Regulating Reproduction: A Century of Conflict in Britain and France* (Manchester University Press, 2002) chapter 4 and, critically, Sally Sheldon, *Beyond Control: Medical Power and Abortion Law* (Pluto Press, 1997).
[60] Nebel and Hurka, above n 55, 69.
[61] Note that 'absorption' here means that despite the existence of significant pressures, caused by social mobilisation, political advocacy, and cases of non-compliance washing up in the courts, the policy status does not change, see Adam, Knill and Hurka, above n 46, 53 (footnote added).
[62] Nebel and Hurka, above n 55, 73.

indication model (broadly interpreted) in 2002, after decades of campaigning and numerous failed reform attempts, and in no small part, this was due to institutional constraints, notably women's suffrage: on the national level, women did not win the right to vote until 1971; on the Canton level, the last restrictions were lifted only in 1990.[63] Consequently, during a crucial period of modernisation, women and women's claims, which is not the same thing, were systematically underrepresented on every thinkable policy issue, including abortion, confirming that where *access* is limited—or virtually non-existent—*recognition* and *change* and thus, ultimately, political compromise are hard to find.[64] To avoid misunderstanding, this is not to suggest that women somehow 'naturally' gravitate towards permissive regulations, and that policies 'must' move in that direction once they are adequately represented. Many jurisdictions have seen considerable fluctuation in abortion laws,[65] and others have moved rather slowly, despite having granted women's suffrage much earlier, during the first wave of feminism.

New Zealand, certainly, will come to mind in this regard. The Electoral Act 1893 conferred full voting rights on women ahead of every other country in the world; and the right to stand for parliamentary elections was won in 1919.[66] Still, insofar as abortion laws were concerned, New Zealand's approach in the 1960's was not more permissive than that of other jurisdictions, and subsequent reform efforts took nearly a decade to catch up to the developments in Great Britain,[67] where the Abortion Act 1967—still in force today—legalised the procedure for medical and eugenic reasons.[68] Things have changed, however. In 2020, New Zealand joined other former British colonies in removing abortion from the realm of criminal law entirely.[69] Which does not mean that

[63] For a (short) history of women's suffrage in Switzerland, see the website of the Oxford Human Rights Hub at: https://ohrh.law.ox.ac.uk/womens-suffrage-in-switzerland/ [last accessed 10 March 2023].
[64] This is not the place to dive into this in any detail, but the Swiss political system is peculiar in many ways, making it rather difficult to push through new policies, especially on the national level, compare Wolf Linder et al, 'Switzerland' in Dieter Nohlen and Philip Stöver (eds), *Elections in Europe: A Data Handbook* (Nomos, 2011) 1879, 1879-85.
[65] Examples are Spain, Poland and, of course, quite a few states in the US (to be returned to below).
[66] For a (not so short) history of women's suffrage in New Zealand, see the official history website by the New Zealand government at: https://nzhistory.govt.nz/politics/womens-suffrage/brief-history [last accessed 10 March 2023].
[67] The Abortion, Contraception and Sterilisation Act 1977 was passed by what was basically still an all-male parliament. On the perceived paradox between women's rights and conservative reproductive policy in New Zealand, see generally Alison McCulloch, *Fighting to Choose: The Abortion Rights Struggle in New Zealand* (Victoria University Press, 2013).
[68] Nebel and Hurka, above n 55, 70-73; compare also above n 50.
[69] The Abortion Legislation Act 2020 was passed with a majority of 68 to 51 votes on 18 March 2020: https://www.parliament.nz/en/pb/bills-and-laws/bills-proposed-laws/document/BILL_89814/abortion-legislation-bill [last accessed 10 March 2021].

its practice has been de-regulated. Quite the opposite; it shows that it can be regulated differently, by other means, namely as *a healthcare issue*. Now, of course, both provision of and access to abortion services are always, albeit to varying degrees,[70] subject to other, non-criminal regulatory mechanisms, which, too, can be more or less restrictive, but full decriminalisation marks a significant shift in focus. While situational and temporal restrictions may remain in place—under the new legislation in New Zealand, termination can be performed upon request up until 20 weeks into the pregnancy, and later where deemed 'clinically appropriate' to preserve the woman's physical or mental health[71]—the primary regulatory interest lies in ensuring the appropriate execution, not the omission of the procedure. On the medical practitioner's side, this interest can find articulation in licensing requirements, best practice guidelines, data reporting and protection duties, and rules regarding conscientious objection and referral. On the patient's side, it might entail counselling, fixed 'cool-off periods', consent requirements, and prescription-only access to abortion medicines. Public information, sex education, early pregnancy testing, and safe access zones can have further regulatory impact.[72]

Apart from New Zealand, several Australian jurisdictions—in fact, all but one—have opted for this approach and removed abortion from the criminal law.[73] Its real pioneer, however, was Canada—if somewhat by accident. In January 1988, six years after the Charter of Rights and Freedoms had been entrenched in the Constitution, the Supreme Court of Canada ruled that s 251(4) of the Criminal Code, which set out the conditions of impunity for the offence of abortion,[74] violated a woman's right to life, liberty and security of the person under s 7 of the Charter.[75] The statute required that the majority of a 'therapeutic abortion committee' at an accredited or approved hospital (the practitioner who performed the procedure could not be a member) had certified in writing that the continuance of the pregnancy 'would or would be likely to endanger her [the woman's] life or health.' By a 5-2 division, a majority of the Court held that the statute

[70] Usually, the more permissive (criminal) abortion laws are, the more supplementary regulations there tend to be. Great Britain is a case in point, see generally Jonathan Herring, Emily Jackson and Sally Sheldon, 'Would Decriminalisation Mean Deregulation?' in Sally Sheldon and Kaye Wellings (eds), *Decriminalising Abortion in the UK: What Would It Mean?* (Policy Press, 2020) 57.
[71] Abortion Legislation Act 2020, ss 10, 11.
[72] Reed Boland, 'Second Trimester Abortion Laws Globally: Actuality, Trends and Recommendations' (2010) 18(36) *Reproductive Health Matters* 67, 75-76.
[73] The first jurisdiction was the Australian Capital Territory (2002), followed by Victoria (2008), Tasmania (2013), the Northern Territory (2017), Queensland (2018), New South Wales (2019), and South Australia (2021). Regulatory regimes vary by state and territory, funding is provided federally.
[74] The provision had been introduced in 1969.
[75] *R v Morgentaler* [1988] 1 SCR 30.

'forces women to carry a foetus to term contrary to their own priorities and aspirations and… imposes serious delay causing increased physical and psychological trauma to those women who meet its criteria.'[76] Paired with the Court's assessment that the committee procedure was arbitrary and unfair, the infringement of the Charter right under s 7 was deemed unsalvageable.[77] The loss of the (federal) offence meant that abortion abruptly became subject to standard (provincial) healthcare regulation; attempts to enact a new (federal) criminal law immediately after the decision were unsuccessful and soon dropped completely.[78] It is important to note, however, that the Court did not rule out the possibility of such a law. 'State protection of foetal interests', it held, 'may well be deserving of constitutional recognition', but it did not specify the conditions under which 'any such interests might prevail over those of the woman.'[79] The ball, in other words, was tossed back to Parliament and Parliament 'failed' to catch it. Every catch, though, to labour the metaphor, could have, and still can, trigger the whistle. Because compromise on abortion, the struggle of 'life against liberty', is not simply a matter of public health policy; it has been drawn into the realm of constitutional adjudication.

In Canada, this approach has held up very well so far. The Court's decision was,[80] and still is,[81] in step with public opinion, and given that it did not in fact establish a 'right' to the procedure, but merely struck down a law which arbitrarily denied it, the margin for political decision-making (seemingly) remains relatively wide. Canada's partisan culture, moreover, was, already at the time, not such as to press the issue. Many Conservatives, leaning towards British 'traditionalism', were like their Liberal colleagues

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[76] Ibid 63 (per Dickson CJ).
[77] Ibid 76 (per Dickson CJ); s 1 of the Charter provides that rights and freedoms are subject to 'such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society', opening the door to a proportionality test which, according to the Court, s 251(4) had clearly failed.
[78] There was a lot of regulatory activity in the provinces, however. Throughout the 1990's, access and funding remained fairly limited, see Joanna N. Erdman, 'In the Back Alleys of Health Care: Abortion, Equality, and Community in Canada' (2007) 56(4) *Emory Law Journal* 1093, 1094-95. The last (brief) attempt to re-open the debate on the federal level was in 2012 under the Harper administration.
[79] *Morgentaler*, above n 75, 76 (per Dickson CJ).
[80] According to the May 1988 Gallup Poll, over 80% of Canadians were in favour of legalising abortion always (22.6%) or under certain conditions (61.5%). The data is available online at: http://odesi2.scholarsportal.info/webview/index.jsp?object=http://142.150.190.128:80%2Fobj%2FfStudy%2Fcipo-533-1-E-1988-05&mode=documentation&v=2&top=yes [last accessed 4 March 2023]. It is also noteworthy that by 1988, female voter turnout in elections was far higher than male voter turnout, see the report by Jane Jenson for the Inter-American Commission of Women: 'Women's Citizenship in the Democracies of the Americas: Canada' (2013) 13, available online at: http://www.oas.org/es/cim/docs/ciudadaniamujeresdemocracia-canada-en.pdf [last accessed 4 March 2023].
[81] The August 2022 IPSOS Poll found that over 70% of Canadians think that abortion should be legal in all (46%) or most (25%) cases, 5% think it should be banned entirely, and 9% would favour a ban in most cases: https://www.ipsos.com/sites/default/files/ct/news/documents/2022-07/Global%20Advisor-Global%20Opinion%20on%20Abortion%202022-Graphic%20Report.pdf[last accessed 4 March 2023].

inclined to relegate abortion to the private sphere[82] and, in light of significant support expressed by the medical profession, showed reluctance to stir controversy.[83] (Which also explains why the Conservative leadership in both attempts to re-introduce federal legislation did not impose party discipline on the vote.) That said, 'not everywhere is Canada.'[84] Indeed, just across the southern border the dangers of moving contextual claims about the 'rightness' and 'wrongness' of abortion,[85] and the messy process of their repeated reconciliation, out of the political and into the judicial arena could not be more apparent. And once again, taking a look back proves highly instructive.

Until the 1960's, as was typical then, most US states had very restrictive abortion laws allowing termination only in cases where the woman's life was demonstrably at risk. But yielding to the pressures of the time, reform was underway. As early as 1959, the American Law Institute issued recommendations to decriminalise abortion for medical (non-fatal) reasons, in cases with criminological indication (rape, incest), and where the foetus exhibited grave abnormalities—and several states followed suit, some even going beyond the Institute's recommendations.[86] By 1973, the year of *Roe v Wade*,[87] a third of all US states had either significantly broadened the scope for legal abortion or decriminalised its practice for women;[88] public opinion was divided almost equally still, but started to move towards partial liberalisation.[89] Once the US Supreme Court

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[82] Jim Farney, 'Cross-Border Influences or Parallel Developments? A Process-Tracing Approach to the Development of Social Conservatism in Canada and the US' (2019) 24(2) *Journal of Political Ideologies* 139, 150-51.

[83] Drew Halfmann, *Doctors and Demonstrators: How Political Institutions Shape Abortion Law in the United States, Britain, and Canada* (University of Chicago Press, 2011) 3-4. To be very clear, abortion is not beyond contestation (compare the poll results in above n 80 and 81)—although there are groups and organisations, on both sides, that wish it were, see, e.g., the blog entry by Joyce Arthur, 'Women's Rights Are Not Up for Debate' (2009) for the Abortion Rights Coalition of Canada, available online at: https://www.arcc-cdac.ca/nodebate/ [last accessed 10 March 2023].

[84] Marge Berer, 'Abortion Law and Policy Around the World: In Search of Decriminalization' (2017) 19(1) *Health and Human Rights Journal* 13, 23. Germany is comparable to Canada in terms of having effectively 'settled' the abortion issue after constitutional review, but both reasoning and outcome are very different. The Bundesverfassungsgericht struck down two laws amending the offence of abortion *pre* (BVerfGE 39, 1) and *post* (BVerfGE 88, 203) re-unification for violating a foetus's right to life and human dignity under Art. 2(1), 1(1) Grundgesetz. It further demanded that these rights be protected under *criminal* law and narrowed the legislature's discretion regarding the conditions of impunity.

[85] The same is true for any other contested policy issue, of course.

[86] Interestingly, these early reform efforts were often driven by members of the Republican Party, see Daniel K. Williams, 'The GOP's Abortion Strategy: Why Pro-Choice Republicans Became Pro-Life in the 1970s' (2011) 23(4) *Journal of Policy History* 513, 515-16.

[87] *Roe v Wade*, 410 US 113 (1973).

[88] Joshua C. Wilson, 'Striving to Rollback or Protect *Roe*: State Legislation and the Trump-Era Politics of Abortion' (2020) 50(3) *Publius: The Journal of Federalism* 370, 373.

[89] Reporting on (archived) US Gallup Poll results from 1969 and 1973 (the latter survey was carried out before *Roe*), the *New York Times*, 28 January 1973: https://www.nytimes.com/1973/01/28/archives/gallup-poll-finds-public-divided-on-abortions-in-first-3-months.html [last accessed 10 March 2023].

had intervened, however, this chain of incremental, bottom-up, political change was broken. Abortion had been declared a *constitutional right*, and thereafter every claim to the contrary was not merely an opinion anymore, not even a temporarily 'defeated' opinion—it was *wrong*. And the backlash, predictably, was tremendous. Within days of the decision and all through the 1970's and 1980's, anti-abortion activists, interest groups, and partisans demanded a 'Human Life Amendment' to the Federal Constitution, and numerous state governments pushed for legislation (frequently struck down by the judiciary) to heavily restrict access and procedures within the margins that *Roe* had left them.[90] The 1992 US Supreme Court ruling in *Planned Parenthood of Southeastern Pennsylvania v Casey*,[91] handed down with the hope of smoothing the waters, only galvanised the conflict further. It replaced the *Roe* framework, allowing obstructive regulation from the third trimester, with a flexible 'undue burden' test applicable from viability, which in the years since has generally been interpreted as an invitation to 'pro-life' legislatures to have their turn in defending the 'rights' of the foetus.[92]

To put this clearly, both *Roe* and *Casey* sought to establish a compromise in the sense of setting behavioural boundaries that, in theory, are acceptable from a variety of perspectives, but the terms of that compromise never originated from nor came within the political reach of those to whom it was addressed. The awkward and awfully irritating consequence of this development, as Conor Gearty noted already in 2006, is 'that the supposedly super-democratic United States is now a place where it is remarked without any intended irony that the most important task facing an elected president is his or her selection of members of the Supreme Court.'[93] For as soon as *Roe* was in place, it was high up on a lofty bench not down in the pit of politics that the 'abortion wars'[94] were being decided—and the 'wars' were raging on ever more viciously. The 2010's, particularly in the years after Donald Trump had been elected, saw an unprecedented surge in regulatory activity, on both sides, but more so in 'pro-life' and 'battleground'

[90] Compare Wilson, above n 88, 374-75; and Noya Rimalt, 'When Rights Don't Talk: Abortion Law and the Politics of Compromise' (2017) 28(2) *Yale Journal of Law and Feminism* 327, 363-66.
[91] *Planned Parenthood of Southeastern Pennsylvania v Casey*, 505 US 833 (1992).
[92] Compare Neal Devins, 'Rethinking Judicial Minimalism: Abortion Politics, Party Polarization, and the Consequences of Returning the Constitution to Elected Government' (2016) 69(4) *Vanderbilt Law Review* 935, 962-82.
[93] *Can Human Rights Survive?* (Cambridge University Press, 2006) 86. One might argue, of course, that the appointment of justices by an elected president is itself a measure, sufficiently political in the sense advocated here, to secure congruence. And if the entire bench were replaced after and composed in line with each election, that argument might be compelling. But since justices are, as of now, appointed for life, at unpredictable and, as of late, fairly perilous moments in the electoral cycle, it is not.
[94] Devins, above n 92, 946.

states, and more often to undermine *Casey*;[95] party lines have deepened markedly, fostering ideological identification with reproductive policies;[96] and every abortion case added to the docket of the (now mostly conservative) US Supreme Court sends shock waves around the entire country. Or, at least, it did, until *Dobbs* v. *Jackson Women's Health Organization*, upholding a Mississippi state law banning access after 15 weeks of gestation, 'return[ed] the issue of abortion to the people's elected representatives.'[97] The decision, handed down in June 2022,[98] found that there is, after all, no such thing as a constitutional 'right' to abortion: abortion is a matter of state politics.[99]

Now, while the outcome itself is laudable from a realist point of view,[100] the decision is infused with comments acknowledging—and favouring—the 'rights' of the foetus, and thus has only exacerbated the extraordinary blow suffered, often quite literally, by all those acknowledging—and favouring—the 'rights' of the woman seeking to abort. (Not to mention the fact that an increasing erosion of voting rights in the US, through gerrymandering and repressive measures such as felon disenfranchisement, to be dealt with in chapter six,[101] makes a genuine return to representative politics very difficult.) Still, there is reason to be optimistic; for while it is hard to say what has been the cause (there likely is more than one) of the extreme polarisation in the US, the lack of actual politics, also and especially with respect to abortion, certainly has been a contributing factor. Compromises do not do the work they are meant to do—stabilise conflicts at a

[95] See Wilson, above n 88, 377-91. 'Pro-life' measures include TRAP laws—a telling acronym for the 'targeted regulation of abortion providers'—that restrict abortion access through seemingly unintrusive healthcare laws, mandatory waiting times and foetal ultrasound screenings, and an increased lowering of the gestational age limits (on the so-called 'heartbeat bills', see above n 52); 'pro-choice' measures include expanded insurance coverage, the opening of (free) designated clinics, and repealing old laws.
[96] See Devins, above n 92, 969-82; and the 2022 data by the Pew Research Center: https://www.pewresearch.org/religion/fact-sheet/public-opinion-on-abortion/ [last accessed 10 March 2023].
[97] *Dobbs* v. *Jackson Women's Health Organization*, 597 US __ (2022), 6 (per Alito J).
[98] A draft opinion was leaked by the news platform Politico in early May 2022. Full text available online at: https://www.politico.com/news/2022/05/02/read-justice-alito-initial-abortion-opinion-overturn-roe-v-wade-pdf-00029504 [last accessed 10 March 2023].
[99] Both *Roe* and *Casey*, in other words, were overruled. The Court held that the constitutional text did not provide any reference to abortion, and that it was neither implicitly protected by an entrenched right nor rooted in the US's history, tradition, or broader conception of civil liberty.
[100] It is difficult but necessary to differentiate between (i) the despair and moral outrage felt (and shared) at the very tangible and very dire consequences faced by so many women who can be, and have already been, subjected to strict abortion bans as a direct result of *Dobbs*, (ii) the constitutional reasoning behind it (which one may or may not find compelling), and (iii) the political potential unleashed, given that the Court did not in fact ban the practice of abortion, but rather returned the question of whether and, if so, how it should be regulated to the arena of politics, where it belongs and where it can be answered in any direction. The 'real' problem is not that abortion is now (or, rather, again) a matter of political decision making—a 'right' that can and has to be argued over, but that most US Americans, after *Roe*, have been drawn into ideological camps, and either do not trust (often, for good reasons) or want (for not so good reasons) their own democratic institutions to effectively moderate the conflict.
[101] See chapter 6 at 145-47.

level conducive to generating collective action—when they are imposed from above, when particular representational claims can simply be 'validated' in court rather than having to be negotiated, time and again, in the realm of opinions. As was seen over the course of this section, abortion can be moved, like every other policy issue, from the very 'core' of the criminal law (here, do note, the law of homicide) to its 'regulatory' periphery, back in and out entirely. But there is no short-cut past political persuasion, the grind of real, profound, continuous contestation. And, indeed, apocalyptic predictions notwithstanding, in what is now *post-Roe* America, the grind, overall, is starting to unfold rather promisingly. According to data compiled by the Pew Research Center, just before *Dobbs*, in March 2022, 61% of US Americans were in favour of legalising abortion in all or most cases; 29% thought it should be illegal in most cases; only 8% favoured a complete ban.[102] These views are almost identical after *Dobbs*;[103] what has changed is that they are translating into political engagement: responding to the August 2022 public opinion poll of the *Wall Street Journal*, 56% of voters said they felt more motivated than before to take part in the midterm elections;[104] several states have held referenda to gauge public opinion on abortion access;[105] and the national anti-abortion movement has been forced to disperse and diversify to more effectively address local contexts.[106] Politics, in short, is turning into a solution instead of the problem.

III. Antagonistic conflict and the mobilisation of 'hate'

If abortion is referred to by scholars as a site of 'reasonable' disagreement, then quite the opposite holds true for manifestations of 'hate'. It is crucial, therefore, to enter this study with a solid understanding of what it is *not* about. First, it is not about disputing the harm experienced by individual subjects who have been exposed, in some way, to 'hateful' actions by others; nor is it about rejecting the proposition that this harm can be experienced as greater than that of differently motivated interactions. Second, this

[102] The data was published in May 2022 and is available online at: https://www.pewresearch.org/religion/2022/05/06/americas-abortion-quandary/ [last accessed 10 March 2023].
[103] See the data from July 2022 at: https://www.pewresearch.org/politics/2022/07/06/majority-of-public-disapproves-of-supreme-courts-decision-to-overturn-roe-v-wade/ [last accessed 10 March 2023].
[104] See responses to Q18B; the results are available for download at: https://www.wsj.com/articles/the-wall-street-journal-poll-11656538220 [last accessed 10 March 2023].
[105] Two interesting examples are Kansas and Kentucky—both 'deep-red'—where voters clearly rejected constitutional amendments that would have erased any 'right' to abortion. And on the federal level, too, Republicans have been hesitant to introduce and (or) support anti-abortion legislation, while sticking to the party's anti-abortion stance, presumably as not to hurt their own prospects for re-election.
[106] Elaine Godfrey, 'What Winning Did to the Anti-Abortion Movement', *The Atlantic,* 19 January 2023.

study is not about affirming, let alone praising, any of the opinions currently travelling under the banner of 'hate'; nor, though, is it about engaging in moral argument about whether or why any of them should. And lastly, it is not about claiming that opinions which are at a given time, in a given place deemed to be properly 'hateful' should not be contested as such. To the contrary; the whole point of this study is to highlight the fact that governments resorting to criminalisation as a means to force back opinions, 'hateful' or other, have given up on contesting them; worse even, they actively shatter the 'fiction' of 'the people' as a unified political entity. But one step at a time.

The notion of 'hate', if not in its contemporary articulation, first meaningfully entered the legal and political vocabulary in the aftermath of the Second World War. Jurisdictions, such as Germany, Austria, and Italy, which had just come out from under fascist control and joined an international community dedicated to fostering the implementation of fundamental human rights standards, enacted laws designed to counter extremist propaganda, Nazi symbolism, and associated radicalisation efforts.[107] In the 1960's, the focus was widened, but it also took on sharper contours. Rapid decolonisation and migration movements across and from African and Southeast Asian countries, as well as the Sharpeville Massacre in Apartheid South Africa, drew renewed attention to racial discrimination and violence.[108] In response to these developments, Article 4(a) of the United Nations International Convention on the Elimination of All Forms of Racial Discrimination,[109] adopted in 1965, expressly called on all states to 'declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof.' In a similar fashion, Article 20(2) of the United Nations International Covenant on Civil and Political Rights,[110] adopted a year later, stipulated that '[a]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.' State level responses to these demands did vary.

