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The Challenge of the Bad Man

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See table of contents

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Article abstract

H.L.A. Hart's insight, that some people may be guided by an offence provision because they take it as authoritative and not merely to avoid sanctions, has had an enormous influence upon criminal law theory. Hart, however, did not claim that any person in any actual legal order in fact thinks like the "puzzled man", and there is lingering doubt as to the extent to which we should place him at the center of our analysis as we try to make sense of moral problems in the criminal law. Instead, we might find that our understanding of at least some issues in criminal law theory is advanced when we look through the eyes of Holmes' "bad man". This becomes clear when we consider the respective works by Hart and Douglas Husak on overcriminalization, James Chalmers and Fiona Leverick's recent discussion of fair labeling, and Meir Dan-Cohen's classic analysis of acoustic separation. These works also suggest, in different ways, that an emphasis on the bad man can expose the role of discretion in criminal justice systems, and the rule of law problems it generates.

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THE CHALLENGE OF THE BAD MAN

*Michael Plaxton**

H.L.A. Hart's insight, that some people may be guided by an offence provision because they take it as authoritative and not merely to avoid sanctions, has had an enormous influence upon criminal law theory. Hart, however, did not claim that any person in any actual legal order in fact thinks like the "puzzled man", and there is lingering doubt as to the extent to which we should place him at the center of our analysis as we try to make sense of moral problems in the criminal law. Instead, we might find that our understanding of at least some issues in criminal law theory is advanced when we look through the eyes of Holmes' "bad man". This becomes clear when we consider the respective works by Hart and Douglas Husak on overcriminalization, James Chalmers and Fiona Leverick's recent discussion of fair labeling, and Meir Dan-Cohen's classic analysis of acoustic separation. These works also suggest, in different ways, that an emphasis on the bad man can expose the role of discretion in criminal justice systems, and the rule of law problems it generates.

La suggestion de H.L.A. Hart que certaines personnes obéissent à une disposition pénale car ils la considèrent comme une source d'autorité, plutôt que pour simplement éviter des sanctions, a eu une énorme influence sur la théorie du droit pénal. Cependant, Hart n'a pas prétendu que, dans les faits, toute personne dans n'importe quel ordre juridique réel pense comme « l'homme perplexe » et il existe des doutes persistants quant à la mesure dans laquelle nous devrions le placer au centre de notre analyse alors que nous essayons de donner un sens à des problèmes moraux au sein du droit pénal. Plutôt, nous pourrions découvrir que notre compréhension d'au moins quelques questions de théorie du droit pénal est améliorée lorsque nous regardons à travers les yeux de l'« homme mauvais » de Holmes. Cela devient évident lorsque l'on considère les œuvres respectifs de Hart et Doublas Husak sur la surcriminalisation, la discussion récente de James Chalmers et Fiona Leverick sur l'étiquetage équitable et l'analyse classique de Meir Dan-Cohen sur la séparation acoustique. Ces travaux suggèrent également, de différentes manières, qu'un accent sur l'homme mauvais peut exposer le rôle de la discrétion dans les systèmes de justice pénale, et les problèmes de primauté du droit qu'il génère.

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* College of Law, University of Saskatchewan. I am grateful to Mark Carter, David Jenkins, Carissima Mathen, and Lisa Clark for their comments and suggestions on this paper, and to Dwight Newman, Glen Luther, Findlay Stark, James Chalmers, and Fiona Leverick for their comments on an earlier incarnation of it. The usual disclaimer applies.

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Introduction 453

I. Hart's Puzzled Man 454

II. Should We Care About the Puzzled Man? 456

III. The Bad Man and the Moral Limits of the Criminal Law 459

IV. Husak on Overcriminalization: Recalibrating the Terms of the Debate 465

V. Chalmers and Leverick on Fair Labelling 468

VI. Dan-Cohen and the Brutality of Acoustic Separation 474

Conclusion 479

Introduction

In *The Concept of Law*, H. L. A. Hart distinguished criminal offences from "orders backed by threats."[1] He did so by observing that a person might be guided by an offence provision not because it credibly threatens her with sanctions, but because she takes it as an authoritative pronouncement that the course of conduct it prohibits is wrongful. This insight has had an enormous influence upon criminal law theory. Hart, however, did not claim that any person in any actual legal order responded to criminal prohibitions in the manner of the "puzzled man", and there is lingering doubt as to the extent to which we should place him at the centre of our analysis as we try to make sense of moral problems in the criminal law. Instead, we might take Holmes' bad man—the person who responds to the threat of sanctions—as our model.

In this paper, I want to make three modest and related claims. First, I argue that with respect to some issues in criminal law theory, it is appropriate to assume that compliance with criminal prohibitions is driven, at least in part, by fear of sanctions rather than by respect for legal authority. Second, I argue that once we premise law's effectiveness on the fear of sanctions, our attention is inevitably drawn away from the role of the legislature in the criminal justice system and toward the discretionary decisions of executive actors (e.g., police officers and prosecutors). Finally, this emphasis on discretion makes apparent ubiquitous rule-of-law problems that an emphasis on the puzzled man would tend to obscure. To make these claims, I draw upon four works presupposing that at least some legal subjects respond to criminal prohibitions in the manner of the bad man: Hart's *Law, Liberty, and Morality*, Douglas Husak's important book on overcriminalization, James Chalmers and Fiona Leverick's recent paper on fair labelling, and Meir Dan-Cohen's noteworthy paper on acoustic separation.[2]

This paper proceeds in six Parts. Parts II to IV dwell predominantly on Hart's use of the puzzled man and the bad man in his work on jurisprudence and criminal law theory. Part II explains Hart's argument that an appreciation of law's normativity requires us to conceptually separate criminal prohibitions from criminal sanctions. This point, we will see, has

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1 HLA Hart, *The Concept of* Law, 2d ed (Oxford: Clarendon Press, 1994) [Hart, *The Concept of Law*].

2 HLA Hart, *Law, Liberty, and Morality* (Stanford: Stanford University Press, 1963) [Hart, *Law, Liberty, and Morality*]; Douglas N Husak, *Overcriminalization: The Limits of the Criminal Law* (Oxford: Oxford University Press, 2008); James Chalmers & Fiona Leverick, "Fair Labelling in Criminal Law" (2008) 71:2 Mod L Rev 217; Meir Dan-Cohen, "Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law" (1984) 97:3 Harv L Rev 625.

been quite influential. Part III warns against reading too much into Hart's discussion of normativity in *The Concept of Law*. His object, there, was to make a conceptual claim about the nature of law, and not an empirical claim about the attitude that actual citizens in any actual legal orders have toward criminal prohibitions. Hart did not deny, then, that some (perhaps many or all) citizens could obey criminal prohibitions solely to avoid sanctions. We will see in Part IV, moreover, that Hart's own arguments about the moral limits of the criminal law presuppose that at least some of those subject to criminal prohibitions would think along the lines of a Holmesian bad man.

Parts V and VI examine the role of the bad man in three later works in criminal law theory, and show that this shift in emphasis toward the bad man leads us to devote closer attention to the role and significance of administrative discretion in the criminal justice system. In Part V, we will see that Douglas Husak's objection to overcriminalization is premised on the scope of discretion enjoyed by prosecutors when deciding whether and how to charge suspects for alleged violations of the criminal law, and on the fact that this discretion interferes with the ability of citizens to weigh the costs attached to law breaking. Husak's understanding of overcriminalization as a rule-of-law problem, then, is grounded in his presupposition that citizens frequently think like Holmes' bad man. In Part VI, moreover, I look at Chalmers and Leverick's recent discussion of fair labelling. Like Husak, they anticipate that members of the public obey the criminal law primarily to avoid sanctions and not wrongdoing as such. Fair labelling, on their reading, is a concern insofar as executive actors fail to explain to offenders how and why their conduct was subject to sanctions. This transforms the issue of fair labelling into a problem of administrative discretion rather than a problem with the way in which criminal legislation is crafted.

Finally, in Part VIII, I consider Dan-Cohen's paper on acoustic separation. Dan-Cohen argues that, inasmuch as some citizens obey the law only to avoid sanctions, the law's concealment of the rules guiding discretion in the criminal justice process amounts to a kind of brutality. In taking that view, Dan-Cohen echoes concerns expressed by Husak that police and prosecutorial discretion are problematic from a rule-of-law perspective. And, although Chalmers and Leverick's analysis could be seen as a reply to Dan-Cohen, their approach ultimately raises new rule-of-law issues.

