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Laurie L. Levenson

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"ON ONE FOOT"

BOOK REVIEW OF IN THE NAME OF JUSTICE

Laurie L. Levenson*


INTRODUCTION

I have been teaching criminal law for more than twenty years and the one question I predictably get from my students every year is, “Why do we have to read so much?” Sometimes they add, “Isn’t there one book—one article—that explains all of criminal law?” Ordinarily, I just smile and assign them more reading. However, the recent book, In the Name of Justice, reminded me that there is such

* David W. Burcham Chair in Ethical Advocacy, Loyola Law School Los Angeles. I am extremely grateful for the assistance of my beloved research assistants Maelesa Oriente and Kate Kaso for their work on this piece, and for the fine editing work of Sabina Jacobs and the staff of the Loyola of Los Angeles Law Review.

1. These very questions bring to mind the classic story in the Talmud of Rabbis Shammai and Hillel, and a gentile who came to them to convert. The gentile wanted to convert, but he insisted on learning the whole Torah while standing on one foot. Rabbi Shammai rejected him. So the man went to Hillel. Rabbi Hillel granted his request and instructed him, “What you dislike, do not do to your friend. That is the basis of the Torah. The rest is commentary; go and learn!” (TALMUD, Shabbos 31a); VINCENT MARTIN, A HOUSE DIVIDED: THE PARTING OF WAYS BETWEEN SYNAGOGUE AND CHURCH (1995). Thus, this book review is titled “On One Foot.”

2. TIMOTHY LYNCH, IN THE NAME OF JUSTICE: LEADING EXPERTS REEXAMINE THE CLASSIC ARTICLE “THE AIMS OF THE CRIMINAL LAW” (2009) [hereinafter IN THE NAME OF JUSTICE]. Tim Lynch works for the Cato Project on Criminal Justice, which prides itself on focusing on the Bill of Rights and civil liberties. Lynch’s research interests include the war on terrorism, overcriminalization, the drug war, the militarization of police tactics, and gun control.
a work. This book raises nearly every important issue one must consider in critically analyzing criminal law. It analyzes an article that has prompted generations of criminal law’s greatest thinkers to probe the essence of our criminal justice system: Professor Henry M. Hart, Jr.’s classic exposition “The Aims of the Criminal Law.”

In 1958, Hart published his article in the journal *Law and Contemporary Problems*. Since then, some of the best legal minds have been inspired by his work to explain the operations of the criminal justice system of their times. The criminal justice system of our times is particularly challenging. We have incarcerated an entire generation of African-Americans, our prisons are overflowing with 2.3 million incarcerated offenders, and the recidivism rate in many


4. Professor Henry M. Hart (1904–1969) attended Harvard Law School where he was a protégé of Felix Frankfurter. He then worked as a clerk for U.S. Supreme Court Justice Louis D. Brandeis. For the remainder of his life he taught as a professor at Harvard Law School. “Hart was one of a handful of the most authoritative academic lawyers of his time. He was, above all, a teacher; his most important scholarship is embodied in two books designed for law school courses. In *The Federal Courts and the Federal System* (1953), coauthored with Herbert Wechsler, Hart introduced students to a conception of the functions of the federal judiciary that still dominates the thinking of courts and commentators. In *The Legal Process* (1958), coauthored with Albert Sacks, Hart expounded a view of the role of courts in lawmaking focused on “reasoned elaboration” of principle.” Kenneth L. Karst, Hart, Henry M., Jr., http://www.novelguide.com/a/discover/eamec_03/eamec_03_01188.html (last visited Jan. 27, 2010).


6. See N.C. Aizenman, *New High in U.S. Prison Numbers*, WASH. POST, Feb. 29, 2008, at A01 (citing study by Pew Center on the United States). Currently, more than one in one hundred adults in the United States is in jail or prison, costing state and federal governments more than $50 billion a year. *Id.*
states is close to 70 percent.\footnote{See Ryan G. Fischer, \textit{Are California's Recidivism Rates Really the Highest in the Nation? It Depends on What Measure of Recidivism You Use}, U.C. IRVINE CENTER FOR EVIDENCE-BASED CORRECTIONS BULL., Sept. 2005, at 1, 1–4.} Clearly, whatever the justifications for our current criminal law regime, prosecutions have not cured the problem of crime and the criminal justice system continues to have a major impact on all aspects of our society. The question, what are we doing and why? finds its starting point in Hart's article.

