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The Criminal Is Political: Policing Politics in Real Existing Liberalism

ABSTRACT: *The familiar irony of 'real existing socialism' is that it never was. Socialist ideals were used to legitimize regimes that fell far short of realizing those ideals—indeed, that violently repressed anyone who tried to realize them. This paper suggests that the derogatory concept of 'the criminal' may be allowing liberal ideals to operate in contemporary political philosophy and real politics in a worryingly similar manner. By depoliticizing deep dissent from the prevailing order of property, this concept can obscure what I call the 'legitimation gap'. This is the gulf between (a) liberal accounts of state legitimacy, and (b) the actual functioning of liberal states. Feminists have long pointed out that the exclusion of what is deemed 'personal' from political consideration is itself a political move. I propose that the construction of the criminal as a category opposed to the political works similarly to perpetuate unjust forms of social power.*

KEYWORDS: legitimacy, liberalism, political obligation, civil disobedience, crime and punishment, property

Introduction

> It is criminality pure and simple. . . . The young people stealing flat screen televisions and burning shops that was not about politics or protest, it was about theft. (Cameron 2011)

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> The struggle for black life and black freedom often requires acting outside the strictly legal, beginning with those fugitive slaves who gained their freedom by committing the crime of 'stealing' themselves. (Hooker 2016: 451)

'Criminality pure and simple' is widely assumed to be a bad thing. Furthermore, insofar as a person is deemed 'criminal', she is assumed to lack political consciousness and political motivation for her actions. These two inferences—(a) from '*X* is criminal' to '*X* is (probably) bad', and (b) from '*X* is criminal' to '*X* is (probably) not political'—are taken for granted in contemporary liberal discourse to such an extent that we can see them as contained in the concept of 'the criminal'. Many liberals will disagree with David Cameron about where to draw the line between 'criminality' and 'politics'. Implicitly it tends to be accepted, though, that these are two very different kinds of things: *if* the riots are 'about theft', *then* they are not 'about politics or protest'. Conversely, arguing that something is political usually means showing that it is not 'really' criminal, even if it breaks the law. The person engaged in civil disobedience—whose lawbreaking is recognized as politically conscious—is defined against the so-called 'common' criminal.

Politics, I will take it, concerns all forms of social power insofar as they are far-reaching and systemic. It concerns the distribution of benefits and burdens in society, how decisions are made regarding the organization of social life, and who has the power to do what to whom—and it concerns struggle over these things. Crime is recognized as political in some sense when it is treated as a symptom of social ills requiring political solutions. However, to be seen as a problematic *symptom* to be managed by those in power is precisely not to be recognized as a politically conscious agent. Indeed, this image of criminals—manifested in frequent use of the prefix 'mindless' ('mindless criminals', 'mindless rioters', 'mindless looting', etc.)—goes along with the notion that criminals lack the kind of rationality required to participate in political processes of collective self-determination. (Of course, insofar as they are deemed morally culpable, criminals are treated as rational in a minimal sense.)

It is this (a) *derogatory* and (b) *depoliticizing* concept of the criminal that I worry may be operating to perpetuate unjust forms of social power. The aim of this paper is to trace one way this concept might do so, namely, by systematically excluding deep dissent from the sphere of the political. By 'deep dissent' I mean dissent that seriously or fundamentally challenges the existing apportionment of wealth and power in society. (The distinction between 'deep' and 'shallow' dissent is best conceived as a spectrum [Finlayson 2015a].) Of course, not all deep dissent is progressive (consider the Stalinist who thinks all resources should be controlled by Party apparatchiks). But so long as *some* of it is progressive—as I will argue it is—we have reason to be concerned about its erasure and to enquire into the mechanisms by which this erasure is achieved. I suggest that the concept of the criminal is one such mechanism.

My argument proceeds from the following observations: (1) a primary meaning of 'criminal' is 'against the law'; therefore, (2) using 'criminal' as a term of approbation seems to presuppose that what falls foul of, or resists, the

prevailing order must involve (or most likely involves) wrongdoing;[1] however, (3) such a presupposition would be warranted only if that order were legitimate.[2] While the mainstream of political philosophy has tended to assume that this condition obtains (i.e., to assume the legitimacy of existing liberal states), this view is increasingly being challenged. Tommie Shelby, for instance, has argued that systemic racism undermines the legitimacy of the US state by denying ghettoized black Americans the benefits of equal citizenship (Shelby 2007). Under these circumstances, he contends, various forms of criminality should be seen not only as necessary survival tactics for ghetto residents but as 'just resistance' to oppression. Shelby includes 'openly transgressing conventional norms, expressing contempt for authority, desecrating revered symbols, pilfering from employers or state institutions, vandalizing public and private property, or disrupting public events' (Shelby 2007: 156) as well as shoplifting from large corporations. Shatema Threadcraft has extended this analysis of criminality-as-just-resistance to include practices of noncompliance with social services that perpetrate racist and sexist social control in intimate matters such as reproduction (Threadcraft 2014). In this paper, I am concerned with the same kinds of 'upward punching' crimes as Shelby and Threadcraft—those against the property of the powerful, against figures of unjust authority (such as institutionally racist police forces), and against 'public order' when that order demands the silence of the oppressed.[3]