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[107] See Eric Bleich, 'From Race to Hate: A Historical Perspective' in Thomas Brudholm and Birgitte Schepelern Johansen (eds), *Hate, Politics, Law: Critical Perspectives on Combating Hate* (Oxford University Press, 2018) 15, 16-17.
[108] Ibid 17-19. Interestingly, South Africa, to this day, does not have any 'hate' legislation at all.
[109] Full text available online at: https://www.ohchr.org/EN/ProfessionalInterest/Pages/CERD.aspx [last accessed 10 March 2023].
[110] Full text available online at: https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx [last accessed 10 March 2023].

In Europe, political pressure was usually, if more or less hesitantly,[111] transmitted into laws against 'hate speech', or what would now be subsumed under the term,[112] that is, against verbal and non-verbal (written, imaged, etc.) communication that 'expresses, encourages, stirs up, or incites hatred against a group of individuals distinguished by a particular feature or set of features.'[113] And in line with international standards at the time, those features were narrowly confined to race, ethnic origin, nationality, and religion. Across the Atlantic, in the US, laws advanced in a different direction. The civil rights movement had raised public awareness of minority communities and their sustained exposure to prejudice and abuse,[114] but First Amendment constitutional doctrine made it virtually impossible to directly target expression. The political focus from the early days, therefore, and more so from the 1980's, was on 'hate crime', not on 'hate speech', and it quickly extended to features of sexual orientation and gender.[115] What distinguishes 'hate crime' is that it is concerned with 'hate' only insofar as it is enacted in an offence whose commission, generally, is already criminal regardless.[116]

Fast forward to today, the US's strict stance on 'hate speech' has not changed, but its conception of 'hate crime' has spread across the entire Anglosphere and—after some delay and hefty international pressure—taken hold also in Continental Europe.[117] The

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[111] In France, for example, and despite intense campaigning by civil rights groups and social activists all through the 1960's, the government moved forward on legislative initiatives only after the United Nations International Convention on the Elimination of All Forms of Racial Discrimination had been successfully ratified in 1971; see Bleich, above n 107, 19-20.

[112] Until the early 1980's, and despite its usage in international discourse, 'hate' remained a relatively marginal concept in the laws of most European jurisdictions. Offences, that is, were drafted in the more traditional language of defamation, insult, or disturbance of the peace; see ibid 18-20.

[113] Bhikhu Parekh, 'Is There a Case for Banning Hate Speech?' in Michael Herz and Péter Molnár (eds), *The Content and Context of Hate Speech: Rethinking Regulation and Responses* (Cambridge University Press, 2012) 37, 40 (emphasis suppressed).

[114] For a comprehensive account of this developments, see John David Skrentny, *The Minority Rights Revolution* (Belknap Press of Harvard University Press, 2002).

[115] The mobilisation against 'hate' was driven by the left, but created powerful synergies with the emerging victims' rights movement on the right, compare Valerie Jenness and Ryken Grattet, *Making Hate a Crime: From Social Movement to Law Enforcement* (Russell Sage Foundation, 2001) 26-32. Note that, as in Europe (see above n 112), the term 'hate' was, and still is, much more prevalent in public discourse and the media than in actual laws and policies, see Bleich, above n 107, 20-23.

[116] One struggles to find an agreed-upon definition of 'hate crime' in the literature. The simplest one, similar to the one provided here, is that by James B. Jacobs and Kimberly Potter for whom 'hate crime refers to criminal conduct motivated by prejudice', see *Hate Crimes: Criminal Law & Identity Politics* (Oxford University Press, 1998) 11. Others are more criminological or sociological in outlook. Most commonly cited in this respect is Barbara Perry, for whom 'hate crime… involves acts of violence and intimidation, usually directed toward already stigmatized and marginalized groups… it is a mechanism of power and oppression, intended to reaffirm the precarious hierarchies that characterize a given social order', *In the Name of Hate: Understanding Hate Crimes* (Routledge, 2001) 10.

[117] Not least to avoid doctrinal friction, Germany was one of the last jurisdictions to bend. In August 2015, § 46(2) Strafgesetzbuch, containing a list of mandatory sentencing considerations, was amended to include racist, xenophobic, and 'inhuman' ('menschenverachtend') motivations. In March 2021, a law designed to more effectively combat online 'hate speech' further added 'antisemitic' to the list.

result is that most Western jurisdictions by now have provisions relating to both 'hate speech' and 'hate crime'. Legislative techniques and the list of protected features can differ, however, not just among but within jurisdictions, as well. In regards to speech offences, the law in Great Britain and, more specifically, in England and Wales serves as a powerful example of that. The Public Order Act 1986 (in force) contains multiple offences on the stirring up of 'hate' against persons on the grounds of race (to include colour, ethnicity and nationality), religion and sexual orientation.[118] The four principal offences relating to race[119] prohibit the use of 'threatening, abusive or insulting' words and behaviour (s 18); the display and dissemination of written material (ss 18, 19) and audio (visual) recordings of the same quality (s 21); and the possession of any of these materials with a view to displaying or disseminating them (s 23). The offences relating to religion and sexual orientation mirror these provisions but require that relevant acts and materials be 'threatening'; insults and abuse are not enough.[120] They also require that prohibited acts be carried out with an intention to stir up 'hate', whereas for racial 'hate speech' it is enough that 'racial hatred is likely to be stirred up.' Finally, only the offences relating to religion and sexual orientation are subject to freedom of expression clauses, holding that no offence 'shall be read or given effect in a way which prohibits or restricts discussion, criticism or expressions of antipathy, dislike, ridicule [etc.]' of those who bear the relevant features or the practices they engage in (ss 29J, 29JA).

What comes out nicely in these offences—apart from the fact that there can be different levels of protection for different protected groups,[121] and a legislative range from complete speech bans to 'mere' speech moderation—is that the principal concern of 'hate

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[118] See Part 3 and Part 3A of the Act. In 2014, the Law Commission investigated whether the existing catalogue of offences should be extended to cover the stirring up of 'hate' on the grounds of disability and gender identity. They reached the conclusion that 'this type of hate speech… amounts to (often highly offensive) statements of opinion that are intended to provoke comment or debate and are not clearly intended or likely to cause others to hate disabled or transgender people', 'Hate Crime: Should the Current Offences be Extended?' (2014) 13-14. Full report available online at: https://www.law-com.gov.uk/project/hate-crime-completed-report-2014/ [last accessed 10 March 2023].

[119] See further s 20 (public performance of a play) and s 22 (broadcasting or including programme in cable programme service) of the Act. While the grounds of religion and sexual orientation were introduced in 2006 and 2008, respectively, the offences on racial 'hate speech' are based on the (repealed) Race Relations Act 1965, with which the British Parliament had, by a few weeks, pre-empted the call for criminalisation in the International Convention on the Elimination of All Forms of Racial Discrimination (see above n 109). This might seem to suggest that Great Britain, unlike many of its European neighbours at the time, was particularly eager to criminalise 'hate speech', but the passage of the Race Relations Act 1965 was not an easy one. Anti-immigration sentiments and, related to those, racism had increased the pressure for governmental intervention already in the 1950's, but sacrificing free speech was a price that many, especially Conservatives, politicians were unwilling to pay. Things changed only once Labour had won the general election in 1964; compare Bleich, above n 107, 19-20.

[120] See ss 29B, 29C, 29E, 29G of the Act.

[121] The selection of protected groups will be returned to below.

speech' offences is not with the harbouring of 'hate' *per se* but with its potential proliferation, or, to put it less evocatively, with the multiplication of the offender's opinion.[122] Which is why most 'hate speech' offences, especially when targeting words or behaviours only, require that the relevant acts be performed in public.[123] The focus of 'hate crime' offences, by contrast, is squarely on the motive of the offender,[124] but the legislative techniques used to capture that motive, again, do vary greatly. Gail Mason helpfully distinguishes between three basic approaches (they may also be used in combination):[125] (i) penalty enhancement, (ii) sentencing aggravation, and (iii) substantive (independent) criminalisation. Penalty enhancement, as the term suggests, involves the imposition of an *additional penalty* (fixed, minimum, maximum) whenever a specific offence is motivated by 'hate' towards a protected group or groups.[126] Sentencing aggravation works similarly in that it, too, applies to an existing offence, but it makes the offender's motive a *sentencing factor*, instead of a surcharge, thus allowing for more judicial discretion.[127] And substantive criminalisation abandons this logic entirely by prohibiting *otherwise legal conduct*, and making 'hate' part of the *mens rea*.[128]

Now, if this is the gist, and it is no more than that, of how 'hate' legislation operates, then there can be little doubt as to its standing in direct contradiction to the framework developed here: it is designed to suppress a selected number viewpoints, not (merely) actions based on those viewpoints, about what is 'good' or 'right' or 'reasonable', and

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[122] See Jeremy Waldron, *The Harm in Hate Speech* (Harvard University Press, 2012) 35 who writes that it is not so much 'hate' as the *driver* of the speech act which is, including by him (see below n 151-52), considered problematic in these offences; it is the possibility of it catching on as a desired *effect*.

[123] In Canada, for instance, s 319 Criminal Code contains two 'hate speech' offences (public incitement and wilful promotion) which require statements to be made 'in any public place' or 'other than in private conversation'. England and Wales, by contrast, have lowered the threshold. As per ss 18(2), 29B(2) of the Public Order Act 1986, 'hate speech' (on all grounds) 'may be committed in a public or a private place, except… where the words or behaviour are used, or the written material is displayed, by a person inside a dwelling and are not heard or seen except by other persons in that or another dwelling.'

[124] To be precise, 'hate crime' theorists often distinguish between the so-called 'animus model' and the 'discriminatory selection model', see generally Kay Goodall, 'Conceptualising "Racism" in Criminal Law' (2013) 33(2) *Legal Studies* 215. On the 'discriminatory selection model', offenders need not be motivated by 'hate'; they just need to select their victim(s) based on membership in a protected group. Most jurisdictions, though, use the 'animus model', which targets motivation proper and could explain why interest in the 'discriminatory selection model' is particularly strong in the US. Compare, e.g., Lu-in Wang, 'Recognizing Opportunistic Bias Crimes' (2000) 80(5) *Boston University Law Review* 1399; Jordan Blair Woods, 'Taking the "Hate" Out of Hate Crimes: Applying Unfair Advantage Theory to Justify the Enhanced Punishment of Opportunistic Bias' (2008) 56(2) *UCLA Law Review* 489.

[125] See 'Legislating Against Hate' in Nathan Hall et al (eds), *The Routledge International Handbook on Hate Crime* (Routledge, 2015) 59, 60-61.

[126] Used, e.g., in Great Britain (ss 29-32 Crime and Disorder Act 1988), and in many states of the US.

[127] Used, e.g., in Great Britain (s 66 Sentencing Act 2020), Canada (s 718.2(a)(i) Criminal Code), New Zealand (s 9(1)(h) Sentencing Act 2002), and several Australian states and territories, as well as in some civil law jurisdictions, such as Germany (§ 46(2) Strafgesetzbuch, compare above n 117).

[128] Most 'hate speech' offences work this way, since it is not (yet) by itself criminal to express 'hate'.

no secret is made of that.[129] But still, the objection that can and likely will be raised at this juncture is: 'So what?' Victims of 'hate' are being targeted 'because of who they are';[130] one might as well target the offender in the same way. One might, indeed. But the question is whether one should—and the (short) answer is *no*. The idea, however, that victims of 'hate' are being targeted 'because of who they are' is an important first step towards understanding the (long) *why*. As was seen at the start of this section, the genesis of the 'anti-hate' movement was tightly enmeshed with the struggle for racial emancipation in the early 1960's.[131] Race, at the time,[132] was considered an immutable trait, a constant way of being, and it is, to this day, the paradigmatic feature protected by 'hate' legislation. Others mentioned so far have been nationality, ethnic origin, religion, sexual orientation, and gender. But the list goes on, and it constantly expands, to include features like age,[133] language,[134] disability,[135] occupation,[136] political party affiliation,[137] homelessness,[138] HIV status,[139] and marital status.[140] Some jurisdictions, like Canada and New Zealand, have non-exhaustive lists ('features such as'),[141] and again others, like the state of Victoria in Australia, refrain from specifying any features at all to extend protection to any 'group of people with common characteristics.'[142]

Like race, these features are generally construed as ways of being, rather than ways of doing, even though, as Birgitte Schepelern Johansen rightly notes, a lot of them 'could, in many respects, just as easily… [be] depicted as related to certain practices, beliefs, or attitudes.'[143] Practices, beliefs, or attitudes are more easily contested, however. To

[129] For 'hate speech' offences, this should be fairly obvious; they criminalise the voicing and (potential) spreading of the offender's opinion. 'Hate crimes' are different in that the offender performs a criminal act, thus *enacting* their opinion—but the law attaches (additional) liability to the quality of that opinion rather than merely to the act and the regular *mens rea* requirements which do not account for motive.
[130] See Mark A. Walters, Susann Wiedlitzka and Abenaa Owusu-Bempah, 'Hate Crime and the Legal Process: Options for Law Reform' (University of Sussex, 2017) 203.
[131] In the US, in fact, one can reach back a lot further, Ely Aaronson, *From Slave Abuse to Hate Crime: The Criminalization of Racial Violence in American History* (Cambridge University Press, 2014).
[132] Today, some would hesitate to reach this conclusion, especially in light of the (highly controversial) article by Rebecca Tuvel, 'In Defense of Transracialism' (2017) 32(2) *Hypatia* 263.
[133] E.g., Canada (s 718.2(a)(i) Criminal Code), New Zealand (s 9(1)(h) Sentencing Act 2002).
[134] E.g., Canada (s 718.2(a)(i) Criminal Code).
[135] E.g., Canada (s 718.2(a)(i) Criminal Code), New Zealand (s 9(1)(h) Sentencing Act 2002).
[136] E.g., the state of Louisiana in the US (s 107.2A LA Revised Statutes).
[137] E.g., the state of Iowa in the US (s 729A.2 Iowa Code).
[138] E.g., the state of Florida in the US (s 775.085(1)(a) Florida Statute).
[139] E.g., the Australian Capital Territory in Australia (s 750(1)(c)(iii) Criminal Code).
[140] E.g., the District of Columbia in the US (§22-3701(1A) DC Code).
[141] See above n 133.
[142] See s 5(2) Sentencing Act 1991 (Victoria).
[143] 'Tolerance: An Appropriate Answer to Hate?' in Thomas Brudholm and Birgitte Schepelern Johansen (eds), *Hate, Politics, Law: Critical Perspectives on Combating Hate* (Oxford University Press, 2018) 172, 181.

mark out a particular set of features as essential to the victim's identity is to attest that they 'have a *justifiable* claim to affirmation, equality, and respect for the attribute that makes them different.'[144] To be fair, it also attests that victims whose features are not being protected do *not* have such a claim—so, apparently, some victims are more equal than others[145]—but the point remains that the 'hating' offender calls into question that which cannot, and could not ever, be called into question: the 'justified' identity of the victim, 'who they are'. It is beyond debate, beyond critique, and most certainly beyond aversion. The upshot of this narrative, this emphasis on 'being', as Schepelern Johansen notes, is that sparking debate, expressing critique, and holding feelings of aversion about anyone from a protected group—which, as was seen, can literally mean anyone, or at least anyone who is not themselves 'bigoted' or else 'undeserving'[146]—becomes deeply and doubly 'wrong': it 'is *irrational* and based on stereotypical ideas (because the differences are really harmless) and *morally wrong* (because they are nevertheless essential and their protection is politically guaranteed).'[147]

The communicative power of 'hate' legislation, therefore, and more so of its enforcement, should not to be underestimated. Nor however, and this needs to be clear before advancing the thought further, should the power of genuine 'hate'. Depending on one's moral position, one might be inclined to read the foregoing passages as an attempt to downplay, or dismiss, the urgency of the problem that 'hate' can pose to the project of political association. Assuredly, it is not; it is an attempt to *reframe* the problem. There is a curious feeling percolating in contemporary Western societies that one needs to be protected from ideas, from opinions, arguments that could be irritating or offensive in some way; dissent has become distasteful, and so much so that those who dare voicing it have to be silenced, discredited, 'punished'. There is room to doubt, in other words, whether all of the interactions to which the 'hate' label is currently attached are in fact

[144] Gail Mason, 'Victim Attributes in Hate Crime Law: Difference and the Politics of Justice' (2014) 54(2) *British Journal of Criminology* 161, 175 (emphasis added). In cases where protected features are unspecified, this argument runs into difficulty, as it would give *everyone* such a claim, and it would also make the 'hate' project rather pointless because, as Jacobs and Potter point out, '[i]t is the exclusion that gives these laws their symbolic power and meaning', above n 116, 133.
[145] Compare Michael Blake, 'Geeks and Monsters: Bias Crimes and Social Identity' (2001) 20(2) *Law and Philosophy* 121, 138; and also Alexander Brown, 'The "Who?" Question in the Hate Speech Debate: Part 2: Functional and Democratic Approaches' (2017) 30(1) *Canadian Journal of Law & Jurisprudence* 23, 24-26.
[146] See Mason, above n 144, 169-71, who discusses the targeted victimisation of paedophiles: 'the problem with applying hate crime sentencing laws to child sex offenders as a protected victim group is that it sends a message of acceptance, equality… [it] assumes that there is no meaningful distinction between this form of difference and other forms of difference' (at 171).
[147] Schepelern Johansen, above n 143, 181, 184-85 (emphasis added).

'hateful' in any relevant sense,[148] but this does not thwart the conclusion that some of them truly are and that something needs to be done about it. Genuine 'hate', as Mikkel Thorup vividly describes it, is a dangerous force: 'it concerns groups, it is not limited in time, it doesn't fade away as the memory of the offense slides into oblivion, it keeps defining and moving me… [It] separates me from what I take to be inherently wrong, whether actually performed or not… It is not only, "I hate you for what you are", but also, "as long as you are, I can't be"… The hated other is the hindrance of my existence.'[149] They cannot be talked to, let alone negotiated with; they need to disappear, be removed, in the name of the 'good', the 'right', the 'truth'. The 'hated other' is the Schmittian enemy:[150] my identity against yours, and no bridge in between.

Theorists rallying for the criminalisation of 'hate', therefore, have every reason to argue that its manifestation tears at the very fabric of political association. However, not because it *prevents* the construction of a social organic whole, a harmonious universe inhabited only by those who subscribe to shared fundamental values,[151] but because it *aspires* to do just that. 'Hate' denies the possibility of disagreement about how to live. It denies the possibility of contradiction, of uncertainty, of change. All it knows is the primitive fight of 'us' against 'them', and the moment the criminal law is mobilised as a weapon to fight back, it has won its case. 'Hate' legislation imagines a world purged of opinions that challenge 'our' way of being.[152] It involves entire classes of the population not in an open-ended, political process of fierce and persistent contestation but

[148] Some scholars for that reason reject 'hate' as the appropriate category, but insist on recognising bias-motivated, 'disempowering' criminality as a distinct category of offending, see, e.g., Barbara Perry, 'A Crime by Any Other Name: The Semantics of "Hate"' (2005) 4(1) *Journal of Hate Studies* 121.
[149] Mikkel Thorup, 'Democratic Hatreds: The Making of "the Hating Enemy" in Liberal Democracy' in Thomas Brudholm and Birgitte Schepelern Johansen (eds), *Hate, Politics, Law: Critical Perspectives on Combating Hate* (Oxford University Press, 2018) 215, 217.
[150] Revisit chapter 1 at 32-33.
[151] This is the standard argument, advanced, in one form or another, by many prominent theorists in the field. Jeremy Waldron, for instance, writes that allowing 'hate speech' is not only to put in jeopardy the equal standing and dignity of those who are targeted, but to signal that 'our' fundamental values are 'up for grabs in a debate—as opposed to settled features of a social environment to which ["we"] are visibly and pervasively committed'; debates about legally protected attributes, in his words, are 'over—won; finished', above n 122, 95-6, 195. After all, 'we are... talking about the fundamentals of justice, not the contestable elements', 'Hate Speech and Political Legitimacy' in Michael Herz and Peter Molnar (eds), *The Content and Context of Hate Speech: Rethinking Regulation and Responses* (Cambridge University Press, 2012) 329, 336. In a similar vein, compare R. A. Duff and S. E. Marshall, 'Criminalizing Hate?' in Thomas Brudholm and Birgitte Schepelern Johansen (eds), *Hate, Politics, Law: Critical Perspectives on Combating Hate* (Oxford University Press, 2018) 115.
[152] Again, Waldron, *The Harm in Hate Speech*, above n 122, 95 is incredibly clear on that: 'we want to convey the sense that the bigots are isolated, embittered individuals, rather than permit them to contact and coordinate with one another in the enterprise of undermining the assurance that is provided in the name of society's most fundamental principles'; that may well mean to drive these subjects, or at least their opinions, 'out of the marketplace of ideas into spaces where [they] cannot easily be engaged.'

in a 'legal process of re-moralization.'[153] Thinking that this process will prompt anything other than a heightened sense of mutual resentment is illusory. 'Hate' offences, as James B. Jacobs and Kimberly Potter rightly diagnose, are designed to 'encourage citizens to think of themselves as members of identity groups… as victimized and besieged'[154] by the 'other'. Not education, debate, persuasion, but the ugly outgrowth of the 'friend-enemy distinction', is put at the core of political association.[155]

Fighting 'hate' with 'hate' legislation, then, is like fighting fire with benzene. Hugely imprudent, and ineffective, at best. Just take the situation in England and Wales as an example. Since the Home Office first started collecting the relevant data, the number of recorded 'hate crime' incidents has risen every single year from 43,748 in 2011-12 to 155,841 in 2021-22,[156] and for every single feature that is being accounted for.[157] It is true, of course, that police recording patterns may have improved, and the Covid-19 pandemic restrictions at least partly explain the jump of 26% more incidents recorded between the years 2020-21 and 2021-22, but there is clearly an upward trend—a trend reflective of real, strong, political sensibilities,[158] which the fight against 'hate', if not co-created, has failed to offset. And so much is lost in this fight. As Robert Post points out, '[f]ocusing on hatred forces us into a narrow and unambiguous repudiation of the "hater"'[159] who, by definition, has to be irrational, abhorrent, and trapped in an unenlightened mind. It conveniently diverts attention from institutional insufficiencies and the 'deep political distress'[160] that breeds attitudes of 'hate' in the first place.[161] Even

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[153] Gail Mason, 'The Symbolic Purpose of Hate Crime Law: Ideal Victims and Emotion' (2014) 18(1) *Theoretical Criminology* 75, 87; Which may explain why protected features come with a whole array of '-phobias' and '-isms' (except for liberalism, of course) to describe the 'hateful' offender.
[154] See above n 116, 131.
[155] For a defence of the former, see Corey Brettschneider, *When the State Speaks, What Should It Say? How Democracies Can Protect Expression and Promote Equality* (Princeton University Press, 2012), who neatly timed the release of his book to match Waldron's *The Harm in Hate Speech*, above n 122.
[156] The official statistics, published annually, can all be found online at: https://www.gov.uk/government/collections/hate-crime-statistics [last accessed 10 March 2023].
[157] The vast majority of incidents—around two-thirds every year—are racially motivated; some features (notably, transgender identity, sexual orientation, and disability) are seeing very steep percentage rises of around 40% - 55% compared to previous years; and for all features, the number of incidents recorded in the year 2021-22 were at their highest annual totals since the start of data collection.
[158] It is no coincidence that the biggest annual percentage rise (overall) was recorded in the year ending March 2017 (29%)—after the EU Referendum. And the Conservative government, to put it mildly, has engaged in a lot of mixed signalling when it comes to their own 'anti-hate' commitments.
[159] Robert Post, 'The Legality and Politics of Hatred' in Thomas Brudholm and Birgitte Schepelern Johansen (eds), *Hate, Politics, Law: Critical Perspectives on Combating Hate* (Oxford University Press, 2018) 263, 274.
[160] Wendy Brown, *States of Injury: Power and Freedom in Late Modernity* (Princeton University Press, 1995) 27.
[161] Post, above n 159, 279-80; see also Claudia Card, 'Is Penalty Enhancement a Sound Idea?' (2001) 20(2) *Law and Philosophy* 195, 200-5.

more conveniently, and this point is developed in the next chapter, it is an elegant way to escape accountability for these conditions. A regime that systematically suppresses selected viewpoints refuses to confront its own opposition—and a regime that refuses to confront its own opposition operates on a serious legitimacy deficit, no matter how noble the goal.[162] Again, the presence and proliferation of genuine 'hate' is a political problem of significant concern. Questioning the appropriateness of the legal response does not change that. But as Post aptly puts it, 'one's person's hate is another person's truth'[163] and these truths, difficult as they might be, need to be aired. Not least to keep them from festering and escalating into a problem of even greater concern.

