

BOOKS IN REVIEW

Hart to Hart

By James Srodes from the June 2009 issue

In the Name of Justice: Leading Experts Reexamine the Classic Article “The Aims of the Criminal Law”

Edited by Timothy Lynch

(Cato Institute, 251 pages, \$19.95)

At the start of the one unsatisfactory year I labored at Duke Law School in the early 1960s, our criminal law professor passed out two mimeographed supplements to our regular course casebook. One was a summary of the details of the major categories of sex crimes “to save you the wasted time looking them all up for your amusement.”

The other was a bootlegged copy of a note prepared a few years earlier by Harvard Law School’s legendary Henry M. Hart, Jr., for his own first-year criminal law students. Law schools in those days (and perhaps even now) had their own *samizdat* network of pirated cribs from other schools, and the Hart memo had been widely circulated. Our professor held up the casebook in one hand and the Hart memo in the other. “This [the casebook] will tell you *what* the criminal law is, and this [the memo] will tell you *why*.”

While I was clearly not meant for a career in the law, I found many times during the next 40-odd years that my exposure to the way the law is organized, its special reasoning—in short, the *why* of it—made me better able to understand the political and economic events I was charged with reporting and translating. That’s why this 50th anniversary reexamination of Hart’s influential theory of the criminal law should interest both practicing attorney and any layman stupefied by the changes in both law and society going on around us.

To Hart all law is more than a set of arbitrary prohibitions, but criminal law is even more a seminal agent for a community. He wrote:

Man is a social animal, and the function of law is to enable him to realize his potentialities as a human being through the forms and modes of social organization. It is important to consider how the criminal law services this ultimate end....What is crucial in this process is the enlargement of each individual’s capacity for effectual and responsible decision. For it is only through personal, self-reliant participation, by trial and error, in the problems of existence, both personal and social, that the capacity to participate effectively can grow. Man learns wisdom in choosing by being confronted with choices and by being made aware that he must abide the consequences of his choice. In the training of a child in the small circle of the family, this

principle is familiar enough. It has the same validity in the training of an adult in the larger circle of the community.

Seen in this light, the criminal law has an obviously significant and, indeed, a fundamental role to play in the effort to create a good society. For it is the criminal law which defines the minimum conditions of man's responsibility to his fellows and holds him to that responsibility. The assertion of social responsibility has value in the treatment even of those who have become criminals. It has far greater value as a stimulus to the great bulk of mankind to abide by the law and to take pride in so abiding.

The end result, the enforcement of criminal law, should be clear enough for all society to understand what is going on, Hart concluded. "Punishments should be severe enough to impress not only upon the defendant's mind, but upon the public mind, the gravity of society's condemnation of irresponsible behavior. *But the ultimate aim of condemning irresponsibility is training for responsibility.*" (Emphasis added.) Criminal law to Hart was not just to dissuade and punish malefactors; it also was to bolster the law-abiding citizen in his good behavior. It's a point one rarely hears these days.

While the book is worth its price just for making Hart's long-ago memo accessible to a new generation of readers, its focus is a collection of essays compiled by Timothy Lynch, the director of the Cato Institute's Project on Criminal Justice. The purpose of the reconsideration acknowledges that the theoretical underpinnings of criminal law have changed so dramatically—alarmingly, even—that some notice should be taken. But when one reads the list of contributors, there is a first impulse to wonder whether Lynch was having a joke in rather bad taste at Hart's expense. Cato by tradition is not intellectually afraid to make available the views of thinkers of less orthodox persuasions, but in this case some of the commentators take individualism past the boundaries of eccentricity and into the realms of the bizarre.

