

ENTITLEMENT TO PUNISHMENT

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ABSTRACT

This Article advances the idea of entitlement to punishment as the core of a normative theory of legal punishment's moral justification. It presents an alternative to normative theories of punishment premised on desert or public welfare; that is, to retributivism and consequentialism. The argument relies on H.L.A. Hart's theory of criminal law as a "choosing system," his theory of legal rules, and his theory of rights. It posits the advancement of positive freedom as a morally justifying function of legal punishment.

An entitlement to punishment is a unique, distinctive legal relation. We impose punishment when an offender initiates an ordered sequence of rights—power, claim, duty, power, liability—by means of committing a crime. This sequence ends with the offender's holding both a claim to be punished and a liability for punishment. This pair of legal relations is not a right to punishment, because it is more than a claim with a corresponding duty. To hold this claim and this liability to punishment in tandem, as cognate legal relations, is better described by the more comprehensive term "entitlement." Neither desert nor good consequences is part of this account of how and why we punish. It is enough to say that an offender is entitled to punishment.

Entitlement to punishment is a more accurate and honest description of the reason we punish than either desert or good consequences is. The belief that legal punishment is imposed because and only when it is deserved obscures the extent to which legal punishment is a consequence of moral luck. The word "entitlement" better describes the situation of a person who has entangled himself in criminal law's stringent rules as a consequence of his limited power to overcome unpredictable outcomes, his circumstances, the influences on his character, or his personal history.

Finally, entitlement to punishment reflects the moral salience of criminal law. Entitlement to punishment conveys respect for the rationality of criminal offenders and their capacity for self-determination—particularly when criminal law is cast as a choosing system and as part of a conception of positive liberty centered in autonomy.

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*"What is needed is a reinterpretation of the notions of desert and responsibility, and fresh accounts of the importance of the principle that a voluntary act should normally be required as a condition of liability to punishment."*¹

I. INTRODUCTION

If Abel wins the lottery, he does not deserve his winnings. He is entitled to them. If Cain commits a crime, can we say that he does not deserve punishment—that, instead, he is entitled to punishment? In this Article, I show that entitlement to punishment is not only a viable idea, but a powerful one. First, it frames the justification of legal punishment in terms of legal rights, powers, liabilities, claims, and duties, instead of the heated and fraught language of retribution or the reductive language of consequentialism.² Second, it exposes criminal law's moral luck problem.³ We punish people whose control over their own acts or the consequences they produce seems too attenuated for the attribution of responsibility, on a scale far beyond the set of cases in which we recognize defenses of involuntariness or insanity. There may be little we can do about moral luck in criminal law if we are to retain its stringency and law's authority generally, but it is just this fact that makes the language of entitlement more accurate and honest than the language of desert. Third, the idea of entitlement to punishment lends support to an alternative to both retribution and

1. H.L.A. HART, PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 181 (Oxford Univ. Press 1968) [hereinafter PUNISHMENT].

2. See discussion *infra* Part IV.

3. See discussion *infra* Part V.

consequentialism as justifications for punishment, an alternative grounded in a defensible conception of positive liberty.⁴

This Article describes entitlement to punishment in detail, as a distinctive legal relation. This description draws on H.L.A. Hart's normative theory of punishment, in which he casts criminal law as a "choosing system."⁵ The argument also draws on Hart's conception of rights as powers, and on his conception of legal rules as a means to exercise powers—a combination that enables an individual to create obligations in others as well as for herself. To commit a crime is to exercise a legal power that, in criminal law as a choosing system, creates a claim to punishment. This claim imposes a duty on the state to punish the offender. In order to perform this duty, the state exercises its power to create a liability for punishment in the offender. The upshot is that the offender holds both a claim to punishment and a liability to be punished. This cognate pair of legal relations constitutes an entitlement to punishment.

II. ON THREE INITIAL OBJECTIONS

A handful of intuitive objections to the idea of entitlement to punishment seems to extinguish its viability immediately. First, we think of entitlement to benefits, whereas we seldom think of entitlement to detriments such as punishment. Second, most criminal offenders view a conviction as bad luck. How does an entitlement to bad luck make sense? Third, an entitlement says nothing about its holder, morally speaking, but punishment says a lot about the offender. If punishment were as morally inert as, say, winning a lottery, then we might take it to be an entitlement; but punishment is morally salient, and does not look like a mere entitlement.

In spite of these intuitions, the idea of entitlement fits punishment. It fits because we can be entitled to detriments. Martin is entitled to the burdens of others if he takes them on voluntarily. It also fits because an entitlement marred by bad luck is, nevertheless, an entitlement. If a contract turns out to be unprofitable to Fiona, she is still entitled to its being performed according to its terms. Finally, an entitlement to punishment is not morally inert. If Cain chooses to kill, this entitles him to consequences that acknowledge his agency, competence, and freedom as well as his responsibility.

4. See discussion *infra* Part VI.

5. PUNISHMENT, *supra* note 1, at 44 ("Consider the law not as a system of stimuli but as what might be termed a *choosing* system, in which individuals can find out, in general terms at least, the costs they have to pay if they act in certain ways.").

Each of these responses will draw a single counter-argument: hints of desert have been smuggled in, so that what is called entitlement to punishment is really deserved punishment after all. Martin's voluntarily taking on the burdens of others has at least the appearance of altruism. Fiona is entitled to the other party's performance of an unprofitable contract, but it might be unprofitable to her because she faithfully performs her part at a loss. And perhaps to focus on the agency, competence, and freedom in Cain's criminal conduct is to willfully ignore the fact that to commit a crime is not just a poor choice, but a bad act.

