

Introduction

For most of the past two centuries, the institutions of criminal justice have been predominantly agencies of or accountable to government (be it local, state, or national). That is not to deny or ignore the presence or influence of privatization. But because government is usually the main source of funding and oversight, how we conceive of governmental power influences how we view such institutions and their processes, and the resources upon which we draw when we seek to justify them. The justificatory framework for this volume is broadly “liberal democratic” – that is, it views the role of the institutions of criminal justice in terms of “social peacekeeping” rather than of “pacification.” It sees, in other words, the institutions of criminal justice as securing public rather than merely state interests. But to say one takes a “liberal democratic” approach is to speak in fairly broad terms. There is no single way of being liberal and democratic, and the institutions and processes of criminal justice found in the United States, United Kingdom, Europe, and Australia differ in many and sometimes quite significant ways, though not necessarily in ways that diminish their liberal democratic claims. Their histories (and to some extent their geographies) are sufficiently different to have given rise to what are often quite distinctive ways of being liberal and democratic. As a result, it is not possible to engage in a relatively brief introductory discussion of a liberal democratic criminal justice ethics that applies accurately and equally to the traditions and institutions of all liberal democracies.

In this volume I focus most directly on the structures and processes of criminal justice in the United States. Apart from the need to simplify, there are at least three additional reasons for this concentration. First, it is the tradition in which most of my own thinking about such issues has occurred (even though it is not the tradition in which I grew up). Second, criminal justice institutions in the USA have tended to generate the

liveliest and sometimes the most probing debate, and so the philosophical and ethical discussion is frequently better developed in relation to US institutions. And third, until recently, university-level discussions of criminal justice have been better integrated into the US curriculum than into the curricula of other liberal democratic societies. Despite these considerations, I have attempted to offer some comparative observations and also to treat problems in ways that allow for their relatively easy transposition to other English-speaking liberal democratic traditions. In the suggested additional reading, I have provided references to extended localized expositions. In the course of some of my comparative observations, I hope that alternative ways of thinking will be opened up for US readers (especially as much of the American debate is still disappointingly parochial).

A few comments on the title might be appropriate. My concern in the volume is with *ethics* in criminal justice. There is a substantial literature on the sociology, politics, and administration of criminal justice, and a great number of explanatory theories about the institutions of criminal justice have been offered. I have not tried to summarize or add to that literature. Although I draw on it from time to time, my main purpose is to direct attention to some of the broader ethical questions that are prompted by the system, its institutions, and its processes. Such questions are *fundamental* and *pervasive*. They are fundamental in two related senses: first, in the sense that they are concerned with the basic currency of human interaction. They are concerned with what we *are* in our relations with others – that is, not only with what we *do* or do not do to and for others, but also with our attitudes and reasons for acting as we do. Behaving well may fail ethically if it is prompted by unworthy reasons, a point often exploited in cases of whistle-blowing when defenders of an exposed organization attempt to divert attention from its failings by impugning the whistle-blower's motives. Second, they are fundamental because ethical standards constitute our most basic tool for the assessment of other social norms – for example, those generated by politics, economics, law, or custom. We do not normally consider it appropriate to judge ethical standards by reference to political, economic, or legal norms, but instead subject the latter to ethical scrutiny. If political decisions or economic policies or laws are criticizable on ethical or moral grounds, we have a strong reason for seeking to change them. If what is put forward as good business or good politics is bad ethics, we should reconsider the former rather than the latter. It is not that for ethical reasons we

should encourage bad commercial or political practices. Our goal should be to develop business and political practices that are not only ethically good but also good commercially and politically.

The ethical discussion to be found in these pages is focused on *criminal justice*. I understand by that the institutions of criminal justice (most centrally, police, courts, and corrections) and their occupational players (police officers, sheriffs, marshals, prosecutors, defense lawyers, jurors, magistrates, judges, correctional officers, and so on). But the institutions and their players are embedded in a wider system of law, a significant amount of which is devoted to other matters – such as contracts, torts, business, divorce, labor, and international affairs – and though we should not overdo their differences, there tend to be different role expectations associated with the different branches. In focusing on criminal justice and its players I do not provide a comprehensive account of either the broad governmental institutions we have or the roles of those who work within them. The civil jury does not operate in the same way as a criminal jury and ethical problems confronted by tort lawyers will at best overlap with those of a criminal defense lawyer.