My argument will be structured as follows. Section 1 ('The Liberal State: An Offer You Can't Refuse?) poses a problem for the attempt to use standard liberal accounts of legitimacy to vindicate existing regimes. Since the term 'legitimacy' can be used in a variety of senses, it is important to clarify at the outset how I will be using it. For our purposes, the relevant notion of legitimacy is tied to the generation of political obligation: an order is legitimate in this sense *if and only if* those subject to it stand under a *pro tanto* moral obligation to obey (the distinction sometimes drawn between obligations and duties is not significant here). Legitimacy in other senses—such as 'having the appropriate standing to exercise power' (Greene 2016)— is relevant only insofar as it is supposed to generate such an obligation. My reason for homing in on this notion of legitimacy is simple. If a state lacks legitimacy of the political-obligation-generating kind, the justification for regarding criminals *qua* criminals as acting wrongly is undermined (although we might still hold their actions to be wrong for other reasons).

Political philosophers have offered various accounts of how such obligation can be generated. I propose, relatively noncontroversially, that it is characteristic of liberal—as opposed to Hobbesian—accounts of state legitimacy that they establish

1 It might be objected that the term 'criminal' can be used to capture wrongdoing in general, not just transgressions against a positive legal order. However, the ease with which people move back and forth between these meanings rather illustrates my point.

2 Or if it criminalized only bad things. While these conditions can come apart on some accounts of legitimacy, this will not affect my argument because the failures of legitimacy I am interested in are generated by states criminalizing things that are not bad (namely, struggles for social justice).

3 Shelby's position, particularly as articulated in his recent book (Shelby 2016), differs in various ways from the one defended here. Exploring these differences would take me too far from my main argument.

only the counterfactual conclusion that a state would be legitimate if it fulfilled certain criteria. Not just any state will do. (In contrast, the classic Hobbesian argument for political obligation runs: any state is better than no state, and thus whoever is in power should be obeyed. From a liberal point of view, this proves too much.) A problem arises, however, when we notice that existing regimes do not fulfill the criteria liberals standardly propose. In fact, there appears to be a substantial gulf between:

(a) 'ideal' liberal accounts of state legitimacy that depend upon the governed having a meaningful right to dissent, whose limits are cashed out in terms of respect for liberal values such as freedom and equality. As I argue in section 1, many liberals appear committed to some version of this as a necessary (though not sufficient) condition of legitimacy, and
(b) the 'nonideal' functioning of actual liberal states, in which struggles for social justice seem too often to be criminalized *not* because they fail to respect freedom and equality but because they threaten the vested interests of those with unjust social power.

I dub this the 'legitimation gap'. The existence of such a gap would appear to provide anyone committed to the principle of government by consent, as articulated in familiar liberal arguments for political obligation, with a prima facie reason to treat existing regimes as *illegitimate*. This in turn would undermine the justification for using 'criminal' as a derogatory term.

Yet, liberals tend to resist drawing this conclusion. More often, they urge obedience to existing regimes on the grounds that this is, supposedly, the best way (gradually) to close the legitimation gap. In other words, they adopt what I call the 'presumption of quasi-legitimacy'. The only morally permissible and politically interesting kind of lawbreaking countenanced on this view is civil disobedience, which is defined against criminality by its overall respect for the system (Rawls 1999: 319–46; Brownlee 2012; Lefkowitz 2007; Lyons 1998). The belief that we should broadly comply with existing institutions is so dominant that it is rarely explicitly defended, but when it is, it is usually by appeal to 'realism'. As Lorna Finlayson points out, the debate between 'realists' and 'ideal theorists' in the methodology of political philosophy often goes so far as to equate being more realist with being more accepting of existing institutions (Finlayson 2015b).

However, in section 2 ('Property Wrongs—And Why We Can't Just be Civil about Them') I consider a realist objection to the presumption of quasi-legitimacy. The worry is that the legitimation gap, rather than being a contingent and reparable feature of liberal regimes, may be a necessary consequence of their role as enforcers of the prevailing order of property. So long as they are committed to enforcing this order, it seems liberal states *cannot* tolerate its being seriously contested. This generates a conflict with any principle of legitimacy that requires a right to reasonable dissent on the part of the governed. This is because 'reasonableness', for liberals, will usually be cashed out in terms of respect for the freedom and equality of all citizens; yet the desirability of the existing order of property, as I will argue,

is the kind of thing that people can dissent from not because they reject the values of freedom and equality, but precisely because they care about them.

Motivating this thought is the observation that unequal economic power is a linchpin of many forms of oppression—gender, race, class, and so on—that progressives are committed to dismantling. This observation may explain why struggles for social justice so often come up against the (historically and currently unjust) order of property. The upshot, though, is that it is difficult to see how the legitimation gap could ever be closed within the framework of presumed quasi-legitimacy, which—even in its account of civil disobedience—retains an overarching presumption in favor of obedience to the property-enforcing state. In short, the liberal commitment to government by consent, which requires a right to dissent if it is to be meaningful, seems to be fundamentally in tension with the liberal commitment to enforcing the prevailing order of property even when that order encodes unjust social hierarchies. This, I propose, is a tension at the heart of liberalism.