The very first commentary that follows Hart's memo is by Judge Alex Kozinski, chief judge of the U.S. Court of Appeals for the Ninth Circuit. A 1982 Reagan appointee in the notoriously liberal circuit, Kozinski has built a reputation as a somewhat lighthearted dissenter. But last year he found it hard during hearings on an obscenity case to laugh away charges that he—according to the *Los Angeles Times*—"maintained a publicly accessible Web site featuring sexually explicit photos and videos" at alex.kozinski.com. Among the images the newspaper cited was a photo of naked women on all fours painted to look like cows and a video of a half-dressed man and some farm animals. In conceding the sexual material was inappropriate, Kozinski called the site's other content "funny."

This adds a certain piquancy to the title of Judge Kozinski's commentary on Hart, "You're (Probably) a Federal Criminal." He starts off with a truly astonishing assertion: "Since most people have committed at least one crime carrying serious consequences, police and prosecutors choose who'll actually suffer for their crimes." His specific target is reasonable enough, if somewhat overstated. "There are thousands of federal crimes and hundreds of thousands of federal regulations that can be criminally enforced." But then he launches into outer space with the blanket accusation that the proliferation of federal rules "becomes a loaded gun in the hands of any malevolent prosecutor or aspiring tyrant."

There are other examples of where the messenger, if not the message, gives the reader pause. Justice Richard B. Sanders of the state of Washington's supreme court is a noted libertarian

whose entirely apposite commentary expresses a concern for the proliferation of “civil commitments” that social agencies use to confine or otherwise limit the freedoms of individuals outside the legal system. His particular target is his state’s extra-judicial so-called sexually violent predator laws, the forerunners of which Hart specifically warned about in his essay.

Sanders, unfortunately, is something of a home-state character, albeit a popular one. Just last November he stood up in the middle of a speech to the Federalist Society in Washington, D.C., and yelled “Tyrant. You are a tyrant!” at ailing Attorney General Michael Mukasey, who shortly afterward collapsed and was carried off to a hospital. Since then, Justice Sanders has published an op-ed piece in the *Seattle Times* urging the Obama administration’s Attorney General Eric Holder to prosecute Bush administration officials for violations of the Constitution during their war on terrorism.

IT IS ONE GETS TO THE ESSAY by Harvard gadfly Harvey Silverglate that one begins to suspect what editor Timothy Lynch is up to. A noted civil liberties (read: ACLU) litigator, Silverglate notes that Hart foreshadowed the current concern about the extension of criminal sanctions to acts that legislatures have not specifically prohibited. His more recent public statements, for example, have protested the U.S. Securities and Exchange Commission’s announced intentions to probe whether Apple founder Steven Jobs misled investors by not fully disclosing details of his health crisis.

Even a one-year law student knows that the law is a plastic thing, not hewn out of immutable granite. By including commentary from those one might at first glance consign to the outer fringes of legal analysis— but who have standing in their areas—the Cato reconsideration of Henry Hart is one, I will venture, that Hart himself would have endorsed. We are squarely in a time that Hart warned about, when criminals are portrayed as “victims” of the society they inhabit and are entitled to “treatment,” without regard to the victim or the far broader law-abiding population. So in this time of what we might call the Rev. Jeremiah Wright Theory of American Law, Justice, and Society, we need to know what its various advocates are saying.

So, quite properly, Alan Dershowitz, probably the most loquacious of cable television’s legal chatterers, should be read for raising a very timely question, “How Would Henry Hart Have Approached the Problem of Suicide Terrorism?” After all, how can the law prevent a violent criminal act by a perpetrator whose self-destruction is his goal?

Lest you think Lynch and Cato have become prisoners of fringe loonies, be advised there also are cogent insights from voices more familiar to *Spectator* readers, including James Q. Wilson and Judge Richard Posner. As a lagniappe, Lynch has included a still relevant 1984 essay by Milton and Rose Friedman, a 2003 address to the American Bar Association by Supreme Court justice Anthony M. Kennedy, and a particularly timely speech made in 1940 by then attorney general Robert H. Jackson, the Supreme Court justice who later served as the chief U.S. prosecutor at the Nuremberg war crimes trials. His comments on the role of the federal prosecutor should be required reading—especially by today’s federal prosecutors.

Read this book. Then think about it.

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