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Legality and Morality in H.L.A. Hart's Theory of Criminal Law

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I. INTRODUCTION

H.L.A. Hart is best known for his *Concept of Law*,[1] a powerful work that fundamentally changed the course of jurisprudential analysis in the common law world.[2] But Hart also made significant contributions to the analysis of two particular areas of Anglo-American law. One of these areas, the criminal law, is the subject of this Article.[3]

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1. H.L.A. Hart, THE CONCEPT OF LAW (2d ed. 1994). The first edition appeared in 1961; the second edition includes the addition of a "Postscript" in which Hart responds to certain criticisms. *See id.* at 238-76.

2. For descriptions of the book's impact, see WILLIAM TWINING, LAW IN CONTEXT 165-69 (1997) and NEIL MACCORMICK, H.L.A. HART 3-6 (1981).

3. The primary texts for this purpose are H.L.A. HART, PUNISHMENT AND RESPONSIBILITY (1968) [hereinafter HART, PUNISHMENT] and H.L.A. HART, LAW, LIBERTY, AND MORALITY (1963) [hereinafter HART, LAW]. *See also* H.L.A. HART, ESSAYS ON BENTHAM (1982) [hereinafter HART, ESSAYS]. I do not consider his earliest paper on criminal law because he later repudiated it. *See* H.L.A. Hart, *The Ascription of Responsibility and Rights*, 49 PROC. ARISTOTELIAN SOC'Y 171 (1948-49); HART, PUNISHMENT, *supra*, at V. Hart's other primary substantive contribution, which I do not discuss here, was his analysis of legal cause. *See* H.L.A. HART & TONY HONORÉ, CAUSATION IN THE LAW (2d ed. 1985).

Hart's account of the nature of law was both positivist, in that it insisted on a strict separation between positive law and law as it ought to be, and rule-oriented, in that the rule-like nature of law was an essential feature of what law is. But his writings on criminal law strongly advocate certain normative positions. While there is no necessary contradiction between these two groups of writings, in that each belongs to a different mode of analysis, the juxtaposition of Hart's criminal law writings with his jurisprudential writings casts doubt on the separation between law and morals.

Hart's work on criminal law may be usefully divided into two categories. The first is his analysis of certain basic criminal law concepts such as responsibility and fault.[4] The second is his discussion of the proper relationship between criminal law and morality.[5] In both categories, Hart argues that criminal law is, and should be, rule-like, so that it can both govern and address the behavior of human agents. Hart's criminal law writing thus offers a substantive, normative account of the reasons for having rules in criminal law. The substance of that account we may call, following Fuller, "legality":[6] the rule-like nature of law is not just a defining feature of law but has normative force in its own right. If this is truly Hart's position, then there are two possibilities: either Hart has uncovered an incredible coincidence between law as it is and law as it should be, or Hart's jurisprudential claim that law is categorically distinct from morality is not sustainable.

II. HART'S THEORY OF CRIMINAL LIABILITY

Theories of punishment may be broadly classified as utilitarian or retributivist. Utilitarian theories justify punishment by pointing to its beneficial consequences: punishment, which in itself produces disutility, is justified if the harm avoided through deterrence outweighs the harm inflicted upon offenders.[7] Retributivist theories justify punishment without reference to consequences by connecting punishment with some normative quality of the offender's actions, usually an intentional rights violation.[8] The two approaches seem utterly incompatible, in that the

4. *See* HART, PUNISHMENT, *supra* note 3.

5. *See* HART, LAW, *supra* note 3.

6. *See* LON L. FULLER, THE MORALITY OF LAW 157-58 (1964).

7. The classic utilitarian account of punishment is JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 143-86 (J.H. Burns & H.L.A. Hart eds., Athlone Press 1970) (1780). Those modern theories of punishment that are oriented towards the prevention of harm may be understood as descendants of Bentham's account. *See* JOEL FEINBERG, HARM TO OTHERS (1984); Richard A. Posner, *An Economic Theory of the Criminal Law*, 85 COLUM. L. REV. 1193 (1985). For a review and discussion of modern utilitarian theories, see C.L. TEN, CRIME, GUILT AND PUNISHMENT 7-37 (1987).

8. The classic retributivist accounts of punishment are IMMANUEL KANT, THE METAPHYSICS OF MORALS 331-37 (Mary Gregor trans., Cambridge Univ. Press 1991) (1797) and G.W.F. HEGEL, PHILOSOPHY OF RIGHT ¶¶ 90-102 (T.M. Knox trans., Oxford Univ. Press 1952) (1821). It is a little hard to find a whole-hearted modern advocate of retribution; Hart's own articulation of a retributivist position includes no references to modern scholars. *See* HART, PUNISHMENT, *supra* note 3, at 230-37. *But see* ALAN BRUDNER, THE

consequential effects of punishment are central for utilitarianism and irrelevant for retributivism. But near the beginning of *Punishment and Responsibility*, Hart offers the following alternative to viewing criminal punishment as purely consequentialist or purely utilitarian:

> [I]t is perfectly consistent to assert *both* that the General Justifying Aim of the practice of punishment is its beneficial consequences *and* that the pursuit of this General Aim should be qualified or restricted out of deference to principles of Distribution which require that punishment should be only of an offender for an offence.[9]

This view, initially presented only as a possibility, is undoubtedly Hart's own. He argued that although the General Justifying Aim of punishment is utilitarian, the principles of liability are not always consistent with utilitarianism, at times seeming almost retributivist.[10] Yet Hart sees no contradiction here; in his view, the broadly utilitarian aim of punishment is not undermined by the non-utilitarian features of criminal law doctrine because utility is not the only value important to a system of criminal justice.[11]

Hart's advocacy of this view can be seen in a number of ways. Whenever he contrasts a retributive with a utilitarian aim, the utilitarian aim always comes out better. He argues that retributivist views "either avoid the question of justification [for punishment] altogether or are . . . disguised forms of Utilitarianism"[12] and that they cannot adequately account for the role of strict liability in regulatory offenses.[13] But Hart maintains that utilitarianism does not explain the standard restriction of punishment to those who have actually offended. Although some "sufficiently comprehensive utilitarianism"[14] might do so, it would not explain why, if we did choose to punish an innocent, "we should do so with the sense of sacrificing an important principle," one which is not itself "only a requirement of utility."[15]

More importantly, Hart argues that his view can account for central features of criminal law doctrine more successfully than retributivism or utilitarianism. The restriction of punishment to those who have actually

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UNITY OF THE COMMON LAW 213-40 (1995). For a review and discussion of retributivist theories, see TEN, *supra* note 7, at 38-65.

9. HART, PUNISHMENT, *supra* note 3, at 9.

10. This point may be seen again in the following pair of questions, which Hart sees as central to understanding criminal responsibility: "Will enforcing [the laws] produce more good than evil? . . . Is it right or just to punish this particular person?" *Id.* at 39. The first question adverts to Hart's utilitarian General Justifying Aim, while the second adverts to non-utilitarian standards of justice in individual cases.

11. "[O]ur main social institutions always possess a plurality of features which can only be understood as a compromise between partly discrepant principles." *Id.* at 10.

12. *Id.* at 9.

13. *See id.* at 236.

14. *Id.* at 11. On this point, Hart cites John Rawls, *Two Concepts of Rules*, 54 PHIL. REV. 3, 4-13 (1955), where Rawls argues, on utilitarian grounds, that the establishment of an institution whose purpose would be to punish the innocent could never be justified.

15. HART, PUNISHMENT, *supra* note 3, at 12.

committed offenses,[16] the significance of mens rea,[17] and the recognition of excuses[18] all have a role to play in a theory whose overall purpose is utilitarian. The bulk of Hart's writing on criminal law is devoted to discussion of these three points, and I will consider each of them in turn.

A. Responsibility: The Restriction of Punishment to Offenders

Retributivists claim that utilitarian theories of punishment fail to accord with strongly-held moral intuitions about the criminal law, in that they fail to offer adequate reasons for not punishing the innocent, where punishing the innocent would create a net gain in utility.[19] Hart treats this objection seriously, noting that it cannot be overcome merely by arguing that punishment of the innocent is not really punishment, as this move "fail[s] to satisfy the advocate of 'Retribution'" and prevents meaningful comparison of the system of criminal punishment with "other forms of social hygiene which we might employ to prevent anti-social behaviour."[20] In other words, to walk the middle path between retributivism and consequentialism, Hart must show that basic criminal law principles that appear most naturally justified by retributive theory are compatible with utilitarianism.