In section 3 ('Policing the Political') I show how the concept of the criminal might itself work to disguise this tension—by wrongly excluding challenges to the prevailing order of property from the sphere of politics. My suggestion is that use of the slur term 'criminal' can conceal the extent of the legitimation gap by making it look like liberal regimes are not repressing *political* dissent when they crack down on challenges to unjust property relations. Perhaps, indeed, it is only through this conceptual sleight of hand that the framework of presumed quasi-legitimacy, which insists that the legitimation gap can be closed by some combination of lawful dissent plus civil disobedience, can present itself as the 'realistic' option.

Before I proceed, though, let me offer a disclaimer. I am not saying that *all* crime constitutes just resistance to oppression. As Louk Hulsman observes, 'Within the concept of criminality a broad range of situations are linked together. Most of these, however, have separate properties and no common denominator' (Hulsman 1986: 65). Unlike the person who uses 'criminal' as a derogatory term, I do not posit an archetypal law-breaker to be either condemned or valorized. Clearly, many illegal acts do not challenge oppression but perpetuate it or are harmful in other ways.

We might wonder whether such a disclaimer should strictly be necessary, though, when we notice that the same is true of legal acts, especially the 'normal' operations of the economy. In the category of acts that cause harm and yet are legal we might include: buy-to-let landlords evicting families so they can charge higher rents; private health-care providers denying people treatment because they cannot afford to pay for it; governments deporting people with marginalized sexualities to life-threatening situations because they do not have the requisite paperwork; large corporations moving into neighborhoods and destroying the livelihoods of small business owners; oil companies destroying nature reserves and displacing indigenous communities; and police officers killing black people, which in practice is almost always declared lawful. Feminists have pointed out, too, that sexual and gendered violence is often de facto legal, especially when committed by the socially powerful (MacKinnon 1991). Yet, those advocating political strategies that collaborate with existing regimes are rarely asked to justify or distance themselves from all these law-abiding (or law-enforcing) wrongs. We might, therefore, detect

some double standards when it is demanded of anyone who wants to discuss illegal forms of dissent that she justify or distance herself from every morally problematic criminal act.

Whether such double standards can be justified will depend upon whether a convincing liberal argument can be provided for the claim that we have a moral duty to obey under conditions of real existing liberalism. In the following section, I suggest that standard liberal accounts of legitimacy seem rather to imply the opposite. (As already noted, we need a distinctively *liberal* argument because a Hobbesian argument for political obligation, if successful, would generate the unwelcome conclusion that there are very limited rights to resistance even under deeply authoritarian regimes.)

1. The Liberal State: An Offer You Can't Refuse?

The argument I want to put forward in this section can be summarized as follows:

1. If a state, *S*, is legitimate, then it fulfills the following criterion: *S* represses dissent (a) *only* in order to respect or promote universal values such as freedom and equality, and correspondingly (b) *not* in order to serve the vested interests of those with unjust social power. (Liberal Premise)
2. Existing liberal states do not fulfill this criterion. (Realist Premise)

Therefore:

3. Existing liberal states are not legitimate.

Let me break this down.

1.1. The Liberal Premise

There are notoriously many—sometimes conflicting—liberal accounts of state legitimacy, and it would be far beyond the scope of this paper to investigate all of them. My aim here is more modest, namely, to motivate the thought that a lot of what liberals of both 'political' and 'perfectionist' varieties have to say on the question of why state coercion is justified suggests a commitment to what I am calling the liberal premise. To make a case for this, I will explain how the premise articulates a widespread commitment to government by consent as a necessary (albeit not a sufficient) condition of legitimacy (Coicaud 2002: 14). Whether an account of legitimacy could still be recognizably liberal if it abandoned this premise is not a question I attempt to settle. It is worth noting, though, that an amended version of my argument might still be run no matter what one's chosen criteria of legitimacy—so long as those criteria were not met by existing states.

Here, in broad brush strokes, is why I think many liberals commit themselves to something like the liberal premise. Liberalism is supposed to have an advantage

over all other modes of government because, so the familiar story goes, a liberal state can tolerate—indeed, can facilitate, meaningfully engage with, even thrive on—political disagreement. A liberal society is often characterized as one in which people can freely express and act upon their differing convictions so long as they allow the same freedom to others. Intuitively, indeed, this seems a prerequisite for realizing the fundamental liberal value of government by consent: for consent to be meaningful, there must be the possibility of dissent. By engaging with, rather than simply repressing, those who disagree, liberal political institutions are supposed to maintain a culture of public deliberation in which every individual can participate if she chooses and through which progress against residual injustices can be achieved. Of course, there are some caveats. Nobody thinks that *all* dissent can or should be tolerated. However, the point of the liberal premise is that these caveats must—and this is point (a) of the premise—appeal to *universal* values (like freedom and equality for all), rather than—and this is point (b)—*particular* interests (like those of the wealthy and powerful). Otherwise, an important plank of liberalism's claim to superiority over other modes of government is lost.