I. Hart's Puzzled Man

In *The Concept of Law*, Hart purported to show that laws are not merely "orders backed by threats" akin to the demands of an armed ban-

dit.[3] We may obey the bandit only insofar as she has the power to *oblige* us to do so; that is, to the extent she makes threats that are sufficiently terrible, and convinces us that she is willing and able to enforce them if and when we fail to comply with her demands.[4] By contrast, Hart argued, at least some people obey the substantive criminal law because they regard themselves as *obligated* to do so (i.e., because they believe they ought to follow the substantive rules it contains) whether or not a threat of punishment is attached to a criminal prohibition, and whether or not there is any realistic prospect that violations of the prohibition will be investigated, prosecuted, or punished. For these people, represented in *The Concept of Law* by the figure of the "puzzled man", the very fact that a course of conduct has been declared criminal by the legislature provides a reason to regard it as wrongful, and therefore as a course of action to be avoided. The criminal law's normative significance distinguishes it from the orders of the gunman.

Once we look at the criminal law through the eyes of the puzzled man, Hart claimed, we are better able to understand how it is distinct from other legal rules. The law is shot through with provisions setting out the circumstances under which a member of the public may be subjected to one sort of deprivation or another. Income tax legislation sets out the conditions under which a person may be moved into a higher tax bracket. Civil forfeiture laws articulate some of the conditions under which a person may be deprived of property. Civil commitment legislation tells us some of the circumstances under which the mentally ill may be forcibly detained. Each of these statutory provisions aims simply at distributing benefits and burdens. At first glance, we might regard the substantive criminal law in the same way as we regard these other provisions—as statements of the conditions under which a person will undergo a deprivation (either in the form of a fine or a term of imprisonment). To the puzzled man, though, they are not the same. Income tax legislation does not aim at discouraging people from earning more income. Property may be seized as proceeds of crime whether or not it was obtained in a blameworthy fashion. If and when the mentally ill are forcibly committed, it is for the sake of their own well-being or the protection of others, and not because they have done anything warranting disapproval. Criminal punishment, on the other hand, necessarily is administered to censure the offender for engaging in wrongdoing—for breaching an obligation. It is in this sense that a fine is materially different from a tax; that a prison sentence is different from state-imposed quarantine.

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3 Hart, *The Concept of Law*, *supra* note 1 at 19.

4 *Ibid* ch 2.

To say that criminal sanctions are supposed to censure wrongdoing, rather than distribute benefits and burdens, is just to make a common-sense (but, before Hart, surprisingly elusive) observation: the primary purpose of the substantive criminal law is not to tell police officers when they can arrest citizens,[5] prosecutors when (and what) they can charge, triers of fact when they can convict, and judges what kinds of sentences they can deliver. Rather, its central object is to guide citizens away from the kinds of wrongful conduct that, if proven, warrant criminal deprivations in the first place. If the criminal law truly functioned as it should—if it successfully and authoritatively conveyed the wrongfulness of all the courses of action it sought to condemn—there would be no crimes to prosecute or punish.[6]

II. Should We Care About the Puzzled Man?

Despite Hart's influence, it is not universally accepted that we can conceptually separate the criminal law's normative force from the use of sanctions. There are at least two reasons for doubt. First, Hart did not suggest that everyone—or even anyone—in a given legal order has the puzzled man's "socialized" perspective of the criminal law.[7] His project, remember, was only to describe "the concept of law"; to provide an account of the essential features of law, as opposed to the contingent features of any particular legal order.[8] To that end, Hart observed that it is possible to imagine a legal order in which sanctions are not used to enforce prohibitions.[9] He invoked the puzzled man to illustrate how and why a person could regard a criminal prohibition as obligation-creating even in the absence of a sanction. But Hart never insisted that citizens in any particular legal system ought to think about the criminal law in the fashion of the puzzled man, and did not claim that any actual citizens do.

Second, there is something suspicious about Hart's suggestion that legal obligations can be conceptually divorced from sanctions. His argument was primarily grounded in the observation that when ordinary people speak of having an "obligation" to do something, they mean something

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5 I use the term "citizen" as a shorthand for "members of the public." Obviously, the substantive criminal law is meant to guide everyone within a country's borders, not only "citizens" in the strict sense.

6 Hart, *The Concept of Law*, *supra* note 1 at 38-39.

7 *Ibid* at 198.

8 *Ibid* at 239.

9 *Ibid* at 198 (noting that sanctions are not required as the "normal motive" for obeying the law, but only as a "guarantee").

other than that they are "obliged" to do it.[10] We might speak of the gunman "obliging" us to do his bidding, Hart argued, but surely not of him "obligating" us to do so. The trouble with this argument, as Schauer has recently noted, is that it is not self-evident that we *do* use these words in importantly different ways—we frequently speak of people with obligations as being "obliged", and of people who are obliged as having "obligations".[11] We should not make too much of this point; at any given time, we may slide between talk of being "obliged" and talk of having "obligations" because we cannot be bothered to reflect on whether we have, at that moment, a genuine duty. Fuzzy usage may simply reflect fuzzy thinking.[12] This in itself, though, suggests that we should not rely on conventions of usage as a central pillar in an account of legal obligations.

If we discard Hart's argument on the distinction between "obliged" and "obligated", it begins to appear quite problematic to claim, as a descriptive matter, that we can have legal obligations in the absence of at least the threat of sanctions.[13] Hart produced no empirical evidence in support of such a claim.[14] As we have seen, he thought it unnecessary (indeed, counterproductive) to examine the features of any actual legal systems given that his aim was to describe the essence of law. But if his account of the essence of law omits a feature that many of us consider an important fact about all legal systems in the world as we know it—that they deploy sanctions—then we may well wonder how it is, properly speaking, a description at all. This is all the more true with respect to the *criminal* law, which, Hart pointedly observed, best (if imperfectly) fits the Austinian sanction-based theory.[15]

We may agree, of course, that a society in which citizens obey the law because they regard legal obligations as legitimately imposed has, all other things being equal, a healthier legal order than one in which sanctions (whether formal or informal) are relied upon to secure compliance.[16] Cer-

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10 *Ibid* at 82-91. See also Leslie Green, "Positivism and the Inseparability of Law and Morals" (2008) 83:4 NYUL Rev 1035 at 1048-49.

11 Frederick Schauer, "Was Austin Right After All? On the Role of Sanctions in a Theory of Law" (2010) 23:1 Ratio Juris 1 at 12-14.

12 See Andrew Halpin, *Definition in the Criminal Law* (Oxford: Hart Publishing, 2004).

13 See Schauer, *supra* note 11 at 13.

14 This point lies at the heart of the criticism that *The Concept of Law* fails as a "descriptive sociology": see Stephen R Perry, "Hart's Methodological Positivism" (1998) 4:4 Legal Theory 427.

15 Hart, *The Concept of Law*, *supra* note 1 at 31.

16 See Dale A Nance, "Rules, Standards, and the Internal Point of View" (2006) 75:3 Fordham L Rev 1287 [Nance, "Internal Point of View"]; W Bradley Wendel, "Lawyers, Citizens, and the Internal Point of View" (2006) 75:3 Fordham L Rev 1473.

tainly, it may be worthwhile to consider how citizens can be encouraged to think like the puzzled man, and thereby reduce the (perceived) need for legal institutions to rely upon threats. But if we want to explain how the criminal law actually *does* create obligations and how it ought to function in the world in which we live, we may think it wise to recognize the fact that many citizens do not resemble the puzzled man in the way they think about criminal prohibitions. Instead, they think (at least sometimes) like Holmes' "bad man", the figure "who cares only for the material consequences which ... knowledge [of the law] enables him to predict."[17] To the bad man, the substantive criminal law is useful, not mainly (or, anyway, not only) because it signals which courses of action are morally wrongful, but because it makes it possible for him to predict when a deprivation will be imposed. In the eyes of the bad man, the criminal law lacks the normative significance it has for the puzzled man. To be sure, the bad man regards the substantive criminal law as an institution that affects how he ought to act, but only in the prudential, self-interested sense of "ought". He believes that he "ought" not to engage in speeding in the same sense in which he believes he "ought" not to earn just enough to fall into a higher income tax bracket—that is, because he stands to lose money by acting in these ways.[18] To say that the deprivation is a fine on one hand and a tax on the other is to draw a distinction without a difference to the bad man. By contrast, the puzzled man takes a criminal prohibition not only as a "harbinger of harm[s]" that may or may not happen to befall him if he runs afoul of it, but as a good and valid reason why others should subject him to strong criticism if he runs afoul of it.[19]

It was plainly with the bad man in mind that Hart remarked that, *practically* speaking, it may be inadvisable for a legal order to attempt to function without the threat of sanctions. This is not just because the bad man will respond to criminal prohibitions only to the extent that breaches will meet with deprivations. It is also because the puzzled man may feel himself under considerable pressure to violate the law if he knows that others are willing to do so, and can do so with impunity. As Hart said:

> [S]ubmission to the system of restraints would be folly if there were no organization for the coercion of those who would then try to obtain the advantages of the system without submitting to its obligations. "Sanctions" are therefore required not as the normal motive for obedience, but as a *guarantee* that those who would voluntarily

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17 OW Holmes, "The Path of the Law" (1897) 10:8 Harv L Rev 457 at 459.