For Hart, a central constraint on carrying out the General Justifying Aim is that the state cannot use a person for the benefit of society unless he or she "could have avoided doing what he did."[21] This principle is supported by at least three considerations. First, it reflects a very basic idea of fairness,[22] which, though Hart does not say so, sounds like a classic retributivist ideal. The other two considerations are more prudential. In a legal world where criminal liability is limited by a principle of responsibility, as opposed to a legal world where liability is not so limited, we enhance the individual's ability to plan by "maximiz[ing] his power to identify in advance the space which will be left open to him free from the law's interference,"[23] and we "foster the prime social virtue of self-restraint."[24] But all three of these ideas, whether we identify each of them individually as retributive or utilitarian, are united in Hart's view by an underlying vision of the nature of human society:

> Human society is a society of persons; and persons do not view themselves or each other merely as so many bodies moving in ways which are sometimes harmful and have to be prevented or altered. Instead persons interpret each other's movements as manifestations of inten-

16. *See id.* at 158-209.
17. *See id.* at 113-57.
18. *See id.* at 28-53.
19. *See id.* at 5-6 (citing J.D. Mabbott, *Punishment*, 48 MIND 152 (1939)); *see also* BRUDNER, *supra* note 8, at 251-52.
20. HART, PUNISHMENT, *supra* note 3, at 6; *see also id.* at 76.
21. *Id.* at 207; *see also id.* at 39, 181.
22. *See id.* at 181.
23. *Id.* at 181-82.
24. *Id.* at 182.

> tion and choices, and these subjective factors are often more important to their social relations than the movements by which they are manifested or their effects. . . . If as our legal moralists maintain it is important for the law to reflect common judgments of morality, it is surely even more important that it should in general reflect in its judgments on human conduct distinctions which not only underly morality, but pervade the whole of our social life. This it would fail to do if it treated men merely as alterable, predictable, curable or manipulable things.[25]

If this is utilitarianism, it is a utilitarianism of a very broad and undogmatic variety;[26] more importantly, it is a utilitarianism tempered by a non-utilitarian understanding of human interaction. Hart sees individual human beings not as mere sites for utility or as automatons to be controlled by incentives, but as purposive, choosing agents. Consequently, he sees the criminal law not merely as a set of incentives or a means of social control, but as a system of rules that addresses itself to human beings and gives them reasons for the choices they make. As we will see, this conception of the criminal law is closely connected with Hart's larger jurisprudential project.

B. THE SIGNIFICANCE OF MENS REA

The distinction between acting with fault and acting without fault is fundamental to the criminal law. Not only is liability without fault alien to the criminal law, but the doctrine frequently distinguishes between subjective and objective forms of liability,[27] sometimes recognizing a lesser offense for one acting with objective fault only,[28] at other times insisting on subjective fault for there to be any liability at all.[29] The importance attached to these distinctions, and the energy directed at explaining their significance, seems mysterious from a utilitarian point of

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25. *Id.* at 182-83.

26. Compare Hart's contrast between Beccaria's and Bentham's utilitarianism. *See* HART, ESSAYS, *supra* note 3, at 50-51. A modern form of utilitarianism that is also attentive to human agency in a way that classical utilitarianism was not has been developed by Amartya Sen. *See* AMARTYA SEN, THE STANDARD OF LIVING 1-38 (1987); Amartya Sen, *Well-being, Agency, and Freedom*, 82 J. PHIL. 169 (1985).

27. This form of liability is called "strict" in some jurisdictions and "absolute" in others. To avoid confusion, I will use "liability without fault" to refer to the imposition of liability without proof of any form of fault. I will use the term "objective liability" to refer to the imposition of liability where the actor ought to have been able to avoid committing the actus reus (e.g., the actor ought to have known that his or her conduct would result in death or injury; the actor ought to have recognized a circumstance that would make his or her otherwise innocent conduct culpable). I will use the term "subjective liability" to refer to the imposition of liability only when the actor adverted in some way to the actus reus (e.g., the actor knew that his or her conduct would cause death; the actor was aware that his or her conduct created an unjustified risk but proceeded anyway; the actor was aware of or willfully blind to a circumstance).

28. Many jurisdictions draw the distinction between murder and manslaughter on this basis. In Canada, the distinction has achieved constitutional status. *See* The Queen v. Martineau [1990] 2 S.C.R. 633; The Queen v. Creighton [1993] 3 S.C.R. 3.

29. Theft is often defined so that a merely negligent deprivation of a property right is no offense at all. *See, e.g.*, Criminal Code, R.S.C., ch. C-46, § 322 (1985) (Can.).

view. Presumably, if the criminal law has the General Justifying Aim Hart attributed to it, then the proper standard of fault should be the one that most effectively deters anti-social conduct.[30] But this is not Hart's view. Rather, like his subjectivist contemporary Glanville Williams,[31] Hart attaches great significance to the distinction between subjective fault, objective fault, and liability without fault. Although he defends objective fault in a way that Williams would not, Hart's theory of fault is not utilitarian.

Hart's central discussion of the relationship between intention and criminal liability[32] is conducted apart from the question of the General Justifying Aim of punishment. He traces the significance of subjective fault for liability[33] and for the quantum of punishment.[34] He then goes to some length to establish that, for the purposes of criminal liability, intending a consequence should be understood to include not just desiring the consequence (direct intention) but acting with knowledge of the consequence (oblique intention).[35] He then asks whether "any intelligible theory of punishment . . . would make sense of this distinction"[36] and concludes that the distinction could not be justified on either utilitarian or retributive grounds. The law's failure to make this distinction, therefore, provides no evidence for or against a utilitarian or a retributivist theory of liability or of punishment.

Punishment for negligence, on the other hand, should provide some such evidence. Because liability for negligence entails punishment for consequences that the actor did not intend or foresee, one would expect a retributivist to oppose punishment for negligence and a utilitarian to welcome it, if it is effective in deterring harmful behavior. Now, Hart is fundamentally a utilitarian rather than a retributivist, and as such has a very different attitude towards penal negligence than writers such as Hall[37] or Brudner.[38] Rather than seeing liability for negligence as a regrettable departure from principle or as a special form of liability appropriate only in the regulatory context, Hart sees it as having a central role in the criminal law.

Hart first distinguishes between "inadvertence" and "negligence." He suggests that negligence "refer[s] to the fact that the agent failed to comply with a standard of conduct with which any ordinary reasonable man

30. For such an account, see Posner, *supra* note 7.

31. *See* GLANVILLE WILLIAMS, CRIMINAL LAW: THE GENERAL PART 122-24 (2d ed. 1961) (offering a deterrent justification for imposing penal liability for negligence, but arguing that "the law acts wisely in making such punishment exceptional").

32. *See* HART, PUNISHMENT, *supra* note 3, at 113-35.

33. *See id.* at 114-15.

34. *See id.* at 115-16.

35. *See id.* at 116-22. The irrelevance of the distinction between direct and oblique intention is now quite commonly accepted. *See* R.A. DUFF, INTENTION, AGENCY AND CRIMINAL LIABILITY 15-135 (1990); The Queen v. Hibbert [1995] 2 S.C.R. 973.

36. HART, PUNISHMENT, *supra* note 3, at 127.

37. *See* JEROME HALL, PRINCIPLES OF CRIMINAL LAW (1947) 169-246, 279-322 (criticizing the use of objective forms of liability in criminal law).

38. *See* BRUDNER, *supra* note 8, at 235-40, 256-57.

could and *would* have complied: a standard requiring him to take precautions against harm."[39] In contrast, inadvertence does not necessarily refer to a failure to fall below a standard of care; it refers rather to the state of mind of not adverting to the consequences or risks of one's actions, for whatever reason. Inadvertence may, of course, lead to a failure to take reasonable precautions and thus to negligence; but "the negligence does not consist in this blank state of mind but in our failure to take precautions against harm by examining the situation."[40]

Thus, one can be inadvertent with or without being negligent. Taking precautions, or meeting the relevant standard of care, negates liability for offenses of negligence, regardless of the state of the accused's mind. Suppose that both Pete and Paula get into (separate) motor vehicle accidents that are causally related to their speed; for example, each is driving on a highway and strikes a vehicle that is making a right-hand turn onto the road. Suppose that in each case Pete's and Paula's speed is a but-for cause of the collision, that there is personal injury to the driver of the other vehicle, that neither Pete nor Paula consciously adverted to the risks entailed by their speed, and that neither Pete nor Paula cares whether his or her driving injures another. But suppose that Pete was driving at the speed limit, while Paula exceeded the speed limit by twenty miles per hour. Paula may be at fault, but Pete probably is not; there is no difference between Pete's and Paula's state of mind, but Pete was conforming to a standard of care and Paula was not.[41]

On the other hand, one can advert, and yet be negligent: the accused may underestimate the risk or the seriousness of the consequences, should the risk materialize; or the accused may form a mistaken belief about the risk or the consequences. In these cases, one might say that advertence, rather than inadvertence, produces negligence.[42] That is, negligence is not determined by what is in the mind of the agent, or in the mind of some hypothetical reasonable agent, but by what the agent does or fails to do: one can be negligent with or without inadvertence.