For simplicity of presentation, I am treating freedom and equality as the paradigmatic liberal values in terms of which state coercion must be justified. However, one could substitute autonomy, capabilities necessary for flourishing, or the like, into premise 1 without substantially affecting my argument. To be sure, liberals can also care about other desirable things like stability, security, and utility. To avoid lapsing into Hobbesianism, though, a liberal must be wary of allowing these values to be invoked to justify the suppression of dissent except insofar as they can be connected in an appropriate way with core liberal values like freedom and equality. That explains why, for instance, stability is to be prized only insofar as it is 'for the right reasons', security is to be valued instrumentally only insofar as it supports rather than undermines the realization of greater freedom and equality; utility-promotion is to be understood as noncontingently connected with the promotion of individual liberty or as subject to distributive constraints that arise from conceiving all citizens as free and equal, and so on. The details of accounts will differ, but these are familiar themes, and they all point toward my liberal premise.

A commitment to this premise is easiest to observe in the case of political liberals, who hold that the state should not impose any 'comprehensive' vision of the good life on citizens. They endorse a 'liberal principle of legitimacy' requiring that 'political power should be exercised . . . in ways that all citizens can publicly endorse in the light of their own reason' (Rawls 2001: 90–91). A legitimate state will tolerate dissenters so long as they are 'reasonable' in the Rawlsian sense of being willing to propose (and stick to) principles of fair social cooperation with fellow citizens conceived as free and equal (Rawls 2001: 6–7). It is disputed whether Rawls's notion of 'reasonableness' can be explicated without circularity as the meanings of the terms 'free', 'equal', and 'fair' are themselves politically contested (Finlayson 2015a: 37–64). Nonetheless, it is clear enough that the 'liberal principle of legitimacy' would be violated by a state that coercively repressed dissent just because it challenged the interests of dominant groups (point (b) in the liberal premise). To put this point intuitively: legitimate political institutions must embody,

fundamentally, albeit perhaps imperfectly, a kind of public reason—a procedure for decision making that is the express opposite of being in thrall to existing social power.

Perfectionist liberals reject the 'liberal principle of legitimacy' in its Rawlsian formulation, arguing that a legitimate state should impose certain 'comprehensive' liberal values on the governed (Colburn 2013; Raz 1988). However, it would be too hasty to conclude that they therefore reject the liberal premise. On the contrary, the values that comprehensive liberals believe states can legitimately impose still tend to be universal ones (fulfilling point (a)). For example, they might think the state can act to promote autonomy for everyone or for a disadvantaged group to bring their autonomy up to the level enjoyed by others. Or they might think cultural practices can (under certain circumstances) be prohibited if they fail to respect the equality of all. However, it is hard to see how promoting the autonomy of an elite group—members of Oxford's exclusive all-male Bullingdon Club, for example—could count as an acceptable policy objective on any comprehensive liberal view. This is point (b) in my formulation. What the perfectionist liberal cannot allow, any more than the political liberal can, is that a liberal state would be in the business of serving particular interests, that is, of repressing dissent because it threatens the domination of some sections of society over others.

1.2. The Realist Premise

Regardless of whether we think they should be, however, liberal states too often do seem to be in this business. From the suffrage campaigns of the nineteenth and early twentieth centuries to the civil rights movement of the 1950s and 60s to the Black Lives Matter, Occupy, Standing Rock, anti-austerity, climate justice, anti-fracking, antifascist, and anti-Trump protests of our own day, those struggling for social justice have routinely fallen foul of the law in liberal states (Alexander 2011; Losurdo 2014; Hooker 2016; El-Enany 2014). Time and again, we have seen the police and criminal justice systems used to suppress challenges to powerful vested interests (those of oil companies, arms manufacturers, banks, groups enjoying unjust racial privilege, and so on), quite contrary to the standards of legitimate coercion formulated by liberal political philosophers. Furthermore, on a worrying number of occasions, we have seen the label 'criminal' used (often effectively) to undermine sympathy among the public at large for the targets of state repression. Turning our attention to the activities of liberal states beyond their own borders would reveal an even more unmistakable pattern of repression directed against threats to powerful interests (Chomsky 2015). However, I want to focus on the repression of domestic dissent because it is here that the concept of the criminal seems to play the greatest role. (The line is blurred when it comes to the treatment of noncitizens labeled 'illegals', who are notable targets of many current administrations.) These are broad empirical propositions, of course, and I do not claim to establish them here. I anticipate, however, that they will be found plausible by liberals who take past and present injustices seriously—and it is to them that my argument is addressed (a caveat I will return to in my conclusion).

The following case study, drawn from Nadine El-Enany's genealogy of British public order law, should illustrate the kind of real-world behavior on the part of liberal states that I am interested in. El-Enany traces the public order legislation currently in force in the United Kingdom to the aftermath of the Peterloo massacre. In 1819, a peaceful gathering at St Peter's Field in Manchester calling for parliamentary reforms and the extension of the franchise was set upon by saber-wielding cavalry officers, killing at least 11 and injuring over 500. As El-Enany explains, the charge of 'unlawful assembly' was subsequently concocted by the British authorities, who needed a way to justify the massacre and the targeting of survivors for further repression to an increasingly rights-conscious public. By proclaiming large political gatherings inherently violent, as the new law did, the aim was to depoliticize them, 'presenting [them] in terms of individual wrongdoing and disorder rather than as political contestation' (El-Enany 2014: 73). This allowed the state to crack down on 'disorder' while maintaining the charade that political dissent was tolerated and public discourse thriving.