18 *Ibid*. I proceed here on the basis that higher income tax rates are not levied on a marginal basis.

19 See Scott J Shapiro, "The Bad Man and the Internal Point of View" in Steven J Burton, ed, *The Path of the Law and Its Influence: The Legacy of Oliver Wendell Holmes, Jr.* (Cambridge, UK: Cambridge University Press, 2000) 197 at 198-200.

> obey shall not be sacrificed to those who would not. To obey, without this, would be to risk going to the wall.[20]

Notwithstanding Hart's observations about the lack of any necessary conceptual connection between obedience and sanctions, then, the bad man still exerted some pull on his analysis of the criminal law. To make this point is not to call into question Hart's central claims about law's normativity, but to note that his claim was conceptual, not empirical. Indeed, we may want to acknowledge that certain discrete issues in the substantive criminal law can be appreciated best if we approach them from the point of view of the bad man. The overcriminalization debate provides a case in point.

III. The Bad Man and the Moral Limits of the Criminal Law

For one familiar with Hart's path-breaking work on normativity, *Law, Liberty, and Morality*—his important reply to Lord Devlin on the moral limits of the criminal law[21]—can be a disorienting experience.[22] This is true for a number of reasons. First, Hart follows Devlin's lead in framing the central issue as one concerning "the legal *enforcement* of morality."[23] Indeed, at the outset of the book, he expresses an intention to address the following questions: "Is the fact that certain conduct is by common standards immoral sufficient to justify making that conduct *punishable* by law? Is it morally permissible to *enforce* morality as such? Ought immorality as such to be a crime?"[24] Hart, then, straightaway gives the impression that the prohibition per se of sexually immoral practices is not his primary concern; rather, his concern is with the use of the criminal law to coerce citizens into complying with accepted standards of sexual morality.

This is interesting from a thinker who, in *The Concept of Law*, rejected any necessary connection between obedience and the threat of sanctions. The clear implication was that the criminal law is not inherently coer-

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20 Hart, *The Concept of Law*, *supra* note 1 at 198 [emphasis in original]. Hart uses similar language in *Punishment and Responsibility: Essays in the Philosophy of Law*, 2d ed (Oxford: Oxford University Press, 2011) at 50 [Hart, *Punishment and Responsibility*].

21 See Patrick Devlin, *The Enforcement of Morals* (London: Oxford University Press, 1959). See also Nicola Lacey, *A Life of H.L.A. Hart: The Nightmare and the Noble Dream* (Oxford: Oxford University Press, 2004) at 256-59.

22 Hart, *Law, Liberty, and Morality supra* note 2.

23 *Ibid* at 4 [emphasis added].

24 *Ibid* [emphasis added].

cive[25] since the puzzled man will obey because he wants to avoid wrongdoing and accepts that the legislature is the final arbiter on what wrongdoing entails. Yet, the puzzled man is nowhere to be found in Hart's analysis of "what it is that is *prima facie* objectionable in the legal enforcement of morality."[26] Consider these remarks:

> [T]he idea of legal enforcement ... has two different but related aspects. One is the actual punishment of the offender. This characteristically involves depriving him of liberty of movement or of property or of association with family or friends, or the infliction upon him of physical pain or even death. All these are things which are assumed to be wrong to inflict on others without special justification.[27]

He continues:

> The second aspect of legal enforcement bears on those who may never offend against the law, but are coerced into obedience by the threat of legal punishment. ... [I]t is itself the infliction of a special form of suffering—often very acute—on those whose desires are frustrated by the fear of punishment. This is of particular importance in the case of laws enforcing a sexual morality. They may create misery of a quite special degree. For both the difficulties involved in the repression of sexual impulses and the consequences of repression are quite different from those involved in the abstention from "ordinary" crime. Unlike sexual impulses, the impulse to steal or to wound or even kill is not, except in a minority of mentally abnormal cases, a recurrent and insistent part of daily life. Resistance to the temptation to commit these crimes is not often, as the suppression of sexual impulses generally is, something which affects the development or balance of the individual's emotional life, happiness, and personality.[28]

The concern, in both passages, is not for the citizen who accepts the legislature's determination that some sexual practice or another is wrongful and decides on that basis not to engage in it—Hart's concern is for the person who does *not* accept it, and is either punished for disobedience or coerced into complying by "the threat of legal punishment." Insofar as we cannot separate his reasons for obeying—if he does—from the point that sanctions may be imposed for breach, the object of Hart's concern cannot be the puzzled man. Rather, it must be Holmes' bad man.[29] This is further

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25 On the point that law is not inherently *brutal*, see Jeremy Waldron, "Torture and Positive Law: Jurisprudence for the White House" (2005) 105:6 Colum L Rev 1681 at 1726-27.

26 Hart, *Law, Liberty, and Morality*, *supra* note 2 at 21.

27 *Ibid*.

28 *Ibid* at 21-22.

29 The fact that a person may be characterized as a Holmesian bad man merely because, or to the extent that, she is prepared to game or skirt laws enforcing sexual morality

underscored by the fact that Hart clearly thought it important to his argument to show that sexual offences in the United States were, at least occasionally, actually enforced and prosecuted:

> No doubt much, and perhaps most, of this American legislation against sexual morality is as dead a letter as it is commonly said to be. But the facts as to law enforcement are at present very hard to establish. In many states, California among them, the annual criminal statistics do not usually break down figures for sex crimes further than the two heads of "Rape" and "Other sexual offences." But in Boston as late as 1954 the sex laws were reported to receive "normal" enforcement, and in 1948 there were 248 arrests for adultery in that city. No one, I think, should contemplate this situation with complacency, for in combination with inadequate published statistics the existence of criminal laws which are generally not enforced places formidable discriminatory powers in the hands of the police and prosecuting authorities.[30]

Again, there is no obvious reason to care about arrest and prosecution statistics for sexual offences unless Hart's principal worry is that citizens face a real threat of prosecution and punishment, a concern that would be decidedly less urgent if citizens were guided by criminal prohibitions irrespective of sanctions.

That Hart himself framed the issue as one of unjust punishment and coercion is noteworthy because of the approach he took in *The Concept of Law*. He is not, however, the only significant thinker to pose the matter in these terms. Joel Feinberg, introducing his exhaustive four-volume work on the subject, defended his decision to focus exclusively on the criminal law in part by observing: "The threat of legal punishment enforces public opinion by putting the nonconformist in a terror of apprehension, rendering his privacy precarious, and his prospects in life uncertain. The punishments themselves brand him with society's most powerful stigma and

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underscores that there may not be anything especially "bad" about the bad man. He need not be evil, only insufficiently socialized to accept the legislature's determination that a given practice is truly wrongful. Indeed, criminal laws enforcing sexual morality so troubled Hart, as the above quotation suggests, because they require people who generally respect the law to choose between obedience and happiness. The photographer Cecil Beaton, lamenting that it had taken so long for consensual sodomy to be decriminalized in Britain, remarked: "It is not that I would have wished to avail myself of further licence, but to feel that one was not a felon and an outcast would have helped enormously during the difficult young years" (Hugo Vickers, ed, *Beaton in the Sixties: The Cecil Beaton Diaries as They were Written* (Michigan: Knopf Publishing, 2004) at 185). Lacey's biography of Hart shows that he would have been exceedingly sensitive to the "difficulties" to which Beaton alluded: see Lacey, *supra* note 21 at 74-75.

30 Hart, *Law, Liberty, and Morality*, *supra* note 2 at 27.

undermine his life projects, in career or family, disastrously."[31] Feinberg, like Hart in *Law, Liberty, and Morality*, emphasized the coercive aspects of criminalization—which is to say he presupposed that many citizens would not respond to at least some criminal prohibitions like Hart's puzzled man.