It is not necessary to smuggle desert into criminal law as a choosing system, however. Neither detriment, bad luck, nor moral salience is incompatible with entitlement. First, one who takes on the burdens of others might be entitled in a way that is neither deserved nor beneficial. Consider Edward, a jaded, disillusioned social worker who is assigned to remove a child from an abusive situation and who resents this duty along with the other duties of his job. Edward's professional obligation does not imply that he deserves to take on the burden of the child's welfare; only that he is entitled to do so. After all, a bystander has no entitlement to remove the child from her home. Desert does not enter into it, and neither does benefit or detriment. Edward's position is like that of Gerald, who holds the title to a car that is beyond repair; or to Henry, who holds the deed to a piece of property on which he cannot pay past due taxes. Each is entitled to a detriment that he does not deserve. To say that their wayward brother Isaac is entitled to punishment expresses the same irrelevance of desert and detriment.

Second, the winner of a lottery does not deserve her winnings. The same is true of a lottery loser. He does not deserve his loss; he was simply unlucky. Entitlement to bad luck might sound odd in his case, and no less so in a case of punishment. Even so, it is a fitting description of criminal liability. If Barbara was compelled to steal food to save her family, then she has a plausible defense of necessity, but only morally. Any of us would be compelled to act as she did if we were in her circumstances; but, fairly or not, Barbara will be punished. To recognize any but the most extraordinary necessity in criminal law effectively grants a broad permission to violate it, so successful claims of legal necessity are necessarily rare. From an offender's point of view, it is bad luck to be caught up in such a stringent legal rule. Given that Barbara does not morally deserve punishment, entitlement best describes her position. It captures a feature that criminal law systematically elides: the moral luck of legal consequences that do not align with an actor's moral desert.

Finally, entitlement to punishment does not have the moral salience that desert for punishment has. Then again, criminal law's moral salience varies depending on how it is theorized. Jeremy Bentham warned that retributive punishment authorized gratuitous cruelty for the sake of reasons so emotionally charged that they hardly count as reasons at all.⁶ Immanuel Kant argued that utilitarian desert is not proper desert at all; that it sheds the moral significance of punishment in the "windings of eudaemonism."⁷ Some consequentialist theories attempt to reduce moral imperatives to expressions of moral preferences.⁸ Some retributive theories feature threshold deontology as a way to cope with retributivism's more extravagant moral demands by appealing to consequences.⁹ An entitlement to punishment is best understood in terms of Hart's conception of criminal law as a choosing system, and this entitlement takes on the moral salience of that conception: that of positive freedom.

III. Hart's "Choosing System" as a Normative Theory of Punishment

Hart described criminal law as a choosing system in an argument that, as it is interpreted here, drew on both his general jurisprudence and his account of rights. Under criminal law as Hart describes it, an offender committing a crime hopes to obtain an advantage, and having been caught and prosecuted, may hope for the advantage of a defense.¹⁰ If convicted, she will have obtained only a disadvantage. This is all she is entitled to. There is no hint of retributive desert for punishment in this picture, and surprisingly little of consequentialism's concern with the common good.

6. See JEREMY BENTHAM, *THE PRINCIPLES OF MORALS AND LEGISLATION* 142, 166–73 (Prometheus Books 1988) (1781) (under the "principle of frugality," punishment should not inflict pain greater than is required to accomplish its goal); *id.* at 166 (stating that "all punishment in itself is evil").

7. See IMMANUEL KANT, *THE METAPHYSICS OF MORALS* 141 (Mary Gregor ed. and trans., Cambridge Univ. Press 1996) (1797) (internal citations omitted) ("The principle of punishment is a categorical imperative, and woe to him who crawls through the windings of eudaemonism in order to discover something that releases the criminal from punishment . . .").

8. See, e.g., Kenneth G. Dau-Schmidt, *An Economic Analysis of the Criminal Law as a Preference-Shaping Policy*, 1990 DUKE L.J. 1, 3 (1990).

9. See Larry Alexander, *Deontology at the Threshold*, 37 SAN DIEGO L. REV. 893, 894 (2000) (critically examining the thesis that at some limit the deontological imperative to punish gives way to consequentialist considerations).

10. See *id.* at 50.

Perhaps the expectation of such moral salience has contributed to a mistaken understanding of Hart's criminal jurisprudence. The principal contribution to punishment theory in Hart's *Punishment and Responsibility* is generally taken to be a hybrid theory of punishment's justification.¹¹ In the first chapter, "Prolegomenon to the Principles of Punishment," he makes a distinction between the "General Justifying Aim" of criminal law and the "distribution" of punishment to particular offenders.¹² The former, Hart argues, consists of the law's forward-facing functions: deterrence, incapacitation, and rehabilitation.¹³ Retribution, the backward-facing function, is confined to the latter role of determining which individuals shall be punished.¹⁴ This move is generally read as consigning retribution to the role of a side-constraint.¹⁵ This bifurcation and recombination of consequentialist and retributive functions constitutes a hybrid theory of punishment.¹⁶

11. See John Bronsteen, *Retribution's Role*, 84 IND. L.J. 1129, 1136 (2009) ("Hart's mixed or hybrid theory of punishment, building as it does on the insights of Rawls, has in turn proved extremely influential."); Ian P. Farrell, *Gilbert & Sullivan and Scalia: Philosophy, Proportionality, and the Eighth Amendment*, 55 VILL. L. REV. 321, 336, 359 (2010) ("[John] Rawls's approach to deriving proportionality via a rule-utilitarian model of punishment, while not ultimately persuasive, nonetheless contains insights that, in the hands of other theorists such as H.L.A. Hart, lead to the development of mixed or hybrid theories of punishment . . . Hart's mixed or hybrid theory of punishment, building as it does on the insights of Rawls, has in turn proved extremely influential.").