With the benefit of hindsight, the charade is obvious. However, while the term 'unlawful assembly' itself came to sound too political for the state's purposes and was dropped, its rationale has been preserved in various sections of the Public Order Act 1986. These offences, particularly the charge of 'violent disorder' (which carries a prison sentence of up to five years), 'are used to target political activity and expression in very much the same way today' (El-Enany 2014: 73). The state's response to the 2010 student protests for free education, for instance, exhibits a 'pattern of prosecutions, convictions, and harsh and exemplary sentences' that 'points towards a policy of criminalizing dissent' (El-Enany 2014: 84). Furthermore, just like after Peterloo, prosecutions under the Public Order Act were used after 2010 to give a sheen of legitimacy to the state's use of extrajudicial violence, which included 'kettling' crowds of protesters and charging them with horses, indiscriminate strikes with truncheons, fists, and riot shields, and aggressive surveillance (for first-hand accounts, see Myers [2017: 89–105]; for details of surveillance methods, see Swain [2013]). Scrutiny has been averted from these anti-dissent tactics by portraying those against whom they are directed as 'criminals', therefore by implication 'mindless' and unresponsive to reasons, governable only by force.

To recapitulate the argument so far, the problem I have identified with real existing liberal states is that they can be observed repressing dissent not only when that dissent fails to respect the freedom and equality of all, but also when it disrupts a social order that systematically refuses to do so. If this is the case, it poses a serious problem for the legitimacy of these regimes, which in turn would undermine the rationale for using 'criminal' as a derogatory term in the here and now.

1.3. The presumption of quasi-legitimacy

However, there is a familiar way of trying to avoid this conclusion or mitigate its consequences. The thought goes something like this: while existing states might, strictly speaking, fall short of liberal criteria of legitimacy, the best way to arrive

at just, legitimate institutions is, for the most part, to obey the unjust, illegitimate ones and work within their 'official channels' for social change. The equally familiar response from progressives is to point out that part of what constitutes the existing 'nonideal' setup is that it contains mechanisms to forestall or ignore attempts by the oppressed collectively to improve their circumstances by legally permitted means (Young 2001). (The term 'collectively' is important because even when opportunities exist for individual social mobility, leaving behind one's fellow-oppressed or even profiting at their expense may not be the more politically conscious decision [Shelby 2007].) Structural racism in the USA, for instance, means differential access to educational opportunities, positions of influence, even the ballot—as criminalization often brings with it disenfranchisement, and black and Hispanic people are disproportionately criminalized (Alexander 2011; Shelby 2007).

Most liberals agree, therefore, that some notion of progressive lawbreaking is required, this recognition being enshrined in the concept of civil disobedience. Precisely how the concept should be delineated is contested, but this much is uncontroversial:

(a) the civil disobedient is to be differentiated from the ('common') criminal;
(b) respect for the law in general is a necessary condition of civil disobedience (as opposed to crime).

The standard formula for closing the legitimation gap, then, is this: work within the 'official channels' of liberal regimes; plus, in exceptional circumstances, engage in civil disobedience. (Anyone who endorses (b) must hold that lawbreaking should be exceptional rather than routine because otherwise respect for the law in general would not be displayed; Lefkowitz [2007] argues explicitly that there must not be too much civil disobedience.)

Because it proposes that we treat existing regimes broadly as though they were legitimate while recognizing that strictly speaking they are not, I dub this standard formula the 'presumption of quasi-legitimacy'. It tends to be defended (when it is defended at all and not simply adopted without argument) by appeal to realism. No 'sensible person', we are told, will deny that existing coercive institutions are 'necessary'; therefore, we should be 'realistic' and accept that complying with them is a prerequisite for progress (Sleat 2013). Note that the promise of progress-through-compliance is essential to this argument, at least on a charitable reading. Without that promise, Matt Sleat and realists like him would be offering us no more than the claim that: (a) coercion (beyond what is justified according to the liberal premise) is necessary for the perpetuation of the existing social order and perhaps also (b) coercion (beyond what is justified according to the liberal premise) is necessary for social order *tout court*. The former claim is plausible—indeed, it chimes with my realist premise—but begs the question regarding political obligation because it does not tell us why the perpetuation of the existing order is desirable, all things considered. It therefore gives us no reason to disparage the criminal. To invoke the latter claim, on the other hand, is to revert to a Hobbesian argument for political obligation, potentially proving too much. To avoid lapsing into an

unappealing authoritarianism, then, it seems that Sleat's argument must depend on the claim that treating existing regimes as broadly legitimate is the most realistic way of improving them.

However, as Finlayson points out, whether a proposed course of action should be regarded as realistic depends not only on whether it is modest, but on whether it is effective. She illustrates this point with the following analogy:

> If I recommend that you continue to smoke and drink heavily, to overeat and to take no exercise, and also *be healthier*, while someone else suggests an alternative programme involving various tedious and demanding lifestyle changes that you have no intention of making, then in one sense I have given you the more feasible plan. But pretty clearly, I am peddling comforting delusions and should not be listened to. (Finlayson 2015a: 24)

This raises the question: might the framework of presumed quasi-legitimacy be unrealistic in precisely the manner of Finlayson's fraudulent guru? It would be impossible to settle this question definitively here. However, in the next section, I lay out a problem that any attempt to answer this question in the negative will have to overcome. There is, I suggest, a serious obstacle to achieving our desired end (closing the legitimation gap) solely through the modest forms of dissent countenanced within the framework of presumed quasi-legitimacy (official channels plus civil disobedience). That obstacle is the existing order of property, and the liberal state's commitment to enforcing it.