It is easy to see why Hart paid so little attention to the puzzled man in *Law, Liberty, and Morality*. Intuitively, the problem with illiberal uses of the criminal law-making power is that it diminishes the autonomy of citizens.[32] When people are made to comply with a criminal offence through the credible threat of sanctions, it is reasonably plain that their autonomy has been undermined to some extent. It is less obvious, however, that the autonomy of citizens is similarly undermined when they comply with a criminal statute just because they accept the legislature's determination that the course of action it has criminalized is indeed wrongful. It would, after all, be strange to infer that a person acts with something less than complete autonomy simply because she chooses not to act in a way that she believes would be a wrong way to act. By that reasoning, Dworkin's judges lack autonomy when they decide cases in the manner of Hercules rather than flip a coin;[33] Christian husbands and wives lack autonomy when they choose to live monogamously with one another; chess players lack autonomy when they choose to move their rooks only lengthwise across the board rather than diagonally; and English pub goers lack autonomy when they offer to buy the bartender a drink rather than offer a tip.[34] To be sure, Hart's puzzled man, Dworkin's judge, the faithful husband, the chess player, and the English pub goer are all constrained in *some* sense by the rules of the practice in which each is engaged, but only in the sense that each takes deviation from those rules as good and valid reasons for criticizing themselves.[35]

This is not to deny that a person's autonomy can be compromised by the beliefs she has. A person born into slavery may think it *right* to obey

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[31] Joel Feinberg, *The Moral Limits of the Criminal Law: Harm to Others*, vol 1 (Oxford: Oxford University Press, 1984) at 4.

[32] Consider the analysis in William Wilson, *Central Issues in Criminal Law Theory* (Oxford: Hart Publishing, 2002) ch 1.

[33] See Ronald Dworkin, *Taking Rights Seriously* (Cambridge, Mass: Harvard University Press, 1978) ch 4.

[34] See Kate Fox, *Watching the English: The Hidden Rules of English Behaviour* (London: Hodder & Stoughton, 2004) at 95-98.

[35] For the definition of a "practice", see Alasdair MacIntyre, *After Virtue: A Study in Moral Theory*, 3d ed (Notre Dame: University of Notre Dame Press, 2007) at 187-88. For Hart's discussion of rules, see Hart, *The Concept of Law*, *supra* note 1 ch 4-5.

her "master", never giving a thought to escape.[36] Women, particularly in developing countries, may believe it is wrong to learn even basic literacy skills, leaving themselves at the mercy of their families.[37] A person subjected to intense brainwashing may hold an entire set of values that we would hesitate to call her own.[38] We do not tend to think that merely because such people contentedly (or resignedly) act on the beliefs they hold, their autonomy is anything other than impaired. Quite the contrary, we think of them as essentially trapped in (perhaps stiflingly narrow) world views.[39] But these are decidedly stark examples, in which individuals are denied the psychological or mental resources to function as fully fledged moral agents in the first place. Once we leave these "limit cases" behind, we will (rightly) be reluctant to say that people who choose not to act in one way rather than another, on the basis of their belief that the course of action in question is wrongful, are acting anything other than autonomously. For that reason, debates surrounding the moral limits of the criminal law cannot presuppose that citizens have the puzzled man's attitude toward law without obscuring the fact that what is at stake is their autonomy.

Before moving on, it is worth noting that Hart also reserved a space for the bad man in his other great work on criminal law theory, *Punishment and Responsibility*. Hart claimed that the central justifying aim of criminal punishment is to reduce future wrongdoing.[40] For Hart, the infliction of suffering is never valuable in and of itself; it is defensible only insofar as it discourages the commission of wrongful acts. It may be possible for criminal punishment to nudge individuals away from law breaking even if there are no Holmesian bad men in a given society. As Hart observed on a number of occasions, even the puzzled man needs the assurance that, by obeying the law, he does not leave himself uniquely vulnerable to predators whose obedience is predicated on cold calculations of profit and loss.[41] But the puzzled man is not *motivated* by the sanction. It is, rather, a background consideration informing his judgment that the law will guide others; that it will serve to coordinate everyone, and that

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36 See, for instance, the figure of Uncle Tom in Harriett Beecher Stowe's *Uncle Tom's Cabin* (Cambridge, Mass: Harvard University Press, 2009).

37 See Martha C Nussbaum, *Women and Human Development: The Capabilities Approach* (Cambridge, UK: Cambridge University Press, 2000) at 1.

38 For a discussion of brainwashing, see David Sussman, "What's Wrong with Torture?" (2005) 33:1 Phil & Pub Aff 1 at 8-11.

39 *Ibid* at 9-10.

40 Hart, *Punishment and Responsibility*, *supra* note 20 at 6-7.

41 Hart, *The Concept of Law*, *supra* note 1 at 198; Hart, *Punishment and Responsibility*, *supra* note 20 at 50.

he may allow himself to be guided by it. The person who stands to be most influenced by the sanction is Holmes' calculating bad man. What is more, the sanction provides assurance to the puzzled man only to the extent that it is capable of giving the bad man—if he exists—a motivation to obey the law that he might otherwise lack.[42]

Hart's argument for recognizing excusing mental conditions hints at an even stronger role for the bad man. Hart acknowledges that the availability of excuses tends to diminish the deterrent effect of criminal punishment, since some members of the public will try to use them to escape liability even when the prohibited act was intended.[43] The very fact that some citizens think like the bad man, then, calls into question the utility of excuses.[44] Yet, Hart claims, we should nonetheless insist that the criminal law recognize excuses. In doing so, he argues, the law respects us as "choosing being[s]".[45] It allows us to predict when sanctions will be imposed and to decide whether the costs of engaging in a given course of action outweigh the benefits.[46] The availability of excuses is salutary, in other words, precisely because it allows us to make the very sort of cost-benefit calculations that Holmes' bad man would want to make before deciding whether or not to obey the law. This is a good thing, Hart wants to say, because the criminal law may be oppressive—it may require us to do things that are morally wrongful or prohibit courses of actions that are, on any plausible moral theory, innocent. In making this point, Hart refers to apartheid South Africa, Soviet Russia, and Nazi Germany,[47] but he might just as easily have mentioned laws enforcing sexual morality. Hart's argument for excuses buttresses his argument in *Law, Liberty, and Morality*. On his analysis, moral limits on the criminal law and the availability of excuses both preserve the autonomy of citizens, albeit in somewhat different ways. The former ensure that citizens can be guided by the law without needlessly sacrificing their individual conceptions of the good life; the latter ensures that, where the state fails to heed moral limits on the criminal law-making power, citizens are nonetheless in a position to choose between adherence to law and adherence to conscience.[48] In both

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[42] See the discussion by John Gardner in his introduction to *Punishment and Responsibility*, *ibid* at xliii.

[43] *Ibid* at 43-44, 49.

[44] *Ibid* at 49.

[45] *Ibid*.

[46] *Ibid* at 47.

[47] *Ibid*.

[48] For a brief discussion of Hart's view of excuses, see Gardner's introduction in *ibid* at xlvi-xlviii.

cases, though, Hart shows the relationship between law and autonomy by evoking the bad man.

IV. Husak on Overcriminalization: Recalibrating the Terms of the Debate

In the previous section, I deliberately avoided using the term "overcriminalization". There is a good reason for this. The term has an ambiguity that, if glossed over, invites us to collapse quite different arguments and concerns into each other as if they were the same. "Overcriminalization" can refer to the criminalization of courses of action that legislatures (at least those in liberal democratic states) ought not to make criminal. On this understanding, thinkers who address the phenomenon of overcriminalization are more or less talking about the "moral limits of the criminal law." Overcriminalization in this sense is concerned with what the legislature may criminalize: with whether, for example, it may criminalize conduct on the basis of the harm it causes to oneself, specified others, or to society at large; or whether offensiveness is sufficient basis for criminalization; or whether the criminal law-making power may be used to address private in addition to public wrongs. The foundational works of Mill,[49] Devlin,[50] Hart,[51] and Feinberg[52] (to say nothing of the contributions by Dworkin[53] and Duff[54]) all tackle the phenomenon of overcriminalization in this narrow sense.

An exclusive focus on the "what" of criminalization makes it impossible to criticize certain uses of the criminal law-making power that many of us find intuitively problematic. Kent Roach, for example, vigorously criticized the Canadian Parliament for devising new criminal offences in response to the 9/11 attacks.[55] This criticism was based, in part, on the premise that there was no need for such offences—that existing criminal offences would have been adequate to prosecute and convict the 9/11 attackers, even before the attack had been carried out.[56] But there can be little doubt that acts of terrorism, by any standard, pass the threshold for what the state is entitled to criminalize, even assuming that the prepara-

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[49] See John Stuart Mill, *On Liberty* (New Haven: Yale University Press, 2003) ch 1, 4.