Finally, this volume is intended only as an *introduction*. It envisages the constraints of a course in criminal justice ethics and does not claim or attempt to provide a comprehensive coverage of even the main ethical issues that practitioners will encounter or thoughtful citizens will ponder. But I hope to have provided a sufficiently developed framework of understanding to enable readers to grapple with those issues and to stimulate and enable such readers to take the discussion further.

In conclusion, it needs to be emphasized that this volume does not seek to endorse criminal justice systems or institutions or processes *as they exist*. Indeed, insofar as it refers to the workings of actual criminal justice systems, it will often be to suggest that the system as we find it falls short in various ways. Its purpose, rather, is to offer a normative account of the institutions and processes of criminal justice, that is, one that indicates how such institutions and processes might be legitimately reconceived and improved.

Part I

Criminalization

The institutions of criminal justice – most particularly the police, courts, and corrections – do not exist in a moral, social, or political vacuum, but reflect important and often controversial assumptions. The three chapters that follow attempt to expose and reflect on some of those assumptions, not specifically to reject them but to enable us to hear the “accent” with which we speak when we consider the activities of police, courts, and corrections. Our accent is that of a liberal democratic tradition, with roots in Greek, Judaeo-Christian, and Enlightenment thinking, characterized by ideas of equality, dignity, freedom, and responsibility, but increasingly enriched and challenged by ideas from other traditions. It is within this increasingly diverse environment that the institutions of criminal justice must develop a voice that is not only faithful to their heritage but also sensitive to the legitimate expectations of those who have come within their reach.

1 Civil society: its institutions and major players

We never hear our own accent. But others do.

Because you are reading this, it is highly likely that you possess certain beliefs about yourself and other human beings – for example, that you are a rational being and that in virtue of that you possess a certain dignity and, by implication, have certain rights such as those to life and liberty. You are also likely to believe that you – and others – are generally responsible for what you do. But these beliefs have not always been held and even now are not universally held. Indeed, at different periods of human history and in different places, these beliefs would have seemed alien and unintelligible. You hold these beliefs now because you are part of a *tradition* – in this case a *liberal* tradition – that originated several centuries ago in response to and with the decline of feudalism.

It is worth pondering the fact that what you believe and who you take yourself to be is due in large part to your social and cultural history. You probably see yourself not as having been born into a fixed social order with a relatively predetermined social role (as was the case with those born into a feudal society), but rather as a unique human individual possessing the ability, within the limits of your capacities and preparation, to be many things. But you did not come to be this individual on your own, as a tree might “naturally” develop its distinctive characteristics, given only adequate physical sustenance. Your genetic endowment aside, you are the self-reflective and self-determining individual you are by virtue of a fairly long process of social nurture provided by your family, your friends, your school, and other influences to which you have been exposed. All of these have enabled you to become the person you now are. Had you been reared in a different kind of society you would have had a very different conception of yourself. And had you instead been reared in the wild by animals or without human contact,

you would lack most of the personal qualities you almost certainly consider to be central to the person you now are.¹

Of the many things you have learned in the course of your life, one of the most important is that your relations with others are – or at least should be – mediated by certain understandings, expectations, and norms or standards, much of which we include under the umbrella term “morality.” Although moral standards differ somewhat from community to community and even from individual to individual, there is significant overlap between them because we share a fair degree of understanding about the things that are important for our human flourishing and therefore about what should constrain as well as what should direct our relations with others. For example, almost all of us believe that we should not maim or kill others, treat others as objects for our manipulation or deception, or steal from them. Probably we also think that – insofar as we are able – we should positively care for others. It is not that these expectations are without exception or that we will apply them in the same way. But we are all physically embodied in much the same way, and our mental and emotional capacities are sufficiently similar for us to have shared understandings about what compromises or jeopardizes the flourishing of creatures such as ourselves. Moreover, to the extent that our understanding of constraints and requirements is *not* shared, we have a problem, for then our relations with others will be beset by conflicting understandings. Fortunately, this problem is not always irresolvable because, as language-speakers, we can engage in rational discourse with one another, and thereby address our differences with a view to their resolution or at least mutual understanding. Of course, differences in our understanding about what makes for a good or flourishing life can make *initial* encounters problematic, a matter to which we will later return.