2. Property Wrongs—And Why We Can't Just be Civil about Them.

I have argued that liberal states must stop criminalizing struggles for social justice if they are to fulfill—or even come close to fulfilling—their own criteria of legitimacy. Suppose, however, that the tendency of liberal states to criminalize challenges to the existing (unjust) apportionment of wealth and power in society were not best understood as merely a failure to be liberal enough on the part of those states, but rather as a manifestation of a tension within liberalism. This suggestion acquires some plausibility when we consider the following:

> 1) On the one hand, liberals believe in universal values like freedom, equality, and government by consent. These values are foregrounded in liberal accounts of state legitimacy. Insofar as the entrenched social power of dominant groups implies vastly differential access to political participation, safety from violence, educational opportunities, and other prerequisites for human flourishing, most contemporary liberals are therefore committed, at least in principle, to challenging that power.

2) On the other hand, liberals tend to assume that a basic function of the state is to uphold what might be called the 'order of property'. I use this term to encompass both (and to capture the connections between): (a) laws against property damage, theft, trespassing, and so on, that enforce the existing distribution and forms of property; (b) laws that uphold 'public order' by preventing the disruption of business as usual.

Let me bring out the tension between these commitments. Enforcing the order of property will tend to mean siding with the propertied, which (not always but often) means siding with the economically powerful *even when* that power is unjust. To put this point in its starkest form: since dominant groups tend to wield economic power over those they subordinate, the state's enforcement of 'property rights' through violence and the threat of violence must be partly constitutive of the power of dominant groups. Property in its current forms and distribution is a linchpin of multiple forms of oppression. The flip side of this is that challenging oppression will tend to involve some clash with the existing order of property. Transgressing that order, however, makes you a criminal.

The problem this generates can be stated simply. Just as a theocratic state demands worship of the one true God, a liberal state demands respect for prevailing property relations. However, the desirability of this system is precisely the kind of thing that people can disagree about politically even if they respect (1). Therefore, according to (1), dissent from the order of property (so long as it respects freedom, equality, etc.) must be tolerated and engaged with if the right to dissent is to become meaningful and the legitimation gap to be closed. However, according to (2), this kind of deep disagreement cannot be tolerated by liberal states without undermining their own raison d'être as enforcers of property. Therein lies the contradiction.

It will probably be objected that I am equivocating on the meaning of 'prevailing order of property' and therefore mistaking the sense in which liberal states are committed to upholding it. Most liberals, as I have said, will agree that the existing distribution of property is unjust. (Right-wing liberals attempt to block the inference from inequality to injustice by arguing that rampant inequality could hypothetically come about through what they regard as 'just transactions' [Nozick 1974]. However, even if these arguements were successful, they could not vindicate actual inequalities of wealth and power, which came about through historical 'transactions' including colonial pillage and enslavement.) Many liberals will even contest (or allow that one reasonably could contest) the desirability of dominant forms of property. For instance, they may object to forms of land ownership that neglect environmental concerns or to the commodification of basic building blocks of human flourishing, such as healthcare and education. However, the objection continues, one can challenge the prevailing forms and distribution of property without violating the property rights of existing proprietors. Let us leave aside for the moment the question whether we have any moral obligation to refrain from doing so. Whether there could (hypothetically) be a just order of property and if so what it might look like is also not what is at issue here. The state

criminalizes transgressions of the existing order, not of some hypothetical just order. For instance, it does not stop to inquire into the justice of Wal-Mart's profits before it prosecutes a shoplifter. To remove the conflict between (1) and (2), therefore, it must be the case that those wronged by the existing order of property (and their allies) can effectively speak out against that order without transgressing it.

What this proposal founders on is, quite simply, real existing liberalism. In our 'nonideal' reality, the order of property defines the permissible uses of space. It has often been observed that the enormous inequalities in property ownership that currently exist tend to translate into inequalities in access to public speech, hence to sanctioned forms of political participation (Young 2001). This point is strengthened by attending to the phenomena of 'epistemic injustice', that is, the ways in which unjust social power can generate differential access to credibility and skew the hermeneutical resources available for making sense of social experience (Fricker 2007). However, it also has a straightforwardly economic dimension. If I have money (and the status and connections that come with it), I can plaster my message on billboards and across high-distribution media outlets or donate to a political party to carry my agenda forward. If, on the other hand, I do not have money, how might I make my voice heard in the public sphere? Writing my message on a billboard is criminal damage, handing out leaflets on corporate or state property is aggravated trespass, talking through a megaphone is antisocial behavior, holding a banner across the road is obstructing a highway, and waving a placard outwith the police-designated 'protest pen' is a breach of public order (in the UK, this would constitute breach of section 14 of the Public Order Act 1986). Essentially, we can say: since business as usual means the oppressed not having their voices heard, speaking out against power usually requires some disruption of business as usual—that is, using spaces in ways that are not sanctioned by those who own those spaces. But that is exactly what the system of laws protecting property rights and public order—what together I am calling the order of property—is designed to criminalize.