12. See PUNISHMENT, *supra* note 1, at 9 ("Here I shall merely insist that it is one thing to use the word Retribution at this point in an account of the principle of punishment in order to designate the General Justifying Aim of the system, and quite another to use it to [answer] the question 'To whom may punishment be applied?' (the question of Distribution) . . .").

13. See *id.* at 6–7 ("Without recourse to the simple idea that the criminal law sets up, in its rules, standards of behaviour to encourage certain types of conduct and discourage others we cannot distinguish a punishment in the form of a fine from a tax on a course of conduct.").

14. See *id.* at 11 ("The root question to be considered is, however, why we attach the moral importance which we do to retribution in Distribution.").

15. See, e.g., Andrew R. Strauss, *Losing Sight of the Utilitarian Forest for the Retributivist Trees: An Analysis of the Role of Public Opinion in A Utilitarian Model of Punishment*, 23 CARDOZO L. REV. 1549, 1569 (2002) ("This solution is utilitarian at its heart, and, like Hart's model, it includes desert-based side-constraints on punishment.").

16. See PUNISHMENT, *supra* note 1, at 9 ("[I]t is perfectly consistent to assert both that the General Justifying Aim of the practice of punishment is its beneficial consequences and that the pursuit of this General Aim should be qualified or restricted

This hybridization is not, however, Hart's most important contribution to the normative theory of punishment. In "Legal Responsibility and Excuses" the chapter that follows "Prolegomenon," Hart offers an account of criminal law as a choosing system; a system in which desert has no role.¹⁷ Speaking of criminal law's providing defenses generally, he asks: "Can anything positive be said about this principle except that it is one to which we attach moral importance as a restriction on the pursuit of any aim we have in punishing?"¹⁸ It might be sufficient to acknowledge the role of Kantian, deontological desert, he writes, under which we "treat all alike as persons by attaching special significance to voluntary action and . . . forbid the use of one human being for the benefit of others."¹⁹ But Hart immediately adds, "I confess however to an itch to go further."²⁰ He cites "modern scepticism" as his motive.²¹ The objective of Hart's further argument is a non-retributive normative theory of legal punishment.

Hart launches his argument in a strange direction. Instead of addressing punishment for offenses, he considers defenses.²² He construes excuse broadly as encompassing doctrines that today are separated into at least three categories: missing culpability elements, as in mistake of fact; justifications such as self-defense; and non-responsibility defenses such as insanity.²³ The common thread of the excuses is involuntariness, he argues, and in their shared role of precluding punishment they comprise a system for the exercise of voluntariness.²⁴

out of deference to principles of Distribution which require that punishment should be only of an offender for an offence.").

17. *See id.* at 44.

18. *Id.* at 21.

19. *Id.* at 22.

20. *Id.*

21. *Id.* In the era in which Hart wrote, morality—including moral desert and retribution—was thought to be a matter of feelings, and therefore not open to rational discussion. *See, e.g.* *Woodson v. North Carolina*, 428 U.S. 280, 314–15 (1976) (Rehnquist, J., dissenting) ("In Georgia juries are entitled to return a sentence of life, rather than death, for no reason whatever, simply based upon their own subjective notions of what is right and what is wrong."). This is the "modern skepticism" to which Hart refers. *Cf.* PUNISHMENT, *supra* note 1, at 37 ("Now, if [retributivism] were merely a theory as to what the criminal law of a good society should be, it would not be possible to refute it, for it represents a moral preference: namely that legal punishment should be administered only where a 'morally wrong act has been done. . .').

22. *See* PUNISHMENT, *supra* note 1, at 31.

23. *See id.*

24. *See id.* at 14 ("Actions done under these excusing conditions are in the

Criminal punishment as an attempt to secure desired behaviour differs from the manipulative techniques of the Brave New World (conditioning, propaganda, etc.) . . . by taking a risk. It defers action till harm has been done; its primary operation consists simply in announcing certain standards of behaviour and attaching penalties for deviation, making it less eligible, and then leaving individuals to choose.²⁵

In other words, criminal law is not an economy of threats²⁶ that goads people into conformity.²⁷ Instead, criminal law's offenses and defenses together constitute a choosing system.²⁸

Premising the excuses on choice leads Hart to reject a role for retributive desert in the distribution of punishment. The excuses are not grounded in retributive desert because moral culpability is not the basis of criminal liability. Hart squarely rejects the view that *mens rea* as a criterion of desert consists of "a morally evil mind,"²⁹ a view stated most extravagantly by Lord Justice Alfred Denning: "In order that an act should be punishable, it must be morally blameworthy. It must be a sin."³⁰ Hart's argument consists primarily of a rebuttal of Jerome Hall's view that legal punishment requires moral desert and that moral desert is identified with mental states.³¹ Under Hall's view, the existence of strict liability offenses creates a dilemma: punish in the absence of desert or condemn strict liability as unjust.³² Hall took the latter position.³³ Oliver Wendell Holmes took the former decades before.³⁴ Hart denies there is any such dilemma.³⁵ The excusing conditions all turn on voluntariness, and voluntary choice is

misleading terminology of Anglo-American law done without *mens rea*, and most people would say of them that they were not 'voluntary' or 'not wholly voluntary.'").

25. *Id.* at 23.

26. *Id.* at 40.

27. *See id.* at 43–44.

28. *Id.* at 44, 49.

29. *Id.* at 35.

30. *Id.* at 36 (quoting ALFRED DENNING, *THE CHANGING LAW* 112 (Stevens and Sons Ltd. 1953)).

31. *See id.* at 37–39.

32. *See id.* at 37–38.

33. *See id.* at 37.

34. *See* OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 48 (1882) ("[J]ustice to the individual is rightly outweighed by the larger interests [of preventing harm] on the other side of the scales.").

