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"On One Foot": Book Review of In the Name of Justice

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BOOK REVIEW OF *IN THE NAME OF JUSTICE*

Laurie L. Levenson *

Timothy Lynch's recent book, In The Name of Justice: Leading Experts Reexamine the Classic Article "The Aims of the Criminal Law," *is a compilation of essays by Judge Alex Kozinski, James Q. Wilson, Harvey A. Silverglate, Judge Richard A. Posner, Alan M. Dershowitz, James B. Jacobs, Justice Richard B. Sanders, and Justice Stephen J. Markman. Each of these essays is a critical examination of the contributions of Professor Henry M. Hart, Jr.'s classic exposition,* "The Aims of the Criminal Law." *Collectively, this book probes the essence of our criminal justice system and raises nearly every important issue one must consider in critically analyzing criminal law.*

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?"[1] Ordinarily, I just smile and assign them more reading. However, the recent book, *In the Name of Justice,*[2] 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."[3]

In 1958, Hart[4] 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,[5] our prisons are overflowing with 2.3 million incarcerated offenders,[6] and the recidivism rate in many

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In 2000, he served on the National Committee to Prevent Wrongful Executions. Lynch has also filed several amicus briefs in the U.S. Supreme Court in cases involving constitutional rights. He is the editor of *After Prohibition: An Adult Approach to Drug Policies in the 21st Century*. Since joining the Cato Institute in 1991, Lynch has published articles in the *New York Times*, the *Washington Post*, the *Wall Street Journal*, the *Los Angeles Times*, the *ABA Journal*, and the *National Law Journal*. He has appeared on *The NewsHour with Jim Lehrer*, *NBC Nightly News*, *ABC World News Tonight*, Fox's *The O'Reilly Factor*, and C-SPAN's *Washington Journal*. Lynch is a member of the Wisconsin, District of Columbia, and U.S. Supreme Court bars. He earned both a B.S. and a J.D. from Marquette University. Cato Institute: Tim Lynch, http://www.cato.org/people/tim-lynch (last visited Jan. 27. 2010).

3. Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401 (1958).

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/eamc_03/eamc_03_01188.html (last visited Jan. 27, 2010).

5. Two out of every three young African-American men are currently defendants in our criminal justice system, which wreaks havoc on families in their community. *See generally* Jean Bonhomme et al., *African-American Males in the United States Prison System: Impact on Family and Community*, 3 J. MEN'S HEALTH & GENDER 223, 226 (2006); Paul Butler, *Affirmative Action and the Criminal Law*, 68 U. COLO. L. REV. 841, 857 (1997); Carolyn Wolpert, *Considering Race and Crime: Distilling Non-Partisan Policy from Opposing Theories*, 36 AM. CRIM. L. REV. 265 (1999).

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.[7] 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."[8] 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."[9] *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.

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:

1. Criminal law tells people what they must and cannot do. For example, you cannot murder your law professor, but you must pay your taxes.
2. Criminal law uses valid commands derived from the authority of the community upon whose behalf it operates.
3. Criminal law enforces its commands through sanctions for disobedience.
4. Criminal sanctions are fundamentally different from civil sanctions because they represent a moral

7. *See* Ryan G. Fischer, *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.

8. Hart, *supra* note 3, at 401.

9. *Id.* at 401–02.

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

10. *See* Laurie L. Levenson, *Good Faith Defenses: Reshaping Strict Liability Crimes*, 78 CORNELL L. REV. 401, 402 (1993).

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.[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. *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.

HAS THE LAW GONE OVERBOARD?

Ninth Circuit Chief Judge Alex Kozinski[14] and his coauthor Misha Tseytlin lead off the essays in the book by focusing on the

13. *Id.* at 440.

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.[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."[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.[17]

Kozinski worked in private practice and served as the Deputy Legal Counsel of the President-Elect from 1980 to 1981, Assistant Counsel for the Office of Counsel to the President in 1981, and Special Counsel for the Merit Systems Protection Board from 1981 to 1982. U.S. Courts, Ninth Circuit, Circuit Judges: Kozinski, Alex, http://www.ce9.uscourts.gov/ninthcircuit/circuit_judges.html (last visited Mar. 19, 2010).