At this point, the concept of civil disobedience is supposed to step in. Its point is to protect whatever progressive lawbreaking is required to overcome the legitimation gap from the taint of the term 'criminal'. However, as David Lyons has argued, there is reason to doubt that the notion of civil disobedience, as standardly theorized, will be adequate to this task—and for a very simple reason: it can only rescue shallow dissent. The civil disobedient is defined *against* the criminal by (among other things) her overarching respect for the law. As Lyons notes, standard accounts 'assume that civil disobedients consider the prevailing system as "reasonably just" and accordingly seek limited reform, not radical change' (Lyons 1998: 32). The perverse upshot of defining civil disobedience in this way is that while those subject to minor and easily correctable injustices may rightfully challenge them, those subjected to more pervasive and systematic injustices (or their allies) will count as criminals if they try. Having a deep political disagreement with the way things are prevents you from qualifying as having a political disagreement at all.

Indeed, Lyons points out that the 'respect for law' criterion would exclude even Martin Luther King Jr. from the category of civil disobedient because he cannot plausibly be said to have accepted a 'moral presumption of obedience' to the law

in Jim Crow America (Lyons 1998), a fact suppressed by romanticized histories of the civil rights movement (Mills 2007; Hooker 2016). Another way of putting this objection is to say that insofar as they insist that dissenters must broadly endorse and succeed in conforming to the rules of dominant society in order to be recognized as conscientiously contesting the injustices of that society, standard accounts of civil disobedience enforce a 'politics of respectability' that tends to rule out of bounds dissent by (or with) the least well-off (Alexander 2011: 212). Shelby argues, furthermore, that demanding compliant behavior from the most oppressed 'fails to appreciate that acquiescing to injustice is simply incompatible with the maintenance of self-respect' (Shelby 2007: 156). We might want to add, although Shelby does not, that it seems to place an unfair burden on those at the sharp end of oppression if their more privileged allies refuse to incur any of the risks of extralegal resistance. Indeed, to argue that those who draw relatively greater benefits from existing regimes have *for that reason* a moral obligation to comply with them seems to postulate, somewhat perversely, a moral duty to collude in oppression from which one benefits.

That final point aside, these criticisms of the concept of civil disobedience are not new. I suggest, though, that we can make the diagnosis more precise by relating it to the problem of property. To qualify for the respectable category of 'civil disobedient' rather than the denigrated category 'criminal', you must locate the injustice to which you are responding in some separable, peripheral laws, or misguided but short-lived policies, which can be challenged while keeping the system mostly intact. The laws that uphold the prevailing order of property, however, cannot be described as either peripheral or short-lived. Enforcing existing property titles is widely accepted to be a core function of liberal states. Consequently, dissent that transgresses the order of property will struggle to qualify as civil disobedience because it will (often rightly) be regarded as failing to exhibit an overarching respect for the law.

In the face of this, it might be thought that what is needed is just a broader concept of civil disobedience, which discards the 'respect for law' criterion and its ties to respectability politics. The merits of this strategy are likely to depend on context and cannot be assessed here. (One difficulty is that the other criteria standardly proposed to delineate civil disobedience—'nonviolence' [itself a notoriously contested notion], publicity, accepting punishment, and the like—might also tie that concept to a politics of respectability and, indeed, are often recommended on the grounds that they demonstrate respect for the law [Rawls 1999].) However, what matters here is that insofar as redefining civil disobedience in this way marks a departure from the presumption of quasi-legitimacy, it removes the purported justification for taking 'criminal' as the disparaged and depoliticized contrast class. That is just the conclusion I am seeking to establish. The problem I have identified with the concept of civil disobedience is not that it draws a distinction between progressive and nonprogressive lawbreaking or between good and bad lawbreaking or between lawbreaking that is politically conscious and lawbreaking that is not.[4] The problem is that it figures these differences in terms of

4 These can come apart. The concept of civil disobedience is primarily supposed to capture a kind of lawbreaking that is political *and* progressive *and* morally acceptable. I am also concerned with actions that

an overarching 'respect for the law' and therefore tends to validate only shallow dissent by the relatively privileged.

To summarize the argument of this section: the liberal state's commitment to enforcing the prevailing (unjust) order of property poses a problem for the framework of presumed quasi-legitimacy according to which law-abiding dissent plus 'civil disobedience'—as that term is currently understood—is supposed to effect a miraculous closing of the legitimation gap. Crucially, however, it was only the hope that the gap could be closed *within* the framework of presumed quasi-legitimacy that justified our remaining within that framework in the first place. Realism therefore seems to demand that we look beyond it.

3. Policing the Political

So far, I have presented a relatively straightforward argument for the conclusion that, under real existing liberalism, the moral presumption in favor of obedience to the law—and hence the derogatory use of the term 'criminal'—may be misplaced. This argument has nothing to do with 'philosophical anarchism' (Wolff 1970). Rather, it follows from taking seriously the standard liberal story about legitimacy. Furthermore, the empirical premises I have appealed to are readily acknowledged by many progressive liberals. Why, then, is the conclusion not already obvious? To put this another way, I have identified what appear to be glaring contradictions:

(a) between liberal ideals and the reality they are invoked to uphold (the legitimation gap);
(b) between these liberal ideals themselves (government by consent versus government to enforce the order of property).