35. PUNISHMENT, *supra* note 1, at 37–38.

the principal necessary condition for the imposition of punishment.³⁶ *Mens rea*—in the broad sense that encompasses criminal blameworthiness generally—is required to prove an offense, but this is not because it denotes moral wrongdoing. Instead, it denotes voluntariness and voluntary choices.

If the excuses are grounded in choice instead of retribution for moral wrongdoing, then one might think that they have a consequentialist rationale, such as the general justifying aim of punishment described in “Prolegomenon.” But Hart expressly rules this out. “On this view,” he writes, “excusing conditions are accepted as something that may conflict with the social utility of the law’s threats.”³⁷ Criminal law’s distributive principle is not retributive or consequentialist, and neither is its general justifying aim. The principle Hart substitutes for both purposes is choice as assessed according to the excusing conditions, which are, in turn, a matter of voluntariness.³⁸

How does this principle work? Hart argues that the excusing conditions—such as mistake, self-defense, or insanity—are invalidating conditions premised on non-responsible agency.³⁹ They are analogous to the conditions that invalidate wills, gifts, contracts, and marriages, such as mental incompetence, coercion, or minority.⁴⁰ The commission of a crime, correspondingly, is analogous to the creation of a will, a gift, or a marriage.⁴¹ All legal systems “contain rules . . . that provide legal facilities whereby individuals can give effect to their wishes by entering into certain transactions that alter their own and/or others’ legal position (rights, duties, status, &c.).”⁴² To commit a crime is a transaction by which the offender alters his own legal position in the course of giving effect to his wishes, and by which he also changes the legal position of the state.⁴³ He creates an entitlement to punishment under the jurisdiction’s sentencing laws.

36. *See id.* at 38.

37. *Id.* at 49.

38. *See id.* at 35–40, 44.

39. *See id.* at 28–30.

40. *See id.* at 34 (“But here too most of the mental conditions we have mentioned are recognized by the law as important not primarily as *excusing* conditions but as *invalidating* conditions.”).

41. *Id.*

42. *Id.*

43. *See id.*

It is important to pause here and stress that the person in civil law who is analogous to the offender in criminal law is not the beneficiary of a will, gift, or contract. It seems natural to conclude that an offender is analogous to a beneficiary, because each deserves something. In Hart's choosing system, however, the offender occupies the position of a maker of a will, gift, or contract.⁴⁴ She is entitled to have her wishes, as she has committed them to law, carried out. The offender creates an entitlement such as this when she commits a crime.

Desert need not be a feature of legal punishment if both the general justifying aim of criminal law and the principle that distributes punishment to individuals is choice. Desert is a reason to punish all offenders in a full retributivist theory of punishment; or, under threshold deontology, a reason to punish fewer than all, or some less severely, on consequentialist grounds.⁴⁵ In a consequentialist system, the absence of desert might serve as a side-constraint on punishment, as described by Hart in "Prolegomenon."⁴⁶ In contrast, an offender's acting on the opportunity to change her legal position does not provide reasons to condemn or blame her, as moral wrongdoing and damage to the welfare of society might do. A choosing system determines the reach and severity of punishment only by virtue of the transaction and its terms. The offender, one might say, is entitled to punishment.

IV. ENTITLEMENT TO PUNISHMENT AS A LEGAL RELATION

Hart's choosing system account of criminal law accords with both his theory of legal rights and his theory of legal rules. All three accord with the idea of an entitlement to punishment. Criminal law—when viewed as a choosing system that gives rise to an entitlement to punishment—sets aside retributivism as a normative theory of punishment, and with it the dominance of desert in punishment's moral justification and distribution. Furthermore, the operation of rights and rules in this choosing system is not understood in terms of interests; that is, in terms of benefit and burden.

44. *See id.* at 44–45.

45. *See* Alexander, *supra* note 9, at 894 ("There are some acts that are morally wrong despite producing a net positive balance of consequences; but if the positive balance of consequences becomes sufficiently great—especially if it does so by averting horrible consequences as opposed to merely making people quite well off—then one is morally permitted, and perhaps required, to engage in those acts that are otherwise morally prohibited.").

46. *See* PUNISHMENT, *supra* note 1, at 181.

Accordingly, consequences, good or ill, are neither the aim nor the organizing principle of criminal law.

An entitlement to punishment is different from a right to punishment; it is, instead, a claim to punishment. Among the myriad meanings of “right,” Wesley Newcomb Hohfeld identified “property, interest, power, prerogative, immunity, [and] privilege.”⁴⁷ Hohfeld isolates all of these relations from the central case of a right, which is best described as a claim with a correlative duty in another to satisfy that claim.⁴⁸ An entitlement to punishment is best described as a claim. A claim is not, on its face, property, and neither is an entitlement, of course. A claim does not necessarily entail a benefit and claims and entitlements are distinguishable from privilege and immunity on this score. Unlike a claim or an entitlement, a prerogative can be exercised without the performance of a duty by another, other than the duty of all not to interfere. An interest is not like a claim because it usually involves a number of constitutive claims and duties. In addition, a claim is imperative, whereas an interest is not. That is, a duty correlative to a claim is an “upon demand” duty. In contrast, the duties correlative to interests require some sorting out not only as to who is to satisfy them, but also as to if and when a given duty arises. An entitlement to punishment is a claim: a discrete imperative imposed upon a readily identifiable agent. The state and only the state has a duty to punish upon a showing that criminal law has been violated.

An entitlement to punishment, however, is not only a claim to punishment. In order to describe entitlement as a legal relation, I will graft Hart’s conception of rules—in particular, his notion of secondary rules—and his conception of rights—in particular, his account of powers—onto a Hohfeldian scheme of legal relations.