None of this means that 'haters' are 'right'. In fact, having to stress that is a worrying sign of how much the 'anti-hate' mobilisation, especially over the last few years, has impoverished not only the practice of politics but the practice of toleration. The practice of toleration, as was established in chapter three, assumes relevance only in conditions of profound conflict. Its very purpose is to accommodate attitudes of rejection and disapproval, of contempt even, and it is called a 'practice' because it requires that one accept limits to which one can *act* on them—limits that have been negotiated, and can always be re-negotiated, in the concrete context to which they apply.[164] The identitarian stand-off staged by the 'anti-hate' paradigm, by contrast, transforms toleration, like the features it is meant to protect, into a way of being, a 'virtuous' trait, an attitude of 'respect' and warm embrace reserved only for those who do not challenge 'who we are'.[165] It is a comfortable way of being—after all, it does not call for any action other than the vilification of the 'other' (who, by definition, is the intolerant)—but it is also incredibly reductive. The richness and complexity of human experience, 'the space for ambiguity and the unsettled',[166] melts into the binary opposition of 'us' against 'them'. Addressing, rather than exacerbating, the problem of 'hate' requires leaving this paradigm behind, restoring toleration as a political practice, and placing the law in its service. For as much as identities can be celebrated, they also need to be endured.

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[162] Compare Eric Heinze, 'Toward a Legal Concept of Hatred: Democracy, Ontology, and the Limits of Deconstruction' in Thomas Brudholm and Birgitte Schepelern Johansen (eds), *Hate, Politics, Law: Critical Perspectives on Combating Hate* (Oxford University Press, 2018) 94, 105-6. Note that Heinze distinguishes between two different expressive paradigms, the essential-attitude paradigm (targeted by 'hate speech' laws) and the concomitant-attitude paradigm (targeted by 'hate crime' laws). The latter, he claims, can and should be subjected to a punitive response by the state. Within the present framework, any such distinction and the conclusion he draws from it are unsustainable (see above n 129).
[163] Post, above n 159, 276.
[164] See chapter 3 at 73-75.
[165] Schepelern Johansen, above n 143, 185-88.
[166] Ibid 190.

CONCLUSION

Politics is exhausting. A matter of the many. Stubborn, loud, a little feverish at times, and, most frustratingly, never finished. It can be tempting to try and escape the tumult by thinking of law, and of criminal law, in particular, as standing 'above' the day-to-day struggles on the ground. The purpose of this chapter has been to illustrate the dangers of doing so; more than that, though, it has underscored the claim advanced over the first three chapters that a realist conception of legitimacy, of political compromise, properly understood, has much to offer as an evaluative standard. No doubt, it strives for accuracy in terms of its description of the historical and institutional dynamics underpinning the development of particular criminal justice policies—but it is also more courageous in terms of their critique and, crucially, their re-invention. Criminal law as political compromise faces up to the fact that the 'rule of law' is always and inevitably a 'rule of humans' trying to figure out how to live, in a particular place, at a particular time. But still, not anything goes. The case studies on abortion and the criminalisation of 'hate' have demonstrated that compromise without politics is no better than politics without compromise. Only if the law is a reflection of both does it retain its openness to the opposite, the ability to bring together differences without dissolving them.

CHAPTER FIVE

COMPROMISE AND COMPLIANCE

INTRODUCTION

Conceptually and practically, it has been stressed throughout, criminal law as political compromise is oriented towards compliance, not coercion[1]—yet, little so far has been said about what that actually means. What is it for an individual subject, in a particular place, at a particular time, to comply with the (criminal) law?[2] What is it for a government, whose laws are concretely at stake, to effectively secure such compliance? And, finally, what is it for each to fail in so doing? These are the questions that this chapter seeks to address, and they are important questions. For not only do they explain, more thoroughly than the previous chapter could, the criminal law's function as a regulatory instrument,[3] a means to manage, rather than resolve, the continuous clash of normative expectations over how the project of political association ought best to be configured. They also come, as will be discussed in the next and final chapter of this thesis, with important implications for the role and practice of state coercion as one possible (and, at present, fairly ill-suited) answer to instances of individual non-compliance.

[1] See chapter 1 at 34-37 and chapter 4 at 86-87.
[2] It should be clear from the foregoing that, within the present framework, there can be no relevant distinction between complying with the criminal law and complying with any other kind of law.
[3] Revisit chapter 4 at 84-86.

But one should not get ahead of the work: the focus of this chapter is on understanding (non-)compliance, both as a political concept and as a political phenomenon; the why, when, and how of dealing with its potential fallout is another matter. Led by the above questions, then, the argument will proceed in two parts and three steps. The first part, looking at compliance as a positive achievement, is about (1.) what it is, exactly, that subjects do when they comply with the (criminal) law, and (2.) what it is, exactly, that governments must do to elicit that kind of response. As will be seen shortly, there is a moral and a political way of assessing these questions, and each perspective arises out of a distinct account of what it means to successfully create and maintain relations of authority.[4] The foundations of these accounts were laid in chapters one and two,[5] and they will be returned to here to integrate and press the realist case further. From a moral perspective, to say that the (criminal) law is oriented towards compliance is to say that it strives to generate a 'genuine obligation' to be complied with, one that exceeds—or, rather, backs up—the 'legal obligation' which the respective law *qua* law imposes on all those to whom it is addressed. Thus, for a subject to comply is to discharge a moral obligation to do so—an obligation which, in turn, exists only if the government got the content of the law 'right'. The task, in other words, is largely philosophical: a regime seeking compliance with its laws needs to figure out which laws its subjects would be 'justified' in following so as to secure 'genuine' obligations for them to do so. (And to occupy the moral high ground when resorting to force, but that is left to later).

From a political perspective, and this will not be surprising, the task is a political one: a regime seeking compliance with its laws needs to figure out which laws its subjects will in fact *deem* legitimate to follow so as to secure a genuine *sense* of obligation for them to do so. The answer—and there may be one[6]—to whether or not they are (also) from a viewpoint other than their own (be that an objective viewpoint, that of another subject, or that of an outsider) under a moral obligation to comply is inconsequential. Compliance is a behavioural response to a law that is motivationally effective and, as such, action-guiding. Research in political science and social psychology corroborates the claim, so far advanced only theoretically, that congruence between the law and the

[4] 'Moral' in this chapter should be read to mean both 'moralist' and 'liberal', as it was shown in chapter 2 (see below n 5 for relevant references) that both camps appeal to pre-political norms in their accounts of what it means to have authority and thus, structurally, do not and cannot meaningfully diverge.
[5] See chapter 1 at 19-22, 34-37 and chapter 2 at 48-53, 54-57, respectively.
[6] Though one should not expect to reach agreement on this any time soon. For a neat overview of the ongoing debate, see David Lefkowitz, 'The Duty to Obey the Law' (2006) 1(6) *Philosophy Compass* 571; and in more depth, John Horton, *Political Obligation* (Palgrave Macmillan, 2nd ed, 2010).

actual normative expectations of those to whom it is addressed is the dominant determinant in fostering legitimacy perceptions and, by extension, compliance.[7] Practicing political compromise, which, as was seen in previous chapters, maximises congruence by way of mutual concession, enabling settlement on a specific range of actions while leaving underlying disagreement intact,[8] thus proves a powerful tool in securing compliance with the (criminal) law.[9] More than that, however, and this is the concern taken up in the second part of this chapter, it clarifies (3.) what *non*-compliance means, both for an individual subject and for the government to whom they respond. While from a moral perspective, a subject's failure to comply with the (criminal) law is inevitably a moral failure, calling for 'blame' and condemnation and punishment, from a political perspective, it is a behavioural one. And, importantly, it is a 'failure' only as measured against and in virtue of an insufficient regulatory prompt on the part of the government whose laws are concretely at stake—indicating a lack of congruence with the subject's normative expectations and, which amounts to the same, a lack of representation. This flip in perspective casts doubt not only on current models of (criminal) accountability, but on the design and administration of consequences, both of which, as stated above, will be explored in more depth in the next and final chapter of this thesis.

I. Understanding compliance: moral and political

Pinning down the idea of 'compliance'[10] is a theoretical exercise; it hinges on what is meant by saying that a government operates from a position of authority vis-à-vis its subjects. But it is also, or at least ought to be, indicative of what is involved in securing

[7] Congruence is the preferred term here as it can cover factors elsewhere described as 'moral alignment', 'procedural justice', 'outcome favourability', etc.; more on this in section I.2. at below n 65-78.
[8] On the idea of 'continued conflictuality', revisit chapter 3 at 68-71.
[9] Of course, there are other factors involved, especially when it comes to direct interactions between individual subjects and law enforcement personnel—both pre- and post-offending—which, although beyond the immediate scope of this study, which focuses on criminalisation as the initial legislative intervention by the state, too, will be touched on below under section I.2.
[10] 'Compliance' is the standard term in the social science literature and thus it will be used here, as well. Yet it should be noted that not unlike in the case of 'compromise' and 'MV' (see chapter 3 at 63 (n 23)), there exists some underlying debate in the legal theory literature as to whether or not 'compliance' is in fact the correct term: some theorists use 'obedience' and 'compliance' interchangeably; others, moral theorists, think of 'obedience' as distinct from and superior to 'compliance' (as in: 'compliance for the right reasons'); and again others, influenced by Joseph Raz's account in *Practical Reason and Norms* (Oxford University Press, 2nd ed, 1990) 178-80, draw a similar distinction, only now between 'compliance' and 'conformity', and think of 'compliance' as the superior concept. As in the chapter on political compromise, it seems unhelpful to delve too deeply into terminological questions—especially since it will be seen shortly that much of what is important, or even troubling, from a moral perspective is not very important, and certainly not troubling, from a political perspective.

compliance as a real-life, political practice. The aim of this first section is to show that taking a moral perspective[11] on the matter does not add greatly to one's understanding of either of these aspects. It cannot capture the predicament that is being faced with (a claim to) authority, a demand to comply with the (criminal) laws of a political regime to which one is (claimed to be) a subject, and it affords little prospect of successfully addressing it in practice. The realist political perspective developed here, by contrast, can both make sense, real sense, of the connection between compliance and 'political obligation' and give an empirically sound account of what it takes for it to be activated in the contexts to which it applies. Each aspect will be examined in turn.

1. Compliance and obligation

From a moral perspective, one that relies on pre-political standards, whichever they be (freedom, right(s), wrong(s), etc.), to speak of legitimate government is to imply—and criminal theorists more often imply than argue for it—that a given regime and its laws, directives, etc., *ought* to be complied with, thereby making compliance the conceptual correlate of obligation. One can take a variety of routes to arrive at this conclusion, of course, and not only the content but the character of the obligation, as well, will differ depending on the route taken, so it is helpful to take a couple of examples to illustrate the point. Recall, first, the communitarian view defended by S. E. Marshall and R. A. Duff, which was discussed at the very beginning, in chapter one.[12] On this view—the details of which need not be rehearsed here—the substantive criminal law expresses, at least ideally, the 'shared values' of the community; it is a tool, in Duff's own words, to identify and prohibit 'a set of pre-existing wrongs (kinds of conduct that are wrongful prior to and independently of their criminalisation) as "public" wrongs.'[13] Provided that this is done properly, meaning that the laws and the community they belong to are indeed rooted in a set of values that are sufficiently shared,[14] the state,[15] according to Marshall and Duff, is in a position to make claims, legitimate claims, on its subjects' allegiance—claims, and this is crucial, that 'are not undermined or refuted merely by

[11] Which, again, is to include both 'moralist' and 'liberal' perspectives, see above n 4.
[12] See chapter 1 at 17-22.
[13] R. A. Duff, *The Realm of Criminal Law* (Oxford University Press, 2018) 130.
[14] Ibid 127. On what qualifies as 'sufficient', see chapter 1 at 19.
[15] And, of course, every individual subject, too. For as will be recalled from the discussion in chapter 1 at 21-22, for Marshall and Duff, authority and the ability to act on it where necessary derives from, and resides with, 'the citizens' in their collectivity.

the fact that those against whom they are made reject them.'[16] If that were so, the state would have no authority precisely over those whom it most seeks to govern; an absurd conclusion, from a moral perspective (and one that shall be returned to below). These claims to allegiance, which comprise, most fundamentally, a claim to compliance with the (criminal) law, are legitimate because they appeal to the subjects' normative status as members of the relevant community. They appeal to what Marshall and Duff, along with others in the field,[17] refer to as 'associative' political obligations.[18]

Associative obligations, for those who defend them, are moral[19] obligations that arise out of the salient relationships that make up a particular (political) community, and as such, they are not only non-universal in nature but can be (and generally are; by birth, most often) incurred non-voluntarily.[20] As moral obligations, they need not be written into law; in fact, they might even run counter to it. For while associative theorists insist that membership in a community, political or other, 'in and of itself'[21] involves certain obligations, towards other members and towards the institutions which they co-create, they also insist, at least nowadays,[22] that for any such obligations to be generated, and to override other (associative) obligations that members are already under,[23] the community in question has to be minimally moral in some sense. It has to be a 'true' rather than a 'bare' community, characterised by equality and reciprocal concern;[24] it has to provide 'some measure of order and security',[25] be 'tolerably just',[26] etc. Whatever the

[16] Duff, above n 13, 129.
[17] Especially notable in this regard are Ronald Dworkin, *Law's Empire* (Belknap Press of Harvard University Press, 1986) chapter 6; Margaret Gilbert, *A Theory of Political Obligation: Membership, Commitment, and the Bonds of Society* (Oxford University Press, 2006); Horton, above n 6, chapters 6-7; and Jonathan Seglow, *Defending Associative Duties* (Routledge, 2013).
[18] Duff, above n 13, 128-30; R. A. Duff and S. E. Marshall, 'Crimes, Public Wrongs, and Civil Order' (2019) 13(1) *Criminal Law and Philosophy* 27, 33 (n 18), 42-44.
[19] Admittedly, not everyone would call them that. Margaret Gilbert, above n 17, for one, argues that associative obligations should not be framed as moral requirements but as 'joint commitments' which, once undertaken, and regardless of any intentions to the contrary, give significance to the practices of the community and create a distinct realm of 'political obligation', see 21-4, 30-1, 53-4, 165-81. Noting (rightly) that Gilbert's 'commitments' cannot be evacuated of moral content, Horton, above n 6, 156.
[20] These, arguably, are the two most basic features of every associative theory, but, as usual, there exists considerable variation when it comes to spelling out the details. For a good overview, see Bas van der Vossen, 'Associative Political Obligations' (2011) 6(7) *Philosophy Compass* 477.
[21] Gilbert, above n 17, 18; and she, unlike others, stays true to that statement, see ibid 289.
[22] Mid-century theorists like Margaret MacDonald, 'The Language of Political Theory' (1941) 41(1) *Proceedings of the Aristotelian Society* 91, and Thomas McPherson, *Political Obligation* (Routledge, 1967) construed associative obligations as a conceptual necessity, a simple truth about what it means to belong to a political community. Needless to say, this argument was and still is hugely unpopular.
[23] Arising, e.g., out of familial ties or grander, 'human' relations; compare Duff, above n 13, 129.
[24] Dworkin, above n 17, 198-201. In a similar vein, Stephen Utz, 'Associative Obligation and Law's Authority' (2004) 17(3) *Ratio Juris* 285, who draws on Dworkin's account.
[25] Horton, above n 6, 189.
[26] Duff, above n 13, 127.

proposed quality, it plays a significant role in constraining the membership principle. So much so that one might well wonder whether it is not (predominantly) that quality, an external moral standard against which the community's local features and practices are assessed, instead of one's membership in it, that does the legitimatory work.[27] And indeed, for most theorists pondering the idea of 'political obligation', the question of whether subjects have to support their government and comply with its laws, this line of argument sounds much more appealing. Like the associative approach, it avoids the impractical recourse to voluntarist strategies that make obligations dependent on their being freely entered into;[28] but it requires a more open and rigorous justification of the substantive considerations driving the inference that they nonetheless obtain.

Candidates for these considerations are plenty, and not unfamiliar since they are identical to the arguments offered for why it is 'good' or 'right' or in 'everyone's interest' to have a certain kind of government and (criminal) laws to begin with. As R. M. Hare puts it: 'To ask what obligations I have as a citizen is… a question about what I *morally ought* to do'; and the answer, he adds, must be 'disregarding the fact that I occupy the place in the system that I do (i.e., [give] no preferential weight to my own interests just because they are mine).'[29] For Hare, the appropriate moral principle is the principle of 'utility',[30] which in the shape of a 'harmfulness constraint' balances the 'wrongfulness

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[27] See A. J. Simmons, 'Associative Political Obligations' (1996) 106(2) *Ethics* 247, 262-63. Similar concerns apply to 'fair play'-based theories of 'political obligation' which, too, rely on the idea that subjects are part of a 'joint enterprise' with distinct moral ties and claim, to quote H. L. A. Hart, that 'those who have submitted to… restrictions… have a right to a similar submission from those who have benefited by their submission', 'Are There Any Natural Rights?' (1955) 64(2) *The Philosophical Review* 175, 185. Recent contributions to criminal law theory invoking the principle of 'fair play' have been put forth by Richard Dagger, *Playing Fair: Political Obligation and the Problems of Punishment* (Oxford University Press, 2018) and Stephen P. Garvey, *Guilty Acts, Guilty Minds* (Oxford University Press, 2020)—both accounts operate with the moral caveat that the political enterprise in question has to be 'reasonably just' (Dagger) or at least not 'unjust beyond a reasonable doubt' (Garvey).

[28] And, therefore, largely non-existent, see A. J. Simmons, *Moral Principles and Political Obligations* (Princeton University Press, 1979) chapters 3-4. John Locke, *The Second Treatise of Government* (Dover Publications, 2002 [1690]) and, on some readings, Thomas Hobbes, *Leviathan* (Wordsworth, 2014 [1651]) are often said to be the forefathers of modern voluntarism, but one can trace it back all the way to Socrates, see Horton, above n 6, chapter 2. Despite its obvious drawbacks—above all, the pains of coming up with a defensible, low-threshold definition of (tacit) consent—the basic idea that 'political obligations' must rest on the subjects' choice or decision to morally bind themselves to their government continues to draw interest, if less so (for obvious reasons) in the criminal law literature. Its earliest and, perhaps, most poignant critique was offered by David Hume, *A Treatise of Human Nature* (Oxford University Press, 2005 [1739-40]) book III, part II, sections VII-VIII.

[29] 'Political Obligation' in Ted Honderich (ed), *Social Ends and Political Means* (Routledge & K. Paul, 1976) 1, 3 (emphasis added).

[30] Hare is one of few utilitarians to engage the concept of 'obligation'; even Jeremy Bentham had very little to say about it: '[subjects] should obey… so long as the probable mischiefs of obedience are less than the probable mischiefs of resistance… it is their duty to obey, just as long as it is in their interest', *A Fragment on Government* (Cambridge University Press, 1988 [1776]) 56 (emphasis suppressed).

constraint' in many theories of criminalisation.[31] The most elaborate accounts put forth in recent years, however, and this was seen in chapter two, are anchored to an abstract conception of the 'person' and the protection and promotion of their intrinsic value as 'free and equal'. To take just one example from this group—as before, there is no need to rehash the details—recall the Rawlsian approach adopted by theorists like Sharon Dolovich and Matt Matravers.[32] For Rawls, freedom is about social justice; it is about fairly distributing certain rights, goods, opportunities, etc., and 'we are to comply with and do our share in just institutions when they exist and apply to us.'[33] Little more is said about it, and little more can be said about it. Individual obligation is the flip side of a moral system: 'if the basic structure of society is just, or as just as it is reasonable to expect in the circumstances, everyone has a natural duty[34] to do what is required of him… irrespective of his voluntary acts, performative or otherwise.'[35] Rawls's test to prove that this holds true is to ask whether those who are (hypothetically) party to his 'original position' and (hypothetically) decide on what shall pass as 'just', while being stripped of their personal and socio-economic circumstances, preferences, biases, and beliefs, would choose to be obligated in this way—and, of course, they would.[36]

Now, as said, these are only examples. The point here is not to provide an overview of the (extensive) literature on 'political obligation' or to litigate between the approaches mentioned.[37] It is simply to illustrate that, when conceptualised from a moral perspective, compliance is what subjects *ought* to do, regardless or even in spite of their own

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[31] Such as the one advanced by A. P. Simester and Andreas von Hirsch, *Crimes, Harms, and Wrongs* (Hart Publishing, 2011); see chapter 1 at 18 for more examples. Both the 'wrongfulness constraint' and the 'harmfulness constraint' are poorly named, of course, considering that each primarily functions as a reason for, instead of a limit on, regulatory state intervention, see chapter 4 at 82-83.

[32] See chapter 2 at 44-45.

[33] When they do *not* exist 'we are to assist in [their] establishment…, at least when this can be done with little cost to ourselves', John Rawls, *A Theory of Justice* (Belknap Press of Harvard University Press, 2005 [1971]) 334.

[34] Rawls distinguishes between 'duties' (of justice) and 'obligations' (of fairness); the two can overlap, but obligations have to be voluntarily undertaken or incurred, see ibid 113-14. What that means is that he would object to describing his 'natural duty to support just institutions' as an account of 'political obligation'. Functionally, though, it makes no difference—unless, and this would be plausible, 'natural duties' hold beyond the realms of a particular state, compare Simmons, *Moral Principles and Political Obligations*, above n 28, 147-52. This interpretation sits in some tension with Rawls's claim that 'we are to comply… with just institutions when… they apply to us' (above n 33, 334), but it fits his more Kantian claim that 'natural duties' *qua* duties 'hold between persons irrespective of their institutional relationships; they obtain between all as equal moral persons' (above n 33, 115) (footnote added).

[35] Rawls, above n 33, 334.

[36] Ibid 115-16, 333-37. They would see, reasonable and rational as they are, that only an unconditional duty to support 'just' institutions can match the conception of justice previously devised, successfully address the assurance problem, and thus secure the stability of cooperative practices over time.

[37] Arguably, the best place to go for both is still Simmons, *Moral Principles and Political Obligations*, above n 28; and for more up-to-date discussion (though not much has changed) Horton, above n 6.

personal assessment as to whether or not the particular regime and the (criminal) laws which they are confronted with are legitimate. And that is because, from a moral perspective, being in a position of authority, having a legitimate claim to allegiance, is a matter of 'being right' (with regard to what is 'true', 'good', 'reasonable', etc.) prior to and independently of whether or not that position is, in fact, recognised by those to whom it is addressed; that is, whether or not that claim to allegiance, to 'being right', does, in fact, carry.[38] The consequences of subscribing to this perspective were seen in chapters one and two: the criminal law's legitimacy becomes a philosophical problem that calls for a philosophical resolution; and since only legitimate laws can 'genuinely' obligate, so does the quest for compliance. The primary task of a government seeking compliance is thus to pin down and act on the 'right' moral principles, principles that make laws legitimate and subjects justified in following them, for it is the observation of those principles that secures the appropriate moral bond between state and subject, and affords everyone with a reason for allegiance. To comply with the (criminal) law, then, is to discharge the obligation to comply that springs from this bond.[39]

Several things are off in this picture. For one, 'political obligation' in its current usage is a complete misnomer. There is nothing 'political' about a 'political obligation' that exists outside, and works against, the ongoing, conflictual practice of politics, just as there is nothing 'political' about a standard of 'political legitimacy' that boils down to moral principle. The former is a function of the latter. But, of course, to leave it at that would simply be to repeat the critique offered in chapters one and two. Zooming in on the concept of compliance is necessary and helpful because it brings to life that which is so fundamentally, positively different about the realist's understanding of authority, and that is the unqualified commitment to representation, to the continuous process of approximation—of creating congruence—between the actual normative expectations

[38] Communitarian theorists, by trade, have to advocate for some degree of (rationalised) consensus, but they have no difficulty proclaiming the state's authority in the face of even considerable dissent. Indeed, thinking back to last chapter's excursion into the logic of 'hate' laws, it is the dissenter—the deplorable 'other'—that provides the backdrop for much communitarian (as well as abstract liberal) reasoning.