Hart argues further that negligent conduct should not be criminally punishable unless the accused both failed to meet the relevant standard of care and had the capacity to meet the standard of care.[43] To punish someone whose reason for departing from the standard of care was inca-

39. HART, PUNISHMENT, *supra* note 3, at 147-48.

40. *Id.* at 148.

41. It may be objected that this example is implausible, in that I have assumed that Pete is indifferent to the consequences of his driving but nonetheless meets the standard of care. It is plausible to assume that people who are indifferent to consequences are less likely to meet the standard of care, but the purpose of the example is to reinforce Hart's point that negligence and inadvertence are not the same thing, and thus to isolate the factor that relieves Pete of liability.

42. *See* DUFF, *supra* note 35, at 175.

43. Hart's argument on this point was invoked by both the majority and the minority in a recent leading Canadian case on penal negligence. *See* The Queen v. Creighton [1993] 3 S.C.R. 3 at 25, 62-3; *see also* George P. Fletcher, *The Meaning of Innocence*, 48 U. TORONTO L.J. 157, 172-73 (1998).

pacity to live up to the standard would be to impose liability without fault:

> 'Absolute liability' results, not from the admission of the principle that one who has been grossly negligent is criminally responsible for the consequent harm even if 'he had no idea in his mind of harm to anyone', but from the refusal in the application of this principle to consider the capacities of an individual who has fallen below the standard of care.[44]

The fault is thus located not simply in the departure from the relevant standard of care, but in departing from that standard even though the accused was capable of meeting it; this type of fault is as "subjective" as full mens rea, though it is a different sort of fault.[45]

Hart's point may be recast as follows. The fault element in crimes of negligence is often said to be that the accused ought to have met the standard of care that the reasonable person would have met. However, this statement needs to be broken down into three distinct components: (i) the reasonable person would have observed the appropriate standard of care; (ii) the accused departed markedly from that standard of care; and (iii) the accused could have met (had the capacity to meet) the standard of care. It is true that the standard of care is objectively defined, and that the accused's departure from that standard may be externally observed. But this departure is only a necessary and not a sufficient condition for liability; just as the actus reus of a crime of intention is necessary but not sufficient, the departure is not in itself a fault element, and to convict on proof of (i) and (ii) only would be to impose absolute liability. The fault element is in the third component: the accused failed to meet the standard when he could have. Thus, Hart justifies a form of objective liability with reference to a subjective characteristic of the accused.[46]

Now, this form of criminal liability can plainly be justified on utilitarian grounds: Hart suggests that it has a role in making people advert to risks caused by their conduct.[47] But Hart also wants to say that it is not unfair to impose criminal liability for negligence, provided that liability is imposed not simply for departure from a standard of care, but for a departure that the agent could have avoided. There is a sense in which this standard of liability is just as subjective as a requirement of intention or advertent negligence: the accused's liability ultimately depends as much on his or her capacities as on his or her conduct. Liability for negligence, interpreted in this way, might therefore be compatible with some forms of retributivism as well as with utilitarianism. Thus, Hart's theory of liability for criminal negligence, though utilitarian in its basic thrust, is significantly constrained by values which, if not exactly retributivist, require an attention to human agency quite alien to utilitarianism.

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44. HART, PUNISHMENT, *supra* note 3, at 154-55.
45. *See id.* at 152-55.
46. *See* DUFF, *supra* note 35, at 156.
47. *See* HART, PUNISHMENT, *supra* note 3, at 134.

C. The Recognition of Excuses

Hart's approach to excuses, like his approach to fault requirements, tempers the overall utilitarian aim of the law with other considerations. He begins with Bentham's utilitarian argument for excuses. Bentham argued that punishment was wrong where it was inefficacious and that it was inefficacious in two classes of cases.[48]

> The first class consists of cases in which the penal threat of punishment could not prevent a person from performing an action forbidden by the law *or any action of the same sort*; . . . The second class consists of cases in which the law's threat could not have had any effect on the agent in relation to the *particular* act committed because of his lack of knowledge or control.[49]

But, Hart points out, this argument contains a serious *non sequitur*. The fact that the threat of punishment would not have deterred the particular individual does not mean that punishing him or her will not have beneficial social effects. In particular, punishing the insane, the incapable, or the necessitous may have the effect of deterring others from faking insanity, incapacity, or necessity:

> It may very well be that, if the law contained no explicit exemptions from responsibility on the score of ignorance, accident, mistake, or insanity, many people who now take a chance in the hope that they will bring themselves, if discovered, within these exempting provisions would in fact be deterred. . . . The uselessness of a *threat* against a given individual or class does not entail that the *punishment* of that individual or class cannot be required to maintain in the highest degree the efficacy of threats for others.[50]

So, unless there is some empirical proof that the harm caused by this sort of fakery is less than the harm caused by punishing the innocent, the rationale for excuses cannot be Bentham's straightforwardly utilitarian one.

Hart proposes instead that we understand the function of excuses by "consider[ing] the law . . . as what might be termed a *choosing* system."[51] In this light, the criminal law appears less as a "system of stimuli" or a goad[52] than as a system that "guide[s] individuals' choices as to behaviour by presenting them with reasons for exercising choice in the direction of obedience, but leaving them to choose."[53] A criminal law excuse is then best understood as "a mechanism for . . . maximizing within the framework of coercive criminal law the efficacy of the individual's informed and considered choice in determining the future and also his power to predict that future."[54] Although the function of criminal law as a system

48. *See* Bentham, *supra* note 7, at 161-62.
49. Hart, Punishment, *supra* note 3, at 41.
50. *Id.* at 43; *see also id.* at 19-20, 77.
51. *Id.* at 44.
52. *Id.*
53. *Id.*
54. *Id.* at 46.

may be to impose "at least some check on behaviour that threatens society,"[55] recognition of excuses provides the same sort of advantages as insistence on fault requirements. Individual freedom is enhanced, in that individuals will not be liable for criminal consequences that they could not have helped causing.[56] Although the recognition of criminal law excuses may well lead to some cost in the efficacy of law enforcement,[57] it respects the personhood of the human beings whom the system is designed to serve:

> On this view excusing conditions are accepted as something that may conflict with the social utility of the law's threats; they are regarded as of moral importance because they provide for all individuals alike the satisfactions of a choosing system. Recognition of excusing conditions is therefore seen as a matter of protection of the individual against the claims of society for the highest measure of protection from crime that can be obtained from a system of threats. In this way the criminal law respects the claims of the individual as such, or at least as a *choosing being*, and distributes its coercive sanctions in a way that reflects this respect for the individual.[58]

Thus, in the analysis of excuses, as in the analysis of responsibility and fault, Hart adopts a vision of the criminal process in which the general utilitarian aim of the system is significantly constrained by the nature of law as a system governing the behavior of choosing agents.

D. A Concept of Criminal Law?

In three critical areas of the criminal law—the role of responsibility, the understanding of mens rea, and the function of excuses—Hart sees the overall utilitarian aim of criminal law as constrained by principles deriving from the importance of preserving a space for individual freedom of action.[59] But does Hart mean this discussion of criminal law to offer us a vision of a desirable system of criminal law, to offer us a method of distinguishing criminal law from other sorts of law, or to stand as a description of the central features of actually existing Anglo-American criminal law? In other words, is Hart's criminal law project critical, analytical, or descriptive?

It is most natural to understand Hart's project in his writings on criminal law as being in a critical mode. Hart outlines an approach to criminal law that he evidently regards as desirable,[60] and subsequent commentators have not unnaturally treated these writings as demonstrating Hart's commitment to certain substantive values.[61] At the same time, it is fairly

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55. *Id.*
56. *See id.* at 47.
57. *See id.* at 44, 49.
58. *Id.* at 49.
59. *See id.* at 28-30.
60. *See* HART, PUNISHMENT, *supra* note 3, at 210, 233.
61. Fletcher treats Hart's theory of excuses as part of a normative theory of justice, rather than as a description of any existing system of law. *See* GEORGE FLETCHER, RETHINKING CRIMINAL LAW 802-03 (1978). Similarly, MacCormick describes Hart's work on

clear that these writings do not simply describe any particular legal system. But the basic vision underlying Hart's criminal law project is closely linked with his understanding of what law is. As I will show below, the distinction he draws between the rules of criminal law and mere goads to conduct is the same as the distinction between law as a system of rules and law as orders backed by threats.[62] That is, for Hart, the rule-like nature of the criminal law is not just desirable but a defining feature of what the law is. In other words, Hart's account of criminal law offers us a concept of criminal law.[63]

Indeed, at one point, Hart plainly states that his discussion of basic criminal law principles is as relevant to repugnant legal systems as to his own.[64] In a rather utilitarian mode of analysis, Hart suggests that one justification for excusing conditions is that "if the sanctions of the criminal law are applied, the pains of punishment will for each individual represent the price of some satisfaction obtained from breach of law."[65] He then adds:

> This . . . can sound like a very cold, if not immoral attitude toward the criminal law, general obedience to which we regard as an essential part of a decent social order. But this attitude seems repellent only if we assume that all criminal laws are ones whose operation we approve. To be realistic we must also think of bad and repressive criminal laws; in South Africa, Nazi Germany, Soviet Russia and no doubt elsewhere, we might be thankful to have their badness mitigated by the fact that they fall only on those who have obtained a satisfaction from knowingly doing what they forbid.[66]

This qualification would surely not be necessary if Hart's criminal law project were not meant to be consistent with his positivist jurisprudence. But before turning to that jurisprudence, I consider Hart's other main contribution to the criminal law: his position on the relationship between criminal law and morality.