Hart articulated a “choice” or “will” conception of rights in a set of arguments against Bentham’s “interests” conception.⁴⁹ That is, Hart did not frame rights in terms of benefit or burden. Bentham viewed any breach of law by one person as necessarily a detriment to others, and compliance with

47. WESLEY NEWCOMB HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING* 36 (Walter Wheeler Cook ed., 1919).

48. Hohfeld initially identifies the correlative of a duty as a right. He then shifts to the term “claim” as the correlative of a duty, because right is a broad term sometimes used to designate privileges, powers, and immunities. *See id.* at 37–38.

49. *See* H.L.A. HART, *ESSAYS ON BENTHAM: JURISPRUDENCE AND POLITICAL THEORY* 164 (Oxford Univ. Press 1982) [hereinafter *ESSAYS*].

law by one person as necessarily a benefit to others.⁵⁰ As Hart pointed out, however, the beneficiary of a contract might have no right to enforce it, and a party who holds a right to enforce a contract is not always its beneficiary.⁵¹ The main difficulty, however, is the failure of an interest theory to capture the significance of powers as distinguished from claims, privileges, or immunities. A central feature of civil law is:

[t]he idea . . . of one individual being given by the law exclusive control, more or less extensive, over another person's duty so that in the area of conduct covered by that duty the individual who has the right is a small-scale sovereign to whom the duty is owed.⁵²

This sovereignty is a power, and when it is exercised to change one's legal status and that of others—that is, when it is used to create a claim, immunity, or privilege—it also creates further legal powers.⁵³ Bentham's interest in conception of rights overlooks this little sovereignty.

Hart's account of rights has more in common with Hohfeld's account than with Bentham's, but of course it differs from Hohfeld's as well.⁵⁴ Like Bentham, Hohfeld failed to appreciate the full scope and significance of powers.⁵⁵ Whereas Hohfeld presented a power and a liability as correlates, Hart recognized a broader range of powers' correlative effects.⁵⁶ A power can be exercised to create claims, duties, immunities, and further powers.⁵⁷ A power entails “an act-in-the-law, just in the sense that it is specifically recognized by the law as having legal effects in varying the legal position of various parties and as an appropriate means for varying it.”⁵⁸ Nevertheless, it is possible to portray Hart's account of powers as a Hohfeldian scheme. Doing so allows one to see how a person creates an entitlement to punishment when she commits a crime.

First, however, it is helpful to connect Hart's account of powers with his account of criminal law as a choosing system, by way of his account of

50. *See id.* at 174.

51. *Id.* at 187.

52. *Id.* at 183.

53. *Id.* at 183–84.

54. *Compare id.*, with HOHFELD, *supra* note 47, at 36–37.

55. *Compare* ESSAYS, *supra* note 49, at 183–84, with HOHFELD, *supra* note 47, at 36–37.

56. *See* ESSAYS, *supra* note 49, at 184.

57. *See id.*

58. *Id.* at 188.

legal rules. In his *The Concept of Law*, Hart effectively clarifies the notion of a power as an “act-in-the-law.”⁵⁹ We tend to think of legal rules, especially criminal prohibitions, as norms to which we are obligated to conform. Hart calls these primary rules.⁶⁰ A second class of rules, however, is not like this. Hart’s secondary rules are power-conferring rules.⁶¹ If and when we comply with secondary rules, we succeed in creating legal relations.⁶² The law of wills is a body of secondary rules by which we create estates and beneficiaries. The law of contract is a body of secondary rules that create duties and obligations for the contracting parties. The law of marriage is a body of secondary rules by which we create a unique domestic partnership. A criminal code seems not to be a body of secondary rules at all, because its prohibitions are all primary rules. Each and every crime, however, carries a specified penalty under sentencing laws that are integrated with the prohibitions. These prohibition-sentencing pairs comprise a system of secondary rules for creating criminal liability. That is, they constitute criminal law as a choosing system.

When an offender commits a crime within a choosing system, she creates both a claim to be punished and a liability to be punished at the same time. This is her entitlement to punishment. The creation of this entitlement in criminal law is accomplished in several steps within law as a choosing system, as depicted in Figure 1.

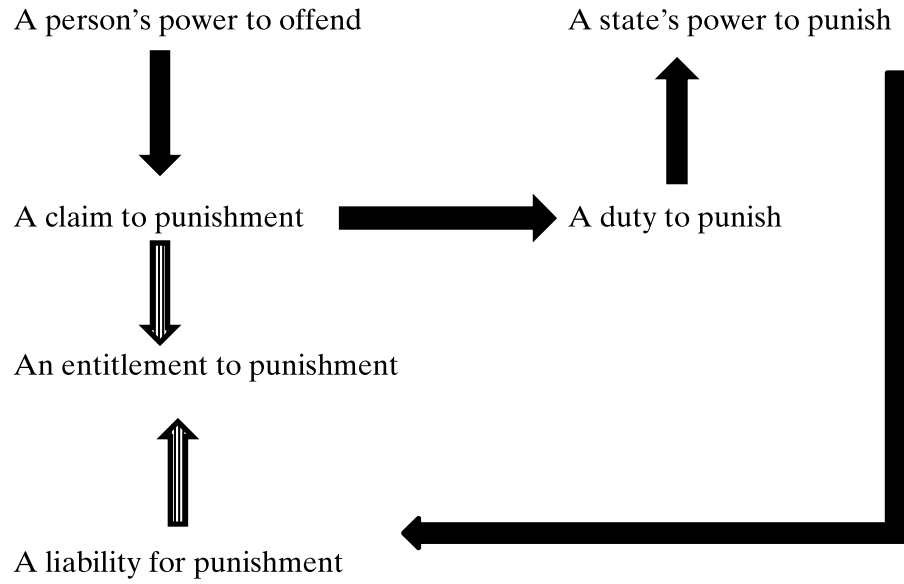
59. See H.L.A. HART, *THE CONCEPT OF LAW* 96 (Oxford Univ. Press 1961) [hereinafter *THE CONCEPT OF LAW*].