[39] For those committed to the moral perspective, or, rather, one of its many offshoots, the next question, of course, is 'what sort of thing a person must do, or what sort of thing must happen, in order for that person to… discharge the duty, whatever it is', see Michael Sevel, 'Obeying the Law' (2018) 24(3) *Legal Theory* 191, 191. Does she have to act *for* the reason that the law requires that she act? If not, does she have to at least be *aware* of the reason on some level, even if she does not act *for* it? Or is it enough for her to just act as required, *regardless* of the reason? — Depending on how one answers these questions, one arrives at a broader or narrower conception of ('true') compliance, compare above 10. What remains the same, however, is that neither the existence of the obligation to comply nor the act of successfully discharging it requires that the person to whom the obligation applies accept the obligation or be in any way committed to the principles in which it is grounded; Sevel makes this clear at ibid 195 (n 5).

of actual political subjects and the concrete institutional arrangements with which they are to comply.[40] Again, for most theorists, as Alan Gewirth explained over half a century ago, 'the basic question of political obligation', of whether or not a particular law or a government directive, more generally, comes with a legitimate claim to authority, to being complied with, is a straightforward question about 'whether or not it satisfies the criteria which would make it a moral obligation.'[41] The political raising of a claim to authority, in other words, poses, first and foremost, a theoretical problem of having to reconcile the claim and its content with a—the 'right'—set of principles which exist prior to and are independent of the law, the directive, the institutional practice, etc., in question. For the realist, it poses a practical problem. A problem calling for judgment, real, contextual judgment by all those to whom that claim to authority, to compliance, is being addressed. Judgment as to whether (and, if so, to what degree) it is acceptable to them; whether it 'makes sense' in the circumstances in which they find themselves; whether it tracks the expectations, moral or other, that they have, right here, right now, towards their government and those who run it, the opinions they hold, unadulterated by ideological censure or rational reconfiguration, popular or unpopular, about how to live. In short, 'political' authority, for the realist, is always and inextricably tied to the fact that at least some of those to whom it is addressed practically, affirmatively relate to it—and complying with the law is one way of doing so, one way of revealing one's individual judgment as to the congruence between 'is' and 'ought'.

Now, in case the 'at least some' in the previous sentence causes confusion: it has been emphasised again and again over the course of this thesis that political authority is not 'all or nothing'; normative expectations are plural and continually in flux, so not every political subject will find a particular law or policy decision acceptable (or acceptable to the same degree) and thus authority, too, will exist (or exist to a sustainable degree) only in relation to some and not others. Governing with zero authority deficits, that is, zero deficits of representation—of legitimacy, properly construed—is unrealistic. But these deficits can grow, of course, gradually over time or with a sudden rift, and then what once had authority turns for (too) many into a sheer imposition power.[42] There is

[40] For the full account, revisit chapter 2 at 54-57.
[41] Alan Gewirth, 'Obligation: Political, Legal, Moral' in J. Roland Pennock and John W. Chapman (eds), *Political and Legal Obligation: NOMOS XII (Yearbook of the American Society for Political and Legal Philosophy)* (Atherton Press, 1970) 55, 81: '[the] "moral" refers to the reasons or criteria which are brought to bear in evaluation or justification, while the "legal" and "political" refer to the institutions or activities which are adjudged by the criteria.'
[42] See chapter 1 at 35-36; the distinction will be returned to below under section I.2.

no way for a government to prevent this or to get to an acceptable level of legitimacy, of actual normative congruence, in the first place, unless they put in the work. Not the philosophical work of figuring out the 'right' principles which, in theory, should give every subject a reason for allegiance if only they were 'reasonable' enough to grasp it, but the political work of generating support for the (criminal) law and the institutions it creates and protects—the work that requires recognising and managing differences, disagreement, change, and the continual struggle for representation. So, then, with that in mind, is it possible, for a realist, to conceive of such a thing as 'political obligation' at all? Certainly not in the way that most legal and political theorists do, but here another clarification is in order. The realist is not, or at least need not be, a philosophical anarchist (just as she is not, or at least need not be, a moral relativist[43]). Philosophical anarchism is a theoretical position according to which few—if any—political subjects are, in fact, under a moral obligation to support their government and comply with its laws.[44] The realist's position is that, frankly, it does not matter whether they are under such an obligation or not; what matters is that they *deem* legitimate, wholeheartedly or begrudgingly and for whichever reason, the institutions that make claims on them, and that when prompted to respond to these claims, they *act* accordingly.[45]

It is this combination of normative attitude (based on one's individual judgment of the degree of congruence) and practical response (by committing to it through action) that gives real shape to the idea that there is such a thing as 'political obligation', a duty of allegiance to back up the 'legal obligation' that the (criminal) law *qua* law imposes on those to whom it is addressed. Truly 'political obligation' is the obligation that subjects

[43] Compare chapter 3 at 70 (n 87).

[44] There are several strands to this position, but the '[c]ommitment to one central claim unites all forms of anarchist political philosophy: all existing states are illegitimate' because none of the theories seeking to ground 'political legitimacy' and 'political obligation' in a moral bond between state and subject can, in a morally defensible way and (or) without running into practical impossibility, prove that such a bond does, in fact, exist, see A. J. Simmons, *Justification and Legitimacy: Essays on Rights and Obligations* (Cambridge University Press, 2001) 103. Simmons himself, together with Leslie Green, *The Authority of the State* (Clarendon Press of Oxford University Press, 1988), is probably the most famous proponent of this claim. For contemporary variations, see Magda Egoumenides (ed), *Philosophical Anarchism and Political Obligation* (Bloomsbury Publishing, 2014).

[45] Truly excellent on this point is Glen Newey, 'Realism and Surrealism in Political Philosophy' in Matt Sleat (ed), *Politics Recovered: Realist Thought in Theory and Practice* (Columbia University Press, 2018) 49, 58-63. Newey draws an analogy between being exposed to a political regime, as humans quite inevitably are, and being exposed to the weather, for which the same holds true. Each phenomenon, he writes, requires 'forming attitudes toward it in conjunction with practical responses that may prove more or less maladaptive… What seems quite gratuitous, however, is the claim that [these] responses must organize by subsuming themselves under a category such as *obligation*' (at 59, emphasis in original). He is one of few realists to engage with the concept of 'political obligation' at all, see also *After Politics: The Rejection of Politics in Contemporary Liberal Philosophy* (Palgrave Macmillan, 2000) chapter 3.

attribute to themselves. It derives not from some independent moral principle which is superior to the subjects' actual sense of commitment, but from the practice of politics, the ongoing engagement and, at times, painful confrontation with diverging representational claims, claims about what ought and ought not to be done—which, of course, may and will, among other things, appeal to moral principle—and the transmission of those claims into law and policy. Thomas Fossen, who constructs a similar argument based on Wittgensteinian ('pragmatist') trends in the philosophy of language,[46] neatly captures this dynamic when he writes that 'political obligation' understood, like here, as a matter of contextual judgment involves 'a radically situated kind of attunement'[47] to political institutions, to circumstances, and to the perspectives of other subjects. Its 'content and validity… are provisionally determined in eventful, temporally extended and embodied practices of stance-taking.'[48] He rightly notes, though, and this is worth stressing yet again, that '[t]his account does not collapse the distinction between what is legitimate and what is ['merely'] taken to be so', as morally inclined theorists would keenly object; 'rather this distinction is interpreted as a permanent tension, a structural feature of political subjectivity'[49] that is both relational and contestatory in nature.

The real problem of 'political obligation', to sum this up then, is not the philosopher's problem of having to devise the 'right' moral principles which, in theory, should settle the question of legitimate allegiance; it is every subject's individual problem of having to exercise, articulate, and continually revise their own judgment as to that question by engaging in the unsettling practice called politics. Compliance with the (criminal) law is one way of making that judgment explicit. It is not a moral entitlement—something that subjects *ought* to do; not for the realist. It is what they *do* do in response to a claim to authority which they themselves consider legitimate, at least for the time being.

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[46] See especially 'The Grammar of Political Obligation' (2014) 13(3) *Politics, Philosophy & Economics* 215, where he skilfully dissects and reframes two of the most famous and, arguably, finest pieces on the problem of 'political obligation': Hanna Pitkin's 'Obligation and Consent—I' (1965) 59(4) *American Political Science Review* 990 and 'Obligation and Consent—II' (1966) 60(1) *American Political Science Review* 39. Pitkin's view has often been associated with—and dismissed as—the so-called 'conceptual argument' (compare above n 22) because of her insistence that '[p]art of what "authority" *means* is that those subject to it are obligated to obey', 'Obligation and Consent—II', 40 (emphasis added); compare, e.g., Simmons, *Moral Principles and Political Obligations*, above n 28, 39-45. Fossen, however, shows convincingly that her appeal to the *meaning* of political authority is much better read as a reminder that, in real life, calling someone an 'authority' is to pass judgment on their legitimacy—judgment on whose validity '[n]o one has the last word because there is no last word', 'Obligation and Consent—II', 52.

[47] Fossen, above n 46, 228. There is some resonance here with H. L. A. Hart's 'internal point of view' as a conduct-guiding attitude, *The Concept of Law* (Oxford University Press, 3rd ed, 2012 [1961]) 89.

[48] Thomas Fossen, 'Taking Stances, Contesting Commitments: Political Legitimacy and the Pragmatic Turn' (2013) 21(4) *Journal of Political Philosophy* 426, 446.

[49] Ibid. See also 'Political Legitimacy as an Existential Predicament' (2022) 50(4) *Political Theory* 621.

2. Compliance and motivation

Having teased out the conceptual differences between the moral and the political perspective, it is now possible to state, in unavoidably general terms, what is involved for each in securing compliance as a real-life, political practice, and, crucially, to compare their prospects for successful implementation. In the interest of symmetry, start, first, by considering the moral perspective. As was seen most clearly in the examples given at the beginning of the preceding section,[50] the whole point of linking compliance to a deontic interpretation of 'political obligation' is to make it *motivation-independent*. It would be nice, in other words, if the subjects to whom the (criminal) law is addressed were to be moved by the principles which it embodies—and fostering some degree of moral enlightenment is no doubt part of the agenda—but really, it makes no difference whether they are or not. Obligation is obligation and subjects are to do as the law says, period.[51] Now, of course, the number of subjects who will be addressed in these terms will vary depending on the preferred narrative. A staunch communitarian, for instance, will demand that the regime in question and its (criminal) laws enjoy quite substantial (if highly rationalised) support; a devoted Kantian, on the other hand, need not. Either way, though, it should be clear from the foregoing that a government committed to the moral perspective is a government committed to force back its opposition. In practice, that generally means using sanctions and the threat thereof as a motivation substitute: subjects are dissuaded—it is hoped—from engaging in illegal behaviour by making it too costly, on balance, for them to do so. The technical word for this is 'deterrence';[52] and the less subjects are willing, for whichever reason, to live by the ('right') law, the more deterrence-heavy the strategy for its implementation will have to be.

The basic theory behind deterrent practices is easily summarised: humans are rational, reasonable, and self-interest creatures, which is why when confronted with a decision to act in one way or another, they will perform the action whose perceived benefits are

[50] See above section I.1. at 112-13 (Duff and Marshall) and 115 (Rawls).
[51] All of this is provided that the government got the law 'right', of course, or else there is no obligation to discharge. Considering, however, that, from a moral perspective, the subjects' own assessment of the law is inherently unreliable, the default assumption will likely be that it did.
[52] The first theorists to turn their attention to deterrence practices were Cesare Beccaria, *On Crimes and Punishments* (David Young trans, Hackett Publishing, 2nd ed, 1986 [1764]) and Jeremy Bentham, *The Rationale of Punishment* (Robert Heward, 1830 [1775]). Not by accident, their ideas, which inspired a long line of legal and criminological research, originated in a time and place, 18th century Europe, when criminal justice was an exceptionally harsh business to get caught up in, and the social, economic, and political climate urged a need for reform, see Gerben J. N. Bruinsma, 'Classical Theory: The Emergence of Deterrence Theory in the Age of the Enlightenment' in Daniel S. Nagin, Francis T. Cullen and Cheryl Lero Jonson (eds), *Deterrence, Choice, and Crime: Contemporary Perspectives* (Routledge, 2018) 3.

expected to outweigh its costs.[53] While the benefits of offending can include virtually anything and are hugely specific both to the individual subject and to the situation, the main, formalised cost (others may include a loss of social status or the support of one's family) is being sanctioned by the state—which, in turn, can range from getting a fine to being banned from one's chosen profession, to suffering short or long term imprisonment or even death. The magnitude of the cost of sanctions can be measured along three variables: (i) certainty (sanctions will be imposed), (ii) celerity (sanctions will be swiftly administered), and (iii) severity (sanctions will be punitive).[54] Just as benefits need to be perceived as beneficial, however, costs are relevant to the decision-making process only if and insofar as they are perceived as costly. Strictly speaking, therefore, deterrence relies on a double causal link between the actual properties of a sanctioning regime, its perceived properties, and the actual behaviour of those perceiving them.

Empirical research has shown this link to be weak at best, both with regard to subjects who have had first-hand experience with being sanctioned ('specific deterrence') and with regard to subjects who, through laws, policies and enforcement practices, are exposed only to its threat ('general deterrence').[55] The main finding is that, while neither perceived severity nor perceived celerity have proven to create a significant deterrent effect, there exists a marginal, inverse relationship between perceived certainty[56] and subsequent offending. The strength of this relationship, though, will vary among subjects and situations, hinging, notably, on the processing of available information,[57] the ability and method used to assess costs and benefits, other personal and social factors,

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[53] See David M. Kennedy, *Deterrence and Crime Prevention: Reconsidering the Prospect of Sanction* (Routledge, 2009) chapter 2. It is worth noting the irony of how many criminal law theorists who spend their careers fending off utilitarian reasoning thus, ultimately, have to make their peace with it.

[54] Here and in the following, Raymond Paternoster, 'How Much Do We Really Know About Criminal Deterrence?' (2010) 100(3) *Journal of Criminal Law & Criminology* 765, 782-87.

[55] The existing literature is too large to be discussed in any detail here. Helpful review studies have been published by Daniel S. Nagin, 'Deterrence in the Twenty-First Century' in Michael H. Tonry (ed), *Crime and Justice: A Review of Research* (University of Chicago Press, 2013) vol 42, 199 (general deterrence); Daniel S. Nagin, Francis T. Cullen and Cheryl Lero Jonson, 'Imprisonment and Reoffending' in Michael Tonry (ed), *Crime and Justice: A Review of Research* (2009) vol 38, 115 (specific deterrence, focused on the effects of prior imprisonment); Paternoster, above n 54; and Travis C. Pratt et al, 'The Empirical Status of Deterrence Theory: A Meta-Analysis' in Francis T. Cullen, John Paul Wright and Kristie R. Blevins (eds), *Taking Stock: The Status of Criminological Theory, Advances in Criminological Theory* (Transaction Publishers, 2008) vol 15, 367.

[56] Note that 'the certainty of punishment is conceptually and mathematically the product of a series of conditional probabilities: the probability of apprehension given commission of a crime, the probability of prosecution given apprehension, the probability of conviction given prosecution, and the probability of sanction given conviction', Nagin, above n 55, 201-2. The evidence in favour of perceived certainty's deterrent effect relates overwhelmingly to 'getting caught' (ie, the perceived certainty of apprehension).

[57] As Kennedy, above n 53, 24-27 points out, public knowledge of sanction schemes and enforcement practices is usually presumed high, especially by politicians, but more often than not low and outdated.

such as age, race or gender,[58] and the prior or recurring, active or passive involvement in illegal (group) behaviour.[59] What this means is that, even if a deterrence strategy is focused—as few are but the evidence suggests they should—on steadily signalling the certainty of coercive intervention, its effects are going to be both modest in degree and highly heterogenous in reach. Not to mention the fact that (believably) communicating such a large-scale threat over time is itself an extremely costly endeavour.[60] It requires a great deal of surveillance, on the street, and even more so online, a veritable army of skilled enforcement personnel, and an ongoing, heavy investment in carceral and (or) non-carceral offender programmes and attendant 'corrective' facilities.[61] Arguably the most worrying issue of all, however, and a neat segue over to the political perspective, is that what deterrent practices lack in salient deterrent effect, they more than make up for in the fuelling of antagonistic attitudes. For not only are targeted subjects told that their ideas are 'wrong' (or, indeed, irrelevant) as per some standard which a select few or many have decided is 'right';[62] they also come to understand their relationship with their government, and the group of subjects whom it represents, as one of risk, intimidation, and reprisal.[63] So, while, at best, deterrence manages to 'subtly' steer subjects away from the political process, at worst, it actively encourages a climate of exclusion and mutual 'othering' whose sole discernible use is a symbolic display of power.

And 'power' is the decisive word here: as was established at the very beginning of this thesis,[64] from a political perspective, resorting to power—which includes force of any kind, legal or not, threatened or executed—is never an expression of authority, never, under no circumstances. It is an expression of a *lack* thereof. It means that the regime in question is trying to govern against the grain, break down resistance, bend the will of those whose support it does not have. In short, it indicates illegitimacy. Not full-on,

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[58] See generally Brenda Sims Blackwell, 'Perceived Sanction Threats, Gender, and Crime: A Test and Elaboration of Power-Control Theory' (2000) 38(2) *Criminology* 439; and on the offence of drunk driving, Frank A. Sloan, Lindsey M. Chepke and Dontrell V. Davis, 'Race, Gender, and Risk Perceptions of the Legal Consequences of Drinking and Driving' (2013) 45 *Journal of Safety Research* 117.

[59] Both has been shown, independently and interactively, to lower the perceived certainty of sanctions, Raymond Paternoster and Alex Piquero, 'Reconceptualizing Deterrence: An Empirical Test of Personal and Vicarious Experiences' (1995) 32(3) *The Journal of Research in Crime and Delinquency* 251; Ross L. Matsueda, Derek A. Kreager and David Huizinga, 'Deterring Delinquents: A Rational Choice Model of Theft and Violence' (2006) 71(1) *American Sociological Review* 95.

[60] See Tom R. Tyler, 'Legitimacy and Criminal Justice: The Benefits of Self-Regulation' (2009) 7(1) *Ohio State Journal of Criminal Law* 307, 309-10.

[61] This aspect will be discussed in more detail in chapter 6.

[62] On the dangers of classifying ideas—and people—as 'right' or 'wrong' and using the (criminal) law as a messaging service, revisit chapter 4 at 95-97, 104-7.

[63] Tyler, above n 60, 310. So, if at all, these tactics are to be used sparingly; see chapter 6 at 148-49.

[64] Revisit the discussion in chapter 1 at 35-36.

not necessarily; authority, as was emphasised above, is always scalar. Any lack, therefore, can be very minor, localised in one place, or span multiple groups of subjects; it can concern a specific law directly, or signal problems with an entire policy area. The point is, whenever and wherever power is the means to control behaviour, authority by definition is missing. Because, again, authority, for the political realist, is the ability to generate the expected behavioural response *without* force. Which is why compliance induced by threat of (further) sanction is no compliance at all; it is simple compulsion, and evidence that things are—a bit or a lot—awry. By contrast, the moral perspective, and that should be very clear by now, is immune to such evidence. Laws, criminal or other, are (morally) legitimate and (morally) obligate regardless of whether or not they are, in fact, acceptable to those who are expected to comply with them. They just have to be (morally) 'right'; and since subjects' judgments on that matter cannot be trusted, a lack of support for these laws, and a lack of motivation to do as they say, is likely no more than an indication that the subjects concerned are defiant and 'wrong'. Which is why, from a moral perspective, power can and has to be used to realise authority; most scholars even use the terms interchangeably. The political realist, on the other hand, is committed to a clear distinction between the two, in theory and in practice. Being in a position of authority, as opposed to a position of power, means resting one's rule on a system of laws whose claim to allegiance is *motivationally effective*. And that, in turn, requires matching or at least approximating the actual normative expectations of those whom one seeks to govern, their judgments—moulded through contestation—as to the congruence between 'is' and 'ought'. For the realist, therefore, compliance exists only in relation to authority. It is a behavioural response to a law (and to a regime) which is deemed acceptable and, as such, action-guiding. It is a measure of congruence.

Empirical research strongly supports this line of argument and its utility as an approach to fostering compliance in day-to-day political practice.[65] It has shown that when and, importantly, insofar as subjects ascribe legitimacy to the (criminal) law, to directives, to policies, and to those who make them—that is, when and insofar as they practically, affirmatively relate to an actual claim to authority—they are significantly more likely,

[65] As before, the literature is too vast to be reviewed in detail. Recent studies by prominent contributors include Jonathan Jackson et al, 'Why do People Comply with the Law? Legitimacy and the Influence of Legal Institutions' (2012) 52(6) *British Journal of Criminology* 1051; Rick Trinkner, Jonathan Jackson and Tom R. Tyler, 'Bounded Authority: Expanding 'Appropriate' Police Behavior Beyond Procedural Justice' (2018) 42(3) *Law and Human Behavior* 280; and, focusing on cooperation, Tom R. Tyler and Jonathan Jackson, 'Popular Legitimacy and the Exercise of Legal Authority: Motivating Compliance, Cooperation, and Engagement' (2014) 20(1) *Psychology, Public Policy, and Law* 78.

compared to when faced with a threat of sanction (alone), not only to comply with that claim, and to do so consistently,[66] but to engage and cooperate with those who raise it. And that is because perceived legitimacy, a judgment of normative congruence, much more effectively than any deterrence strategy, triggers that which the realist means by 'political obligation': the formation of a—more or less—positive attitude towards the legal and political arrangements in question, and a commitment to this attitude through action.[67] Now, obviously, there are no 'restrictions' as to the expectations that subjects can have towards their government, and so the factors pertaining to an individual judgment of congruence cannot be determined *a priori*. Numerous studies, especially over the last few years, however, have shown that it is possible, and very instructive indeed, to distinguish between procedural and substantive expectations.