But if the contradictions are so glaring, how can I account for the fact that so few liberals have recognized them as such? In this last section before my conclusion I propose a partial explanation of this widespread oversight. The culprit I identify is the derogatory and depoliticizing concept of the criminal itself.

Could it be that the construction of the criminal within liberal discourse as 'mindless' and nonpolitical is masking the legitimation gap by making it look like the authorities are not repressing political dissent when they criminalize the disruption of business as usual? The analysis I have presented should make us, at the very least, take this suggestion seriously. To begin with, I have pointed to a sense in which the disrupters of business as usual are rightly called criminals. This is because they are transgressing the order of property, the enforcement of which is a core function of the law in liberal states. But now, if we allow the inference from '*X* is criminal' to '*X* is (most likely) not political', we seem to have a recipe for excluding challenges to the prevailing order of property from the sphere of politics.

tick these boxes—and showing why the label 'criminal' can so easily and effectively be used to erase them from the record of dissent.

This move has the potential, furthermore, to paper over whatever tensions exist between the liberal ideal of government by consent, on the one hand, and the liberal commitment to enforcing the existing order of property, on the other. It makes it much easier to imagine that the order of property is broadly uncontested if anyone who does contest it gets labeled a criminal and *therefore* does not count as 'contesting' anything in the first place. My concern is that this circular reasoning—enabled by the derogatory and depoliticizing concept of the criminal—may be lending an unwarranted sheen of realism to the framework of presumed quasi-legitimacy.

An analogy between my contention that the criminal is political and the feminist slogan 'the personal is political' (Hanisch 1970) may help to clarify this point. Like the splitting of the personal from the political—that is, the conceptualization of these categories as dichotomous—I am suggesting that that the splitting of the criminal from the political has the potential to naturalize oppressions (in this case, those coded into the existing coercively enforced order of property) by placing them outside the arena of collective contestation and to misrepresent systematic injustices as matters of individual inadequacy (or, in this case, delinquency). The analogy goes further. Feminists have noted that while politics is understood as a sphere of rational deliberation and agency, those tainted by association with the 'private sphere' are denied rationality, cast as creatures of whim, instinct, and emotion (Brown 1995). Arguably, the same is true of the criminalized, who are often compared to 'dumb' or 'feral' animals by writers across the political spectrum (Harvey 2011; Wilson 2011). In both cases, the charge of irrationality is taken to justify the exclusion of members of the maligned group from the body politic of reasonable citizens whose consent is required for legitimacy.

To be clear, the feminist insight is that the dichotomy between the personal and the political is itself political. This does not mean that every single personal matter is therefore, automatically and without further ado, of great (or indeed any) political significance. Analogously, it would be wrong to claim that every crime is political, even under an illegitimate regime. It would equally be wrong to claim that all political crimes are good. But then it might be asked, why do I not propose some criterion for delineating those crimes that do constitute just resistance from those that do not? The answer is that, once we leave behind the framework of presumed quasi-legitimacy, with its double standards for assessing the obedient and the disobedient (illegality being treated as a wrong-making property and acts of noncompliance as standing in need of far more strenuous justification than acts of compliance), it is unclear why we should expect a simple rule for distinguishing good lawbreaking from bad—any more than we would expect ethics *tout court* to be reducible to a simple rule. Dissecting the derogatory label 'criminal' is not the end of nuanced political discussion, but the beginning.

4. Conclusion

I have argued that if we are committed to a liberal justification of the state, we need to take seriously the possibility that existing liberal regimes may be unworthy of our obedience as long as they persist in criminalizing struggles for social justice.

Yet, a presumption of quasi-legitimacy has the status of common sense—if not of self-evident truth—in the dominant liberal discourse. I have argued, though, that this presumption would be justified only if the existing system could be regarded as 'self-correcting'. There would have to be a realistic prospect of transforming the system into one that meets liberal criteria of legitimacy solely by means of actions that treat it as though it were already broadly legitimate (namely, legally sanctioned dissent plus 'civil disobedience' as it is usually understood). A serious and deep-rooted obstacle to this, however, is the liberal state's commitment to enforcing the existing order of property, an order that not only reflects and perpetuates but in part constitutes the domination of some sections of society over others. Finally, I have raised the worry that the derogatory and depoliticizing concept of the criminal may serve to naturalize this unjust order by excluding those who contest it from the sphere of politics—a kind of border policing on the level of ideology.

Having said all this, though, there remains an obvious way to resist my conclusions: just deny the legitimation gap or deny that the current order of property stands in the way of closing it. Interpret 'freedom' to mean not having your property interfered with except by the whims of the market, 'equality' to mean no more than that rich and poor alike are forbidden to sleep under the bridges of Paris, and so on. There certainly are liberals who would take this path; perhaps dominant strands in liberalism have always done so (as Losurdo argues [2014]). However, for liberals committed to fighting injustice, this option will not be attractive. For feminists, antiracists, and other progressives, it only makes sense to operate within the theoretical framework of liberalism insofar as it can provide the resources for criticizing existing forms of oppression. Gutting liberal values of their critical content might allow you to maintain your allegiance to the checkered regimes of real existing liberalism, but then you might wonder what the point is in being a liberal at all.

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