15. *See* Laurie L. Levenson, *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.").

16. IN THE NAME OF JUSTICE, *supra* note 2, at 53; *see also* Kay L. Levine, *The External Evolution of Criminal Law*, 45 AM. CRIM. L. REV. 1039, 1095–98 (2008); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH L. REV. 505 (2001); Fred C. Zacharias & Bruce A. Green, *The Duty to Avoid Wrongful Convictions: A Thought Experiment in the Regulation of Prosecutors*, 89 B.U. L. REV. 1, 1–10 (2009).

17. Dan M. Kahan, *Rethinking Federal Criminal Law: Three Conceptions of Federal Criminal-Lawmaking*, 1 BUFF. CRIM. L. REV. 5, 15–16 (1997); Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?*, 44 VAND. L. REV. 45, 48–51 (1991).

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."[18] 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.[19] Yet, there are core human behaviors that few would dispute should be criminalized. These include "violent, property, and economic offenses."[20] The problem is often with offenses that some would identify (or misidentify) as "victimless crimes." These may include crimes such as pornography,[21] homosexual conduct,[22] prostitution,[23] abortion,[24] drug use,[25] and euthanasia.[26]

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18. *See* James Q. Wilson, *How Correct Was Henry M. Hart?*, *in* IN THE NAME OF JUSTICE, *supra* note 2, at 57. Wilson is currently the Ronald Reagan Professor of Public Policy at Pepperdine University, where he teaches courses on crime and gun control, drugs and crime control, crime prevention, and a course titled "Why is Any Nation a Democracy?" Meet the Faculty, Pepperdine University, http://publicpolicy.pepperdine.edu/academics/faculty/default.htm?faculty=james_wilson (last visited Mar. 19, 2010). Wilson has been published several times. JAMES Q. WILSON, THE MARRIAGE PROBLEM: HOW OUR CULTURE HAS WEAKENED FAMILIES (2002); JAMES Q. WILSON & DAVID Q. WILSON, MORAL JUDGMENT (1998); JAMES Q. WILSON, THE MORAL SENSE (1997); JAMES Q. WILSON, ON CHARACTER (1995); James Q. Wilson, *Hate and Punishment: Does the Criminal Motive Matter?*, 34 PROSECUTOR, Jan./Feb. 2000, at 31; and James Q. Wilson, *Hostility in America: Book Review of Crime is Not the Problem*, 69 U. COLO. L. REV. 1207 (1998).

19. *See* MATTHEW R. LIPPMAN, CONTEMPORARY CRIMINAL LAW: CONCEPTS, CASES AND CONTROVERSIES (2010); ROBERT MCNAMARA & ROBERT BURNS, MULTICULTURALISM IN THE CRIMINAL JUSTICE SYSTEM (2008); Daina C. Chiu, *The Cultural Defense: Beyond Exclusion, Assimilation, and Guilty Liberalism*, 82 CAL. L. REV. 1053, 1053–58 (1994); Valerie L. Sacks, *An Indefensible Defense: On the Misuse of Culture in Criminal Law*, 13 ARIZ. J. INT'L & COMP. LAW 523, 523–26 (1996).

20. Wilson, *supra* note 18, at 58.

21. *See generally* 18 U.S.C. §§ 1460–65 (2006) (prohibiting the possession and distribution of obscene materials); ACLU v. Reno, 929 F. Supp. 824 (E.D. Pa. 1996) (interpreting and invalidating the Communications Decency Act's attempt to regulate "indecent and obscene" Internet speech as unconstitutional); Kelly M. Doherty, *WWW.OBSCENITY.COM: An Analysis of Obscenity and Indecency Regulation on the Internet*, 32 AKRON L. REV. 259 (1999) (discussing the application of indecency and obscenity laws to Internet content and analyzing the constitutionality of the Child Online Protection Act, 47 U.S.C. § 231).

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

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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 scienter and urging courts to defer to the legislatures' determination of whether scienter is required).