Procedural expectations are content-independent. They relate to the way decisions are made and communicated. Substantive expectations, by contrast, relate to the outcomes produced, the values, interests, and circumstances that are taken into account, and how they are weighted, etc. Substantive expectations, in short, are content-dependent.[68] As far as decision acceptance and associated compliance enhancement are concerned, the research suggests that congruence with procedural expectations is especially critical at the implementation level, where subjects have to respond to decisions by the police or by court officials, etc.[69] These expectations tend to include: voice (being able to make one's standpoint heard), neutrality (being treated transparently and without prejudice), respect (being protected in one's rights), and trustworthiness (being afforded genuine concern and honesty).[70] At the policy level, on the other hand, where the acceptability

[66] Where avoiding sanctions or apprehension is the only motivator, subjects often 'lapse' and return to preferred behavioural patterns once they feel 'safe' enough to do so, see Tyler, above n 60, 311-12.
[67] See section I.1. at n 45-49. Many empirical scholars, therefore, model legitimacy as a two-part concept describing 'a sense of obligation or willingness to obey authorities (value-based legitimacy) that then translates into actual compliance with governmental regulations and laws (behavioural legitimacy)', see Margaret Levi, Audrey Sacks and Tom R. Tyler, 'Conceptualizing Legitimacy, Measuring Legitimating Beliefs' (2009) 53(3) *American Behavioral Scientist* 354, 356.
[68] Note that in practice procedural and substantive expectations will be entangled, making the distinction between the two, especially as perceived by the subjects, somewhat less clear-cut than portrayed here.
[69] Ever since the publication of Tom R. Tyler's pioneering Chicago study, *Why People Obey the Law: Procedural Justice, Legitimacy, and Compliance* (Yale University Press, 1990), research into personal encounters with government agents, especially the police, has reliably confirmed his findings, see Tom R. Tyler and Tracey L. Meares, 'Procedural Justice Policing' in David Weisburd and Anthony A. Braga (eds), *Police Innovation: Contrasting Perspectives* (Cambridge University Press, 2nd ed, 2019) 71.
[70] Tyler and Meares, above n 69, 74. These are the four considerations that 'procedural justice' research has identified as particularly important. But there can be others, of course. Anthony Bottoms and Justice Tankebe, for instance, argue that lawfulness (being subjected only to decisions provided for by the law), distributive justice (not being disproportionately (dis-)advantaged), and effectiveness (being able to rely on authorities 'doing their job') should be added to the canon, see 'Procedural Justice, Legitimacy, and

of the law itself and by all subjects (prior to any personalised decisions) is on the line, substantive congruence, more frequently referred to as 'moral alignment' or 'outcome favourability', has proven to be—by far—the dominant determinant.[71] Now, this does not mean, of course, that procedural expectations do not matter at all. Several studies, for instance, have shown that the ability to participate in the decision-making process, or to be represented by someone of 'one's own kind' or with the necessary expertise, noticeably boosts legitimacy perceptions, and to some extent[72] even buffers the impact of an unfavourable outcome.[73] And very similar synergies exist at the implementation level, as well. Substantive expectations, for instance, have shown to supersede, but not nullify, procedural ones whenever the stakes of a situation are considered particularly high.[74] And even where that is not the case, in routine situations, in other words, it has been found that the feeling of having to comply is amplified, and thus a much stronger predictor of actual compliance, if decisions and the law, more generally, are perceived as *both* procedurally congruent and—more or less—in line with the subjects' personal values and interests, their very own assessments, that is, of 'right' and 'wrong'.[75]

Social Contexts' in Denise Meyersen, Catriona Mackenzie and Therese MacDermott (eds), *Procedural Justice and Relational Theory: Empirical, Philosophical, and Legal Perspectives* (Routledge, 2021) 85, 90-93. Their proposal is corroborated by the findings of a recent US study by Erin M. Kearns, Emma Ashooh and Belén Lowrey-Kinberg, 'Racial Differences in Conceptualizing Legitimacy and Trust in Police' (2019) 45(2) *American Journal of Criminal Justice* 190.

[71] Peter Esaiasson et al, 'Reconsidering the Role of Procedures for Decision Acceptance' (2019) 49(1) *British Journal of Political Science* 291, in a recent meta-study on the topic, have shown that this holds true 'across regulatory and distributive policy issues, across large-scale democracy and school settings, across comparisons among and within decision-making arrangements, and across vignette and field experiments' (at 309). See also Kwok Leung, Kwok-Kit Tong and E. Allan Lind, 'Realpolitik Versus Fair Process: Moderating Effects of Group Identification on Acceptance of Political Decisions' (2007) 92(3) *Journal of Personality and Social Psychology* 476.

[72] There is evidence suggesting that not only the acceptability of decisions themselves but the legitimacy of the decision-making procedure is suffering after multiple losses, compare Anna Kern, Lala Muradova and Sofie Marien, 'The Effect of Accumulated Losses on Perceptions of Legitimacy' (2021), available online at: https://ssrn.com/abstract=3762746 [last accessed 10 March 2023].

[73] See, e.g., Henrik Serup Christensen, Staffan Himmelroos and Maija Setälä, 'A Matter of Life or Death: A Survey Experiment on the Perceived Legitimacy of Political Decision-Making on Euthanasia' (2020) 73(3) *Parliamentary Affairs* 627 (participation; expertise; giving reasons for decisions); Hannah Werner and Sofie Marien, 'Process vs. Outcome? How to Evaluate the Effects of Participatory Processes on Legitimacy Perceptions' (2020) *British Journal of Political Science* 1 (participation vs. representation); Amanda Clayton, Diana Z. O'Brien and Jennifer M. Piscopo, 'All Male Panels? Representation and Democratic Legitimacy' (2019) 63(1) *American Journal of Political Science* 113 (gender equality; descriptive representation); and Sveinung Arnesen and Yvette Peters, 'The Legitimacy of Representation: How Descriptive, Formal, and Responsiveness Representation Affect the Acceptability of Political Decisions' (2017) 51(7) *Comparative Political Studies* 868 (representation; expertise).

[74] See Jessica Jacobson, Gillian Hunter and Amy Kirby, *Inside Crown Court: Personal Experiences and Questions of Legitimacy* (Policy Press, 2016) who found that if a conviction and (or) imprisonment for a serious offence is at stake, substantive congruence is 'a crucial determinant' of legitimacy (at 166).

[75] See Noam Gur and Jonathan Jackson, 'Procedure-Content Interaction in Attitudes to Law and in the Value of the Rule of Law: An Empirical and Philosophical Collaboration' in Denise Meyersen, Catriona Mackenzie and Therese MacDermott (eds), *Procedural Justice and Relational Theory: Empirical, Philosophical, and Legal Perspectives* (Routledge, 2021) 111, 116-23.

Overall, it can be concluded, therefore, that, while certainly 'there is no one *factor* that best promotes legitimacy in every context',[76] putting in the political work of figuring out, time and again, what kind of normative expectations, procedural and substantive, subjects actually have, and trying to match these expectations with laws, policies, and implementation practices, is the best *strategy* to promote long term legitimacy and, by extension, compliance. Especially at the policy level, where substantive congruence is key, political compromise, a mechanism meant to facilitate repeated reconciliation of diverging representational claims, is an excellent vehicle for this strategy: focused on regulating behaviour, not supressing opinions, it allows for different substantive preferences, moral convictions, and beliefs to stay alive and audible, while simultaneously maximising the number of subjects who can—legally—act on them.[77] Its emphasis on inclusive institutional design, granting *access* to the political process, the opportunity to be *recognised* in one's difference, and the perennial prospect of *change*,[78] moreover speaks to the criteria that are likely to enhance procedural congruence and thus deepen the sense of 'political obligation', that actual, individual commitment which lies at the heart of compliance with the (criminal) law, in both theory and practice.

II. Understanding non-compliance: the duality of failure

All that is left to do now is spell out the lessons which this new and genuinely political understanding of compliance holds for a new and genuinely political understanding of non-compliance. And seeing as the (connected but separate) question of how governments ought to *anticipate* and *react* to manifestations of non-compliance is a question reserved to the next chapter, this final section can be kept fairly brief.

So, to start things off, the most basic realisation emerging from the previous discussion surely is this: if compliance is a behavioural response to an authority claim (a criminal law, an order, etc.) which is deemed acceptable by the subjects to whom it is addressed (read: it is sufficiently congruent with their own normative expectations and, as such, motivationally effective), then non-compliance is the exact opposite. Non-compliance is a behavioural response to an authority claim which is deemed *un*acceptable by those to whom it is addressed (read: it is insufficiently congruent and, as such, motivationally

[76] Bottoms and Tankebe, above n 70, 91 (emphasis added).
[77] Revisit chapter 3 at 61-71, and chapter 4 at 81-87.
[78] Revisit chapter 3 at 75-79.

ineffective).[79] Whether or not it is also by some standard in breach of a moral obligation to comply and to support one's government is irrelevant—the realist, as was seen, can be agnostic about that. All that matters is that the subjects' individual commitment to comply, their own sense of 'political obligation' is either too weak or has never been properly activated at all. It follows that non-compliance, like compliance, too, is really a 'two-party' concept and a 'two-party' practice which consists of a regulatory prompt (government) and a behavioural response (subject). The empirical research has shown that if and insofar as the prompt ('do X') is congruent with the expectations that subjects have towards their laws and their institutional arrangements, more generally, the behavioural response is likely to mirror the prompt ('subject does X'); by contrast, if and insofar as the prompt ('do X') is *in*congruent with any of these expectations, the behavioural response is likely to deviate ('subject does Y'). So, the core lesson to take away from this is that focusing solely on the subject's response will deliver a distorted picture, not only of the problem (dissonance) but of its solution (congruence).

As will have become evident over the course of this chapter, from a moral perspective, the focus is inevitably drawn towards the response. For as long as the government got the law 'right' (and given the 'unreliability' of political judgment, it is mighty difficult to prove the opposite), subjects are under a moral obligation to comply; and thus, any failure to do so is a moral failure,[80] and like every moral failure, it is first and foremost that of the one who commits it. Non-compliance, from a moral perspective, thus, says more about the subject who broke the law than it does about the law being broken. For the realist, the focus is much more balanced. Of course, non-compliance constitutes an individual failure, but that failure is a behavioural one and, importantly, it is a 'failure' only as measured against and in virtue of an insufficient regulatory prompt. One could say, therefore, that non-compliance, understood in genuinely political terms, is always a *dual failure*, revealing the relationship between two parties. On the one side, there is a subject (or, realistically, more than one) who failed to do as the law says; which may sound modest, trivial even—and it is. And on the other side, there is a political regime of one kind or another, that, to a greater or lesser degree, failed to do its job. The 'job'

[79] As will be discussed further in the next chapter, this does not mean that non-compliance has to involve some grand act of defiance—subjects do not even have to know that what they are doing is illegal. And the same is true for compliance; there need be no conscious endorsement of the law (cf. Sevel, above n 39, 200-3). In fact, habitual compliance is a sign that subjects are effectively self-regulating.

[80] Arguably, the more accurate way to put it would be to say that it is a *prima facie* moral failure, since there could always be a ('moral') defence wiping out the 'wrongfulness' of the act. Similarly, the moral perspective tends to leave room for instants of civil disobedience—but that is a whole other matter.

being to bring the law and other institutional arrangements in line with the expectations of those to whom they are addressed; to maintain a system of political representation, that is, of authority, properly construed. Now, as has been noted repeatedly, the realist rejects the notion of 'perfect' legitimacy. Normative expectations diverge and change, so every regime, no matter how dedicated, operates on a certain legitimacy deficit. The (by this logic, inevitable) occurrence of non-compliance, therefore, is an indicator not only of how great this deficit (still) is, or has over time become, but of which laws and institutional arrangements are concretely affected. The answer may not always be very obvious, of course. A widespread commission of sodomy offences, for instance, gives clear indication that the subjects concerned have no issue with sodomy, and feel their range of congruent action unduly restricted. But to take a more elaborate example, the prevalence of property offences in a particular age group or segment of the population will likely indicate a more diffuse problem of social policy requiring complex attention in the shape of ongoing research, personal engagement, and institutional collaboration. What stays the same, though, is that non-compliance, like compliance, means taking a stance towards one's government, making manifest through action one's own sense of 'political obligation' or lack thereof.[81] And if the government takes heed, they will be guided not only to the problem, the lack of congruence, of legitimacy, properly understood, but maybe, just maybe, be able to fix it—at least, for the time being.

CONCLUSION

This chapter has been about putting some 'real' flesh on the idea that the criminal law is oriented towards compliance. It has un- or, rather, re-packed the concept of 'political obligation' and shown that it can successfully, and sustainably, be activated only if the message of risk and moral superiority is replaced with one of genuine competence, the ability to maintain an acceptable level of normative congruence. The consequences for understanding *non*-compliance are sweeping: each instance signals both a behavioural failure (on the part of the subject) and a regulatory one (on the part of the government). Drawing and expanding upon these insights, the next and final chapter will now move on to the question with which most theories of criminal law—at least implicitly—start: what, if anything, is a government to do when its subjects fail to comply?

[81] As an aside, therefore, it is worth noting that all criminal offences are 'political' offences. Whether a subject is withholding taxes, beating up his wife, or planting a bomb in a government building, they are always taking a stance towards the law and those who claim authority over how they ought to live.

CHAPTER SIX

COMPROMISE AND CONSEQUENCE

INTRODUCTION

Saying that non-compliance indicates a regulatory failure, in addition to a behavioural one, is not the same as saying that once non-compliance occurs, the regulatory project is over. Failure is integral, inevitable—and useful: it points towards existing legitimacy deficits, old and new, major and minor, direct and diffuse, and the work yet to be done; it is a reminder that expectations conflict, change and need to be revisited, negotiations resumed or intensified, and that better, more congruent compromises need to be struck; and finally, it is a prompt for engagement with individual subjects or groups of subjects whose sense of 'political obligation' and (or) capacity for practicing toleration requires a more finely tailored approach.[1] From a governing perspective, then, the situation and the task *pre* and *post* non-compliance are not materially different. Be it through policy development or institutional reform, targeted programmes or personal intervention, the goal is and remains the same: to maximise legitimacy through representation, and thus foster, over time, a sustainable degree of collective action. Which really is just another way of saying that any consequence, broadly construed, that is put in place in response to non-compliance has to itself be oriented towards future compliance. This chapter is about how these consequences, how these second, third, etc., regulatory attempts need to be thought of and designed if they are to have the desired motivational effect.

[1] As will be discussed under section I.2. below, the two are related but not necessarily so.

I. Passing judgment

Be it from a moral or a genuinely political perspective, holding another to account for instances of non-compliance is a matter of passing judgment. Yet, what that judgment is aimed at exactly, and what it entails in practical terms, will hinge on how the alleged failure underpinning those instances is defined—and that is where the two approaches diverge. From a moral perspective, it was seen in the last chapter,[2] non-compliance is, first and foremost, a symptom of individual moral failure, failure to discharge a 'political' obligation to support one's government and comply with its laws. Which means any judgment passed with respect to such failure, too, is moral in nature: subjects who break the (criminal) law, and, crucially, 'wrong' their fellow subjects as a result, stand to be 'blamed', publicly, for what they did and who they were when they did it. But it was also seen, indeed, that was the starting point of the discussion, that 'political' obligation of this kind obtains only if and insofar as a government's claim to allegiance is—again, morally—legitimate. Which means, in exceptional circumstances,[3] at least, it is conceivable that the 'blame' attached to non-compliance does not rest entirely, or at all, with the non-compliant subjects; it is a moral burden that can be shared, shifted, including to governments who themselves are 'guilty' of committing 'injustice'.

This second, institutional dimension of the moral accountability paradigm, commonly problematised as the state's 'standing to blame', has received a fair bit of attention in recent years. And it may seem to dilute the contrast with a realist political perspective that, based on a diagnosis of non-compliance as dual failure, behavioural (subject) and regulatory (government),[4] must arrive at judgments of dual accountability, as well. In part, that is right. There definitely is movement within the moral camp towards a more situated and two-dimensional understanding of accountability that takes seriously the structural grievances associated with non-compliance; but this does not mean that they have the tools to tackle them. Mapping accountability, first, as a moral practice seeking to place 'blame' and, second, as a political practice seeking to spur change, this section will show that not only is the former unmotivated on conceptual grounds and unhelpful practically, but that the 'social justice' considerations that moral thinkers evidently and duly are grappling with are much better accommodated in a political framework.

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[2] Revisit chapter 5 at 112-16, 126-28.
[3] Recall that, if political opinions and their behavioural manifestations, are deemed irrelevant or, at best, unreliable indicators of political legitimacy, then illegitimacy becomes remarkably difficult to ascertain.
[4] Revisit chapter 5 at 126-28.

1. Moral blame

Approaching accountability for non-compliance as liability to moral judgment means entering a philosophical debate about who is 'worthy' of 'blame' and who is 'worthy' of meting it out. The designated 'blamee', of course, is easily identified. It is the non-compliant subject—the 'wrongdoer'—who broke the (criminal) law, thereby failed to live up to their 'political' obligation and violated a set of standards—the 'right' moral standards (autonomy, equality, freedom, dignity, etc.)—on whose validity and proper articulation the nature, scope and force of the 'political' obligation are premised.[5] The 'blame' assigned, in other words, is the 'blame' deserved; and the 'blame' deserved is deserved regardless of whether or not anyone, let alone the state,[6] in fact assigns it. It is a judgment, actual or potential, that attaches to a moral property incurred as a result of the 'wrong' committed. Which means it is warranted in virtue of a finding of *moral responsibility*,[7] and passing it is meant to affirm not only the violated moral standards but the subject's moral status as a 'person' and as a member of the community.[8]

Now, while the substantive moral breach no doubt is key, most theorists would argue that a robust finding of moral responsibility for (criminal) non-compliance, and a subject's corresponding liability to 'blame', must come with further conditions, conditions that show respect for the individual as *moral agent*. Typically, that is taken to mean at least one of two things: first, the non-compliant subject must have had the capacity to comply (they had an opportunity and (or) chose not to); and second, their conduct must have been aligned with their character (the 'wrong' is reflective of who they are).[9] In

[5] The various standards, derived from the precepts of interpersonal morality and liberal political thought, respectively, were discussed in chapters 1 and 2; their conceptual link to the idea of 'political obligation' was fleshed out in chapter 5 at 112-16. There is no need to rehearse these accounts here.

[6] Recall that, if the law and the machinery of government, more generally, are no more than a convenient instrument for the official communication and implementation of pre-political standards, whatever they be, then the authority to hold a non-compliant subject to account for a violation of these standards, rests with the community (a more or less aspirational 'people', depending on the preferred narrative) to whom they belong; and worryingly, as was seen in chapter 1 at 21-22 already, this means the appropriate penal measures can be administered with or without 'the help' of the state, as well.

[7] 'Blame' and 'responsibility', accordingly, are connected but not the same. 'Blame' is the interpersonal response (judgment) to a state of personal responsibility (quality); or, to put it the other way around, the finding of responsibility is what justifies the allocation of 'blame', compare Peter Cane, *Responsibility in Law and Morality* (Hart Publishing, 2002) 185, who (at 23) rightly traces this logic back to Kant, and notes that 'responsibility is not something we ascribe or attribute to human beings but is, rather, intrinsic … [a] part of the constitution of human beings—a fundamental human characteristic, as it were.'

[8] For a succinct analysis of the moralist and liberal ideas informing this view, see Arlie Loughnan, *Self, Others and the State: Relations of Criminal Responsibility* (Cambridge University Press, 2020) 49-55.

[9] Other conditions, building on these rationales and on each other, are causation of harm and causation of risk of harm, although these are driven less by a concern for agency and more by a concern for public welfare and the moral significance of behaviours that (might) undermine it, see Nicola Lacey, *In Search of Criminal Responsibility: Ideas, Interests, and Institutions* (Oxford University Press, 2016) 25-48.

regards to the former, the idea is that non-compliance gives rise to moral responsibility only if and insofar as the relevant conduct was an expression of free will.[10] The attribution of 'blame', therefore, is dependent on whether or not the subject in question did, at the time, have the cognitive and volitional ability to comply with the law's demands; whether or not they had both some 'basic understanding of the nature and significance of their conduct' and, crucially, some 'basic control over it'.[11] The character condition is different; it focuses not on the will but on the reasons that informed it.[12] In the words of one of its most fervent defenders, 'this condition will only be fulfilled insofar as the desire that motivated the action [or omission] is appropriately connected to the system of values of the agent'.[13] The idea behind this is that attributing 'blame' for (criminal) non-compliance 'involves moral criticism of the defendant as a person.'[14] And so, not just the conduct they performed but their attitudes, beliefs and overall disposition, too, must be at odds with the ('right') moral standards embodied in the (criminal) law.[15]

Provided that either or both of these conditions are proven to have been met, a finding of individual moral responsibility, and thus of liability to moral judgment, to 'blame', will generally be 'justified'. And as representative of the community whose standards are concretely at stake, the task of conveying this judgment will generally[16] fall to the state, or rather its government, as the designated 'blamer'. The 'standing' to do so can

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[10] Arguably, the most prominent defence of this view is H. L. A. Hart's *Punishment and Responsibility: Essays in the Philosophy of Law* (Oxford University Press, 2nd ed, 2008 [1968]) chapters 2 and 4-7.
[11] Cane, above n 7, 65. The term 'basic', of course, reveals little about the many thorny issues that arise when attempting to pin down a workable definition of 'capacity', see Nicola Lacey, 'Responsibility and Modernity in Criminal Law' (2001) 9(3) *Journal of Political Philosophy* 249, 255, who, too, goes on to highlight only a few: 'Must the cognitive conditions for responsibility include actual knowledge of the facts or foresight of the consequences? Or is it sufficient that a 'reasonable person' could have acquired such knowledge or realisation—it being proven or—significantly—assumed that the defendant had the capacities of a reasonable person? What forms of external pressure or emotional disturbance undermine the existence of the relevant volitional capacities? What kinds and degrees of mental incapacity remove a person from the category of responsible subjects?' These questions keep animating scholarly debates, but there is no need, and no space, to delve into them here. Suffice it to say that the concept of 'capacity' admits of various conceptions, and moral theorists will continue to argue about which of them sets the 'right' threshold for an attribution of moral 'blame'. From a political perspective, as will be seen shortly, the matter is, by and large, up for political determination and constrained only by scientific evidence.
[12] Technically, as Cane, above n 7, 103 (n 124) rightly notes, though, reasons for action and 'character' are not quite the same: 'Character is an evaluative inference based on a person's behaviour, or an interpretation of their behaviour… it does not provide a causal explanation of that behaviour.' Compare also John Gardner, 'Why Blame?' in Iyiola Solanke (ed), *On Crime, Society, and Responsibility in the Work of Nicola Lacey* (Oxford University Press, 2021) 83-91.
[13] Victor Tadros, *Criminal Responsibility* (Oxford University Press, 2005) 44.
[14] Ibid 48. Note here that Tadros is arguing 'backwards' ('blame' is attributed, therefore the conduct in question has to not only be 'wrong' but reveal the subject's 'bad' character). This kind of reasoning was exposed as both typical and flawed in chapter 1 at 35-36.
[15] For variations of this rationale, see Lacey, *In Search of Criminal Responsibility*, above n 9, 34-36.
[16] But see above n 6.

be lost, however, or it can become defective.[17] Particularly, as Stephen P. Garvey puts it, if the government of the day has failed 'to do as morality requires… in the domain of distributive justice.'[18] If, in other words, it, too, has committed 'wrong' against the non-compliant subject or the wider group of subjects to whom they belong. Two kinds of argument have been advanced to support this claim:[19] one from 'hypocrisy' and one from 'complicity'.[20] The argument from 'hypocrisy' is that governments which fail to discharge their moral obligations—notably, by allowing poverty, systemic racism and other severe 'social injustices' to flourish and fester—cannot 'blame' their subjects for doing the same.[21] That would be to '[exhibit] an inconsistent commitment to the norms in question',[22] notably, 'to the equality of persons that is constitutive of moral relations in the first place.'[23] The argument from 'complicity', on the other hand, rests on an (at least loosely) causal nexus between a government's moral failings and the conduct of the non-compliant subject.[24] That is, the charge reads not merely that the government has itself been involved in some kind of 'wrongdoing' but that it has been involved, implicated, even, in the subject's specific case—not as an accomplice in the doctrinal sense, of course, but as the architect of socio-economic policies well-known to create conditions of deprivation, desperation, and an increased propensity to deviance.

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[17] It is not entirely clear—even to those who advance this claim—what 'standing' actually means in this context (is it a 'right'? an 'entitlement'? an expression of 'authority'?) but they are quite sure that it can be lost, see James Edwards, 'Standing to Hold Responsible' (2019) 2019(4) *Journal of Moral Philosophy* 437, 438-39 who embarks on an analytic philosophical exploration of the matter. Again, from a political perspective, things will look a lot clearer, and a lot simpler, very shortly.