60. *Id.* at 91.

61. See *id.* at 79.

62. See *id.* at 81 (“Rules of the first type impose duties; rules of the second type confer powers, public or private.”).

Figure. 1.



To commit a crime is to alter one's legal status by the exercise of a power to create a claim to punishment. This claim correlates to a duty to punish on part of the state, a duty that the offender is able to create because the claim to punishment carries with it the power to alter the legal status of another as well as oneself. The state, of course, has the power to perform the duty to punish, and in the exercise of that power it creates a liability in the offender: a liability to punishment. In short, the offender tips over five dominoes—power, claim, duty, power, liability—and creates both a claim and a liability to punishment. The claim-liability pair produced by this sequence is not a simple set of correlatives in Hohfeld's system or in Hart's. It is the product of a system of powers exercised by means of a set of secondary rules. A claim and a liability are held in tandem, but this does not mean merely that they are held simultaneously. The claim and the liability are cognate; they arise together from a single act. This amounts to a distinctive legal relation that is characteristic of criminal law as a choosing system.

In criminal law as a choosing system, desert for punishment no longer holds pride of place. That place belongs to entitlement to punishment and its role in securing positive freedom, as we will see in Part VI. Entitlement is preferable to desert as the defining legal relation in the law of punishment, as we will see next, because in addition to its other shortcomings, desert is dishonest.

V. ENTITLEMENT TO PUNISHMENT AND MORAL LUCK

Moral luck is bad luck of a notorious kind.⁶³ We can be held responsible even though our control over our acts or the consequences they produce seems too attenuated for the attribution of responsibility. In the example given earlier, Barbara has a good moral defense of necessity if circumstances drive her to the extremity of stealing to feed her family. She has no legal defense, however, because the rule of law can afford to license only a few violations of criminal law. She does not deserve to be punished, but she will be punished. She is a victim of moral luck.

We typically do not pay much attention to predicaments such as Barbara's. To see punishment in terms of desert is partly responsible for this blindness. Deserved punishment does not seem to be bad luck at all, so we stretch the meaning of desert to cover her case and others like it. The more

63. See THOMAS NAGEL, *MORTAL QUESTIONS* 26 (Cambridge Univ. Press 1979) (1613) ("Where a significant aspect of what someone does depends on factors beyond his control, yet we continue to treat him in that respect as an object of moral judgment, it can be called moral luck.").

we do so, however, the more we cover up the vein of moral luck that runs through criminal law. Perhaps there is an air of paradox in saying that an offender is entitled to the bad luck of punishment; but if it has no other virtue, at least it allows us to see criminal law's moral luck problem.

Criminal law presents the problem of moral luck in many dimensions. In his early, influential examination of moral luck, Thomas Nagel found it in four different kinds of luck: resultant, circumstantial, constitutive, and causal.⁶⁴ The first kind, resultant luck, is simply how things turn out, for good or ill.⁶⁵ If Isabelle heedlessly cleans her loaded gun and it fires and kills Isador as he walks by her house, she will be guilty of negligent homicide. If Isabelle's neighbor Jasmine heedlessly cleans her loaded gun and it fires after Isador has passed her house, she will not have committed a homicide at all. Neither woman had a say in where and when Isador walked, and each woman cleaned her gun heedlessly. But Jasmine was lucky while Isabelle was unlucky. Isabelle's bad luck is resultant moral luck, as it is in any crime of negligence, but there is virtually nothing in the law of negligence that acknowledges her misfortune.⁶⁶ Similarly, if Kevin shoots at his business partner Laura and misses because she suddenly kneels down to check on a noisy piece of machinery, he will be guilty of attempted murder. If Calvin shoots at his business partner Laurel and kills her because she is standing while looking down at a noisy piece of machinery, he will be guilty of murder. In most places, Kevin will receive a lesser sentence than Calvin will.⁶⁷ Calvin's bad luck in sentencing is resultant moral luck, given that Laurel was as likely to kneel down as Laura was, and given that Calvin had no more control over Laurel's movements than Kevin had over Laura's. There is

64. *See id.* at 28.

65. *See id.* at 28–32.

66. Moral luck is acknowledged in the doctrine that the offender must be shown not only to have failed the reasonable person standard, but also to have been able to comply with it. *See* PUNISHMENT, *supra* note 1, at 153–54. The attributes of the offender that are considered on the second prong, however, are limited to extreme mental or physical disability. Anything more would compromise the stringency of criminal law. *Compare* State v. Everhart, 231 S.E.2d 604 (N.C. 1977) (finding that a person with an IQ of 72 cannot be held negligent), *with* State v. Patterson, 27 A.3d 374 (Conn. App. Ct. 2011), *aff'd*, 68 A.3d 83 (Conn. 2013) (finding on similar facts, a person with an IQ of 61 can be held negligent).

67. *See* Sanford H. Kadish, *The Criminal Law and the Luck of the Draw*, 84 J. CRIM. L. & CRIMINOLOGY 679, 679 (1994) (arguing that to punish attempts less than completed crimes is “not rationally supportable notwithstanding its near universal acceptance in Western law, the support of many jurists and philosophers, and its resonance with the intuitions of lawyers and lay people alike”).

nothing in the law of attempt that explains or mitigates Calvin's resultant moral luck.