[50] Devlin, *supra* note 21.

[51] Hart, *Law, Liberty, and Morality*, *supra* note 2.

[52] Feinberg, *supra* note 31.

[53] Ronald Dworkin, "Lord Devlin and the Enforcement of Morals" (1966) 75:6 Yale LJ 986.

[54] See RA Duff, *Answering for Crime: Responsibility and Liability in the Criminal Law* (Oxford: Hart Publishing, 2007) ch 6.

[55] Kent Roach, *September 11: Consequences for Canada* (Montreal: McGill-Queen's University Press, 2003) at 23-25.

[56] *Ibid* at 21-23

tory offences do not. Roach's overarching objection to the use of the criminal law to address terrorism concerns was not that Parliament had applied the wrong test for what may be criminalized, but that it was unnecessary. There is little or nothing in Hart or Feinberg's work that gives us the resources to make sense of such a problem.

To say that critics of overcriminalization have tended to worry about the "what" of criminalization is just to say that their preoccupation has been with the undue "expan[sion of] the type of conduct subjected to liability."[57] Many new offences, in fact, do not have this effect. Many "overlap" with preexisting offences,[58] in the sense that they create new bases of liability for conduct that would have been criminal with or without the new offence. Furthermore, we have seen that overlapping offences often target clearly harmful or wrongful conduct (albeit conduct that has already been targeted by other offences). Traditional criticisms of overcriminalization, therefore, simply do not apply to them. In order to explain why the creation of overlapping offences is problematic, we must use "overcriminalization" in a broader sense: as an issue, not with what the criminal lawmaking power is used to prohibit, but with how often it is used.

Husak's *Overcriminalization* confronts this issue head on. He observes that, even if new offences do not expand liability, they expand the discretionary powers of prosecutors. By giving prosecutors new and further bases upon which to charge individuals, new offences facilitate "charge-stacking" and make it easier to leverage guilty pleas and obtain higher (and disproportionate) sentences.[59] The sheer number of possible ways to be charged for a given course of conduct makes it virtually impossible for even informed members of the public to predict how they might be punished for engaging in such conduct.[60] This, Husak concludes, amounts to a serious rule-of-law issue.[61]

Husak worries that legal officials, particularly prosecutors, have too much discretion to punish citizens. The proliferation of criminal offences places legal officials in a position in which they could successfully prosecute an offender for any one of several offences, each carrying a quite different sanction, even though there was only a single criminal transaction. Though "decision rules" (to use Dan-Cohen's language)[62] narrow the circumstances under which one may be successfully prosecuted for, say, as-

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57 Husak, s*upra* note 2 at 20.

58 *Ibid* at 9, 36-37.

59 *Ibid* at 14-15, 21-27, 37-38.

60 *Ibid* at 29-31.

61 *Ibid* at 27.

62 See discussion in Part VI below.

sault, they do not require legal officials to address a given criminal act *as* an assault rather than some other criminal offence. Since it is the decision to charge a given offender in one way rather than another that will ultimately determine whether and how her criminal conduct will be sanctioned, and since the phenomenon of overcriminalization presents the prosecutor with an extensive menu of (more or less unreviewable) charging options, Husak implicitly argues that decision rules in fact do little work in constraining prosecutorial discretion.

This lack of constraint is a rule-of-law problem for Husak because possible offenders cannot predict how they would be sanctioned if they engaged in criminal conduct. This would not be so problematic for Husak if he took the view that citizens *ought* to adopt the point of view of the puzzled man—in that case, it would not obviously matter that a given criminal act could be sanctioned in any number of (unpredictable) ways, so long as citizens knew in advance that the act was *criminal*. Husak, though, proceeds on the basis that citizens are entitled to know when and how breaches will be sanctioned.[63] His discretion-focused critique of overcriminalization rests on the view that individuals are entitled to know not just whether a course of conduct is criminal, but (roughly) how it will be punished if prosecuted. The average person, he claims, responds to criminal legislation not like Hart's puzzled man but like Holmes' bad man. Husak remarks, "Without endorsing the whole school of jurisprudence Holmes sought to defend, he clearly articulated the central concern of laypersons who make inquiries about the law."[64] He reiterates this point later: "I assume that laypersons are raising Holmes's question when they ask how the law will react to a marijuana offender."[65]

Husak puts the bad man at the centre of his analysis for the same tactical reason that Hart did in *Law, Liberty, and Morality*: without doing so, it is difficult to grasp what is morally problematic about overcriminalization in its broad sense. Since the puzzled man does not need the threat of sanctions to be guided by criminal prohibitions, the fact that he does not know what those sanctions will be is irrelevant. That being the case, it makes no difference to him that overcriminalization expands prosecutorial discretion. But it makes an important difference to the bad man, whose decision to obey (or not) rests on a calculation of costs and benefits. Wide prosecutorial discretion prevents the bad man from making that decision in an informed way, and, to that extent, interferes with his autonomy. Just as Hart could not explain how overcriminalization in the narrow

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[63] *Husak*, *supra* note 2 at 17-32.

[64] *Ibid* at 27.

[65] *Ibid* at 29.

sense affects autonomy without positing a citizen who thinks like the bad man, so Husak is similarly constrained when he tries to explain how autonomy is undermined by overcriminalization in the broad sense.

Husak's work is instructive in an additional way: it illustrates, to a degree Hart's work does not, that when we consider the criminal law from the perspective of the bad man, we shift our attention away from the legislature that crafts criminal prohibitions and toward the conduct of administrative actors in the criminal justice system.[66] To be sure, Husak's answer to the overcriminalization problem complicates this reading. He suggests that the state should bear a burden of justification—if only a political burden—when new criminal offences are created.[67] He does not claim that prosecutorial discretion is problematic in itself. That position, however, may simply reflect the centrality of discretion in Anglo-American criminal justice systems—to propose limitations on it is effectively to propose a radical transformation of the way those systems function.[68] To avoid making that more contentious argument, Husak instead suggests political limits on the creation of new offences. There is no doubt, though, that the problem he wants to address is administrative discretion, and that it is revealed as a problem only by drawing upon the experience of the bad man.

V. Chalmers and Leverick on Fair Labelling

By presupposing that at least some ordinary citizens respond to criminal prohibitions in the manner of the bad man, Husak draws our attention away from legislative processes and toward executive decision making and discretion. Once we shift our attention away from the impact that declarations of wrongfulness as such will have on the puzzled man and toward the impact that criminal prohibitions as a deterrent threat will have on the bad man, we are irrevocably led to consider how decisions to arrest, prosecute, and convict are actually made, and whether they are de-

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[66] Hart, to a degree, acknowledged that the quoted passage in Part III indicates some alertness to the connection between issues of criminalization and executive discretion: see *supra* note 20. But he was chiefly preoccupied with the state's criminalization of offences of sexual morality, and especially with offences that tended to be committed in private, between consenting adults, and that therefore could not be easily enforced. That may explain why Hart, though focusing on the bad man's experience of overcriminalization in the narrow sense, did not dwell on executive discretion. See the discussion of Hart, *Law, Liberty, and Morality* (*supra* note 2) in Part III.

[67] Husak, *supra* note 2 at 128-29.

[68] See Benjamin L Berger, "The Abiding Presence of Conscience: Criminal Justice Against the Law and the Modern Constitutional Imagination" (2011) 61:4 UTLJ 579 at 610-13. See also Rachel E Barkow, "The Ascent of the Administrative State and the Demise of Mercy" (2008) 121:5 Harv L Rev 1332 at 1351ff.

fensible. We are led to focus, in other words, upon the very questions that preoccupy the bad man. We can see the pull of the bad man away from abstract substantive law and toward policing and prosecutorial practice in James Chalmers and Fiona Leverick's work on fair labelling.[69]

The principle of fair labelling expresses the common conviction that the *name* we attach to a criminal offence should, at least to some degree, accurately track the "nature and magnitude" of the wrongdoing it proscribes.[70] The principle should be distinguished from the related view that the *elements* that must be proven by the Crown in order to secure a conviction for a given offence should reflect the wrong that Parliament seeks to address by creating that offence.[71] Even if the elements of a given offence are such that no citizen can be convicted of it without engaging in the wrongful conduct targeted by Parliament, we have a powerful sense that the name given to the offence can itself be inappropriate insofar as it misrepresents the nature or magnitude of the wrong targeted. The reason is straightforward enough: to say only that a given course of conduct is criminal tells us nothing about the precise wrong that Parliament has sought to address by making it criminal. And, in various contexts and for various reasons, it is often important that we and others be able to identify the precise wrong that Parliament meant to target with a particular offence.