In his wisdom, Hart admonished the reader from the beginning that a penal code that "reflected only a single basic principle would be a very bad one."\footnote{Hart, \textit{supra} note 3, at 401.} There are many purposes of criminal law and they are intertwined and complex. In fact, the very "purpose of having principles and theories is to help in organizing thought."\footnote{\textit{Id.} at 401–02.} \textit{In the Name of Justice} brilliantly does just that. It provides a forum for criminal law experts to organize their thoughts on the foundations and operations of criminal law today. By the end of this compilation of essays, not only does the reader gain a better understanding of Hart's position, but the reader is challenged to formulate his or her own theories of criminal law.

\section*{THE AIMS OF CRIMINAL LAW}

What are the basics of criminal law? The question is simple, the answer is not. Hart was interested in the central issue of how and what our government should define as a crime, although he fully admitted that criminal law is more of a method than a constant. According to Hart, here are some basic aspects of criminal law:

\begin{enumerate}
  \item Criminal law tells people what they must and cannot do. For example, you cannot murder your law professor, but you must pay your taxes.
  \item Criminal law uses valid commands derived from the authority of the community upon whose behalf it operates.
  \item Criminal law enforces its commands through sanctions for disobedience.
  \item Criminal sanctions are fundamentally different from civil sanctions because they represent a moral
\end{enumerate}
condemnation of the defendant’s behavior and mark the defendant with the stigma of being a criminal.

5. Criminal sanctions go beyond condemnation; they involve actual punishment, including the taking of a person’s life, to enforce criminal laws.

What is the goal of criminal sanctions? Well, that is where the debate begins. For some, it is to correct the defendant’s behavior. For others, it is to prevent the defendant from repeating the criminal behavior. For yet others, it is the means by which society defines its boundaries for acceptable behavior.

Yet, criminal law does not focus just on the defendant’s behavior. At the heart of criminal law is the requirement of moral blameworthiness warranting community condemnation. And that moral blameworthiness depends on the ability of the defendant to knowingly and intentionally engage in acts that are intrinsically wrongful. The defendant’s mens rea is critical to determining whether there is moral culpability. Thus, the very doctrine of strict liability calls into question whether strict liability violations should be called crimes.10 Courts have an obligation to ensure that statutory laws are interpreted in a manner that serves the purposes of punishment. Hart was unabashed in his contempt for American legislatures,11 but his goal was not to assess blame for our faulty criminal justice system. Rather, it was to encourage the courts to do their part to ensure that “a coherent and worthy body of penal law will . . . be developed in this country.”12

Criminal law does not stop with defining crimes. Rather, we must make decisions about the appropriate sanctions for criminal violations. Legislators rank crimes and decide what punishment fits the offense. The permutation of sentencing systems is endless. A great deal of the struggle today has been in embracing a sentencing system that takes into account all of the factors that should be

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11. For example, in discussing the obligation of the courts to collaborate with the legislature in discerning and expressing the unifying principles of criminal law, Hart spoke of “[t]he need of some improvement in the shoddy and little-minded thinking of American legislatures . . . .” Hart, *supra* note 3, at 435.