Circumstantial moral luck is similarly obvious but ignored in criminal law.⁶⁸ A classic classroom hypothetical has Yves driving down a mountain road with a cliff going steeply up on one side and a cliff going steeply down on the other. He comes upon two drunks passed out in the road, completely blocking it. If he runs over them because Yvette orders him to do so while holding a gun to his head, he will have a defense of duress. If Yolanda comes upon a pair of drunks lying in the same road and chooses to run over them because her brakes failed, and she naturally did not choose to drive off the cliff and die, she will not have a defense of duress of circumstances because most jurisdictions recognize no such defense.⁶⁹ Yolanda is the victim of circumstantial bad luck, or, given her resulting punishment, circumstantial moral luck. Criminal law fails to address Yolanda's unfair treatment. Similarly, if Floyd robs a bank and a security guard panics, fires his gun, and kills a customer, Floyd will be guilty of murder. If Florence robs a bank, and a security guard panics, fires his gun, and shatters a teller's window, she will not be guilty of murder. From Floyd's point of view, he is unlucky to be facing a murder charge. He had no more control over his security guard's skill than Florence did hers, but his circumstantial moral luck will put him in prison. Nothing in the law of felony murder mitigates this arbitrariness.

Constitutive luck is luck in the influences that make us who we, uniquely, are.⁷⁰ Suppose Sasha is mentally ill and that her symptoms include severe delusions. She shoots and kills Ivan, an ordinary human being, believing him to be Beelzebub and herself to be one of God's avenging angels acting to remove him from this realm, at least, though he is immortal. She would undoubtedly succeed in a defense of insanity because she has no capacity to understand the nature of her actions or their consequences.⁷¹ If Sally shoots and kills Isaac because she believes that MI-6 has granted her a

68. See NAGEL, *supra* note 63, at 27.

69. Unlike most United States jurisdictions, Canada does recognize a defense of duress of circumstances. The standard for this defense, however, is very strict. See, e.g., *R. v. Latimer*, 1 S.C.R. 3, 2001 S.C.C. 1 (2001) (finding euthanasia of a disabled child under the belief that she was suffering does not meet the standard of necessity).

70. See NAGEL, *supra* note 63, at 32–33.

71. See Stephen P. Garvey, *Agency and Insanity*, 66 BUFF. L. REV. 123, 129 (2018) (asserting that the gist of the traditional test for insanity is that “a person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks capacity to know the criminality of his conduct”).

license to kill, she will not succeed with an insanity defense because she has the capacity to understand that she shot and killed a human being.⁷² Sally is mentally ill, but not in the right way. Her bad luck is constitutive moral luck. Then again, the insanity defense is formulated and applied in a variety of ways. If Siobhan shoots and kills Iggy because she believes that MI-6 has granted her a license to kill, she might succeed with an insanity defense whereas Sally cannot, because the requisite incapacity to appreciate the nature of her actions and their results is construed more broadly where Siobhan committed her crime.⁷³ Furthermore, the luck of the draw in local law is an instance of circumstantial moral luck. Still, the law has nothing to say about moral luck regarding which local law governs one's crime.

Causal luck is a function of antecedent circumstances.⁷⁴ Suppose that Nathan rapes Ned, a stranger, then sets fire to him so that Ned falls unconscious, then puts him in a body bag along with a fifty-pound bag of sand and waits for Ned to regain agonizing consciousness, then throws him in a river to drown. In many places, Nathan will be sentenced to death for committing a murder that is heinous, atrocious, and cruel.⁷⁵ Suppose Nathan's father routinely burned his son with cigarettes from the time he was an infant, and his mother delighted in pushing him under water in the bath so long and so often that he suffered brain damage, and both parents raped Nathan from the time he reached puberty, but only for a few months because he ran away and lived on the streets from the age of 11, making a living as a prostitute. None of this will matter to most juries in capital cases, and it will make even less difference to an appellate court inclined to defer to these juries. Nathan's bad luck is causal moral luck.

As Nagel points out, moral luck of each kind is indistinguishable from the problem of free will versus determinism.⁷⁶ Could Barbara, Yves,

72. *See id.*

73. The Model Penal Code uses "appreciate" instead of "understand" in its formulation of the insanity defense. *See* MODEL PENAL CODE § 4.01(1). This word captures the effects of mental illness beyond the cognitive; that is, mental illnesses' volitional, affective, and desiderative effects.

74. *See* NAGEL, *supra* note 63, at 34–35.

75. *See* Richard A. Rosen, *The "Especially Heinous" Aggravating Circumstance in Capital Cases—The Standardless Standard*, 64 N.C. L. REV. 941, 943 (1986) (finding most states' death sentencing statutes contain "alone or in some combination, the terms 'especially heinous, atrocious, or cruel,' 'depravity of mind,' or 'outrageously vile wanton or inhuman'").

76. *See id.* at 34. *See also* BERNARD WILLIAMS, *MORAL LUCK: PHILOSOPHICAL PAPERS 1973–1980* 21 (Cambridge Univ. Press 1981) (1600) ("The form of this point

Yolanda, Sasha, Sally, or Nathan have acted differently from the way each did? The public policy debate over capital punishment sometimes touches on determinism versus free will, but death penalty law fails to mitigate Nathan's moral luck.⁷⁷ If Nathan is tried before 12 believers in free will, his causal moral luck will have been compounded by circumstantial moral luck. One determinist might have saved him.

What can be done about criminal law's poor handling of moral luck? Probably nothing. Moral luck is just a feature of human life and morality. We are hostage to unpredictable outcomes, our circumstances, influences on our character, and our personal histories. There is no immunity to these effects in law, and no recognizable defense can make full allowance for it. To do so would be to weaken criminal law's stringency. We have to ask which doctrine we are willing or able to sacrifice. Perhaps negligence. Glanville Williams and Jerome Hall both argued that it should not count as *mens rea*.⁷⁸ The problem is that their opposition was based on the belief that objective culpability should not be included in criminal law, whereas in fact objective criminal culpability is pervasive.⁷⁹ Conditional intent suffices to show intent,⁸⁰ for example, and willful ignorance suffices to show knowledge.⁸¹ Both doctrines appeal to circumstances surrounding the commission of a crime. Should all objective culpability be banned, then? Even if we were to solve the moral luck problem where objective culpability is concerned, we would

which is most familiar, from discussions of freewill, is that the dispositions of morality, however far back they are placed in the direction of motive and intention, are as 'conditioned' as anything else.").