III. THE HART-DEVLIN DEBATE

In 1957, the Wolfenden Committee made a number of recommendations in relation to the law of sexual offenses in England.[67] Its most important recommendation was that private, homosexual acts between consenting adults should not be subject to criminal sanctions.[68] Patrick

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criminal law as favoring a certain type of liberalization. *See* MACCORMICK, *supra* note 2, at 10. I do not mean to suggest that these commentators are in error, but Hart's analysis of criminal law presents itself more as a descriptive account than appears at first sight.

62. *Compare* HART, PUNISHMENT, *supra* note 3, at 44, *with* HART, *supra* note 1, at 38-41, 55-60.

63. Denise RJaume suggested that I put my point this way.

64. *See* HART, PUNISHMENT, *supra* note 3, at 53.

65. *Id.* at 47.

66. *Id.*; *see also id.* at 53 (restricting his analysis to legal, not moral, responsibility).

67. *See* COMMITTEE ON HOMOSEXUAL OFFENCES AND PROSTITUTION, THE WOLFENDEN REPORT, 1957, cmt. 247 [hereinafter WOLFENDEN REPORT].

68. *See id.* ¶¶ 62-72, 355.

Devlin, a judge of the Court of Queen's Bench and later a Law Lord, delivered a lecture defending the criminalization of immoral conduct in general, and the English law of sodomy[69] in particular, against the Wolfenden Committee's recommendations.[70] Hart's response to this lecture, and the subsequent exchanges between Hart and Devlin together with the observations of other commentators, are compendiously known as the Hart-Devlin debate.[71] The debate concerned, most narrowly, the wisdom of criminalizing certain forms of sexual behavior; more broadly, the wisdom of seeking to enforce morality through the criminal sanction; and, at its broadest, the proper role of the criminal law in a democratic society.

Devlin was concerned with the relationship between morality and the criminal law. Whereas the Wolfenden Committee had expressed the view that private immorality was not the business of the criminal law, Devlin argued that "a complete separation of crime from sin . . . would not be good for the moral law and might be disastrous for the criminal"[72] and noted that, as a matter of positive law, it is often the case that the criminal law functions "to enforce a moral principle and nothing else."[73] The historical source of this moral function of the criminal law may be "Christian teaching," but this source is no longer legitimate, because "the law can no longer rely on doctrines in which citizens are entitled to disbelieve."[74] Where, then, does the law get its authority to criminalize immoral conduct?

Devlin argued that there is a shared, public sense of morality, and that the maintenance of this sense of morality is essential to the cohesion of society:

> [S]ociety means a community of ideas; without shared ideas on politics, morals, and ethics no society can exist. . . . If men and women try to create a society in which there is no fundamental agreement about

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69. *See* Offences Against the Person Act, 1861, 24 & 25 Vict., ch. 100, § 61 (Eng.); Sexual Offences Act, 1956, 4 & 5 Eliz. 2, ch. 69 §§ 12-13 (Eng.); Sexual Offences Act, 1967, ch. 60, § 1 (Eng).

70. Patrick Devlin, *The Enforcement of Morals*, 45 PROCEEDINGS OF THE BRITISH ACADEMY 1 (1959). I will cite the lightly revised version of the lecture in PATRICK DEVLIN, THE ENFORCEMENT OF MORALS 1-25 (1965). Devlin's objection to the Wolfenden Committee's recommendations regarding homosexual offenses was based on his view of society's right to criminalize conduct that it regards with abhorrence. *See id.* at 15-17.

71. *See generally* HART, LAW, *supra* note 3; DEVLIN, *supra* note 70; H.L.A. HART, ESSAYS IN JURISPRUDENCE AND PHILOSOPHY 248-62 (1983) [hereinafter HART, ESSAYS IN JURISPRUDENCE]; H.L.A. HART, MORALITY AND THE CRIMINAL LAW 31-54 (1965); Graham Hughes, *Morals and the Criminal Law*, 71 YALE L.J. 662 (1961) (book review) (supporting Hart); Morris Ginsberg, *Law and Morals*, 4 BRIT. J. CRIMINOLOGY 283 (1964) (book review) (supporting Hart); Eugene Rostow, *The Enforcement of Morals*, 1960 CAMBRIDGE L.J. 174 (1960) (supporting Devlin); Robert S. Summers, Book Review, 38 N.Y.U. L. REV. 1201 (1963) (reviewing H.L.A. HART, LAW, LIBERTY, AND MORALITY) (1963) (supporting Hart); Alan W. Mewett, *Morality and the Criminal Law*, 14 U. TORONTO L. J. 213, 222-27 (1962) (criticizing Devlin); BASIL MITCHELL, LAW, MORALITY, AND RELIGION IN A SECULAR SOCIETY (1967) (analyzing the debate and cautiously supporting Devlin).

72. DEVLIN, *supra* note 70, at 4.

73. *Id.* at 7.

74. *Id.*

> good and evil they will fail; if, having based it on common agreement, the agreement goes, the society will disintegrate. For society is not something that is kept together physically; it is held by the invisible bonds of common thought.[75]

From this sense of the role of morality flowed the justification for punishing immorality: If "a recognized morality is as necessary to society as, say, a recognized government, then society may use law to preserve morality in the same way as it uses it to safeguard anything else that is essential to its existence."[76] The public enforcement of morality through the criminal law is no different in principle from the protection of the state against violent overthrow through the law of treason.[77] Furthermore, the content of this morality is not determined by some rational process, but expressed through "the power of common sense" as expressed in abhorrence of certain conduct such as "deliberate cruelty to animals," homosexual acts, and fornication.[78] In Devlin's view, the almost visceral reaction of the ordinary person to such conduct is central to maintaining the bonds of society and thus to the use of the criminal sanction in enforcing morality:

> I do not think that one can ignore disgust if it is deeply felt and not manufactured. Its presence is a good indication that the bounds of toleration are being reached. Not everything is to be tolerated. No society can do without intolerance, indignation, and disgust; they are the forces behind the moral law, and indeed it can be argued that if they or something like them are not present, the feelings of society cannot be weighty enough to deprive the individual of freedom of choice.[79]

Devlin did admit that there were at least three "elastic principles"[80] that would limit the operation of the criminal law on immoral behavior. First, "[t]here must be toleration of the maximum individual freedom that is consistent with the integrity of society";[81] second, it must be recognized that "[t]he limits of tolerance shift"[82] so that immoral conduct need not remain criminalized indefinitely; and third, "as far as possible privacy should be respected."[83] But none of these principles, in itself or taken with the others, could limit the public enforcement of morality where the public feeling for enforcement is strong enough.[84]

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75. *Id.* at 10.
76. *Id.* at 11.
77. *See id.* at 13.
78. *Id.* at 17.
79. *Id.*
80. *Id.* at 16.
81. *Id.*
82. *Id.* at 18.
83. *Id.*
84. Thus, in Devlin's view, the failure of the criminal law to include adultery and fornication in its scope does not rest on a logical or principled preference for freedom or privacy over the protection of society, but merely on an ad hoc balancing of "the pros and cons of legal enforcement in accordance with the sort of considerations I have been outlining." *Id.* at 22.

Hart summarized Devlin's position as follows:

> Lord Devlin bases his affirmative answer to the question [of criminalizing immorality] on the quite general principle that it is permissible for any society to take the steps needed to preserve its own existence as an organized society, and he thinks that immorality—even private sexual immorality—may, like treason, be something which jeopardizes a society's existence.[85]

This summary, though hardly intended to put Devlin's position in a favorable light, is not unfair.