One question that arises is why, if we share a broadly congruent morality, those shared understandings of what is expected of us are not sufficient to govern the social interactions of our daily life without the intervention of other social institutions. Why is so much of our daily intercourse with others constrained or determined or mediated by law and the larger authoritative structures that we see as originating with “government” or “the state”? That

¹ For an account of this phenomenon, see Michael Newton, *Savage Girls and Wild Boys: A History of Feral Children* (New York: Faber & Faber, 2002).

is a question to which the adherents of what is known as “anarchism” offer a skeptical answer. They consider that our moral resources *are* adequate for the business of life and that governments will always oppressively exceed whatever authority they possess. But anarchism is a view that has not found general acceptance, mainly because most of us believe that our personal moral resources alone are collectively inadequate to the task of mediating our relations with others in the full range of cases we are likely to encounter. In a world of limited resources, varying insight, and conflicting claims, we are often unjustifiably self-interested or partial to those who are nearest and dearest to us. Though self-interest and partiality are not illegitimate in themselves, they easily cloud our judgment. We are, moreover, prone to self-deception, weakness of will, and even to nakedly evil tendencies. Such impediments to wise and fair decision-making and conduct toward others show a need for some “outside” governance such as is provided by the state and its agencies.

Moral foundations of liberal democracy

Nominating the state as an institution that may legitimately require – even by threat of force – its citizens to conduct themselves toward one another in certain ways is problematic. It was a chief worry of seventeenth- and eighteenth-century English liberal theorists such as John Locke (1632–1704), who saw the tension between, on the one hand, the establishment of governmental institutions with coercive powers against citizens, and, on the other hand, citizens who had begun to see themselves as free agents with their own rights of self-determination and governance. Locke – a philosopher, physician, and political activist – was fortunate enough to be writing at a period of social transition in England (the English Bill of Rights was promulgated in 1689). The replacement of an absolute monarch by a constitutional one and the ascendancy of an elected parliament as the supreme political institution provided him with the opportunity to offer his reflections upon this transition as well as a “solution” to the problem posed by governmental authority. Although he was only one of many to write on such issues, Locke’s writings came to be greatly influential not only in England but also in the New World ferment that resulted, in 1776, in what became known as “the American experiment.” If you read the Declaration of Independence, which was drafted by Thomas Jefferson, you could almost

believe that it was based on the writings of Locke. The US Constitution, moreover, incorporates a number of the key provisions of the English Bill of Rights.

Chapter 9 of Locke's *Second Treatise of Civil Government* (1690) is particularly relevant to our discussion here. Locke poses for his readers the fundamental political challenge presented by the burgeoning perception – recognition, if you will – of persons as sovereign over their lives by virtue of their standing as rational beings: Why, Locke asks, would sovereign beings tolerate the transfer of some of that sovereignty to government? His answer is simple and elegant: Without the constraining power of government we would find the exercise of our sovereignty “uncertain,” because of the absence of guarantees that others will always respect the moral boundaries required by our status as rational, independent, and therefore sovereign creatures. But Locke believes that there is an obvious way in which we can secure our fundamental interests, and that is to cede some of our powers to people whom we specifically charge to protect these interests and to vest in these people the authority to ensure we are protected. The authority that we vest in such representatives will be legitimate only so long as they continue to act in good faith and on our behalf.

By means of this elegant solution to the problem of government, Locke sought to effect two ends. First, he wanted to reconcile coercive governmental power with our fundamental sovereignty – for, by choosing those who will protect our rights, we *consent* to their governance. Second, he sought to limit governmental power, for our consent is given *only* for the purpose of securing our fundamental interests or rights, and not for other ends.