12. *Id.* at 436.
considered in deciding how the defendant should be punished for his or her crime. Hart’s view of the ideal system was one in which prison and parole authorities would receive prisoners from trial courts with sentences for predetermined, individualized maximum and when appropriate, minimum terms. The correctional authorities would then have the sole responsibility of custody and treatment of each prisoner, with an eye single to determining, within those limits, first, what kind of custodial treatment would best promote the individual prisoner’s growth in responsibility; and, second, when, after the minimum sentence, if any, had been served, growth had progressed to a point which made it proper to permit the prisoner to resume, on parole, the effort at responsible living.\textsuperscript{13}

Finally, Hart recognized the many constituencies involved in the criminal justice system, and that the very discretion entrusted to the police and to prosecutors can redefine criminal law in action. Prosecutors and enforcement officials have an opportunity and an obligation to use the criminal justice system to inculcate the obligations of responsible citizenship in offenders and to insist that criminal law is used only against those who willfully engage in criminality. The blameworthy should be punished; those who are not blameworthy should be safeguarded from the reach of criminal sanctions.

Hart speaks from beyond the grave as his article highlights the key issues in criminal law. \textit{In the Name of Justice} calls upon today’s guardians of criminal law to use the tools Hart provided to critically analyze the operation and challenges of today’s criminal laws.

\textbf{HAS THE LAW GONE OVERBOARD?}

Ninth Circuit Chief Judge Alex Kozinski\textsuperscript{14} and his coauthor Misha Tseytlin lead off the essays in the book by focusing on the

\textsuperscript{13} Id. at 440.

\textsuperscript{14} Chief Judge Alex Kozinski was appointed to the U.S. Court of Appeals for the Ninth Circuit by Ronald Reagan in 1985 and has served as the chief judge since 2007. Before joining the Ninth Circuit, Judge Kozinski served as the Chief Judge for the U.S. Court of Federal Claims from 1982 to 1985. He earned his A.B. from the University of California Los Angeles (UCLA) in 1972 and his J.D. from UCLA School of Law in 1975. Following law school, Judge Kozinski clerked for the Honorable Anthony Kennedy of the U.S. Court of Appeals of the Ninth Circuit and Chief Justice Warren Burger of the U.S. Supreme Court. Before becoming a judge, Judge
omnipresence of criminal laws, asking whether ubiquitous criminalization diminishes the moral force of the law. As they list the wide array of laws and regulations that might make many of us federal criminals, I find myself wondering whether it is possible to operate in today's society without eventually being marked as a criminal for behavior that is commonplace. Lying to your boss, deceiving a government bureaucrat, or cutting corners on your taxes can easily land you in the federal criminal justice system.\textsuperscript{15}

While Hart supported the apprehension and prosecution of those who violated society's rules, the explosion in criminal laws calls our efforts into question. Not only is this explosion unrealistic given the lack of resources dedicated to the criminal justice system, but it allows for abuses that fundamentally undermine criminal law. Given the number of possible federal violations, "it's important to consider the damage malevolent prosecutors and would-be tyrants could do when empowered by ubiquitous criminal law."\textsuperscript{16}

Hart may have been right that those who violated the law must be punished, but Judge Kozinski is indisputably correct in saying that we need to evaluate how many laws we have created for people to violate. Hart would push for constitutional limitations on criminal offenses, but the courts seem unlikely to jump into the business of limiting legislatures' "war on crime." Therefore, it may well be that those charged with enforcing the laws—prosecutors and law enforcement officers—must exercise self-restraint in exercising their discretion.\textsuperscript{17}


\textsuperscript{16}See Laurie L. Levenson, \textit{Honest Services Fraud}, NAT'L L.J., Mar. 2009, at 14 ("Taken literally, [18 U.S.C. § 1346 (2006)] could apply to almost any situation in which a public or private official has acted dishonestly and not provided the 'services' expected of him.").


DEFINING AND PUNISHING CRIMES

As the second essayist in the book, James Q. Wilson, states, "The central issue in Henry Hart’s essay is what behavior should our government define as a crime." There has been suggestion lately that America, with its diversity of cultures, has a particularly difficult time settling on criminal laws that adequately represent the multicultural society in which we live. Yet, there are core human behaviors that few would dispute should be criminalized. These include "violent, property, and economic offenses." The problem is often with offenses that some would identify (or misidentify) as "victimless crimes." These may include crimes such as pornography, homosexual conduct, prostitution, abortion, drug use, and euthanasia.