26. *See generally* Washington v. Glucksberg, 521 U.S. 702 (1997); Vacco v. Quill, 521 U.S. 793 (1997) (holding that New York's prohibition on assisted suicide did not violate the Equal Protection Clause of the Fourteenth Amendment); Cruzan v. Mo. Dep't of Health, 497 U.S. 261 (1990); Adelaide Conti & Adriana Baratta, *The Right to Self-Determination of Minors With Particular Reference to the Problem of Euthanasia*, 28 MED. & L. 401 (2009) (examining minors' rights to self-determination under Italian law); Jackson Pickett, *Can Legalization Improve End-Of-Life Care? An Empirical Analysis of the Results of the Legalization of Euthanasia and Physician-Assisted Suicide in the Netherlands and Oregon*, 16 ELDER L.J. 333 (2009) (analyzing the effects of legalization on end-of-life care and suggesting goals that future legalization should seek to accomplish); Victor G. Rosenblum & Clarke D. Forsythe, *The Right to Assisted Suicide: Protection of Autonomy or an Open Door to Social Killing?*, 6 ISSUES L. & MED. 3 (1990) (surveying changes in assisted suicide law and public opinion).

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. Silverglate[28] 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.

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27. *See generally* Theodore A. Gottfried & Peter G. Baroni, *Presumptions, Inferences and Strict Liability in Illinois Criminal Law: Preempting the Presumption of Innocence?*, 41 J. MARSHALL L. REV. 715 (2008) (analyzing the use of statutory changes creating strict liability crimes in response to courts striking down mandatory presumptions); Nicole Lybrand Westin, *Arkansas Supreme Court Clarifies Sex Offender Registration as a Strict Liability Offense*, 31 U. ARK. LITTLE ROCK L. REV. 689 (2009) (surveying Adkins v. Arkansas, 264 S.W.3d 523, 526–28 (Ark. 2007), which held that failure to register under the Sex Offender Registration Act was a strict liability offense).

28. Harvey Silverglate is a practicing attorney and author who specializes in academic freedom, civil liberties, computer crime, criminal defense, Internet privacy, legal ethics, news media rights, and student and faculty rights. Harvey A. Silverglate: CV, http://www.harveysilverglate.com/HAS_CV/tabid/978/Default.aspx (last visited Feb. 11, 2010). Silverglate is admitted to practice in the Supreme Judicial Court of Massachusetts, the U.S. Supreme Court, the U.S. Court of Military Appeals, and the U.S. Courts of Appeals for the First, Second, Third, Fourth, Fifth, Eleventh, and Federal Circuits. *Id.* Silverglate regularly publishes articles in the *Wall Street Journal*, the *New York Times*, the *Philadelphia Inquirer*, and the *Boston Globe*. *Id.* He has also published several books. ALAN CHARLES KOS & HARVEY SILVERGLATE, THE SHADOW UNIVERSITY: THE BETRAYAL OF LIBERTY ON AMERICA'S CAMPUSES (1998); HARVEY SILVERGLATE, THREE FELONIES A DAY: HOW THE FEDS TARGET THE INNOCENT (2009); and HARVEY SILVERGLATE, DAVID FRENCH & GREG LUKIANOFF FIRE'S GUIDE TO FREE SPEECH ON CAMPUS (2005).

29. United States v. Councilman, 245 F. Supp. 2d 319 (D. Mass. 2003), *vacated and remanded to* 418 F.3d 67 (1st Cir. 2005). *See also* Hiawatha Bray, *Appeals Court Ruling Revives Case of Intercepted E-Mail: Businessman Can Be Tried Under Wiretap Statute*, BOSTON GLOBE, Aug. 12, 2005, at C3.

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.[30] 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."[31]

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.