Hart's response to Devlin's position was, in a broad sense, utilitarian. Hart first took Devlin and other supporters of a morality-enforcing function for criminal law to task for not drawing certain elementary distinctions about the functioning of criminal law. Where Devlin argued that criminal law rules excluding consent as a defense could only be explained as instances of the enforcement of morality,[86] Hart noted that they could also be explained as instances of the law's paternalism, that is, the law might be intended to protect persons from harms caused by their acting against their own best interests rather than to protect society from the breaking down of morality.[87] The paternalistic explanation would be a straightforward invocation of the harm principle rather than an instance of society defending its very existence against an immoral act. Where a legal moralist would argue that the morality-enforcing function of criminal law could be seen in the role that an offender's moral worth plays in sentencing,[88] Hart suggested that the legal moralist had simply failed to distinguish between two "distinct and independent questions": "'What sort of conduct may justifiably be punished?' and 'How severely should we punish different offenses?'"[89] The question of whether the law should enforce morality relates to the first; the question of whether an offender's moral worth should influence his or her sentence relates to the second.[90] These distinctions are critical for a utilitarian approach to criminal law because the infliction of punishment causes harm, for a utilitarian punishment must be justified by the avoidance of some greater harm (or the provision of some greater benefit). The possibility of a paternalistic justification for a rule of criminal law and the distinction between the justifi-

85. HART, LAW, *supra* note 3, at 18-19.

86. *See* DEVLIN, *supra* note 70, at 8-9.

87. *See* HART, LAW, *supra* note 3, at 32-33. For Devlin's response on this point, see DEVLIN, *supra* note 70, at 132-37 (doubting whether a firm distinction between legal moralism and paternalism can be sustained).

88. Hart attributed this argument to Stephen, not to Devlin, but Devlin subsequently adopted it. *See* HART, LAW, *supra* note 3, at 34-36; *see also* JAMES FITZJAMES STEPHEN, LIBERTY, EQUALITY, FRATERNITY 162-63 (R.J. White ed., Cambridge Univ. Press 1967) (2d ed. 1874); DEVLIN, *supra* note 70, at 130. For Hart's use of the term "legal moralism," see HART, LAW, *supra* note 3, at 6. Devlin was a legal moralist not only in Hart's sense but in Feinberg's "broad sense" as well, because he argued that it was "morally legitimate for the state to prohibit certain types of actions that cause neither harm nor offense to anyone, on the grounds that such actions constitute or cause evils of other ('free-floating') kinds." FEINBERG, *supra* note 7, at 27.

89. HART, LAW, *supra* note 3, at 36.

90. *See id.* at 37.

cation for and the quantum of punishment both create room for a utilitarian explanation of the criminal law's apparent moralism.

Second, Hart challenged Devlin to provide some evidence for what Hart calls "the disintegration thesis," that is, the thesis that a society that fails to enforce sexual morality through the criminal law will tend to fall apart.[91] "[N]o evidence is produced to show that deviation from accepted sexual morality, even by adults in private, is something which, like treason, threatens the existence of society."[92] Neither historical evidence[93] nor social-psychological[94] evidence supports the disintegration thesis; what is worse, "no indication is given of the kind of evidence that would support it, nor is any sensitivity betrayed to the need for evidence."[95] From a utilitarian perspective, the absence of evidence is evidently a serious problem: the infliction of punishment for sexual immorality might well be justified if such punishment could keep society together, but in the absence of proof that it does, this sort of punishment must be seen as the wanton infliction of pain.

Hart takes Devlin's lack of attention to the need for evidence to indicate that Devlin's disintegration thesis is not tenable, but collapses into the "conservative thesis."[96] On this view, the harm caused by the failure to enforce a common sexual morality is not the disintegration of society as such, but the mere fact that some have departed from this morality. The conservative thesis "is the claim that society has a right to enforce its morality by law because the majority have the right to follow their own moral convictions that their moral environment is a thing of value to be defended from change."[97] This non-utilitarian claim does not rest on any evidence about the effects of failing to enforce sexual morality and is, therefore, at least on its own terms, immune from the criticism that it is insufficiently supported by evidence.

The conservative thesis means one of two things. Either we cannot speak of the morality of a society as having changed,[98] or we cannot criticize the moral views of the majority.[99] Both of these positions are unacceptable to Hart. The first is simply "absurd,"[100] while the second offers an impoverished conception of what it means to live in a democracy.

> The central mistake is a failure to distinguish the acceptable principle that political power is best entrusted to the majority from the unacceptable claim that what the majority do with that power is beyond

91. *See id.* at 50.
92. *Id.*
93. *See id.*; *see also* HART, ESSAYS IN JURISPRUDENCE, *supra* note 71, at 260.
94. *See* HART, ESSAYS IN JURISPRUDENCE, *supra* note 71, at 261.
95. *Id.* at 250.
96. *Id.* at 249.
97. *Id.*; *see also* HART, LAW, *supra* note 3, at 49 (calling this view "the extreme thesis").
98. *See* HART, LAW, *supra* note 3, at 51-52.
99. *See id.* at 69-80.
100. *See id.* at 51. For Devlin's response to this particular point, see DEVLIN, *supra* note 70, at 13 n.1.

> criticism and must never be resisted. No one can be a democrat who does not accept the first of these, but no democrat need accept the second.[101]

Hart's criticism of Devlin's case for the enforcement of morality is in a critical or legislative mode: it is not intended to describe the law as it is, but to argue against a conception of what the law ought to be.[102] As such, Hart's position in his debate with Devlin is not inconsistent with his general account of criminal law or with his positivism. But I want to suggest that even within his debate with Devlin, Hart put forward an argument that casts doubt on the separation of law from morality.

Consider Hart's and Devlin's reactions to the House of Lords's controversial decision in *Shaw v. Director of Public Prosecutions*.[103] Shaw was charged with the common law offense of "conspiring to corrupt public morals" because he had published *The Ladies' Directory*, a pamphlet that facilitated contact between prostitutes and their customers.[104] There was no substantive offense of corrupting public morals, and there was some doubt about whether the conspiracy Shaw was charged with was an offense at common law. The House of Lords held that although there was no substantive offense of "corrupting public morals," a conspiracy with that object was an offense at common law; and that although the court's residual power to create common law offenses should be used only sparingly, if there was any doubt that such a conspiracy was criminally punishable, that doubt should be resolved in favor of recognizing the existence of the offense, in the interest of preserving the court's role as guardian of public morality.[105] The House of Lords held further that the trial judge was correct to instruct the jury that tending to corrupt morals meant no more than to "lead astray morally."[106] Shaw had therefore been properly convicted.

Devlin, consistent with his view of the relationship between criminal law and morality, celebrated the decision in *Shaw*, not just for its recogni-

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101. HART, LAW, *supra* note 3, at 79.

102. Hart insists on the distinction between positive and critical morality. *See* HART, LAW, *supra* note 3, at 17-24; *see also id.* at 77-81 (focusing on the context of democratic government). Devlin, in a lecture given before Hart's criticism on this point was published, argued that the line between "positive law and positive morality" was unclear. *See* DEVLIN, *supra* note 70, at 94. It seems unlikely that Devlin would have rejected Hart's view of the role of criticism in a democracy, *see, e.g., id.* at 100, but Devlin's privileging of reactions of indignation and disgust in his approach to criminal law makes one wonder by what mechanism Devlin thought such criticism would ever have any effect.

103. 1962 App. Cas. 220 (appeal taken from Eng.).

104. *Id.* at 223.

105. *See id.* at 285 (per Lord Tucker), 266-68 (per Viscount Simonds), 291-92 (per Lord Morris), 292-94 (per Lord Hodson).

106. *Id.* at 290 (per Lord Tucker), 269 (per Viscount Simonds), 292 (per Lord Morris), 294 (per Lord Hodson). Lord Reid, the sole dissenter, held that the offense did not exist at common law, *see id.* at 272, that the court had no residual power to create it, *see id.* at 275, and that even if the court did have this power, it should not be exercised in the face of "wide differences of opinion . . . as to how far the law ought to punish immoral acts which are not done in the face of the public." *Id.* at 275. Finally, he held that leaving the question of corrupting public morals to the jury in the way the trial judge had created too much uncertainty. *See id.* at 281-282.

tion of the courts' role as *custos morum*, but also for its holding that it was ultimately the jury, not the judge, that was the arbiter of what was immoral.[107] Hart had two objections to the result and the reasoning in *Shaw*. The first, and most obvious, is what I will call the moral objection. Hart believes *Shaw* is badly decided because the decision gives legal force and sanction to legal moralism. Although Hart is a bit hesitant to express this objection to *Shaw* directly, the whole of *Law, Liberty, and Morality* is a sustained critique of legal moralism and so may be taken as a critique of the decision in *Shaw*. The second is what I will call the legalistic objection. This objection is founded on Hart's commitment to "the principle of legality which requires criminal offenses to be as precisely defined as possible, so that it can be known with reasonable certainty beforehand what acts are criminal and what are not."[108]

The legalistic objection to *Shaw* is based on the same sort of values that animated Hart's explanation of the basic concepts of criminal liability:

> [The House of Lords] seemed willing to pay a high price in terms of the sacrifice of other values for the establishment . . . of the Courts as *custos morum*. The particular value which they sacrificed is the principle of legality which requires criminal offences to be as precisely defined as possible, so that it can be known beforehand what acts are criminal and what are not. As a result of Shaw's case, virtually any cooperative conduct is criminal if a jury consider it *ex post facto* to have been immoral. Perhaps the nearest counterpart to this in modern European jurisprudence is the idea to be found in German statutes of the Nazi period that anything is punishable if it is deserving of punishment according "to the fundamental conceptions of a penal law and sound popular feeling."[109]

For Hart, Nazi criminal law is still criminal law,[110] so if this is a criticism, it is a criticism based on a vision of what the law ought to be. But the value animating this criticism is among those animating Hart's account of what criminal law is, that members of society should be able to govern their affairs with confidence that they will not be found guilty of criminal offenses unless they had a reasonable opportunity to avoid criminal liability.