20. Wilson, supra note 18, at 58.


22. See generally MICH. COMP. LAWS ANN. § 750.338 (West 2004) ("Any male person who, in public or in private, commits or is a party to the commission of or procures or attempts to procure the commission by any male person of any act of gross indecency with another male person shall be guilty of a felony . . .”); Lawrence v. Texas, 539 U.S. 558 (2003) (striking down Texas’s sodomy law).

23. See generally Michele Alexandre, Sex, Drugs, Rock & Roll and Moral Dirigisme: Toward a Reformation of Drug and Prostitution Regulations, 78 UMKC L. REV. 101 (2009) (discussing the effects of prohibition and arguing that legal prohibition of drugs and prostitution is inefficient); Jane Scoular & Maggie O’Neill, Social Inclusion, Responsibilization and the
These crimes challenge Hart's basic notion that criminal law is designed to uphold moral concerns, not utilitarian concerns. Wilson persuasively argues that there are strong utilitarian concerns underlining punishment and that the reality is that judges must be

Politics of Prostitution Reform, 47 BRIT. J. CRIMINOLOGY 764, 768–69 (2007) (noting the extreme "complexity" of prostitution and pointing out that "some feminists and policy makers too often underestimate how much of what they identify as harmful in prostitution is a product, not of the inherent character of sex work or sexuality, but rather of the specific regimes of criminalization and denigration that serve to marginalize and oppress sex workers while constraining and distorting sex work's radical potential to disrupt the sex/work divide"); CNBC.com, Dirty Money: The Business of High-End Prostitution, http://www.cnbc.com/id/26869953/ (last visited Feb. 26, 2010) (providing an in-depth look at high-end business prostitution).

24. See generally N.D. CENT. CODE §§ 14-02.1-01 to -04 (2009); Gonzales v. Carhart, 550 U.S. 124 (2007) (finding that the prohibition of "intact D&E" abortions did not present a substantial obstacle to women seeking abortions even with no health exception included); Planned Parenthood v. Casey, 505 U.S. 833 (1992); N.Y. PENAL LAW §§ 125.40, 125.45, 125.55 (McKinney 2009) (making all abortions illegal unless "committed upon a female with her consent by a duly licensed physician acting (a) under a reasonable belief that such is necessary to preserve her life, or, (b) within twenty-four weeks from the commencement of her pregnancy"); LESLIE J. REAGAN, WHEN ABORTION WAS A CRIME: WOMEN, MEDICINE, AND LAW IN THE UNITED STATES (1997) (tracing the practice and policing of abortion through previously untapped sources, including inquest records and trial transcripts, to show the fragility of patient rights and raising provocative questions about the relationship between medicine and law); Michael J. Sandel, Moral Argument and Liberal Toleration: Abortion and Homosexuality, 77 CAL. L. REV. 521 (1989) (evaluating different approaches to legal problems involving morality and highlighting the difficulty of bracketing moral issues for legal purposes).

25. See generally FLA. STAT. ANN. § 775.16 (West 2009) (disqualifying any person convicted of a drug-related felony from being employed in a state agency or applying for a license required for employment or business unless conditions are met); N.Y. PENAL LAW § 220.46 (McKinney 2008) (making injection of a narcotic a Class E felony); id. § 220.50 (making criminal use of drug paraphernalia a misdemeanor); id. § 220.55 (making criminal use of drug paraphernalia a felony if the individual has previously been convicted of § 220.50); JUSTIN FERNANDEZ, VICTIMLESS CRIMES: CRIME, JUSTICE, AND PUNISHMENT (2002) (questioning if the law should punish people for crimes that harm no one but the perpetrator); ROBERT F. MEIER & GILBERT GEIS, VICTIMLESS CRIME?: PROSTITUTION, DRUGS, HOMOSEXUALITY, AND ABORTION (1997) (examining the problems that laws create and solve in the areas of victimless crimes); cf Richard L. Gray, Note, Eliminating the (Absurd) Distinction Between Malum In Se and Malum Prohibitum Crimes, 73 WASH. U. L.Q. 1369 (1995) (arguing for no distinction of sciencer and urging courts to defer to the legislatures' determination of whether sciencer is required).