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30. After graduating from Harvard Law School, Judge Richard A. Posner clerked for Justice William J. Brennan Jr. From 1963 to 1965, he worked for Commissioner Philip Elman of the Federal Trade Commission. He then served as an assistant to the Solicitor General of the United States. Prior to teaching at Stanford Law School, Judge Posner served as general counsel of the President's Task Force on Communications Policy. He first came to the University of Chicago Law School in 1969, where he was the Lee and Brena Freeman Professor of Law. In 1981, Judge Posner was appointed to the U.S. Court of Appeals for the Seventh Circuit, where he currently presides. He was the Chief Judge of the court from 1993 to 2000. The University of Chicago Law School, Faculty: Richard A. Posner, http://www.law.uchicago.edu/faculty/posner-r (last visited Jan. 27, 2010). Judge Posner has written a number of books. RICHARD A. POSNER, CARDOZO: A STUDY IN REPUTATION (1990), RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW (7th ed. 2007), RICHARD A. POSNER, THE ECONOMICS OF JUSTICE (1981), LAW AND LITERATURE (3d ed. 2009), THE ESSENTIAL HOLMES (Richard A. Posner ed., Press 1992), RICHARD A. POSNER, A FAILURE OF CAPITALISM: THE CRISIS OF '08 AND THE DESCENT INTO DEPRESSION (2009), RICHARD A. POSNER, THE FEDERAL COURTS: CHALLENGE AND REFORM (1996), RICHARD A. POSNER, HOW JUDGES THINK (2008), RICHARD A. POSNER, OVERCOMING LAW (1995), RICHARD A. POSNER, PREVENTING SURPRISE ATTACKS: INTELLIGENCE REFORM IN THE WAKE OF 9/11 (2005), RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE (1990), and RICHARD A. POSNER, SEX AND REASON (1992). Judge Posner has also published books on the Clinton impeachment and *Bush v. Gore*, and many articles in legal and economic journals and book reviews in the popular press. He has taught courses on administrative law, antitrust, economic analysis of law, history of legal thought, conflict of laws, regulated industries, law and literature, the legislative process, family law, primitive law, torts, civil procedure, evidence, health law and economics, law and science, and jurisprudence. The University of Chicago Law School: The Faculty—Richard A. Posner, http://www.law.uchicago.edu/faculty/posner-r (last visited Jan. 27, 2010).

31. Richard A. Posner, *Henry Hart's "The Aims of the Criminal Law": A Reconsideration*, *in* IN THE NAME OF JUSTICE, *supra* note 2, at 102.

HOT CRIMINAL LAW ISSUES OF OUR DAY

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,[32] one cannot help but think of how greatness builds on greatness.[33] 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[34] focuses on one of the soft points

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32. Professor Alan Dershowitz is currently the Felix Frankfurter Professor of Law at Harvard Law School. His research interests lie in Criminal Law and Rights. Dershowitz received his A.B. from Brooklyn College in 1959 and earned his LL.B. from Yale Law School in 1962. Harvard Law School, Faculty Directory: Alan M Dershowitz, http://www.law.harvard.edu/faculty/directory/index.html?id=12 (last visited Jan. 27, 2010). Dershowitz has been called the "winningest appellate criminal defense lawyer in history." Alan M. Dershowitz: Biography: Detailed: http://www.alandershowitz.com/detailed.php (last visited Jan. 27, 2010). In a 35-year career, Dershowitz has won over one hundred cases, mostly criminal appeals. *Id.* Dershowitz has been published several times. ALAN DERSHOWITZ, AMERICA DECLARES INDEPENDENCE (2003), ALAN M. DERSHOWITZ, AMERICA ON TRIAL: INSIDE THE LEGAL BATTLES THAT TRANSFORMED OUR NATION (2004), ALAN DERSHOWITZ, THE CASE FOR PEACE (John Wiley & Sons 2005), and ALAN M. DERSHOWITZ, PREEMPTION: A KNIFE THAT CUTS BOTH WAYS (2006); Alan Dershowitz, *Response to Chutzpah*, CONG. MONTHLY, Sept./Oct. 2005, at 3; Alan Dershowitz, *The Phony War Crimes Accusation Against Israel*, JERUSALEM POST, Jan. 20, 2009, http://cgis.jpost.com/Blogs/dershowitz/entry/the_phony_war_crimes_accusation.