One way of understanding the relationship between these two objections is that the legalistic objection is secondary to the moral objection. The decision in *Shaw* is bad for reasons of substantive morality, and worse for the degree of uncertainty it introduces; but since adjudication always contains a zone of uncertainty where judges have to act on moral

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107. *See* DEVLIN, *supra* note 70, at 97-100.

108. HART, LAW, *supra* note 3, at 12. Thus, Hart does not rely on Bentham's utilitarian argument that ex post facto punishment is inefficacious. *See* BENTHAM, *supra* note 7, at 160. Rather Hart relies on a notion of procedural fairness more akin to Fuller's argument that ex post facto punishment is repugnant to the law's internal morality. *See* FULLER, *supra* note 6, at 51-62. For a critique of *Shaw* directed precisely at the undesirability of punishing immorality as such, see Mewett, *supra* note 71.

109. HART, LAW, *supra* note 3, at 12 (citation omitted).

110. *See* HART, PUNISHMENT, *supra* note 3, at 47.

grounds, the legalistic objection would not be decisive on its own.[111] But this account of the relationship between the two objections is only partially satisfactory because the moral objection rests, at least in part, on the same foundations as the legalistic objection.

Hart cannot very well deny that the criminal law does and should enforce morality when it punishes theft, murder, rape, and the like,[112] but he wants to deny that the criminal law should enforce morality when the conduct sanctioned is not harmful. He therefore draws a distinction between formal and material values in morality:

> In moral relationships with others the individual sees questions of conduct from an impersonal point of view and applies general rules impartially to himself and to others; . . . he exerts self-discipline and control in adapting his conduct to a system of reciprocal claims. These are universal virtues and indeed constitute the specifically moral attitude to conduct.[113]

But the preservation of these formal values is not, Hart argues, what Devlin has in mind; rather, Devlin simply wants to punish mere departures from a moral code. Indeed, Devlin's position undermines rather than supports the formal values of morality:

> The use of legal punishment to freeze into immobility the morality dominant at a particular time in a society's existence may possibly succeed, but even where it does it contributes nothing to the survival of the animating spirit and formal values of social morality and may do much to harm them.[114]

The formal values of morality are, so to speak, the private counterparts of the public values of legality. A departure from the basic principles of criminal law that Hart outlines would be inappropriate for a society of human agents because it would damage their ability to act as moral agents. Thus, the moral objection to *Shaw* is not simply utilitarian, but shares with the legalistic objection a sense of the nature of human societies, and consequently a sense of what is good for those societies.

IV. CRIMINAL LAW AND HART'S POSITIVISM

My purpose in this Article is to describe and criticize Hart's approach to jurisprudence indirectly through his writings on criminal law, rather than directly through an analysis of the approach itself. But at this point a brief sketch of my understanding of *The Concept of Law*[115] is in order, if only to establish some points of reference for the discussion that

111. David Dyzenhaus suggested to me that the two objections might be related in this way. For Hart's recognition of the role of uncertainty in adjudication, see HART, *supra* note 1, at 123-32 and HART, ESSAYS IN JURISPRUDENCE, *supra* note 71, at 62-72.

112. *See* HART, LAW, *supra* note 3, at 70.

113. *Id.* at 71.

114. *Id.* at 72.

115. HART, *supra* note 1.

follows.[116]

Hart's initial target in *The Concept of Law* is the model of law as orders backed by threats. He argues that this model fails to explain two central features of the law. First, not all laws amount to prohibitions or punishments. Many are enabling rather than penal.[117] Second, the model attributes too much importance to the idea that a habit of obedience is sufficient to explain the continuity and persistence of legal authority. A habit "is merely a fact about the observable behaviour of most of [a] group."[118] Behavior in accordance with law cannot be merely habitual in this sense, but must have an internal aspect, such that the members of the group feel normatively bound to follow the law. "What is necessary is that there should be a critical reflective attitude to certain patterns of behaviour as a common standard, and that this should display itself in criticism (including self-criticism), demands for conformity, and in acknowledgements that such criticism and demands are justified. . . ."[119] If law is merely a habit of obedience, we cannot explain how legal authority can be transmitted from one group of persons to another, as when an outgoing legislature is replaced by an incoming legislature, or how legal authority can persist, as when a law outlasts the society than enacted it. But if law is a body of rules, we can understand the procedures for the continuity and the persistence of legal authority.[120]

Law, then, is better understood as consisting of a system of rules; more particularly, law centers around "[t]he union of primary and secondary rules."[121] Primary rules are those that impose the basic obligations that are necessary whenever human beings live together.[122] But primary rules have certain flaws. They are often uncertain in their application, they often have a static character, and they cannot efficiently maintain themselves.[123] Primary rules must therefore be supplemented by secondary rules, which provide remedies for these defects, and it is these secondary rules that "convert the regime of primary rules into what is indisputably a legal system."[124] There are three types of secondary rules. First is the

116. For other sketches, see MACCORMICK, *supra* note 2, at 20-28 and P.M.S. Hacker, *Hart's Philosophy of Law, in* LAW, MORALITY, AND SOCIETY 1 (P.M.S. Hacker & J. Raz eds., 1977).

117. *See* HART, *supra* note 1, at 26-49.

118. *Id.* at 56.

119. *Id.* at 57; *see also* MACCORMICK, *supra* note 2, at 29-44 (describing this argument as a hermeneutic approach to understanding law because it seeks to take on the perspective of the person subject to the law).

120. *See* HART, *supra* note 1, at 51-66.

121. *Id.* at 99.

122. *See id.* at 91. It is not completely clear why Hart does not include basic enabling rules (e.g., basic ideas of gift and contract) under the rubric of primary rules. He sees these basic enabling rules as analogous to the secondary rules of change. *See id.* at 96. But the presence of basic enabling rules even in the absence of public secondary rules (e.g., the law merchant) is not unknown. For discussions of some of the difficulties in Hart's categorization of rules as primary or secondary, see JOSEPH RAZ, THE AUTHORITY OF LAW 177-79 (1979) and MACCORMICK, *supra* note 2, at 103-06.

123. *See* HART, *supra* note 1, at 92-93.

124. *Id.* at 94.

rule of recognition, which "will specify some feature or features possession of which by a suggested rule is taken as a conclusive affirmative indication that it is a rule of the group to be supported by the social pressure it exerts."[125] Second, rules of change specify the methods by which primary rules may be authoritatively altered. Third, rules of adjudication "empower[ ] individuals to make authoritative determinations of the question whether, on a particular occasion, a primary rule has been broken."[126]

Although the secondary rules have the function of repairing the defects in primary rules, they are not themselves self-applying or fully determinate. This is particularly true of the rules of adjudication.[127] Because even secondary rules always leave open areas for choice, law is not just a set of rules but a set of rules with an open texture. "[I]n the vast majority of decided cases there is very little doubt" about the legally correct result.[128] But in the small area where the result is not evident, the law "must be left to be developed by courts or officials striking a balance, in the light of circumstances, between competing interests which vary in weight from case to case."[129]

Finally, this analysis is presented to explain what constitutes law "in order to elucidate features distinctive of law as a means of social control,"[130] not to assert that any particular legal rule or system of legal rules is desirable or morally valid. Hart's analysis is positivist in this sense: he denies "that between law and morality there is a connection which is in some sense 'necessary'"[131] and asserts "that it is in no sense a necessary truth that laws reproduce or satisfy certain demands of morality."[132] Although the legal scholar may take an internal point of view for the purpose of analyzing any given system of law, he or she neither endorses nor criticizes that law while doing the analysis. The analysis of the moral quality of the law is another matter.[133]

Hart believes that the separation thesis flows from his account of what

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125. *Id.*

126. *Id.* at 96.

127. Hart recognizes that rules of recognition and change may be subject to similar uncertainties. *See id.* at 123. However, he treats these uncertainties as instances of "the pathology and embryology of legal systems," rather than as an instance of the systematic uncertainty that afflicts rules of adjudication. *Id.* at 122; *see also* FULLER, *supra* note 6, at 140-45, 156-57; Hacker, *supra* note 116, at 24-25.