[18] *Guilty Acts, Guilty Minds* (Oxford University Press, 2020) 287.

[19] Sometimes, it is said that there is a third one: the case of 'meddling' which involves passing judgment on conduct that is not properly one's 'business', see Linda Radzik, 'On the Virtue of Minding Our Own Business' (2012) 46(2) *The Journal of Value Inquiry* 173. Arguably, though, that is a case not of *loss* of 'standing' but of 'standing' being *absent from the very beginning*: if the state exceeds its moral mandate, however defined, that is, if it brings a certain kind of conduct within the realm of the (criminal) law that does not, by the 'right' standards, belong there, then the state has no 'business' calling out the violation. See, e.g., R. A. Duff, 'Responsibility, Citizenship, and Criminal Law' in R. A. Duff and Stuart P. Green (eds), *Philosophical Foundations of Criminal Law* (Oxford University Press, 2011) 125, 132-33.

[20] Making a (convincing) case that the latter essentially reduces to the former, Patrick Todd, 'A Unified Account of the Moral Standing to Blame' (2019) 53(2) *Noûs* 347.

[21] Compare G. A. Cohen, 'Casting the First Stone: Who Can, and Who Can't, Condemn the Terrorists?' (2006) 58 *Royal Institute of Philosophy Supplement* 113, 117-26; Victor Tadros, 'Poverty and Criminal Responsibility' (2009) 43(3) *The Journal of Value Inquiry* 391, 396-98.

[22] Marilyn Friedman, 'How to Blame People Responsibly' (2013) 47(3) *The Journal of Value Inquiry* 271, 280. T. M. Scanlon, *Moral Dimensions: Permissibility, Meaning, Blame* (Belknap Press of Harvard University Press, 2008) 175-76, by contrast, thinks that 'blaming' presupposes the breakdown of a previously intact moral relationship, which is not the case if the hypocritical 'blamer' has broken it already.

[23] And therefore, both of interpersonal and liberal political relations that are founded on moral principle, R. Jay Wallace, 'Hypocrisy, Moral Address, and the Equal Standing of Persons' (2010) 38(4) *Philosophy & Public Affairs* 307, 308. Also, Kyle G. Fritz and Daniel Miller, 'Hypocrisy and the Standing to Blame' (2018) 99(1) *Pacific Philosophical Quarterly* 118 ('a rejection of the impartiality of morality').

[24] Compare Cohen, above n 21, 126-33; Tadros, 'Poverty and Criminal Responsibility', above n 21, 398-400; and Gary Watson, 'A Moral Predicament in the Criminal Law' (2015) 58(2) *Inquiry* 168, 178-87.

Now, to be sure, both arguments are considerably more nuanced than this crude summary may suggest, but the nuances are not essential here. What matters is that, from a moral perspective, governments, too, can fall short of their obligations, thereby move into a position of responsibility, and become liable to moral judgment, to 'blame', by their subjects. This remains an exception, however. As Gary Watson notes, the 'injustice' suffered has to be 'so extreme as to destroy the normative basis for ties of mutual respect and allegiance to public institutions, including the criminal law.'[25] Meaning, it has to be so serious and so persistent as to—at least, partially—suspend the 'political' obligation on whose deliberate disregard any attribution of 'blame' must legitimately be based.[26] Whenever that is the case, though,[27] the burden of moral judgment will be shared between subject and government, and could, indeed, be shifted entirely.

2. Political accountability

Things look different from a realist political perspective. And to see why, it is vital to, again, start with an understanding of the failure underpinning a given instance of non-compliance, and to then extrapolate from that an understanding of the judgment which becomes available as a result. So, as was seen in the previous chapter, non-compliance is a symptom of dual failure, revealing the relationship between two parties: a subject who failed to do as the law says (behavioural failure), and a government who failed to establish (enough) congruence between the law and the actual normative expectations of those to whom it is addressed (regulatory failure).[28] Consider first the failure of the individual subject, for there is more to be said about this now that it needs tying into a system of potential consequences; in fact, an immediate thing to note is that the phrase 'failed to do as the law says', though accurate and workable as a general guide, is over-inclusive. If non-compliance is defined as a behavioural response to an authority claim which is deemed unacceptable, and, as such, motivationally ineffective,[29] then failures

[25] Watson, above n 24, 179.
[26] For a (dubious) distinction between *mala in se* and *mala prohibita* offences, see Garvey, above n 18, 299-303, and for discussion, Stephanie Classmann, 'Guilty Acts, Guilty Minds (review)' (2022) 72(1) *University of Toronto Law Journal* 148. It seems to be inspired by R. A. Duff, e.g., 'Moral and Criminal Responsibility: Answering and Refusing to Answer' in D. Justin Coates and Neal A. Tognazzini (eds), *Oxford Studies in Agency and Responsibility* (Oxford University Press, 2019) vol 5, 165, 184-85.
[27] Arguably, the most famous case thought to fall into this category, which gave rise to the various lines of scholarship circling the issue today, is *US v Alexander* 471 F.2d 923. It coined the term 'rotten social background' and considered the impact of social deprivation on findings of criminal responsibility.
[28] Revisit chapter 5 at 116-19, 126-28.
[29] See chapter 5 at 126-27.

'to do as the law says' are relevant failures only if and insofar as they are accompanied by precisely that kind of assessment: an assessment of normative incongruence.[30] They have to involve taking a stance,[31] in other words, a stance, critical to a greater or lesser degree and at least temporary in nature, towards the respective law, the political regime to which it belongs, and (or) the state of public policy, more generally.[32] This, it should be added, though, is not to say that non-compliance requires knowledge of the violated law. It is possible to take and manifest a stance towards an existing euthanasia ban, for instance, without knowing that consensually administering an overdose of prescribed sleeping pills to one's terminally ill spouse is illegal. (Passing judgment on such a case is another matter, of course, but that would be to race ahead.) The individual failure of non-compliance, then, is most accurately described as a failure to stay within the realm of congruent action as specified by the (criminal) law; or, positively, it is to exceed the behavioural limits set by it, acting on one's own preferences and beliefs instead. Failure to comply, for the realist, in short, is failure to practice *political toleration*.

To recap,[33] political toleration is a practice, not an attitude, because it derives from the concept of compromise as political settlement and its rationale of conflict confinement and strategic suspension. Becoming party to such a settlement, it was seen in previous chapters, does not require that one relinquish one's personal ideas about what is 'good' or 'right' or 'reasonable' in favour of agreement on some basic values or principles. It requires that one accept, wholeheartedly or begrudgingly, and for whichever reason, a set of contingently negotiated—and always re-negotiable—limits to which one can act

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[30] 'Relevant' here means 'relevant to the regulatory project': behavioural failures unaccompanied by an assessment of incongruence can, of course, still have significant impacts on other subjects, but they do not indicate a lack of representation, of legitimacy, properly understood. Which is not to say that nothing can be done to mitigate those impacts. Insurance mechanisms and other instruments for risk sharing and spreading have proven to serve as useful tools to offset—or at the very least buffer—some of the adverse consequences that 'purely' behavioural failures, undoubtedly and unavoidably, bring about.

[31] Revisit the discussion in chapter 5 at 117-19, 128.

[32] In more doctrinal terms, then, non-compliance requires a certain 'intentionality', a commitment, however profound, to action (or inaction), whose exact parameters are fixed politically, and which will differ from subject to subject and from case to case (cf. Nicola Lacey and Hanna Pickard, 'Why Standing to Blame May Be Lost but Authority to Hold Accountable Retained: Criminal Law as a Regulative Public Institution' (2021) 104(2) *The Monist* 265, 275-76 who consider the concept of strict liability compatible with the goals of public behavioural regulation). And that, in turn, means that not every instance of non-compliance will have the same gravitas, politically speaking. Being deeply opposed to an abortion ban on feminist grounds, for instance, and manifesting that opposition by purposely going against it, is qualitatively different from reckless driving or swiping a pack of cigarettes out of convenience—not because one action is more 'wrong' than the other, which may or may not be true, but because they reflect vastly different degrees of political dissent, from fervent conviction to mere and momentary indifference. And any consequences attached to individual non-compliance will need to be considerate of these variances, if they are to optimally regulate a subject's behaviour in the future. But more on that below.

[33] Revisit chapter 3 at 73-75 and chapter 4 at 107.

on those ideas.[34] Passing judgment on a subject's failure to practice political toleration, therefore, does not and cannot mean passing judgment on the moral, religious, cultural, etc., considerations that informed their actions. That would be utterly beside the point, conceptually and, prior to that even, with a view to what political compromise and, by extension, legitimate government is for, namely the generation of collective action, of compliance, properly understood. As has been emphasised throughout this thesis, and supported by empirical research in chapter five,[35] official attempts to scare or shame subjects into submission by systematically repressing their—'wrong'—opinions have neither place nor purpose in such a project. That, however, is exactly what judgments based on findings of moral responsibility are all about. As Erin I. Kelly puts it, 'blame stakes a certain claim: a person's voluntary and wrongful criminal act reveals more or less permanent aspects of that individual's character or personhood; these undesirable aspects mark that person, by virtue of his or her criminality, as defective, tainted, and morally inferior.'[36] Addressing non-compliant subjects, and framing their relationship with other subjects and the institutional apparatus of the state, in those terms is mildly effective, at best,[37] and profoundly alienating and counter-productive, at worst.[38]

But, then, what is it, for the realist, to pass judgment on non-compliance, an individual failure to practice political toleration? First and most fundamentally, it is a decision. A political decision. Not an imperative moral verdict attaching to a moral property of the

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[34] On the idea of 'continued conflictuality' as the space between 'first order' political conflict and moral consensus based on its normative and (or) ontological denial, see chapter 3 at 68-71.
[35] See chapter 5 at 120-26.
[36] *The Limits of Blame: Rethinking Punishment and Responsibility* (Harvard University Press, 2018) 9. And as Lacey, *In Search of Criminal Responsibility*, above n 9, 36-37 points out, this move from the evaluation of 'wrongful' conduct to the evaluation of the subject who performs it is 'a hugely siginificant phenomenon' regardless of wheher or not one buys into the character condition for moral responsibility. After all, 'the dynamics which shape the practice of criminal law and criminal justice, and the socially received meaning of criminal conviction, are not necessarily respecters of philosophical integrity.'
[37] John Braithwaite, *Crime, Shame and Reintegration* (Cambridge University Press, 1989), puts a spin on the traditional (Western) idea of moral 'blame' by making a case for (non-Western inspired) practices of 'reintegrative shaming'. These practices seek to 're-moralise' the non-compliant subject and foster a Durkheimian sense of collective conscience within the community by pairing methods of ('respectful') humiliation and the 'expression of abhorrence' for the 'wrong' committed with gestures of forgiveness and social reintegration. His research suggests that, in close-knit, homogenous communities, and where taking place in intimate, participatory settings, this approach is superior to confrontational 'blame' when it comes to building the motivational resources for future compliance. The restorative justice processes designed for this approach will be returned to under section II. below. For now, suffice it to say that the presupposition of a strong and trusting 'moral community' runs counter both to the analytic framework developed here and the political realities of modern, fragmented societies on which it is based.
[38] Compare, e.g., Nicola Lacey and Hanna Pickard, 'To Blame or to Forgive? Reconciling Punishment and Forgiveness in Criminal Justice' (2015) 35(4) *Oxford Journal of Legal Studies* 665, 669-72 who, in reference to prevailing clinical approaches, explain that 'affective blame' (the expression of anger, condemnation, etc.) is highly obstructive to nurturing the motivation for long-term behavioural change, and indeed more likely to cause disengagement and (or) fuel antagonistic attitudes of 'us' versus 'them'.

subject, the 'fact' of them 'being' responsible. Rather, it is to take a stance, to relate to that subject's behaviour, to treat them as a *political agent* and hold them to account for what they did at a particular time, in a particular place.[39] Any such decision forms part of the ongoing, regulatory project of government—which means, second, it has to be taken, if it is taken, with the aim of modifying that subject's behaviour in the future; it has to be oriented towards compliance, be motivationally effective.[40] And that, in turn, constrains both the circumstances in which it makes sense to pass judgment at all and the official 'message' that is being communicated. So, again, the individual failure of non-compliance is a failure to stay, or operate, within the realm of congruent action as specified by the law. If that is to change in the future, the subject in question needs to have the capacity to do so. That is, they need to, in principle, be capable of practicing political toleration, and the decision to hold them to account for failing to do so on one or more occasions in the past must appeal to that capacity. The realist, therefore, looks back at the concrete circumstances of non-compliant behaviour and the cognitive and volitional faculties of the non-compliant subject not in search of moral indication that judgment is, in fact, 'deserved', but to ascertain whether or not it is likely to have any regulatory effect. Where a set of extraordinary circumstances urge an otherwise capable subject to step outside the law, holding them to account for taking that step may be entirely unnecessary;[41] where cognitive and (or) volitional controls are largely absent, passing judgment on a failure to use them will do little to manage their absence;[42] and where ignorance of the law has prevented a subject from 'activating' their capacity for toleration, the need for change, arguably, lies with those in charge of ensuring that the law is known, in advance, by all those who are expected to comply with it.[43]

These are only examples. But they illustrate the point that passing judgment on non-compliance, for the political realist, is a decision that needs to be driven by regulatory concerns and, consequently, by the best available research on what does and does not,

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[39] Compare again Thomas Fossen, 'Taking Stances, Contesting Commitments: Political Legitimacy and the Pragmatic Turn' (2013) 21(4) *Journal of Political Philosophy* 426, 437-38.
[40] See chapter 5 at 122-23.
[41] For they can be expected to comply under normal circumstances—which is also why these cases will rarely involve the political stance-taking required to put in question the legitimacy of the law; a crucial determinant, as was established above, both of how 'relevant' individual behavioural failures are to the overall regulatory project and, provided that they are, of what kind of measures are suitable in response.
[42] Here again (see ibid), already the requirement of political stance-taking may be unfulfilled. Where it is fulfilled, the emphasis nonetheless shifts towards developing the relevant controls; or, if that is clearly impossible, to provide the subject will help and supervision capable of exercising them on their behalf.
[43] Recall that where a subject complies without knowledge that they are required to, that is a sign not of successful regulation but of regulation being unnecessary, see chapter 5 at 127 (n 79).

and for whom, have the desired motivational effect. Where suitable, passing judgment, then, is about holding the non-compliant subject to account for their failure to practice political toleration (despite having the capacity to do so), for *their* decision, to venture outside the realm of congruent action as specified by the law (instead of, say, try and expand it during the next iteration of the political process).[44] It is not, to re-emphasise this once more, about calling out an alleged failure to discharge a 'political' obligation to comply, for the whole point behind non-compliance is the (temporary) lack of such obligation—construed here not in moral terms but as that active sense of commitment, of allegiance to the (criminal) law and the regime to which it belongs. This lack, it was seen in chapter five,[45] is the result of a regulatory failure on the part of the government as the institutional entity tasked with maximising congruence between the law and the normative expectations of those to whom it is addressed. It is a lack of representation, and hence not a failure of the individual but of authority, properly understood. Calling out that failure, more or less forcefully, depending on the exact size and nature of the representational deficit(s), and in more or less targeted ways, is what subjects do when taking a stance towards the law, including and especially when breaking it.

Now, as will be quite clear from the foregoing, there exists no set limit as to the areas of public policy that may be afflicted by failure. Systemic 'social justice' claims about gender disparities in health care and secure employment, or the overall distribution of wealth, for instance, can (and do) arise alongside more specific, perhaps 'privileged', claims about the need to reform the regulation of money laundering or the use of recreational drugs. And equally, there exists no fixed threshold, moral or other, for when these failures, as lived, contextually embedded experiences of access and recognition, are 'bad enough' to be called out.[46] Attribution of accountability for non-compliance, from a genuinely political perspective, is an inherently relational practice of reciprocal judgment aimed at motivating behavioural *and* institutional change—always.[47] Thus,

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[44] Particularly in cases of substantive incongruence, where the law in question is deemed unacceptable on ethical, religious, cultural, etc., grounds, the manner in which the subject is held to account, will need to be closely aligned with (empirical) 'procedural justice' research on how to foster compliance, which was explored in chapter 5 at 123-25.

[45] See chapter 5 at 126-28.

[46] In other words, there is no need to prove a 'rotten social background' (see above n 27) or other severe, structural disadvantages. The realist recognises that representational deficits, like political agency, come in degrees. Compare Lacey and Pickard, 'Why Standing to Blame May Be Lost but Authority to Hold Accountable Retained: Criminal Law as a Regulative Public Institution', above n 32, 272).

[47] In a similar vein, Loughnan, above n 8, 62-72; and more forcefully, Alice Ristroph, 'Responsibility for the Criminal Law' in R. A. Duff and Stuart P. Green (eds), *Philosophical Foundations of Criminal Law* (Oxford University Press, 2011) 107, 112-116.

much more so, and more consistently, than the moral approach, does the realist framework acknowledge the link, practical, not philosophical, between individual responses to the law and the fact that law is a matter of collective decision-making.[48] Which itself is of tremendous practical import. One of the perennial selling points of understanding non-compliance as 'wrongful' behaviour deserving of 'blame' is that it tends to shield those who created the laws that are broken and the environment conducive to breaking them from facing judgment and other, potentially more drastic political consequences themselves. As was seen earlier, even the growing and fairly progressive moral debate about the state's possible loss of 'standing', for many, a painful and rather contentious intrusion of empirical considerations, can accommodate only the most blatant cases of social and material marginalisation. And the mechanisms floated as suitable remedies for dealing with them are again centred largely around the individual.[49] By contrast, a realist account of what government and law are for (the generation of collective action) and what is involved in achieving that (concessions on all sides and across policy areas as well as an awareness that some subjects, at least temporarily, may lose out entirely), can and has to be sensitive to representational deficits across the entire spectrum, those associated with 'ordinary' political conflict and how it shakes out in a given moment, and those associated with more traditionally criminogenic forms of sustained and utter exclusion.[50] The difference is one of intensity, of urgency, even, but not of kind.

Two things, then, should be taken away from this discussion. First, holding another to account for exceeding the realm of congruent action, and being held to account oneself for delineating it, are political judgments, real, contextual decisions, that, just like the failures which they seek to address, are fully intelligible only in tandem. And second, making these decisions is not about tossing 'blame' back and forth; it is a crucial first step in the direction of change and firmly anchored to the project of government.

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[48] Ristroph, above n 47, 107-9.

[49] To take just two recent examples: Federica Coppola, drawing on Stephen P. Morse's idea of a generic partial excuse (first set out in 'Excusing and the New Excuse Defenses: A Legal and Conceptual Review' (1998) 23 *Crime and Justice: A Review of Research* 329, 390-402), proposes the introduction of a new 'situational' capacity defence designed to capture the exercise of rational choice in pathological circumstances, *The Emotional Brain and the Guilty Mind: Novel Paradigms of Culpability and Punishment* (Hart Publishing, 2021) chapter 5; and Benjamin Ewing, insisting that situational disadvantage does not preclude a finding of 'true' responsibility but may deprive a given subject of a fair opportunity to avoid it, suggests adopting an 'affirmative action' approach at the enforcement and sentencing stage, 'Criminal Responsibility and Fair Moral Opportunity' (2021) *Criminal Law and Philosophy* (forthcoming); and 'Affirmative Action in Criminal Justice' (2022, on file). See also the overview in Nicola Lacey, 'Criminal Justice and Social (In)Justice' (2022, on file) 6-9.

[50] Tommie Shelby, *Dark Ghettos: Injustice, Dissent, and Reform* (Harvard University Press, 2016). The former, moreover, can easily turn into the latter, so it is worth paying attention and doing so early on.

II. Moving forward

Saying that judgment is a 'first' step does not mean it cannot also be the only one. The fact of being held to account, in other words, may have sufficient motivational impact, on the behavioural and (or) institutional level, to trigger the change(s) required.[51] Or it may not. In which case further consequences need to be considered. Further decisions made and implemented. Nothing, from a realist perspective, dictates what these should look like—apart from that they have to 'work'; meaning, they have to foster collective action by developing the individual subject's capacity for political toleration, and (or) by increasing the degree of congruence, substantive and procedural,[52] between specific laws, socio-economic policies, etc., and the normative expectations of those who have failed, or are at the risk of failing, to comply.[53] As in chapter four, which looked at the question of what it is, first of all, that may at a given time, in a given place come under the purview of state regulation, this openness to political determination and empirical research puts constraints on what can be said in the abstract. And so, similar to chapter four, the aim here, too, will simply be to pinpoint a couple of consequences that clearly do *not* 'work' and use those as foils in contouring the vision for a realist alternative.