That is, of course, only half of the story. We may agree that people sometimes need to know "what's wrong" with a particular criminal act, yet think that offence elements can tell us all we need to know. If the elements of an offence can only be proven when a person has engaged in the targeted wrong, then why not look to them rather than the offence label to reveal what the targeted wrong is? We can get some insight by looking to two observations by Dan-Cohen. First, few citizens (we may reasonably suppose) have direct "contact" with offence elements, and fewer still would be expected to know how those elements have been interpreted by the courts. They will likely know, for example, that "theft" is a crime, and may believe that they know what "theft" entails in its ordinary meaning (even if they disagree with each other about what that ordinary meaning is). But there is no guarantee that the ordinary sense of "theft" will match the technical, *legal* meaning of "theft"—indeed, the former will often be

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69 Chalmers & Leverick, *supra* note 2.

70 Andrew Ashworth, *Principles of Criminal Law*, 5th ed (Oxford: Oxford University Press, 2006) at 88.

71 See Victor Tadros & Stephen Tierney, "The Presumption of Innocence and the Human Rights Act" (2004) 67:3 Mod Law Rev 402; Duff, *supra* note 54 at 200.

broader than the latter.[72] Insofar as it is ordinary citizens, rather than legal officials, who need to grasp the precise nature of the targeted wrong, offence elements generally have little (or, at best, hypothetical) value. Second, the fact that the technical meaning of an offence label is narrower than its ordinary meaning does not necessarily mean that Parliament intended to target a narrower class of wrongs. It may merely have decided that, in some circumstances, citizens should not be punished for engaging in the targeted wrong. One may, then, get a distorted sense of Parliament's intention by looking to the offence elements rather than the offence label.

The principle of fair labelling has not been subjected to much focused scholarly attention. Its importance has tended to be presupposed by criminal law thinkers invoking it in the course of making an argument about something else. That has changed with James Chalmers and Fiona Leverick's recent analysis.

Chalmers and Leverick examine a range of arguments that can be made in support of the principle of fair labelling. For our purposes, two have particular interest. First, the principle of fair labelling might be said to protect the reputation of offenders by ensuring that their criminal records do not misrepresent the nature and gravity of their transgressions to *non*-legal officials—i.e., the media, prospective employers, and the public at large.[73] Chalmers and Leverick are receptive to this argument, noting that non-legal professionals will generally rely on the offence label as they decide how it is appropriate to treat a given offender—for example, as dishonest rather than violent, reckless rather than malicious, or opportunistic rather than predatory. Whereas legal officials need offence labels merely to differentiate one offence from another, non-legal decision makers rely upon offence labels to accurately describe the nature and magnitude of the wrong in question.[74]

Second, fair labelling may be thought to ensure that offenders are properly educated as to what they did wrong, such that criminal punishment is not experienced as an arbitrary burden.[75] Interestingly, Chalmers and Leverick dismiss this argument almost out of hand. They write:

> But this is not a particularly convincing justification for fair labelling. If one is to "educate" offenders in this way, the offence name

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72 Where the technical legal meaning is broader than the ordinary meaning, more urgent rule-of-law concerns arise: see e.g. Stephen Shute, "Appropriation and the Law of Theft" [2002] Crim L Rev 445.

73 Chalmers & Leverick, *supra* note 2 at 226-29.

74 *Ibid* at 238-39.

75 *Ibid* at 229-30.

> itself is unlikely to be of much significance. What might be more effective (if indeed there is any educative benefit to be gained here at all) is the magnitude of the sentence and the explanation given by the sentencing judge as to why this was merited. Indeed, if this argument has any force, it is probably in the context of changing the beliefs of those working within the criminal justice system. The creation of a new offence of domestic violence, for example, rather than simply prosecuting acts of domestic violence as assault, might be one way of communicating to criminal justice professionals that such incidents should be taken seriously.[76]

This passage is intriguing. It suggests that offenders may be educated about their legal obligations as a result of their interaction with criminal justice officials and decision makers—those people who decide whether a certain kind of conduct is caught in the net of a criminal statute, how vigorously it should be enforced, or what sort of sentence is appropriate for breaches—but are unlikely to learn anything from the mere fact that a criminal statute "labels" a certain kind of conduct as wrongful. They will draw guidance, in other words, less from the offence label than from the rules that influence legal officials as they decide whether and how to arrest, prosecute, and convict citizens for criminal conduct. The clear suggestion is that offenders are more like the bad man than the puzzled man.[77] This conclusion is buttressed by the fact that Chalmers and Leverick were equally dismissive of the argument that the offence label in itself could serve a deterrent effect. They remark:

> There is little, if any, evidence that potential offenders are deterred even by the severity of sentences, never mind the name of the offence of which they might be convicted. The only factor that has been shown to have even a marginal deterrent effect upon potential offenders is the likelihood of being caught. As Ashworth himself has noted in the context of robbery, many offenders lead chaotic lives and are unlikely to deliberate rationally on either probable penalties or offence names.[78]

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[76] *Ibid* at 229.

[77] It may be that when writing this, Chalmers and Leverick were concerned only with the educative or expressive function of the label at the time of punishment, and not its power when the actor decides what to do. I do not find this possibility terribly troubling, since it is unclear how the label could be more educative or expressive at the time the prospective offender decides upon her course of action than after she has been convicted. Indeed, one would think that, if anything, the offender would be more receptive to messages conveyed by the label than someone who had yet to be convicted for engaging in the criminal conduct in question.

[78] Chalmers & Leverick, *supra* note 2 at 230. Consider, by way of example, the public furor that has erupted in both Canada and the United Kingdom as a result of cases in which a homeowner or shopkeeper has used force against an intruder or robber.

Again, Chalmers and Leverick suggest that prospective offenders are concerned less with the expression of wrongfulness conveyed by the offence label than with the likelihood of enforcement—that is, with the rules that govern exercises of official discretion. This is intriguing, not least because, though Chalmers and Leverick speak in terms of "offenders" and "prospective offenders", their observations about the educative and deterrence rationales do not obviously have less application when we replace "offenders" with "citizens".

There is, in Chalmers and Leverick's assessment of the arguments marshalled in favour of fair labelling, a striking split. They accept that offence labels can help employers, the media, and members of the public as they attempt to make sense of the nature and magnitude of an offender's wrongful conduct. At the same time, they reject the view that offence labels can serve an educative function for *offenders*. That is striking because the prospective employer can be expected to have no more understanding of the decision rules governing official discretion than the offender.

The difference can easily be explained. Offenders rely on decision rules when deciding how to act because their primary concern is to avoid sanctions, not to avoid wrongdoing as such. Employers and the media, by contrast, do not need to look to rules guiding discretion when trying to make sense of what makes an offender's past criminal conduct wrongful. They know that the applicable decision rules, *whatever they are*, permitted the offender to be convicted for the offence in question. Knowledge of the specific content of those decision rules would only put employers and the media in a position where they could say why "this" offender was convicted when another person who engaged in the targeted wrong was not (or would not be). That sort of information might come in handy now and again, as when media reports of a criminal conviction provoke members of the public to worry that a particular criminal offence is over inclusive. But if the aim is only to identify the sense in which the offender's conduct was wrongful—to, again by way of example, distinguish dishonest acts from violent ones—the fact that the offence label fails to distinguish sanctionable from sanctionless wrongs is of no moment.[79]

Chalmers and Leverick, then, reject the usefulness of offence labels precisely because they do not give citizens sufficient notice of the manner in which legal discretion will be exercised. Members of the public, unaware of the degree to which an offence label truly reflects the circum-

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[79] Of course, as Chalmers and Leverick implicitly recognize, it will be quite important for the media to understand the content of decision rules when reporting that an individual was *acquitted* of an offence, since the significance of an excuse-based defence is quite different from that of a justification-based defence. Failure to appreciate the significance of this distinction may well explain the phenomenon of quasi-justificatory drift.

stances under which the offence will be enforced, will simply opt not to look to the offence label for guidance in the first place, preferring instead to rely upon breakdowns of "acoustic separation"[80] to provide the guidance they seek. The message seems plain: offenders and potential offenders care about the circumstances under which sanctions will be administered, not about legislative expressions of wrongfulness as such. In this sense, they resemble the bad man.