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guided by minimum and maximum sentences set by the legislature, instead of just their own individualized view of what would be just in a case.

Yet, many commentators are concerned about the slide from crimes engendering moral condemnation to those based on criminal laws that are inadequately defined, require little or no proof of intent, and are often classified as malum prohibitum offenses.27 The U.S. Code is replete with such offenses. Whereas it is fine to discuss Hart’s position in theory, the only way to really understand the consequences of these issues is to examine real-life stories, and this is exactly how essayist Harvey A. Silverglate28 contributes to the book. He uses a recent case from his own law practice, the prosecution of Bradford C. Councilman, for alleged violation of the federal Wiretap Act.29 He then complements his discussion with tales from other high-profile prosecutions. For Hart and Silvergate, the link between evil intent and criminal law is crucial. As criminal law has expanded, that link has often been broken. It is time to appreciate again how crucial that link is.


A DISSENTING VIEW

One of the strengths of In the Name of Justice is that it does more than present authors who praise Hart as the omnipotent teacher of criminal law. It also presents the views of Hart detractors, such as Judge Richard A. Posner of the U.S. Court of Appeals for the Seventh Circuit. Judge Posner, who is not generally known to pull his punches, puts it this way: "Hart’s theory of criminal justice is a thin and unsatisfying gruel."

Judge Posner is right. Conceptually, Hart does not deal with a range of theories of crime, from economic theories to sociological scholarship, that could challenge (or support) his theories of punishment. Yet, it is telling that such scholarship often uses Hart as the foil against which it can present its opposing views. Opposing theories take on more meaning because Hart was willing to set the groundwork for examining criminal law.


Finally, the book offers commentaries from some of the top scholars of our day regarding some of today's high-profile issues and how Hart’s approach can help us understand these issues. In reading the essay by Professor Alan M. Dershowitz, one cannot help but think of how greatness builds on greatness. Touchingly, Dershowitz describes his personal connection to Hart and his work. He then jerks the reader into the cold reality of the daunting questions Hart would have us confront in analyzing today’s struggle with crimes such as terrorism. What choices are we making as a society when we label these desperate acts as crimes? In a diverse society, how do we start the process of coming together as a diverse polity, driven by politics and compromise, to define the rules? These are profound questions that Hart sought to address and Dershowitz poignantly points out still linger today.

While several of the contributors note the role of the community in defining laws and managing the operation of the criminal justice system, Professor James B. Jacobs focuses on one of the soft points

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33. “Bernard of Chartres used to compare us to dwarfs perched on the shoulder of giants . . . we see more and farther than our predecessors, not because we have keener vision or greater height, but because we are lifted and borne aloft on their gigantic statues.” JOHN OF SALISBURY, METALOGICON OF JOHN SALISBURY 167 (Daniel McGarry trans., Peter Smith Publ’n Inc. 1985).

34. Professor James B. Jacobs is the Chief Justice Warren E. Burger Professor of Constitutional Law and the Courts and the director for the Center for Research in Crime and Justice at New York University School of Law. NYU School of Law, Faculty Profiles: James B. Jacobs: Biography, https://its.law.nyu.edu/facultyprofiles/profile.cfm?section=bio&personID=20016 (last visited Jan. 27, 2010). At NYU School of Law, he also regularly teaches courses on criminal law, criminal procedure, federal criminal law, and juvenile justice. Id. Jacobs earned his J.D. in 1973 and his Ph.D. in Sociology in 1975, both from the University of Chicago. Id. Jacobs has published fourteen books and more than one hundred articles on such topics as prisons and imprisonment, drunk driving, corruption and its control, hate crime, gun control, and labor
in Hart’s essay. How do we define the community for the purposes of criminal law? Whose moral values will be reflected in the criminal laws that are adopted?