1. Punishment

The idea that (a certain type of) non-compliance is 'wrongful'[54] and therefore ought to be followed by moral judgment, by 'blame', has long fuelled the punitive imagination of legal theorists and political leaders alike. Though theorists, in particular, will object to that, of course. Much, arguably too much, has been written about the 'moral limits' of punishment; and for many, the whole purpose of doing criminal legal and (or) penal theory[55] is to try and rein in the 'excess' associated with coercive practices across and beyond the contemporary Anglosphere.[56] Still, outside the circle of radical, anarchical (at least, in the philosophical sense) abolitionists, it is generally assumed that the state,

[51] On the behavioural level, being confronted with official criticism and reminded that there are other, more constructive ways to voice dissent and make it heard can be a catalyst for effective self-regulation and spur engagement in community projects or large-scale political initiatives. Institutionally, persistent and wide-spread non-compliance (e.g., with mask requirements on public transport) can put in question the respective rules themselves or signal the need for more information and (or) better communication.
[52] Revisit chapter 5 at 123-26.
[53] Individual instances of non-compliance will generally be indicative of larger legitimacy deficits.
[54] By the standards of interpersonal or (liberal) political morality.
[55] As was noted in chapter 1 already (at 35-36), most accounts of criminal law start 'from behind', with an account of punishment, so the boundary between the two can be very blurry.
[56] More on that in a moment.

or rather its government, has a, if not the, 'right to punish',[57] a 'right' which is deemed subject to a set of moral constraints—think, notably, of the interminable feud between consequentialist and retributivist theorists—but does, by default, obtain.[58] References to this 'right' are peppered into virtually every account of criminalisation. Systematic articulations of it are somewhat rarer, but as always, a few examples will do. Looking first at the moralist tradition, and the objectivist strain in particular, the most elaborate theorisation, perhaps, has been provided by Victor Tadros. In his view, non-compliant subjects, in virtue of their 'wrongdoing', are under an obligation to protect their victim from future 'wrongdoing'; and victims, in turn, are under an obligation to transfer their right to protection to the institutions of government in order to 'rescue' other, hitherto non-victimised subjects from similar experiences. The government thus gains not only the 'right' to punish relevant 'wrongdoers' but, as a mere functional extension[59] of the community of subjects, will usually be under an obligation to do so.[60] R. A. Duff, who defends the communitarian view, might disagree on the last bit,[61] and there is no need for a transfer of private right if criminal non-compliance is (also) a 'public wrong', but the principled existence of a 'right to punish', in appropriate circumstances and in line with 'shared values', is still very much a given. Criminal 'wrongdoing', the argument goes, calls for condemnation and censure, which punishment does provide;[62] and it is a choice that subjects ought to 'answer' for, including by submitting to punishment, as part of their 'civic responsibility', an obligation owed to the community as a whole.[63]

The reasoning from a liberal perspective is not and, as seen in chapter two, cannot be markedly different, with Kant and Hegel providing the analytic lens through which the numerous other approaches (building on John Rawls, Martha Nussbaum and Amartya Sen, etc.) can be grouped together and understood.[64] Kant, and Malcolm Thorburn, as

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[57] See, e.g., most recently, Gabriel S. Mendlow, 'On the State's Exclusive Right to Punish' (2022) 41(2-3) *Law and Philosophy* 243, responding to Douglas Husak, 'Does the State Have a Monopoly to Punish Crime?' in Chad Flanders and Zachary Hoskins (eds), *The New Philosophy of Criminal Law* (Rowman and Littlefield, 2016) 97.
[58] Philosophical anarchism was discussed in chapter 5 at 118.
[59] Revisit the discussion in chapter 1 at 19-21.
[60] *The Ends of Harm: The Moral Foundations of Criminal Law* (Oxford University Press, 2011) chapters 12-13. In a similar vein, Jacob Bronsther, 'The Corrective Justice Theory of Punishment' (2021) 107(2) *Virginia Law Review* 227, who argues that the criminal 'wrongdoer' owes a duty of repair to society as a whole, not just the individual victim, for having contributed to the overall level of 'criminality'.
[61] *The Realm of Criminal Law* (Oxford University Press, 2018) 220-25.
[62] See generally *Punishment, Communication and Community* (Oxford University Press, 2001).
[63] *The Realm of Criminal Law*, above n 61, 224; this point is fleshed out further in R. A. Duff and S. E. Marshall, 'Civic Punishment' in Albert Dzur, Ian Loader and Richard Sparks (eds), *Democratic Theory and Mass Incarceration* (Oxford University Press, 2016) 33.
[64] Revisit chapter 2 at 40-48.

his distinguished champion, are clear in that 'the right to punish is the right a ruler has against a subject to inflict pain upon him because of his having committed a crime.'[65] It derives from Kant's idea of individual 'freedom' as the formal opportunity to act in line with the categorical imperative:[66] 'if a certain use of freedom is itself a hindrance to freedom in accordance with universal laws (i.e., a wrong), coercion that is opposed to this (as a hindering of a hindering of freedom) is consistent with freedom in accordance with universal laws'; which means, 'there is connected with right by the principle of contradiction an authorization to coerce someone who infringes upon it.'[67] What is key, however, is that any punishment meted out, and Kant has fairly specific views on that too,[68] must pay respect to the non-compliant subject's 'innate personality',[69] their dignity as a human being capable of reason, which leads him to endorse a 'strict' form of retributivism with no 'extraneous considerations' mixed in.[70] In many ways, Hegel, helpfully 'translated' by Alan Brudner,[71] is on board with that approach. Whereas Kant makes an argument from 'duty', he makes one from 'reason' proper,[72] but the need to reverse the contradiction of 'right' is central to them both. Punishment, Hegel writes, is 'the negation of the negation';[73] 'it is one half which is necessarily presupposed by the other':[74] the crime, the 'nullity' that is the claim to a denial of 'right' which, by its very nature, is 'absolute'.[75] The state, accordingly, and Brudner makes a point of that, is not merely entitled to punish (and note that any punishment inflicted, by this logic, is self-inflicted by the 'wrongdoer')[76] but it 'ought to punish as a general rule.'[77]

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[65] Immanuel Kant, *The Metaphysics of Morals* (Mary J. Gregor trans, Cambridge University Press, 2017 [1797]) 114 (6:331) (emphasis suppressed); Malcolm Thorburn, 'Criminal Punishment and the Right to Rule' (2020) 70(5) *University of Toronto Law Journal* 44, 53 puts it thus: 'criminal law and punishment are essential constituent elements of [the state's] right to rule.'
[66] See chapter 2 at 40-42.
[67] Kant, above n 65, 28 (6:231) (emphasis suppressed). An authorisation and, at least in some cases, he (in)famously points out, an obligation: 'Even if a civil society were to be dissolved by the consent of all its members…, the last murderer remaining in prison would first have to be executed.'
[68] Foreshadowing (and, arguably, inspiring) many punitive practices still in place today, he writes about solitary confinement, forced labour, and the death penalty, among others, see ibid 115-19 (6:333-37).
[69] Ibid 114 (6:331). Their 'civil personality', on the other hand, can be rightly extinguished.
[70] Ibid 115 (6:332).
[71] *Punishment and Freedom* (Oxford University Press, 2009) chapter 1.
[72] Revisit the discussion in chapter 2 at 42-43.
[73] Georg Wilhelm Friedrich Hegel, *Elements of the Philosophy of Right* (H. B. Nisbet trans, Cambridge University Press, 1991) 123 (§ 97).
[74] Ibid 129 (§ 101).
[75] Ibid 123 (§ 97). Thus, the 'point of punishment is… to vindicate the truth', Brudner, above n 71, 46.
[76] Hegel, above n 73, 126 (§ 100) insists that as long as the justification for punishment is derived from the subjects' own acts, it is an expression of their freedom, *their* 'right'. Through punishment, a subject can thus be 'honoured as a rational being' (emphasis suppressed). Cf. Kant, above n 65, 117-18 (6:335).
[77] Brudner, above n 71, 47. 'By actualizing a right-denying principle', he explains, 'the wrongdoer gave that principle an appearance of worldly authority', and only 'punishment removes the appearance of its worldly validity and vindicates the worldly authority of Law', ibid (emphasis suppressed).

Against this theoretical backdrop it is hardly surprising that political leaders across the globe have felt rather 'justified' in focusing their efforts in response to non-compliance on the imposition of sanctions.[78] Anglophone jurisdictions, in particular, have come to embrace a remarkable level of punitiveness,[79] manifested both in the (re-)emergence of expressive and emotive practices aiming for humiliation, stigmatisation, and social exclusion (think of chain gangs, publicly accessible offender registries, etc.) as well as harsher sentencing and non-parole legislation (including the reinstatement and (or) increased application of the death penalty); and accompanied by new and more intense forms of victim participation (notably, in court hearings) as well as an overall rhetoric of vengeance and retaliation that has unleashed a special kind of resentment and freely articulated hostility towards 'deviant' subjects.[80] This is not the place to analyse these trends in any detail. Highlighting one 'core' and one 'collateral' consequence integral to their unfolding, however, will help illustrate and press the realist case further.

According to the latest World Prison Population List,[81] a 2021 report compiling data from 223 jurisdictions, and taking into account the effects of the Covid-19 pandemic and associated emergency release mechanisms, a (rough) total of 11.5 million people worldwide are temporarily or permanently incarcerated. Based on current estimates of national population levels, that amounts to a rate of 140 per 100,000. Variances across continents and regions and among individual jurisdictions are stark, of course, as are differences in growth over time. There are more than two million prisoners in the US alone (629 per 100,000);[82] rates in England and Wales (131 per 100,000) are almost twice as high as in Western Europe and triple those of several Nordic countries; and while Oceania's prison population has swollen by 82% since the year 2000, and South America's by a whopping 200%, European rates (other than Russia's) have increased

[78] This is not to suggest a causal relation, but simply to note that certain thought patterns do percolate.
[79] For an analysis of Canadian exceptionalism in this regard, compare Jeffrey Meyer and Pat O'Malley, 'Missing the Punitive Turn? Canadian Criminal Justice, 'Balance' and Penal Modernism' in John Pratt et al (eds), *The New Punitiveness: Trends, Theories and Perspectives* (Willan Publishing, 2005) 201.
[80] See generally, though with an inevitable focus on the US as the most striking example, David Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (Oxford University Press, 2001); John Pratt, *Penal Populism* (Routledge, 2007); and James Q. Whitman, *Harsh Justice: Criminal Punishment and the Widening Divide between America and Europe* (Oxford University Press, 2005).
[81] Helen Fair and Roy Walmsley, 'World Prison Population List' (World Prison Brief, 2021), available online at: https://www.prisonstudies.org/sites/default/files/resources/downloads/world_prison_population_list_13th_edition.pdf [last accessed on 10 March 2023].
[82] Note that some states significantly exceed the national incarceration rate. According to data published by the Prison Policy Initiative in 2021, Louisiana tops the list with 1,094 per 100,000, closely followed by Mississippi with 1,031 per 100,000. The lower ranks, by contrast, go to Massachusetts and Vermont with rates of 275 and 288 per 100,000, respectively. The full list is available online at: https://www.prisonpolicy.org/global/appendix_states_2021.html [last accessed 10 March 2023].

by a mere 5% over the same period. Equally, both lengths and conditions of custodial sentences do vary greatly, but they tend to be worse, as in longer and more calamitous, where incarceration is the 'go-to' option in response to non-compliant behaviour. The most recent SPACE report (Statistiques Pénales Annuelles du Conseil de l'Europe),[83] for instance, which compiles data from all 47 (now 46) member states of the Council of Europe,[84] shows that as of January 2021, most prisoners serve for one to three years (23.5%), three to five years (17%), or five to 10 years (20.8%). Sentences for 20 years or more are rare (2%) and so is life imprisonment (1.7%). By contrast, the most recent state data released by the US Bureau of Justice Statistics[85] shows that violent, property and drug offences (> 85% of convictions at this level) attract sentences of, on average, 10.8 years, 4.9 years and 5.2 years, respectively. In England and Wales, these figures are slightly lower, but sentences of 10/20 years or more have tripled/quadrupled over the last decade,[86] with 52% of prisons now 'overcrowded' by official standards,[87] and rates of prisoner self-harm hovering just below record levels (688 per 1,000).[88]

The only thing more confronting than these statistics, arguably, is the knowledge that, by itself and under most current models, incarceration, short- and long-term, has few to no regulatory effects. Designed around deterrence and incapacitation,[89] it is meant to and does appeal to 'people who remain attached to common sense intuitions… that crime has consequences and more serious crimes have greater consequences', but, as Michael Tonry goes on to note, '[t]hat many released prisoners commit new crimes is not unexpected.'[90] In truth, though, that is to understate the evidence. One of the most

[83] Marcelo F. Aebi et al, 'SPACE I: Prison Populations' (2021). Report and summary can be downloaded at: https://www.coe.int/en/web/prison/space [last accessed 10 March 2023].
[84] Russia was expelled in March 2022, shortly after the invasion of Ukraine. Even before, though, it was important to consider their data separately, as both the total prison population (around 439,000) and the rate per 100,000 (304), albeit shrinking, depart significantly from those of other European jurisdictions, see: https://www.prisonstudies.org/country/russian-federation [last accessed 10 March 2023].
[85] The full report by Danielle Kaeble, 'Time Served in State Prison: 2018' (2021) is available online at: https://bjs.ojp.gov/content/pub/pdf/tssp18.pdf [last accessed 14 February 2023].
[86] A dedicated report on this has been published by the Prison Reform Trust, 'Long-term Prisoners: The Facts' (2021), available online at: https://prisonreformtrust.org.uk/wp-content/uploads/2021/10/Long-term-prisoners_the-facts_2021.pdf [last accessed 10 March 2023].
[87] Georgina Sturge, 'UK Prison Population Statistics' (House of Commons Library, 2022) 14-15, available online at: https://researchbriefings.files.parliament.uk/documents/SN04334/SN04334.pdf [last accessed 18 January 2023]. The government is now using police cells to compensate for a lack of space.
[88] In 2019, it was 767 per 1,000; women account for a disproportionate share of those incidents. Prison Reform Trust, 'Prison: The Facts' (2022) 5, available online at: https://prisonreformtrust.org.uk/wp-content/uploads/2022/07/Prison-the-facts-2022.pdf [last accessed 18 January 2023].
[89] Deterrence was discussed in chapter 5 at 120-22; incapacitation will be returned to below at 148-49.
[90] 'An Honest Politician's Guide to Deterrence: Certainty, Severity, Celerity, and Parsimony' in Daniel S. Nagin, Francis T. Cullen and Cheryl Lero Jonson (eds), *Deterrence, Choice, Crime: Contemporary Perspectives* (Routledge, 2018) 365, 376 and 374, respectively.

exhaustive reviews of research concerning the actual, empirical relationship between incarceration and subsequent non-compliance reveals that, if affected at all, prospects of the latter are likely to increase, not decrease (due to interaction with other prisoners, loss or weakening of social and familial ties, stigma and discrimination upon release, etc.);[91] and the more threatening or harsh a prison environment is perceived to be, the more pronounced is that effect.[92] So to put it quite bluntly, most modern 'correctional' facilities do pitifully little to deserve their name. They punish. Largely, for the sake of punishing, for the sake of vindicating the state's 'right' to do so. And often, that is not the end of the story. A whole range of so-called 'collateral' consequences—additional but subordinate ('civil') sanctions activated upon conviction (and, one might add, far from 'collateral' in terms of impact)—extend beyond the deprivations suffered while 'processed' and into domains of everyday life, such as employment and occupational licensing, immigration, the ability to volunteer, and access to public benefits.[93]

The most drastic and yet, in many jurisdictions, almost routine sanction belonging to this pool (very aptly dubbed 'civil death') is the permanent or temporary, full or partial loss of the legal right to vote.[94] According to recent data compiled by The Sentencing Project, an estimated 4.6 million US Americans are disenfranchised due to current or previous felony convictions.[95] That is down from an estimated 6.1 million in 2016, but since voting is a matter of state, not federal, competence, the American Civil Liberties

[91] The review was done by Daniel S. Nagin, Francis T. Cullen and Cheryl Lero Jonson, 'Imprisonment and Reoffending' in Michael Tonry (ed), *Crime and Justice: A Review of Research* (2009) vol 38, 115, focusing mainly on the US. But see José Cid, 'Is Imprisonment Criminogenic? A Comparative Study of Recidivism Rates between Prison and Suspended Prison Sanctions' (2009) 6(6) *European Journal of Criminology* 459 (Spain); and Paul Nieuwbeerta, Daniel S. Nagin and Arjan A. J. Blokland, 'Assessing the Impact of First-Time Imprisonment on Offenders' Subsequent Criminal Career Development: A Matched Samples Comparison' (2009) 25(3) *Journal of Quantitative Criminology* 227 (Netherlands).
[92] Shelley Johnson Listwan et al, 'The Pains of Imprisonment Revisited: The Impact of Strain on Inmate Recidivism' (2013) 30(1) *Justice Quarterly* 144. Measuring objective security levels has been linked to similar findings, compare M. Keith Chen and Jesse M. Shapiro, 'Do Harsher Prison Conditions Reduce Recidivism? A Discontinuity-based Approach' (2007) 9(1) *American Law and Economics Review* 1 and the study conducted by Gerald G. Gaes and Scott D. Camp, 'Unintended Consequences: Experimental Evidence for the Criminogenic Effect of Prison Security Level Placement on Post-release Recidivism' (2009) 5(2) *Journal of Experimental Criminology* 139.
[93] Some scholars adopt a wider definition, including the *de facto* burdens which non-state actors, such as landlords, might impose, see, e.g., Alessandro Corda and Johannes Kaspar, 'Collateral Consequences of Criminal Conviction in the United States and Germany' in Kai Ambos et al (eds), *Core Concepts in Criminal Law and Criminal Justice* (Cambridge University Press, 2022) vol 2, 392, 393. While these 'side-effects', no doubt, are considerable, they do not qualify as 'consequences' in the sense used here.
[94] As enshrined in national constitutions, ordinary legislation, and international treaties. Whether these documents positively stipulate the right to vote or merely 'declare' or 'recognise' a moral right to do so (as arising from intrinsic values, such as human dignity) makes no difference from a realist perspective.
[95] See Christopher Uggen et al, 'Locked Out 2022: Estimates of People Denied Voting Rights' (The Sentencing Project, 2022). The full report is available online at: https://www.sentencingproject.org/reports/locked-out-2022-estimates-of-people-denied-voting-rights/ [last accessed 10 March 2023].

Union reckons that the patchwork of laws and ancillary policies, notably with regard to pending financial obligations, and the inevitable difficulties in navigating them, are *de facto* disenfranchising many more subjects than official data is likely to reveal.[96] A majority of US states, mostly in and around the 'bible belt',[97] either permanently ban (at least some) felons from voting or do not restore rights until after the completion of sentence, parole, and probation. States on the East and West coast, by contrast, tend to restore rights immediately after release from prison. Only Maine and Vermont do not disenfranchise at all.[98] What seems like a true aberration by US standards is perfectly normal in Canada. Striking down a provision of the Canada Elections Act 1985 which precluded prisoners serving sentences of two or more years from voting, the Supreme Court in a 2002 landmark ruling[99] held that s 3 of the Charter of Rights and Freedoms guarantees suffrage for all Canadians—including convicts and prisoners. The blanket ban was deemed arbitrary, disconnected from legitimate criminal justice purposes, and incompatible with basic tenets of liberal democracy.[100] A sentiment very much echoed by the European Court of Human Rights,[101] which explains why most member states of the Council of Europe either do not suspend convict and (or) prisoner voting rights at all or do so only in exceptional circumstances, for a limited time, and (or) by special court order.[102] The UK, infamously, is an outlier in that regard. Lengthy disputes with the Council notwithstanding,[103] only remand and civil prisoners (that is, those serving for non-payment of a fine, etc.) and those on licence or in home detention are eligible to vote. All others, thousands every single year, are disenfranchised until release.

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[96] The Union publishes its own data, estimating a much higher total of 5.85 million cases of (felony and misdemeanour) disenfranchisement across the US: https://www.aclu.org/issues/voting-rights/voter-restoration/felony-disenfranchisement-laws-map [last accessed 10 March 2023].

[97] According to the 2022 Sentencing Project report (above n 95), an astonishing 8%, that is, 1 in 13, US Americans of voting age in Alabama, Mississippi, and Tennessee are disenfranchised; and Florida alone is home to 1.1 million convicts who have permanently been stripped off their voting rights.

[98] The Brennan Center for Justice at NYU Law maintains a useful database with up-to-date information on all states, available online at: https://www.brennancenter.org/our-work/research-reports/can-people-convicted-felony-vote-felony-voting-laws-state [last accessed 10 March 2023].

[99] *Sauvé v. Canada (Chief Electoral Officer)* [2002] 3 SCR 519.

[100] 'The government's novel political theory that would permit elected representatives to disenfranchise a segment of the population finds no place in a democracy built upon principles of inclusiveness, equality, and citizen participation' (at 5, per McLachlin CJ).

[101] See, most notably, the 2005 decision in *Hirst v UK No.2 [GC], No. 74025/01*, paras 58-61, 69-71, in reference to Article 3 of Protocol No. 1 to the European Convention of Human Rights.

[102] For a helpful, though not entirely up-to-date, systematisation, see Christopher Uggen, Mischelle Van Brakle and Heather McLaughlin, 'Punishment and Social Exclusion: National Differences in Prisoner Disenfranchisement' in Alec C. Ewald and Brandon Rottinghaus (eds), *Criminal Disenfranchisement in an International Perspective* (Cambridge University Press, 2009) 59.

[103] For analysis and contextualisation, see Helen Hardman, 'In the Name of Parliamentary Sovereignty: Conflict between the UK Government and the Courts over Judicial Deference in the Case of Prisoner Voting Rights' (2020) 15(2) *British Politics* 226.

The UK's resistance, and the American extreme, are not surprising; 'civil death' is an English invention.[104] Its purpose is to punish. Peter Ramsay, for instance, sees disenfranchisement in Hegelian terms and, drawing on Brudner's reading, submits that any democracy worth its salt 'would necessarily deny political rights to prisoners.'[105] After all, he writes, 'criminal offences… serve to uphold personal interests… the protection of which is an *essential* precondition for the exercise of civil liberty, so that violation of these interests amounts to a denial of citizenship.'[106] And a subject who denies another subject's citizenship also denies their own. Imprisonment or, to be precise, being disenfranchised while imprisoned—as 'the negation of the negation'[107]—therefore is *essential* to affirm, and not itself in breach of, 'the rules of democratic citizenship'.[108] And that, in turn, means the state or, rather, its government does not actually deprive its prisoners of their political rights; '[t]hey have done that for themselves.'[109] Sadly, though, it does nothing for the regulatory project.[110] Temporarily or permanently excluding a whole swathe of subjects from the franchise is to block *access* to one of the most vital ways to participate in the political process,[111] thus not only stifling dissent and weakening the government's capacity to gauge normative expectations and adjust laws and other institutional arrangements accordingly to enhance congruence but also, and inseparably, damaging the prospects of future compliance. Like other 'collateral' consequences,[112] criminal disenfranchisement and the disengagement it promotes has been linked to a significant increase in the rate of subsequent re-offending.[113]

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[104] For a brief history, see Corda and Kaspar, above n 93, 396-98. Most (current and former) Commonwealth countries—Canada being the exception—have retained the sanction in some form.

[105] 'Voters Should Not Be in Prison! The Rights of Prisoners in a Democracy' (2013) 16(3) *Critical Review of International Social and Political Philosophy* 421, 425.

[106] Ibid 427 (emphasis in original). And, therefore, a 'public wrong', ibid.

[107] Hegel, above n 73, 123 (§ 97).

[108] Ramsay, above n 105, 428. Compare also the position by Jean Hampton, 'Punishment, Feminism, and Political Identity: A Case Study in the Expressive Meaning of the Law' (1998) 11(1) *Canadian Journal of Law and Jurisprudence* 23, 42 who argues that at least some offences—those which are 'destructive of the values and functioning of a democratic society'—need to result in disenfranchisement in order to send the kind of 'expressive retributive response that negates their significance.'

[109] Ramsay, above n 105, 428 (emphasis suppressed).

[110] Which Ramsay seems less concerned about. He emphasises that every case of imprisonment is a case of democratic failure, but in addressing *Hirst* (see above n 101) and the argument for rehabilitation and reintegration made by the charities supporting the applicant, notes (at 424) that 'whatever the empirical merits, it is the logic of the argument that is inconsistent with democracy as self-government.'

[111] Revisit the discussion in chapter 3 at 77-79.

[112] Compare Danielle R. Jones, 'When the Fallout of a Criminal Conviction Goes Too Far: Challenging Collateral Consequences' (2015) 11(2) *Stanford Journal of Civil Rights & Civil Liberties* 237.

[113] Admittedly, the empirical work on recidivism is only now getting off the ground. Most research on criminal disenfranchisement has focused on constitutional and human rights issues and the impact it has on the outcome of elections. But there is a solid group of studies whose results can be drawn on, including, most notably, the work by Christopher Uggen and Jeff Manza, 'Voting and Subsequent Crime and Arrest: Evidence from a Community Sample' (2004) 36(1) *Columbia Human Rights Law Review* 193;

So, then, if punishment tends to feed into the problem rather than solve it, how else to move forward? The final section of this chapter—to be read as a placeholder for many more thorough, contextualised discussions relevant to specific political systems—sets out the vision, brave, new and 'unfinished', for a realist response to this question.

2. Re-constitution

Starting from the same place, the first thing to note, once again, is that, whether or not there in fact is such a thing as a 'right' to punish non-compliance, doing so remains a decision.[114] That is, while non-compliance is inevitable—every regime, no matter how dedicated, operates on a certain legitimacy deficit—the imposition of sanctions is not; and as shown, right now, in most cases, the decision to impose them is a bad one. Not 'bad' in the sense of being 'morally objectionable', which, for the realist, may or may not be true, but in the sense of palpably undermining the goal of generating collective action, compliance, the regulatory goal that government is all about. To be very clear, though, and that is vital to fully grasping the difference in approaches, the realist does not make a blanket argument against coercion. Because, first, where sanctions can be designed in line with empirical research (and that, as was shown in section I.2. above, means unaccompanied by motivationally harmful 'blame'), there can be reason to use them, provided they prove as effective as other consequences or at least intersect with those consequences in relevant ways. They might not look like punishment, of course, but that is the point, as extremely harsh interventions will only produce or further entrench impervious and antagonistic attitudes. Second, and this is not to be brushed off, the realist, in addition to acknowledging the possibility of coercion as part of a regulatory regime, can acknowledge its reality: some subjects, robust and perhaps repeated interventions notwithstanding, cannot or will not practice (enough) political toleration to reliably stabilise behavioural boundaries; others, actual and potential 'victims', who cannot or will not accept that, might expect that these boundaries be stabilised by other

'Citizenship, Democracy, and the Civic Reintegration of Criminal Offenders' (2006) 605(1) *The Annals of the American Academy of Political and Social Science* 281; and Guy Padraic Hamilton-Smith and Matt Vogel, 'The Violence of Voicelessness: The Impact of Felony Disenfranchisement on Recidivism' (2012) 22 *Berkeley La Raza Law Journal* 407. Compare also Shadman Zaman, 'Violence and Exclusion: Felon Disenfranchisement as a Badge of Slavery' (2015) 46(2) *Columbia Human Rights Law Review* 233 who notes a 'chilling effect' of disenfranchisement on voting activity of associated communities.