Whether or not we accept Chalmers and Leverick's presupposition that members of the public should be treated like "bad men", it is interesting to note how that suggestion affects the way we think about fair labelling problems. So long as we suppose that citizens look to the criminal prohibition itself for guidance, it is possible to think that the label itself serves an important role in informing them as to the nature of the wrong it targets and the reasons why offenders deserve to be punished. But once we deny that citizens find the declaration of wrongfulness a compelling reason in itself for avoiding criminal behaviour, the label appears to serve little or no educational function. The bad man is, of course, still concerned about arbitrary detention and sanctions, but the mere fact that the legislature has said that a course of action is wrongful does not lead him to conclude that he deserves to be punished for engaging in it. To him, the legislature's declaration means only that, when legal officials arrested him and subjected him to fines or imprisonment, they acted within the grant of authority conferred upon them. His concern, in other words, is not with the arbitrariness of the legislature, but with the arbitrariness of the officials administering its instructions. To learn anything about arbitrariness in *that* sense, the offender must, as Chalmers and Leverick suggest, have some insight into the content of the decision rules police officers, prosecutors, and juries are meant to apply.

But this, in turn, means that the principle of fair labelling, to the extent it is animated by concerns about the offender's "education", should be directed not at the legislature crafting the offence prohibition, but at the police officers, lawyers, trial judges, and (arguably) media outlets who transmit the content of decision rules to the public at large. For our purposes here, we can set aside the question of what these various actors do or ought to do to make exercises of discretion appear less arbitrary to suspects, defendants, and offenders. For our purposes, what matters is that these exercises of discretion, and the constitutional, procedural, and professional rules that guide them, are not tangential to a discussion of fair labelling. Once we imagine a society of "bad men", these rules go to its core.

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80 See the discussion of Dan-Cohen in Part VI below.

VI. Dan-Cohen and the Brutality of Acoustic Separation

Husak, by situating the bad man at the heart of his analysis of over-criminalization, shifted our attention away from duties on the legislature and toward exercises of discretion by executive actors. Likewise, Chalmers and Leverick's discussion of the principle of fair labelling, and particularly their discussion of its supposed educative function, effectively invite us to think about "arbitrariness" in a new way—one that places an emphasis on the decision rules guiding executive discretion rather than the propriety of the label legislatively tacked onto the offence in question. In this section, I want to make a further point—namely, that the emphasis on the bad man also shines a light on rule-of-law concerns built into Anglo-American criminal justice systems that might otherwise go unnoticed. To do that, I want to draw on Meir Dan-Cohen's paper on "acoustic separation".[81]

The core insight of Hart, that the criminal law primarily lays down rules for the guidance of citizens, and only secondarily lays down rules to guide the decision making of legal officials (like police officers, prosecutors, juries, and judges), animated Meir Dan-Cohen's observation that many rules in the criminal law do not "speak" to ordinary citizens at all.[82] We can distinguish between "decision rules" and "conduct rules". Conduct rules are addressed to members of the public for the purpose of guiding their behaviour.[83] We might see prohibitions on robbery or theft as conduct rules: they advise *citizens* that it is wrongful to engage in robbery or theft, and that these are courses of action to be avoided. Decision rules are addressed to *legal officials*, and set out the conditions under which citizens may be convicted of criminal offences, and whether and how they should be punished.[84] We might see rules requiring an acquittal where an offence was committed under duress, or guidelines directing sentencing judges to grant absolute discharges to people convicted of theft of goods valued less than $5.00, as decision rules.

Dan-Cohen observes that conduct rules might fail to express the wrongfulness of certain courses of action—or at any rate, might fail to articulate it as forcefully as they otherwise would—if the citizens they purport to guide are also exposed to decision rules. A member of the public who knows that theft under $5.00 will not be punished, or even prosecut-

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[81] Dan-Cohen, *supra* note 2.

[82] *Ibid*. See also Nance, "Internal Point of View", *supra* note 16 at 1289.

[83] Dan-Cohen, *supra* note 2 at 626-34.

[84] *Ibid*. We might speak just as well of "guidance rules" and "enforcement rules": see Dale A Nance, "Guidance Rules and Enforcement Rules: A Better View of the Cathedral" (1997) 83:5 Va L Rev 837.

ed, may take that as a signal that it is a not-inappropriate course of action, despite the terms of the criminal prohibition. A member of the public aware of the defence of necessity may be too quick to conclude that a peril is sufficiently dire, imminent, and unavoidable that she is justified or excused in committing a criminal offence to avert it. By contrast, someone who knows only that theft has been criminalized may not assume that theft under $5.00 is any less wrongful than any other kind of theft. Someone who knows nothing of the defence of necessity or the circumstances under which it will be accepted in a courtroom—that is, who knows only that a course of action has been declared "wrongful" by a criminal statute—will hesitate to engage in that prohibited conduct unless she truly has no option but to do so.

As the above suggests, Dan-Cohen's argument rests on the supposition that the state may want to authoritatively express the wrongfulness of a particular kind of conduct, yet not want to punish all, some, or even any of the persons who engage in it. There are different reasons why one may not want to punish certain offences. We recognize excuses (or exemptions) for the mentally ill for reasons of fairness. It may be thought wise not to prosecute petty thefts because of the scarcity of resources. We may want to encourage narrow interpretations of offence definitions to avoid, for example, imprisoning people for private conduct that, though undesirable or objectionable, strikes us as an inappropriate basis for criminal sanction. Importantly, though, we may still think that the conduct in question is wrongful, and that the state should use criminal statutes to guide citizens away from it. It is, therefore, simply a mistake for citizens to seek guidance from decision rules (or "enforcement rules").[85]

Because the criminal law is best able to carry out its primary expressive function if citizens are exposed only to conduct rules and not decision rules, Dan-Cohen argues, members of the public are often not alerted to judicial decisions interpreting terms of art in offence definitions, or clarifying the boundaries of defences.[86] Indeed, he claims that courts sometimes refuse to recognize defences in contexts where acoustic separation could not reliably be maintained. We might add that citizens have traditionally not been thought entitled to information about how charging decisions are to be made.[87]

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85 On this point, it is interesting to consider Jeremy Waldron's argument that state interrogators are not entitled to know the specific point at which an interrogation amounts to torture: see Waldron, *supra* note 25 at 1701-703. Consider also the "thin ice principle" discussed in Andrew Ashworth, *supra* note 70 at 73-74; Husak, *supra* note 2 at 75.

86 Dan-Cohen, *supra* note 2 at 636-40, 646-51.

87 See *R v Power*, [1994] 1 SCR 601 at 626, 117 Nfld & PEIR 269 [*Power* cited to SCR] (strongly suggesting that the Crown not publish a list of factors that it will consider

Although Dan-Cohen argues that various legal doctrines presupposed the value of acoustic separation and, in a sense, prioritized the puzzled man's experience of criminal prohibitions, he does not suggest that Anglo-American societies are in fact populated by "puzzled men". On the contrary, he takes as given that many citizens look to criminal prohibitions chiefly in order to predict when sanctions will be imposed. For this reason, Dan-Cohen acknowledges that the idea of the criminal law articulating one set of norms to citizens and another to legal officials raises troubling rule-of-law issues. Indeed, he takes the phenomenon of acoustic separation—that is, of criminal law's strategy of "duplicity and concealment"—as a symptom of law's inherent brutality.[88] Whether or not citizens *ought* to rely on defences when deciding how to act, or construe criminal prohibitions in light of how judges ultimately will interpret them, it seems plain that many members of the public will and do reason in precisely this way, or at least would if they had more complete information about the content of decision rules. For these people, the likelihood of enforcement is a relevant consideration when deciding whether a criminal prohibition should be obeyed. Insofar as they obey unenforced conduct norms only because they have been misled into believing that violations will meet with sanctions, Dan-Cohen suggests, it could be said that they have been coerced.