128. HART, *supra* note 1, at 134.

129. *Id.* at 135. Elsewhere, Hart described this contrast as the difference between "a core of settled meaning . . . [and] a penumbra of debatable cases in which words are neither obviously applicable nor obviously ruled out." HART, ESSAYS IN JURISPRUDENCE, *supra* note 71, at 63.

130. HART, *supra* note 1, at 155.

131. *Id.*

132. *Id.* at 185-86; *see also id.* at 268 ("[T]hough there are many different contingent connections between law and morality there are no necessary conceptual connections between the content of law and morality . . . .").

133. *See* MACCORMICK, *supra* note 2, at 30-40 (describing and criticizing this feature of Hart's method).

law is, but also that it has distinct advantages for moral reasoning.[134] Hart argues that if a person is to remain or to become a critical moral agent, he or she must be able to separate the question of the existence of a law from the question of its moral validity.[135] Failing to make this separation may lead to one of two related errors.[136] On the one hand, if the law is assumed to embody some morally valid principles, the person may assume that the law itself is morally valid.[137] This danger is particularly acute since the fact that a rule is a law is supposed to give one a reason to act in accordance with it.[138] On the other hand, the claim that morally iniquitous laws are not really laws at all "may grossly oversimplify the variety of moral issues to which they give rise."[139] For example, the decision to punish those whose behavior was grossly immoral but not illegal under a former regime should be taken in full awareness that another moral principle, "*nulla poena sine lege,*" is being violated.[140] "A case of retroactive punishment should not be made to look like an ordinary case of punishment for an act illegal at the time."[141] In either case, Hart argues, the separation of law and morals enables persons to retain a sharp critical attitude in determining whether to obey, to criticize, or to disobey existing laws.[142]

Another way to express the separation thesis is that the methods to be used in determining whether something is "law" should, in general, be different from the methods used to determine the moral quality of the law.[143] Hart's account of the criminal law will be consistent with the separation thesis to the extent that it invokes the "demands of morality" only where the positive law invokes them.

In his analysis of criminal law and in his debate with Devlin, Hart fails to respect the separation thesis as expressed in this methodological form. Each of these projects has an important critical aspect to it, but as we have seen, each also invokes legal values that are very closely connected with Hart's jurisprudential project. His analysis of what the criminal law is and ought to be, and his critique of the decision in *Shaw* both rest on the notion that the law is, and ought to be, a system for governing choosing agents rather than a mere system of incentives or of state power.[144]

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134. *See* HART, *supra* note 1, at 207.
135. *See id.*
136. *See id.*
137. *See id.* at 207-08.
138. *See id.* at 210-11.
139. *Id.* at 211.
140. *See id.*
141. *Id.* at 211-12; *see also* HART, PUNISHMENT, *supra* note 3, at 12.
142. *See* HART, *supra* note 1, at 207-12; *see also* HART, ESSAYS IN JURISPRUDENCE, *supra* note 71, at 8-12, 72-75; Neil MacCormick, *A Moralistic Case for A-moralistic Law?*, 20 VAL. U. L. REV. 1, 9-11 (1985).
143. "According to my theory, the existence and content of the law can be identified by reference to the social sources of the law (e.g. legislation, judicial decisions, social customs) without reference to morality except where the law thus identified has itself incorporated moral criteria for the identification of the law." HART, *supra* note 1, at 269.
144. *See supra* note 103 and accompanying text.

In part II above, I identified three major features of Hart's theory of criminal law. First, punishment is restricted to offenders; second, even "objective" fault standards contain a "subjective" or agent-related component; and third, excuses are available even where disallowing them might be justified on a purely utilitarian view.[145] Hart explained all of these restrictions on criminal liability as consequences of a very basic notion of fairness, i.e., no one should be held criminally accountable for actions or consequences that he or she could not have helped. But this notion of fairness, as we saw, was treated less as a brute moral fact about existing legal systems than as a normatively desirable feature, itself resting on the importance of preserving individual powers of decision-making in a legal order. Similarly, in Part III, I argued that the central value in Hart's critique of Devlin's legal moralism was that the law should be hesitant to use the criminal sanction in the absence of any evidence that the behavior sanctioned is harmful, but that this value was supported by ideas of legality which in turn were related to Hart's conception of how morality operates in a democratic society.[146]

But, more fundamentally, the values that Hart invokes in his analysis of criminal law and in his debate with Devlin are closely related to the analytical tools he uses in his positive jurisprudence. That is, the idea that law as a system of rules is not a mere system of incentives or goads but a set of reasons addressed to choosing agents appears in Hart's criminal law writing as a desirable feature of a legal system and in his jurisprudential writing as part of the definition of a legal system. Indeed, because Hart's criminal law writing can be understood as having a descriptive as well as a normative or critical element, this idea plays a dual role in that writing. It is very hard to resist the conclusion that Hart's criminal law project does not respect the separation thesis, in that it uses the same tools for both descriptive and normative purposes.

Hart might have two responses to these observations. First, he might give up the claim that his criminal law project is a descriptive one and argue that its purpose is entirely normative: to justify and defend the view that criminal law can and should coherently combine utilitarian and retributive features. This response would be extremely plausible, in that it would require Hart to repudiate very little of his criminal law writing and would make it consistent with his position in the Hart-Devlin debate.

But, this response would require Hart to engage in a more explicit normative defense of his synthesis than he would like. The reason Hart cannot do this is contained in a brief passage in *The Concept of Law*:

> The idea that the substantive rules of the criminal law have as their function (and, in a broad sense, their meaning) the guidance not merely of officials operating a system of penalties, but of ordinary citizens in the activities of non-official life, cannot be eliminated *without jettisoning cardinal distinctions and obscuring the specific*

145. *See supra* Part II.
146. *See supra* Part III.

> *character of law as a means of social control.* A punishment for a crime, such as a fine, is not the same as a tax on a course of conduct, though both involve directions to officials to inflict the same money loss. What differentiates these ideas is that the first involves, as the second does not, an offence or breach of duty in the form of a violation of a rule to set up to guide the conduct of ordinary citizens.[147]

The idea of law as something that is addressed to citizens in their capacity as agents is central to Hart, not only as a desirable feature of a legal order, but also as a tool for distinguishing a legal order from a non-legal order. The distinction between law and orders backed by threats,[148] the analysis of the characteristics of obligation,[149] and the function of the rule of recognition as a remedy for the uncertainty in the application of primary rules[150] all depend on this notion of law as rules, that is, as guides to and facilitators of conduct. It seems that, on Hart's view, a system that did not guide conduct in this way would not merely be a bad legal system, but would be no legal system at all, because it would not be a system of rules.[151]

I assume, therefore, that Hart would not want to give up the claim that his analysis of criminal law is, at least in part, in a positivist mode, because to give up that claim would jeopardize too many of the basic distinctions on which his positivism rests. A second, more promising response is contained in the 1994 "Postscript" to *The Concept of Law*. Dealing at length with Dworkin's criticisms of his jurisprudential project, Hart distinguishes between "plain-fact positivism," which holds "that the criteria of legal validity . . . should consist exclusively of the specific kind[s] of plain fact which he [Dworkin] calls 'pedigree' matters and which concern the manner and form of law-creation or adoption,"[152] and "soft positivism," which "acknowledge[s] that the rule of recognition may incorporate as criteria of legal validity conformity with moral principles or substantive values."[153] He complains that Dworkin incorrectly labels him a plain fact positivist and asserts instead that he is a "soft

147. HART, *supra* note 1, at 39 (emphasis added). *Compare* HART, PUNISHMENT, *supra* note 3, at 23 *with* HART, *supra* note 1, at 39.

148. *See* HART, *supra* note 1, at 27-33.

149. *See id.* at 87.

150. *See id.* at 94-95.

151. MacCormick draws a different conclusion from the observation that for Hart law consists of certain types of rules. In Hart's system, he says, "it seems simply inconceivable that appeals to law—even iniquitous law—can ever shed their moral load. That is and has to be one of the messages emanating from a hermeneutic study like Hart's of laws as special social rules." MACCORMICK, *supra* note 2, at 161. Although he agrees with Hart that "criteria of legal validity neither are identical with nor include criteria of moral value," he argues that "there is at least one necessary conceptual link between the legal and the moral, namely that legal standards and moral standards both belong within the genus of practical reasons for action, whatever be their weight as such." *Id.* I do not disagree with MacCormick's conclusion, but suggest that it does not go far enough: for Hart, a legal system that does not consist of rules that have the characteristics Hart identifies would, I suggest, not be a legal system.