The Lockean solution, which we commonly refer to as the “social contract theory of governmental authority,” has become the dominant theory of liberal democratic states. But it is not without its problems or its rivals. Against Locke's narrow account, it has been argued that the role of government is broader than the mere securing of limited rights from others who would violate them. We have rights to welfare as well as to protection. Moreover, voting in elections, which we recognize as one of the major strategies for registering our consent, does not really express our agreement to the outcome and to what is later done on our behalf. Voting is too thin and too “staged” to do the work that Locke's theory requires. Even thinner is Locke's fallback of a “tacit consent” registered by our remaining in the state and being beneficiaries of its efforts. However, we shall not pursue here various

attempts to meet these challenges. Nor shall we explore alternative views of political authority, which are no less open to challenge, interesting and important though such inquiries are. The social contract account is probably as good as we have and in any case provides a widely held and helpful way of framing our discussion.

One of the most remarkable features of Chapter 9 of the *Second Treatise* is Locke's attempt to provide an institutional diagnosis of the failings of a society that lacks governmental institutions. He refers to such a society as existing in a "state of nature," which Locke views as a social order in which people's conduct is normatively governed only by their apprehension of the "law of nature" – principles of morality. These principles are made known to them through their nature as reasoning beings.² This pre-civil social order, he suggests, will lack three crucial institutions: a legislature, a judiciary, and an agency for enforcement. According to Locke, we need a legislature because people as we find them disagree about the terms under which their interactions with others are to be conducted. This may sometimes be attributable to their failure to think through situations carefully enough; at other times it may reflect a partiality that improperly discounts the interests of others. What is needed is an institution to which we can give responsibility for making societal-wide determinations of the standards that are to govern our public behavior. That is what a legislature is called to do, albeit after a public and sometimes contentious debate. Its determinations become *law*.

But having laws is not enough. The laws need to be interpreted and applied. Locke believes that problems similar to those concerning our discernment of basic moral norms also surface with respect to our understanding and application of laws that have been promulgated. What is called for is an interpretation and application of the law that is both expert and disinterested. What we need, therefore, is a judiciary, or, more broadly, a judicial order, whose primary practitioners – judges – are versed in the laws and pledged to interpret and apply them independently and impartially.

² Locke's own account is also embedded in certain theological presumptions, though there has been considerable debate as to whether these are crucial to his position. For a valuable and provocative defense of the view that Locke's commitment to human equality requires recourse to such presumptions, see Jeremy Waldron, *God, Locke, and Equality: Christian Foundations of Locke's Political Thought* (Cambridge: Cambridge University Press, 2002).

However, not even a legislature and judiciary will be sufficient to make good the deficiencies of the state of nature. We saw that (according to Locke) fundamental to the problem of existing in a state of nature was an inability to ensure that our rights could always be exercised without the interference of others. So Locke argues that a further tier of institutional authority is required – one that “executes” or enforces the law as legislated and interpreted by the judiciary. Locke himself did not specify police or corrections officers as the relevant groups – for they had not yet been socially differentiated in the manner in which we now find them. In addition, we would probably expand this third tier to include customs officers, tax agents, marshals, security personnel, and others. But police and corrections personnel are its most conspicuous institutional representatives.

Thus are all the major institutions of what we sometimes speak of as the criminal justice system neatly encapsulated within Locke’s broad theory of liberal democracy. The existence and shape of these institutions are not mere happenstance; rather, they are intended to reflect certain fundamental ethical ideals as well as practical concerns – namely, that individual human beings possess a dignity that is correlated with certain expectations about the ways in which they may treat and be treated by others, and that our best chance of ensuring such treatment will require social institutions of the sort that are represented by a legislature, a judiciary, and agencies of enforcement.

The outline sketched here leaves a lot of details to be worked out concerning our criminal justice system, details that we will see are often highly controversial. Nevertheless, it also enables us to appreciate the way in which our criminal justice system reflects a liberal democratic heritage, and we may thus be able to discern the particular “accent” of our own heritage – something we usually fail to hear.

Role morality

Let us now turn to one of the important issues that connect directly with our criminal justice system and those who work within it – the moral principles that apply to those who occupy institutional roles such as those of police officer, judge, or corrections officer. By “role” I understand a set of prerogatives and responsibilities that attach to a member of a social institution by virtue of his or her membership in that institution. For example,