To be sure, Dan-Cohen claims that accusations of coercion and brutality should be taken with a grain of salt. He dwells on three points in particular. First, it is not obvious that people who engage in prohibited conduct expecting to rely on defences—like, for example, duress and necessity—are in fact entitled to rely on them at all. The defences of duress and necessity exculpate because the defendant had, in a sense, no choice but to engage in the conduct in question. If the accused was in a position to consider the availability of defences, Dan-Cohen suggests, then her hand was not truly forced and the defences are not genuinely available at all.

when deciding whether to exercise its discretion to charge). But see *R (Purdy) v DPP*, [2009] UKHL 45, [2009] 4 All ER 1147 (holding the opposite with regard to prosecutorial discretion in cases of assisted suicide). The House of Lords' suggestion in this case that the Director of Public Prosecutions has an obligation to publish its charging guidelines so that a citizen can make an informed decision as to whether or not she should commit a criminal offence seems to fly in the face of Hart's understanding of criminal law's normativity. We should, however, hesitate to read too much into the decision. First, the Lords were clear that this obligation is not general but offence specific. Second, the choice that Ms. Purdy was called upon to make was particularly stark: either ask her husband to help her commit suicide abroad once she was truly unable to end her own life, risking criminal prosecution for her husband in the process, or end her own life without assistance but before she actually needed to do so. The Lords may have implicitly decided that, however unreasonable it may be to think like the bad man in most instances, it is at least somewhat reasonable to want to parse a criminal prohibition as finely as possible when the alternative is to end one's own life prematurely.

[88] Dan-Cohen, *supra* note 2 at 673-77.

Second, although grave rule-of-law concerns arise when people are punished for conduct that they did not know was criminal, they do not arise nearly to the same extent when people are deterred from engaging in conduct that is, in fact, not punishable according to the applicable decision rules. Finally, the rule of law is first and foremost valuable insofar as it ensures that citizens are guided in their behaviour. Citizens who respond to conduct rules rather than decision rules have not received less guidance. Indeed, we may think that they have, in a sense, received better guidance as to how they should act than the person who considers both conduct and decision rules.

But, again, these arguments were made, as it were, in mitigation—they did not affect Dan-Cohen's view that the criminal law is inherently brutal. There is, after all, only one reason for withholding information about decision rules: to obtain the compliance of citizens who would otherwise commit non-sanctionable offences.[89] By definition, the strategy is used to coax citizens who do not unreflectively accept the legislature's authority to settle moral questions into outwardly acting as if they do. Acoustic separation is used, in other words, to avoid having to engage citizens in debate over the proper limits of the legislature's moral authority. Rather than deal with its citizens as rational people amenable to persuasion, the legislature manipulates them into complying.[90] To be clear, it may be necessary for legislatures to adopt this kind of approach—it is difficult to imagine a legislature getting anything done if it was constantly required to defend its claim to authority. That, however, only underscores Dan-Cohen's suggestion that *actual* legal systems are coercive at their core.

The deep connection between law and coercion also illustrates an important but rarely mentioned aspect of Hart's discussion of legal orders. By conceptually separating criminal prohibitions from sanctions, Hart *seems* to suggest that legal orders are not inherently coercive. (This impression is strengthened by the fact that Hart focused his attention on the English and American legal systems, rather than other, more tumultuous legal orders.)[91] As we have seen, Hart rested his argument on the conceptual *possibility* of citizens treating criminal prohibitions as authoritative

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89 *C.f.* Samuel W Buell, "The Upside of Overbreadth" (2008) 83:5 NYU L Rev 1491.

90 It is interesting to compare the idea of acoustic separation with Thaler and Sunstein's strategies of libertarian paternalism: see Richard H Thaler & Cass R Sunstein, *Nudge: Improving Decisions About Health, Wealth, and Happiness* (New Haven: Yale University Press, 2010) especially at 244-46 (discussing libertarian paternalism in relation to Rawls' publicity principle).

91 See AW Brian Simpson, *Reflections on* The Concept of Law (Oxford: Oxford University Press, 2011) at 160.

declarations of wrongfulness. In any actual legal order, though, we are likely to find that at least some citizens do not think that way about criminal offences.[92] Because that is only a contingent fact about legal systems, Hart did not need to confront it. But in the real world, lawmakers must find strategies for securing the compliance of "bad men". Those strategies, as Dan-Cohen argues, will typically involve some measure of coercion.

Here, Chalmers and Leverick's discussion of fair labelling is again intriguing. Like Dan-Cohen, they proceed on the basis that citizens will typically have little exposure to decision rules, and that their behaviour is guided less by bare expressions of wrongfulness than by predictions concerning whether and when sanctions will be administered for prohibited conduct. They diverge, however, on the significance of acoustic separation. Dan-Cohen anticipates that citizens, unaware of the gap between conduct rules and decision rules, would err on the side of caution and assume that legal officials could and would convict whenever the conduct rule was breached. Chalmers and Leverick, in stark contrast, appear to anticipate that citizens, unaware of the degree to which an offence label truly reflects the circumstances under which the offence will be enforced, will simply opt not to look to the offence label for guidance in the first place, preferring instead to rely upon *breakdowns* in acoustic separation to provide the guidance they seek. Assuming, if only for the sake of argument, that acoustic separation is problematic (or symptomatic of "brutality"), they hint that the issue can be resolved by executive practices that will make exercises of discretion more transparent.

One can imagine at least two possible responses to this suggestion. First, we might wonder where executive decision makers get the notional authority to explain their decisions in this way. We might say that the legislature has an obligation to impose (or at least allow) decision rules that make executive exercises of discretion more public and transparent—that dispel the appearance of arbitrariness. This is just another way of saying that legislatures cannot morally adopt a policy of acoustic separation. If that course is barred to them, however, Dan-Cohen suggests that legislatures will simply devise other, perhaps more coercive strategies for dealing with citizens who are willing to "game" the substantive criminal law. So we will set this possibility aside as question-begging.

Second, Husak's proposed answer to the problem of overcriminalization suggests a deep-seated resistance to the idea of limiting executive discretion in the administration of criminal justice. Indeed, the Supreme Court of Canada in *Power* expressly advised Crown prosecutors not to

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[92] Indeed, we saw toward the end of Part IV that Hart thought it appropriate for citizens to have the attitude of the bad man with respect to certain laws and legal systems.

publicize the bases on which they decide whether or not to prosecute.[93] For that reason, the rule-of-law problems identified by Husak may not (practically speaking) be resolved by limiting executive discretion. For the same reason, we may be inclined to think that the brutality of acoustic separation is likewise intractable.

Conclusion

Hart's introduction of the puzzled man—and, with him, the idea of normativity—into our thinking about the law was a watershed moment in the philosophy of law and in our understanding of the criminal law in particular. As we have seen, however, Hart himself did not think that he was making an empirical claim about the actual relationship between citizens and criminal offences in any legal order, and it is far from clear that we should try to understand all or even most criminal law doctrines and phenomena by presupposing that real citizens regard offences as authoritative declarations of moral wrongfulness. Indeed, we have seen that some issues, like overcriminalization, can only be understood with the bad man in mind. And once we premise the criminal law's power to guide citizens on the enforcement of criminal offences, substantive criminal law theorists seem committed to shifting their attention away from the legislatures that craft criminal offences and courts that interpret them, and toward the police officers, prosecutors, juries, media outlets, employers, and others who decide when and what sanctions will flow from criminal conduct. This shift in focus, in turn, reveals systemic questions about Anglo-American criminal justice systems that Hart's analysis did not, and could not, reveal—in particular, questions concerning the moral justifiability of virtually untrammelled executive discretion.

To put the last point in another way, once we move the bad man from the periphery to the centre, we seem forced to ask the sorts of questions that are typically associated with thinkers in the public law context:[94] What responsibility do police officers and prosecutors (among others) have to justify their decisions? What sorts of justifications are adequate? If their burden of justification is lower than that of other administrative decision makers, is that because their decisions resemble those made in "emergency contexts", or must we look to some other rationale? To what

[93] See *Power*, *supra* note 87 at 626; Kent Roach, "Developments in Criminal Procedure: The 1993-94 Term" (1995) 6 Sup Ct L Rev (2d) 281 at 337-40.

[94] This is not to make the reverse claim (i.e., that public law thinkers have failed to apply their insights to the criminal sphere). DJ Galligan, for example, makes frequent reference to police officers in his *Discretionary Powers: A Legal Study of Official Discretion* (Oxford: Clarendon Press, 1986).

extent do police officers and prosecutors genuinely have an expertise that justifies the deference shown to them?

Some contemporary thinkers may think it is about time criminal law theory took greater notice of the issues and themes animating public law debates.[95] Others, like John Gardner, may regard administrative law as "still in its intellectual infancy" and find suggestions that we yoke the two together quite unwelcome.[96] But recent work hints that the long-time privileging of the puzzled man in criminal law thinking may have been wrong-headed. The bad man is in ascendance.

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[95] See e.g. Malcolm Thorburn, "Justifications, Powers, and Authority" (2008) 117:6 Yale LJ 1070.

[96] See John Gardner, "Justification Under Authority" (2010) 23:1 Can JL & Jur 71 at 94.