152. HART, *supra* note 1, at 250.

153. *Id.*

positivist."[154]

Dworkin also contends that this type of positivism is too soft to count as positivism at all, in that it admits too much morality into the analysis of what law is, and so violates the separation thesis:

> If a social practice makes morality systematically relevant to legal issues . . ., then the truth of propositions of law will systematically depend upon the truth of propositions of morality. The truth of the former will consist at least partially, in the truth of the latter. So the promised ontological separation of law from morals fails.[155]

The problem this creates for the positivist, Dworkin argues, is that it undermines the positivist "ambition . . . to make the objective standing of propositions of law independent of any controversial theory either of meta-ethics or of moral ontology."[156] But Hart rejects this argument as well, saying that it "exaggerate[s] both the degree of certainty which a consistent positivist must attribute to a body of legal standards and the uncertainty which will result if the criteria of legal validity include conformity with specific moral principles or values."[157] Hart is, of course, right to disavow this degree of certainty. But, the point of Dworkin's critique, and of my discussion of Hart's approach to criminal law, is rather to suggest that soft positivism implicitly gives up the separation thesis, though I would express the point slightly differently from Dworkin: where legal values are themselves used to identify what law is, it is virtually impossible to avoid some sort of connection between what law is and what law ought to be[158] because something which purports to be law but is extremely defective from the point of view of legality will not count as law, even for Hart.[159]

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154. *See id.* at 250-54.

155. Ronald Dworkin, *A Reply*, *in* RONALD DWORKIN AND CONTEMPORARY JURISPRUDENCE 247, 249 (Marshall Cohen ed., 1983). Dworkin is here responding both to Hart and to Soper, and on this occasion neither of them used the term "soft positivism." *See* E. Philip Soper, *Legal Theory and the Obligation of a Judge: The Hart/Dworkin Debate*, *in* RONALD DWORKIN AND CONTEMPORARY JURISPRUDENCE 3 (Marshall Cohen ed., 1983); H.L.A. Hart, *Between Utility and Rights*, *in* RONALD DWORKIN AND CONTEMPORARY JURISPRUDENCE 214 (Marshall Cohen ed., 1983). Elsewhere, Dworkin uses the term "soft conventionalism" to describe a similar position. *See* RONALD DWORKIN, LAW'S EMPIRE 124 (1986). Waluchow defines and defends an "inclusive positivism" which is similar if not identical to the "soft positivism" that Hart adopts in the "Postscript." *See* WILFRED WALUCHOW, INCLUSIVE LEGAL POSITIVISM 82 (1994).

156. Dworkin, *supra* note 155, at 250.

157. HART, *supra* note 1, at 251.

158. The counterexample to this claim would have to be a system that did not recognize any legal values but was nonetheless identifiable as a legal system. I question whether such an example is conceivable for Hart. A different but related sort of counterexample is envisaged by Fuller: "Does Hart mean to assert that history does in fact afford significant examples of regimes that have combined a faithful adherence to the internal morality of law with a brutal indifference to justice and human welfare?" FULLER, *supra* note 6, at 154. For a discussion of whether the South African legal system under apartheid is such a counterexample, see DAVID DYZENHAUS, HARD CASES IN WICKED LEGAL SYSTEMS (1991).

159. For example, although the decision in *Shaw v. Director of Public Prosecutions*, 1962 App. Cas. 223 (appeal taken from Eng.), is law, it is doubtful whether a criminal code consisting only of an injunction to punish immoral behavior would count as law for Hart.

Indeed, in defending the possibility of soft positivism, Hart shifts quickly and easily to the very values I have argued underlie his account of criminal law:

> [E]ven if laws could be framed that could settle in advance all possible questions that could arise about their meaning, to adopt such laws would often war with other aims which law should cherish. . . . The underlying question here concerns the degree or extent of uncertainty which a legal system can tolerate if it is to make any significant advance from a decentralized regime of custom-type rules in providing generally reliable and determinate guides to conduct identifiable in advance.[160]

Once again, as in Hart's account of criminal liability, the idea of law as a system of rules providing some degree of certainty but accommodating other values appears as both an explanatory device and as something to be desired. Soft positivism does not separate these two projects as sharply as Hart's more uncompromising statements of the separation thesis would imply.[161]

The response Hart actually offered to Fuller's critique was to admit Fuller's point and to minimize its impact. If the requirements of legality are all that is meant by "a necessary connection between law and morality, . . . we may accept it. It is unfortunately compatible with very great iniquity."[162] But Hart sees legality in this sense in its minimal procedural sense, rather than in the somewhat richer sense intended by Fuller and implicit, as I have suggested, in his own analysis of criminal law. It is true that the morality of legality is not equivalent to the full range of goods and virtues that a social order might possess,[163] but by conceiving of law as something that addresses itself to choosing agents, as Hart did, we give legality more content than that required for a merely efficacious law, which need only control conduct.

V. CONCLUSION

In this Article, I have suggested that Hart's analysis of criminal law is a particularly good illustration of the central weakness of positivist projects: the positivist's claim that the positive identification of law is separate from the moral validity of law is never quite believable, because the tools used to identify law and to assess law tend to overlap. In Hart's case, although his advocacy of a utilitarian General Justifying Aim of

160. HART, *supra* note 1, at 251-52.

161. A third possible response, related to the second, would be to argue that the "goodness" of legality is an instrumental type of goodness, a form of efficiency only. *See* RAZ, *supra* note 122, at 225-26. This response seems to be vulnerable to a version of Fuller's argument cited in note 158, *supra*, namely the difficulty of identifying an actual regime in which legality was invoked for purely evil purposes. But, in any event, Hart would be unlikely to invoke Raz's argument on this point, because Raz's view that the goodness of legality is purely instrumental is closely bound up with his rejection of soft positivism. *See* RAZ, *supra* note 122, at 42-43.

162. HART, *supra* note 1, at 207.

163. *See* FULLER, *supra* note 6, at 184-86; RAZ, *supra* note 122, at 219-23.

punishment is reasonably well separated from his views about what the law positively states, his advocacy of certain criteria of justice as limits on the operation of the General Justifying Aim in the distribution of punishment is not. His account of what law is—an open-textured system of rules—and his account of what criminal law should be—a guide to choosing agents—are intimately connected, in that both depend on a concept of law as a rule-based system that addresses itself to a moral agent, rather than as a set of incentives to good behavior.

Hart's reluctance to give up the separation thesis in the face of this overlap is undoubtedly due to his strongly held belief that the separation of law and morality is vital to the maintenance of a critical attitude towards the law. But abandonment of the separation thesis in its strong form need not mean abandonment of a critical approach to positive law. Even if we are prepared to say that some systems of positive law are so defective on moral grounds that they do not qualify as law,[164] we need not say that every law or legal system we disapprove of on moral or other normative grounds is not really law. The relationship between the analysis of what the law is and advocacy of what the law ought to be is closer than the separation thesis admits, but not so close as to entail the dangers of blind acceptance or analytical incoherence that Hart fears. The fact that a law has been enacted through an authoritative procedure not only enables us to identify it as law, but also gives us a reason (not necessarily a decisive reason) to obey it. At the same time, both the quality of the procedure followed and the content of the law itself are always open to criticism, and this criticism may in turn produce doubts about the legitimacy of the authority which promulgated the law and thereby call into question its positive authority.[165] This is a process in which "law as it is and law as it ought to be"[166] or "positive and critical morality"[167] are two poles on a continuum, rather than completely separate projects. And Hart's own work, most obviously in his uncertainty about the status of his criminal law project, illustrates this polarity.

Indeed, Hart's approach to criminal law is almost ideally suited to play both a critical and a descriptive role, in that it is an undogmatic attempt to find room for two opposed principles, both of which have value in a system of criminal justice: utilitarianism and retributivism. Any satisfactory account of modern criminal law must, I think, find a "middle way . . . between a purely forward-looking scheme of social hygiene and . . . retribution"[168] because only such an account will be able to explain and justify

164. I have argued above that the possibility of saying this is implicit in Hart's own work, though it is unlikely that he would have accepted this view.

165. *See* DAVID DYZENHAUS, LEGALITY AND LEGITIMACY: CARL SCHMITT, HANS KELSEN AND HERMANN HELLER IN WEIMAR 250-58 (1997); David Dyzenhaus, *The Legitimacy of Legality*, 46 U. TORONTO L. J. 129, 165-80 (1996) (book review).

166. HART, ESSAYS IN JURISPRUDENCE, *supra* note 71, at 84.

167. HART, LAW, *supra* note 3, at 17.

168. HART, PUNISHMENT, *supra* note 3, at 233.

both the harm-oriented and agency-oriented aspects of criminal law.[169] The enduring value of Hart's analysis of criminal liability consists in the resources it continues to supply to such projects.

169. Contemporary accounts of criminal law tend to over-emphasize its harm-controlling aspects at the expense of its agency-structuring aspects. *See, e.g.*, FEINBERG, *supra* note 7; HARM AND CULPABILITY (A.P. Simester & A.T.H. Smith eds., 1996). *See also* BRUDNER, *supra* note 8, at 211-60 (attempting to articulate harm and agency in criminal law as part of a Hegelian whole).

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