Jacobs provides his own examples, but one need only think of the explosive aftermath of the controversial verdict in the Rodney King beating trial to illustrate the importance of trying to answer these questions. We are not, and likely will not be, a single community whose values can be easily assessed. Yet, so much of our criminal law is based upon the assumption that the community will be reflected in the criminal laws and that jurors can represent that community in assessing what behavior is reasonable. If we could figure out who we are, we might be able to determine what our criminal laws should be. However, this fundamental question remains open fifty years after Hart’s essay.

Judges also struggle with the fundamental issues raised by Hart. One of the controversial issues today is the use of sexually violent predator laws to commit suspects even though they have “paid their debt” to society. As Justice Richard B. Sanders of the Washington

35. Laurie L. Levenson, Change of Venue and the Role of the Criminal Jury, 66 S. CAL. L. REV. 1533 (1993) (suggesting different functional definitions of “community” for courts evaluating venue changes); Laurie L. Levenson, The Future of State and Federal Civil Rights Prosecutions: The Lessons of the Rodney King Trial, 41 UCLA L. REV. 509 (SPECIAL ISSUE) (1994) (evaluating the differences between pursuing civil rights cases in state and federal courts and highlighting that the advantages and disadvantages suggest that pursuing claims in state court may be preferable).

Supreme Court and his coauthors describe, we struggle with the use of commitment proceedings to maintain social order because they are completely separate from the protections and operations of criminal law and use dangerousness, instead of moral culpability, as the basis to incarcerate individuals. From Justice Sanders’s perspective, sexual offenders are the canaries in the coal mine. Once we compromise protections of the criminal justice system by substituting civil proceedings to accomplish the same outcomes, we unhinge punishment from its procedural and substantive moorings.

Even in his “random thoughts” at the end of the book, Justice Stephen Markman of the Supreme Court of Michigan hits upon a timely and provocative issue: what is the role of judges compared to the role of legislators in defining and interpreting criminal laws? Hart advocated for constitutional limitations on the law. Yet, in the current era when judges are quick to be branded as “activist judges,” many jurists, including Justice Markman, prefer that

(1999) (criticizing the decision in Hendricks and recommending a revised constitutional standard for evaluating civil commitment laws).

37. Richard B. Sanders, Jacob Zahniser & Derek Bishop, IF THE CRIMINAL LAW DON’T FIT, CIVILLY COMMIT, in IN THE NAME OF JUSTICE, supra note 2, at 131–35. Justice Richard B. Sanders was elected to the Washington Supreme Court in 1995. Before he was elected to the court, he primarily defended the civil rights of his clients in private practice. As a Justice he regards protecting our constitutionally guaranteed liberties as the first duty of our highest court. Justice Sanders is a native of Tacoma. He received his B.A. from the University of Washington, and in 1969, earned his J.D. from the University of Washington School of Law. Since taking his seat on the Washington Supreme Court, Justice Sanders has served as an adjunct professor teaching appellate advocacy at the University of Washington School of Law, has written articles for professional journals and texts, and has presented lectures to local, state, and national organizations. See Justice Richard Sanders, http://www.justicesanders.com/J_Richard.Sanders.Bio.html (last visited Jan. 27, 2010).


legislators take the lead in correcting criminal laws. Hart may have preferred that judges take a leadership role, but judges do not share his enthusiasm for the preference. We can hope that they take to heart the teachings of Hart, but the realities and politics of the court may make it difficult to perform the role that Hart envisioned for them.

CONCLUSION

Timothy Lynch has done an excellent job of assembling original essays and appendices of previously published essays and speeches on the critical issues in criminal law. The book is a smorgasbord of delights—the real “meat and potatoes” of criminal law. For my taste, the most fulfilling observations actually come from the contributions in the book’s closing materials. Justice Robert H. Jackson’s famous speech to federal prosecutors on their role in the criminal justice system and the function of criminal law is infused with lessons from Hart, as are the other speeches and essays in the appendices.

The aim of criminal law remains elusive, but the journey itself is worth the effort. In The Name Of Justice is the perfect manner to explore the journey of understanding and applying our criminal laws. My students still will have to read more than one source, but it is good to remind them and ourselves that one timeless essay can form the basis of decades of learning.