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[35] 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.[36] As Justice Richard B. Sanders of the Washington

racketeering, including recent publications. *E.g.*, JAMES JACOBS, JAY WORTHINGTON & CHRISTOPHER PANARELLA, BUSTING THE MOB: *UNITED STATES V. COSA NOSTRA* (1994); JAMES B. JACOBS, CAN GUN CONTROL WORK? (2002); JAMES JACOBS, COLEEN FRIEL & ROBERT RADICK, GOTHAM UNBOUND: HOW NYC WAS LIBERATED FROM THE GRIP OF ORGANIZED CRIME (1999); JAMES B. JACOBS & KIMBERLY POTTER, HATE CRIME: CRIMINAL LAW AND IDENTITY POLITICS (1998); JAMES B. JACOBS, MOBSTERS, UNIONS AND FEDS: THE MAFIA AND THE AMERICAN LABOR MOVEMENT (2006); CYRILLE FIJNAUT & JAMES B. JACOBS, ORGANIZED CRIME & ITS CONTAINMENT: A TRANSATLANTIC INITIATIVE (1991); FRANK ANECHIARICO & JAMES B. JACOBS, THE PURSUIT OF ABSOLUTE INTEGRITY: HOW CORRUPTION CONTROL MAKES GOVERNMENT INEFFECTIVE (1996). Jacobs also has a forthcoming volume on *United States v. International Brotherhood of Teamsters*, a civil RICO case whose remedial phase has been ongoing since 1989. *Id.*

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).

36. *See* Kansas v. Hendricks, 521 U.S. 346, 360–67, 371 (1997) (holding that civil commitment under the Kansas Sexually Violent Predator Act did not violate substantive due process or constitute a "criminal" proceeding and involuntary commitment pursuant to the Act was not punitive); Hon. Debra H. Goldstein & Stephanie Goldstein, *Sex Offender Registration & Notification: The Constitution vs. Public Safety*, 60 ALA. LAW. 112, 112–17 (1999) (providing an overview of changes in Alabama's Community Notification law and analyzing the impact of Alabama's sexual offender laws on the balance of punitiveness and public security); Adam J. Falk, Note, *Sex Offenders, Mental Illness and Criminal Responsibility: The Constitutional Boundaries of Civil Commitment after* Kansas v. Hendricks, 25 AM. J.L. & MED. 117, 132–47

Supreme Court and his coauthors describe,[37] 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[38] 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,"[39] 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).

38. Justice Stephen Markman was appointed Justice of the Michigan Supreme Court in 1999. Before his appointment, he served as a judge on the Michigan Court of Appeals from 1995 to 1999. Prior to becoming a judge, Justice Markman worked in private practice, served as a U.S. Attorney, an Assistant Attorney General of the United States, and Chief Counsel of the U.S. Senate Subcommittee on the Constitution. Justice Markman's present term on the Michigan Supreme Court expires on January 1, 2013. Biographies of the Justices: Justice Stephen Markham, http://courts.michigan.gov/SUPREMECOURT/AboutCourt/biography.htm#markman (last visited Jan. 27, 2010).

39. For a variety of interpretations and opinions of judicial activism, see Keenan D. Kmiec, *The Origin and Current Meaning of "Judicial Activism"*, 92 CAL. L. REV. 1441 (2004); Richard Lavoie, *Activist or Automaton: The Institutional Need to Reach a Middle Ground in American Jurisprudence*, 68 ALB. L. REV. 611 (2005); Eric J. Segall, *Reconceptualizing Judicial Activism as Judicial Responsibility: A Tale of Two Justice Kennedys*, 41 ARIZ. ST. L.J. 709 (2009); Joan Steinman, *The Newest Frontier of Judicial Activism: Removal Under the All Writs Act*, 80 B.U. L. REV. 773 (2000); Frank V. Williams, III, *Reinventing the Courts: The Frontiers of Judicial Activism in the State Courts*, 29 CAMPBELL L. REV. 591 (2007).

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.[40] 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.

40. Appendix A is the famous 1940 address, titled "The Federal Prosecutor," by then-Attorney General Robert H. Jackson to the Second Annual Conference of the U.S. Attorneys. Robert H. Jackson, THE FEDERAL PROSECUTOR, *in* IN THE NAME OF JUSTICE, *supra* note 2, app. at 173. *See also Working Outside the Rules: The Undefined Responsibilities of Federal Prosecutors*, 26 FORDHAM URB. L. J. 553, 561–62 (1999). Appendix B is Milton and Rose Friedman's essay, "Crime." Appendix C is Associate Justice Anthony M. Kennedy's August 9, 2003 speech at the annual meeting of the American Bar Association.