[114] Compare Didier Fassin, *The Will to Punish,* The Berkeley Tanner Lectures (Oxford University Press, 2018) who shows, from an anthropological, rather than a strictly legal or political, viewpoint, that even if deemed a product of 'principle', real punishment is hardly ever confined by it.

means, notably by some form of incapacitation.[115] Establishing congruence with these expectations—and thereby, as a trade-off, securing cooperation by those who are able and willing—is a realist course of action.[116] Recall, however, that the actual infliction of sanctions in either scenario remains an expression of power, of failed authority, of failed representation and helplessness even, insofar as the subjects on whom they are inflicted, and others who agree, perceive them as such.[117] And thus, arguably, and in the latter scenario in particular, the practice should be approached very cautiously, for legitimacy deficits can spread and grow, and, indeed, rather humbly, too. Enthusiasm belongs elsewhere, as do valuable resources.[118] If consequences are to be broadly and maximally effective and facilitate long-lasting, sustainable change, they need to apply on both ends of the 'dispute', tackling the many complex sources of non-compliance, instead of myopically focusing on its symptoms. Roughly speaking, that means cutting better, more congruent compromises in and across institutions, laws, and policy areas, fostering a culture and individual capacities for toleration, and making a genuine effort to steer (all) subjects towards the political process instead of away from it.

The realist approach, then, shares some commonalities with other progressive models whose mission is to unsettle the existing penal paradigm, but it also moves away from them in important respects and adds a layer of clarity to the task. John Braithwaite, for instance, has long advocated the need to sequence and carefully escalate interventions, to prioritise reintegrative over retributive consequences, and to address non-compliant subjects in non-stigmatising, community-based settings inspired by traditional 'restorative justice' rituals.[119] His most recent work, moreover, makes an ambitious case for how networked mechanisms of accountability among different social actors, systems, and institutions, such as political parties, cultural groups and the market, can 'cascade'

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[115] Often, and that, too, is acknowledged, they will expect considerably more than that. Non-compliance can traumatise and trigger strong, emotional reactions (on top of protective behavioural demands)—and adequate support in those circumstances is crucial in allowing these subjects to 'move forward' as well. Realist institutions, however, built around the concept of political compromise, should be well-equipped to absorb punitive impulses and focus on regulation instead (see also Lacey, below n 122). The purpose behind that is not to 'silence victims', far from it; it is to channel (all) voices productively in the direction of less 'victimisation', more politics and more agency. All too easily, in many systems, can hurt subjects be used—in the name of 'victim protection' but against the evidence—as objects of populist agendas.
[116] Compare Matt Sleat, 'Legitimacy in Realist Thought: Between Moralism and "Realpolitik"' (2014) 42(3) *Political Theory* 314, 329.
[117] Revisit the discussion in chapter 1 at 35-36.
[118] 'Corrections' come with a heavy price tag. The US, for instance, spends around 80 billion USD p.a. on public prisons and jails alone. The data is from 2017 and published by the Prison Policy Initiative at: https://www.prisonpolicy.org/research/economics_of_incarceration/ [last accessed 14 February 2023].
[119] See, notably, *Crime, Shame and Reintegration*, above n 37; and *Restorative Justice and Responsive Regulation* (Oxford University Press, 2002).

in promoting legitimacy perceptions and, as a result, compliance.[120] In a similar vein, Nicola Lacey, in collaboration with Hanna Pickard, has argued against the infliction of repressive and exclusionary measures driven by 'affective blame', and in favour of institutionalised practices of forgiveness that spark interest and genuine participation in redemptive and rehabilitative behavioural strategies.[121] Her (comparative) analysis of the political economy of punishment further reveals that high levels of interlocking and structurally controlled tensions among different regulatory spheres as well as a set of procedural constraints—notably, a system of proportional representation conducive to coalition politics—facilitate long-term cooperation across ideological and (or) party lines and produce both more moderate and less volatile criminal justice policies.[122] In many ways, the realist argument is complemented and buttressed by these accounts. It cannot embrace them in their entirety, however, for while Braithwaite and Lacey each defend a regulatory framework, it is a regulatory framework pursuant of liberal goals. Braithwaite subscribes to a republican notion of 'freedom as non-domination',[123] and strives to 'restore' any violations thereof by gently 'shaming' respective subjects into mending their own 'wrongs'; and Lacey, more hesitant to wed herself to any particular logic, appeals to a generic ideal of 'harm reduction' (with egalitarian undertones), and tries, together with Pickard, to think of designs that will 'repair' ruptured relationships and 'wipe the slate clean' all while 'keep[ing] the wrongdoing clearly in view'.[124] This urge to make things 'right' somehow, to restore and forgive, sits uneasily with a realist admission of deep and persistent conflict. Some instances of non-compliance might be resolved in those terms, and institutions built on realist precepts can straightforwardly accommodate liberal attitudes as part of the mix,[125] but the overarching narrative, if it is to capture and address all types of non-compliance, including, most importantly, the surfacing of antagonistic tendencies, must be a different—a political—one.

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[120] *Macrocriminology and Freedom* (Australian National University Press, 2022).
[121] 'To Blame or to Forgive? Reconciling Punishment and Forgiveness in Criminal Justice', above n 38; 'From the Consulting Room to the Court Room? Taking the Clinical Model of Responsibility Without Blame into the Legal Realm' (2013) 33(1) *Oxford Journal of Legal Studies* 1.
[122] *The Prisoners' Dilemma: Political Economy and Punishment in Contemporary Democracies,* The Hamlyn Lectures (Cambridge University Press, 2008) and 'Political Systems and Criminal Justice: The Prisoners' Dilemma After the Coalition' (2012) 65(1) *Current Legal Problems* 203; compare also Nicola Lacey and Hanna Pickard, 'The Chimera of Proportionality: Institutionalising Limits on Punishment in Contemporary Social and Political Systems' (2015) 78(2) *Modern Law Review* 216.
[123] Revisit chapter 2 at 45-46.
[124] Lacey and Pickard, 'To Blame or to Forgive? Reconciling Punishment and Forgiveness in Criminal Justice', above n 38, 675.
[125] Recall that the issue lies with liberal *theory* and its attempt—theoretically and practically—to remove certain viewpoints from 'legitimate' contestation. Defenders of liberal *politics*, on the other hand, are in no way precluded from making their case within the realist framework developed here.

Borrowing from Andrew Schaap, who tackles very similar challenges in the realm of transitional justice, and returning, fittingly, to where this thesis began, the best answer, perhaps, is this: re-constitution. Of what? The 'fictional', always aspirational unity of 'the state'. Admittedly, Schaap does not put it in those words, he talks about 'agonistic reconciliation' instead,[126] but the thrust goes in the same direction. Re-constitution is the softening of opposition, the at least temporary disentrenching of 'us' versus 'them' to 'make available a space for politics'[127] in which 'deviant' and 'victimised' subjects can co-exist. It is not, as he rightly emphasises, 'a metaphor of "return" to an original condition of harmonious relations', an effort 'to bring social healing to a body politic made sick by grievous wrongs.'[128] In his words, '[a]gonistic reconciliation is oriented toward constitution rather than restoration in that it seeks… to initiate *new* relations'; and it is 'a momentary and contingent achievement that must be continually resought through partaking in the public business of judging, arguing, and persuading.'[129] The realist vision, then, is one that unfolds in perpetual forward motion. It is one of 'state-building' in the most basic, most powerful Hobbesian sense: the political constitution of a provisional, contestable, imperfect 'we' through collective action, which itself, as was seen, is a prospect predicated upon the successful institution and maintenance of a representative body of government.[130] The moment *post* non-compliance, in theory, indistinguishable from that *pre* non-compliance, thus, is a moment to strengthen—not suspend—subjects' citizen- or, better, authorship, their stakes in and 'ownership' over what Schaap neatly refers to as the potentiality of 'a community-to-come'.[131]

In practice, that means returning to the negotiating table (or, indeed, making sure there is one to begin with, by opening up avenues for participation on both a large, 'political' scale and in smaller, community-based or interpersonal settings); it means confronting

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[126] And he has produced quite an extensive body of writing around this. See, especially, 'Guilty Subjects and Political Responsibility: Arendt, Jaspers, and the Resonance of the 'German Question' in Politics of Reconciliation' (2001) 49(4) *Political Studies* 749; 'Political Reconciliation Through a Struggle for Recognition?' (2004) 13(4) *Social & Legal Studies* 523; 'The Time of Reconciliation and the Space of Politics' in Scott Veitch (ed), *Law and the Politics of Reconciliation* (Ashgate Publishing, 2007) 17; and 'Reconciliation as Ideology and Politics' (2008) 15(2) *Constellations* 249.

[127] Schaap, 'Political Reconciliation Through a Struggle for Recognition?', above n 126, 538. Compare also 'The Time of Reconciliation and the Space of Politics', above n 126, 21.

[128] 'Guilty Subjects and Political Responsibility: Arendt, Jaspers, and the Resonance of the 'German Question' in Politics of Reconciliation' above n 126, 762. For as he—again, rightly—points out, such a conception 'makes a presumption of what in fact it must achieve': a 'moral community' (at ibid).

[129] Ibid (emphasis added).

[130] Revisit chapter 1 at 25-34, and chapter 3 at 68-71; and see Schaap, 'Reconciliation as Ideology and Politics', above n 126, 253-55.

[131] 'Reconciliation as Ideology and Politics', above n 123, 256. On the connection between 'authorship' and 'ownership' in a system of political representation, see chapter 1 at 30-31.

the 'other', listening, quarrelling, listening some more, gaining ground, losing ground, reaching settlements, building institutions, building capacities, and cementing, through education and advocacy, research and reform, the practices of toleration on which the implementation of any of these strategies will inevitably depend; but also, and equally, it means taking 'ownership' over decisions made, holding one another accountable, as political leaders and as political subjects, and resisting the liberal temptation, too often indulged, to wipe away the human fingerprint. The rest—the details, for now, have to be left 'unfinished', as a political tactic,[132] but more so, as a matter of politics and with a view to further, contextual analysis. What should have come across once more, however, is that the realist project is an open-ended, critical project derived from a strong, not necessarily an expansive conception of government, one that is willing and able to look inwards and interrogate, time and again, the conditions of its own legitimacy.

CONCLUSION

The main conclusion to draw from all this is very simple. Criminal law, for the realist, and the consequences which may attach to its violation, are not about what we *owe* to each other, morally; they are about what we *do* to each other, politically and in radical recognition of who 'we' are, at a particular time, in a particular place. But, of course, there is nothing simple about its implementation. As this chapter has tried to explain, leaving behind the moral perspective, the certainty and righteousness that it brings, in exchange for 'the risk of politics'[133] is not just to leave behind a conventional, highly questionable approach to criminal justice theory, it is to stand up for an evidence-based approach to criminal justice policy, for actual change and all the work and discomfort that entails. Once governments are no longer preoccupied with 'blaming' and 'punishing' those who fail to comply, they can focus on growing representation. Which, if not to abolish the institution of criminal justice as such, must mean to drastically decentre and re-structure it.[134] This chapter, then, does not in fact end the discussion of criminal law as political compromise. It, in a way, only begins it.

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[132] Thomas Mathiesen, *The Politics of Abolition Revisited* (Taylor and Francis, 2014) 47-61.
[133] Schaap, 'The Time of Reconciliation and the Space of Politics', above n 126, 32.
[134] See Jonathan Simon, *Governing through Crime: How the War on Crime Transformed American Democracy and Created a Culture of Fear* (Oxford University Press, 2007).

SUMMARY AND OUTLOOK

'No one loves a political realist.'[1] This sentiment held true 30 years ago, when Robert G. Gilpin, and several others besides him,[2] refused 'to believe that, with the defeat of the Soviet Union and the end of the Cold War, the liberal millennium of democracy, unfettered markets, and peace [would be] upon us.'[3] And it holds true today; perhaps, even more so. Whenever I presented parts of this thesis at conferences and workshops, I struggled to get beyond defending the basic premises of what I was doing, and why. Having read the argument in its entirety, I hope it is easier to appreciate its critical bite and also, importantly, its distinctly positive, transformative potential.

Chapter one began with a synopsis of the moralist position, in both its objectivist and its communitarian inflection, to draw out the understanding of political representation and, connectedly, authority that underpins it. Moralists consider the criminal law to be an expression of what a—or any—given society does, or, at least, ought to, deem pre-legally 'wrongful'; and the machinery of government serves to make sure the message

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[1] Robert G. Gilpin, 'No One Loves a Political Realist' (1996) 5(3) *Security Studies* 3.
[2] See, e.g., John J. Mearsheimer, who at the turn of the century diagnosed a sustained, and often intense, 'realism bashing' among international relations scholars,'Realism, the Real World, and the Academy' in Michael Brecher and Frank P. Harvey (eds), *Millennial Reflections on International Studies* (University of Michigan Press, 2002) 57, 63.
[3] Gilpin, above n 1, 3. (There is something quite sobering about writing these lines shortly after the first anniversary of the Ukrainian invasion by Russian forces.)

is coming across. The mechanism of representation that caters to this understanding is dyadic (state represents society), the conception of authority moral, that is, dependent on the 'right' set of values. Neither holds up when assessed against the circumstances of real politics. Difference, actual, not just 'reasonable', disagreement, and potentially violent conflict, as well as the need, more so than a willingness, to cooperate, call for a more sophisticated political arrangement. Hobbes, possibly the first 'constructivist' thinker, recognised that; and his logic of representation 'by fiction' helped explain that the institution of government, properly construed, is part of a triadic relationship, with its authority arising not from a specific set of values, but the sustained coordination of competing representational claims, moral or other, at a level that stabilises compliance with collective decisions, thus creating an 'appearance' of political unity rather than a social organic whole (government represents society *as* state). Methodologically, that means that an account of legitimate criminalisation cannot be derived from an account of punishment. Instead, the focus must be on the social scientific, not the philosophical, conditions and mechanisms that stimulate compliance and, crucially, on the normative expectations of those, the political subjects, who are being addressed.

These insights were then carried forward into a critical analysis of the so-called 'political turn' in criminal law theory. Chapter two systematically set out the main proposals advanced in this vein, and showed that their proponents, too, are committed to a set of pre-political standards—liberal standards of freedom, equality, rights, etc., derived not from within the political sphere, in which they are formed and contested, but imposed from without—as well as their communication and implementation by way of criminal law. The logic of representation at work, therefore, still, or again, proved to be dyadic, the conception of authority that springs from it still, or again, tied to the 'right' values, and the normative expectations of the subjects to whom the criminal law is addressed still, or again, irrelevant and (or) 'wrong' unless conforming to an ideal. The upshot is a consensus-oriented, justice-based framework that, like the moralist position, fails to acknowledge and address the circumstances of real politics. Expanding upon Bernard Williams's 'basic legitimation demand', and returning to the idea of coordination, the remainder of the chapter, then, laid the groundwork for a more rigorous, and robustly realist, counterproposal. It introduced the concept of political compromise as a vehicle to maximise congruence between the criminal law and the—actual, conflictual, changing—representational claims (judgments of what 'makes sense') of those expected to comply, and thus set the stage for a genuine 'turn' towards the political.

Since liberals, too, have recently started to invoke the concept of compromise, chapter three had to step outside the criminal debate for a moment to clearly articulate both its constitutive features and its political practice from a realist perspective. The former, it was seen, are fairly straightforward: compromising means making concessions for the sake of settling on a particular course of action. For the realist, these concessions have to, in fact, be mutual (but not equal), or else it is capitulation; and they have to, in fact, lie between the 'conflict point' and the 'aspiration point' of the parties who commit to making them. Where that is, exactly, cannot be determined in advance. That is, against the liberal position—which clings to the idea of a 'moral minimum', a set of, perhaps, somewhat 'thinner' pre-political standards intended, no less intrusively, to restrict the exercise of political agency—any 'red lines', and the decision of whether or not they have been crossed, are up to the parties themselves. A 'good' compromise, then, is one that many political subjects do, in fact, find acceptable, at least for the time being. But those who do not are not forgotten. The idea of 'continued conflictuality' was used to explain that any compromise, by definition, operates against the backdrop of persistent disagreement, between the parties, but also, between the parties and those who got left out. The wider the gap, the worse the arrangement, and the more diminished its ability to foster collective action—but those were issues addressed further in chapter five. The third chapter finished by examining the institutional requirements and the capacity for toleration needed to secure compromise in political practice. While liberals, again, rely (and, indeed, insist) on the 'right' disposition of the parties, realists turn to procedural mechanisms—allowing for access, recognition, change—that increase the prospect of subjects accepting political limits to which they can act on their own preferences.

Chapter four returned to criminal law proper. Starting with a general articulation of the realist framework, it explained the relationship between representation and regulation, and then developed two case studies, on abortion and the criminalisation of 'hate', for illustration and further discussion. The gist is easily summarised: political compromise is concerned with creating collective action, not a collective moral conscience; and the (de-)criminalisation of abortion, in different places, at different times, serves as a vital reminder that even deep-rooted opposition—opposition based on claims about life and liberty—is amenable to institutional negotiation. The prohibition of 'hate', on the other hand, is a decision comparable more to an act of political arson than an act of political representation. Designed to force back opinions rather than regulate behaviour, it only spurs political conflict and, with it, the dangerous division of 'us' versus 'them'.

In an effort to deepen the connection between representation and regulation, or, rather, our understanding thereof, as well as to draw out the difference between the moral and the political conception of authority, chapter five zoomed in on the idea of compliance and the question of how it can be secured in practice. It was shown that, from a moral perspective, to say that the (criminal) law is oriented towards compliance is to say that it strives to generate a 'genuine obligation' to be complied with, one that exceeds—or, rather, backs up—the 'legal obligation' which the respective law *qua* law imposes on all those to whom it is addressed. Thus, for a subject to comply is to discharge a moral obligation to do so—an obligation which, in turn, exists only if the government got the content of the law 'right'. The government's task, in short, is largely philosophical: it has to figure out which laws its subjects would be morally justified in following so as to secure 'genuine' obligations for them to do so. In practice, this interpretation leads to a very deterrence-heavy and, thus, very ineffective approach, as the subjects' actual expectations have to be ignored and (or) overridden. The realist position, by contrast, is that it does not matter whether subjects are under a 'genuine' (moral) obligation or not; what matters is that they deem legitimate, wholeheartedly or begrudgingly and for whichever reason, the institutions that make claims on them, and that when prompted to respond, they act accordingly. It is this combination of normative attitude (based on the subjects' political judgment of the degree of congruence) and behavioural response (by committing to it through action) that gives 'real' shape to the idea behind 'political obligation', and it aligns with the empirical evidence showing that compliance occurs, reliably, only if laws are motivationally effective and, as such, action-guiding.

A government's 'real' task, then, is to increase representation, to negotiate better, more congruent compromises, and thus to strengthen and affirm its own authority, its ability to successfully lay claim to compliance in the first place. And conversely, any instances of non-compliance, of behavioural failure on the part of the subjects addressed, are, at least also, a symptom of political failure: failure to represent, and regulate, effectively. These failures are inevitable. Every regime, no matter dedicated, operates on a certain legitimacy deficit; full congruence in conditions of conflict is impossible. Which lends urgency to the question of what ought to be done when, not if, they occur. Chapter six addressed this question. It showed that for those attached to the vindication of morality, ordinary or 'political', the answer is largely about shifting 'blame' back and forth, and meting out 'punishments', where 'deserved'. The realist remains committed to the goal of collective action, which institutionalised practices of 'blame' and 'punishment' can

hardly serve. Needed are two-directional channels of accountability, collaboration and reform across policy areas, and constructive engagement with subjects whose capacity for toleration requires a more tailored approach. Elaborating what that entails, exactly, is a key mission arising from this thesis, and it clearly points towards: procedure.[4]

There is more to do, however. Just like the 'new' realists whose project my project set out to advance, I have so far, and somewhat unduly, confined my ideas to the domestic legal sphere.[5] But, of course, there is something quite *un*realistic about a realist theory of criminal law that fails, even implicitly, to incorporate and assess the impact of inter- and transnational institutions and practices; particularly if, as is the case, the discourse around these institutions and practices is facing an affliction analogous to the domestic one.[6] With a view to publishing this thesis as a monograph, I plan, therefore, to extend my doctoral research and write an additional chapter, using terrorist offences as a case study. Its aims will be twofold: (i) to break down or at least soften the barriers between 'new' and international realists by re-kindling the 'love' for mid-century thinkers, like Hans J. Morgenthau and E. H. Carr who, unlike most of their successors, affirmed not only the non-reducibility of politics to morality, but the normative priority of sustained de-escalation and contested order over the implementation of a specific set of ideals;[7] and (ii) to show that the lack of institutional compromise in the inter- and transnational arena helps explain and, crucially, critique the openly antagonistic instrumentalisation of criminal law in the 'war' against terrorism. A 'war' considered necessary to build a just and joyous international community but fought out in existential ideological terms of 'humanity and inhumanity; civilization and barbarism; freedom and fear; modernity and pre-modernity; liberal democracy and apocalyptic, eschatological, phantasmagorical nihilism; the rational and the pathological; law and outlaw; friend and enemy; the West and the Others; Christianity and Islam; light and dark; good and evil.'[8]

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[4] And by that I mean not just criminal procedure in the narrow sense, but political procedure, generally.
[5] Rare, but notable, exceptions in this regard are Terry Nardin, 'Realism and Right: Sketch for a Theory of Global Justice' in Cornelia Navari (ed), *Ethical Reasoning in International Affairs: Arguments from the Middle Ground* (Palgrave Macmillan, 2013) 43; and also Matt Sleat, 'The Value of Global Justice: Realism and Moralism' (2016) 12(2) *Journal of International Political Theory* 169.
[6] The affliction here being moralism; see, e.g., Jens D. Ohlin, 'The Right to Punishment for International Crimes' in Florian Jeßberger and Julia Geneuss (eds), *Why Punish Perpetrators of Mass Atrocities? Purposes of Punishment in International Criminal Law* (Cambridge University Press, 2020) 257; and Thomas Elholm and Renaud Colson, 'The Symbolic Purpose of EU Criminal Law' in Renaud Colson and Stewart Field (eds), *EU Criminal Justice and the Challenges of Diversity: Legal Cultures in the Area of Freedom, Security and Justice* (Cambridge University Press, 2016) 48.
[7] See *Politics Among Nations: The Struggle for Power and Peace* (Knopf, 1948) and *The Twenty Years' Crisis, 1919-1939* (Harper and Row, 1964), respectively, and my introductory remarks at 11 (n 19).
[8] Ben Saul, *Defining Terrorism in International Law* (Oxford University Press, 2006) 20.

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Germany:	Grundgesetz (Basic Law): Strafgesetzbuch (Criminal Code)
NZ:	Electoral Act 1893; Abortion, Contraception and Sterilisation Act 1977; Sentencing Act 2002; Abortion Legislation Act 2020
UK:	Race Relations Act 1965 (repealed); Abortion Act 1967; Public Order Act 1986; Crime and Disorder Act 1988; Sentencing Act 2020
US:	Human Life Protection Act 2019 (HB 314) (Alabama); Revised Statutes (Louisiana); Iowa Code (Iowa); Florida Statute (Florida); District of Columbia Code (DC)
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