77. Moral luck is acknowledged in capital cases because any relevant fact is admissible to prove mitigation. *See* Lockett v. Ohio, 438 U.S. 586, 587 (1978). However, given that the capacious standard of heinous, atrocious, and cruel is to be found in almost all jurisdictions as an aggravator, the problem remains one of circumstantial moral luck with juries whose discretion in either direction is essentially uncontrolled. *See id.*

78. *See* GLANVILLE WILLIAMS, CRIMINAL LAW: THE GENERAL PART 122–23 (Stevens & Sons Ltd. 2d ed. 1961) (discussing that negligence liability does not deter and should not be recognized as *mens rea*); Jerome Hall, *Negligent Behavior Should be Excluded from Penal Liability*, 63 COLUM. L. REV. 632, 635 (1963) (arguing that "in the long history of ethics that *voluntary* harm-doing is the essence of fault").

79. *See* Kyron Huigens, *On Aristotelian Criminal Law: A Reply to Duff*, 18 NOTRE DAME J.L. ETHICS & PUB. POL'Y. 465, 473–75 (2004) (listing eleven objective culpability doctrines in addition to negligence).

80. *See, e.g.,* Holloway v. United States, 526 U.S. 1, 12 (1999) (finding evidence of intent to rob was sufficient proof of intent to kill).

81. *See, e.g.,* United States v. Jewell, 532 F.2d 697 (9th Cir. 1976) (holding in a drug smuggling case, defendant's knowledge of a secret compartment and other facts indicating the presence of marijuana sufficient to show knowledge of contraband).

have only just begun. Which defense should we expand? How far? If one, why not all?

Even having reformed culpability in offenses and expanded the defenses, we still would have considered only the stringency of criminal law. To mitigate moral luck in at least one doctrine would undermine the authority of law. Notice and opportunity to comply with the law is a feature of the rule of law, a matter of fundamental fairness. Perfect notice, of course, is not required, which raises a problem of circumstantial moral luck: we bar mistake of law as a defense even when the mistake is reasonable. This is ordinarily justified in pragmatic terms. If mistake or ignorance of the law were an available defense, then everyone would feign mistake and cultivate ignorance. Chaos might ensue. The more fundamental problem, however, is that to recognize mistake of law would be to deprive criminal law of its binding force. To deprive the law of its authority is to have no law at all. Moral luck in mistake of law cases is impossible to cure.

What criminal law might say about moral luck is a different question from what it might do. Law is expressive; it communicates. If criminal law is not enforced or is enforced unevenly, then we lose more than its deterrent effect. This failure creates resentment in those who comply with the law; not only against those who do not comply, but also against law enforcement agents. Poor enforcement saps criminal law of credibility and respect.⁸² Perhaps criminal law's pervasive tolerance of moral luck has similar effects. Draconian law and relentless enforcement also cause resentment and undermine credibility and respect for law, and the moral luck pervading criminal law conveys a similar message of cruelty and intolerance.

What we can do about this message is unclear. Perhaps the procedures of criminal law might be arranged to blunt its damaging expressive effects. For example, both Nagel and Bernard Williams describe a phenomenon of agent regret.⁸³ If Oliver kills someone in self-defense, he might not be able to shake the sense that he has done something wrong. His sense of responsibility tells us, at least, that holding a person accountable for something beyond his control cannot be treated as a simple, inevitable injustice. This complicates the criminal law picture. If Yolanda runs over the drunks on the mountain road because her brakes have failed, we will find this morally excusable, but criminal law will not treat it this way. Yolanda's agent regret might attenuate her sense of injustice over how the law has

82. See Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. Rev. 349, 351–52 (1997).

83. See NAGEL, *supra* note 63, at 27–29; WILLIAMS, *supra* note 76, at 27.

treated her. It will not do the same for her family and friends, however. They will experience her moral luck acutely. Of course, the families of the victims will be less troubled, and they might embrace moral luck in criminal law whole-heartedly—a response that, like the impulse to revenge, criminal law ought to temper. The hard truth, however, is that criminal law does very little to minimize the direct or expressive effects of moral luck.

Any argument denying that moral luck is a genuine phenomenon or minimizing the scope or seriousness of the problem can be applied, in the abstract, to its operations in law.⁸⁴ We have no reason to expect, however, that philosophical discussions of moral luck will ordinarily translate into a public, actionable reassessment of death sentencing—or of negligence, fortuity in attempts, duress, felony murder, insanity, variation in local law, or the jury system. Moral luck is seldom, if ever, offered as a reason for criminal justice reform.

Our inability to eliminate moral luck from criminal law's operations or its expressive effects is a reason to doubt whether punishment's justification or distribution is best described in terms of desert. As noted above, the belief that the system operates on desert conceals the problem of moral luck. It is concealed, that is, until punishment is imposed on a person. Then an offender is likely to perceive it, and to feel it acutely. It is common to hear an offender claim that she has been treated unfairly by the legal system. This complaint should not always be dismissed as childish or self-serving. It is neither one of these things if punishment is the product of moral luck. The most one can say honestly is that the legal system has imposed punishment, and that this was just by the law's own lights, if not morality's. Setting desert aside, we can say only that criminal law entitles an offender to punishment.

VI. ENTITLEMENT TO PUNISHMENT AND POSITIVE FREEDOM

Hart's conception of criminal law as a choosing system departs from both retributivism and consequentialism. This hardly saps it of moral salience. The idea that these theories capture all there is to capture in the way of punishment's moral justification is implausible. Hart's view of criminal law as a choosing system draws an important moral and political value into the analysis of criminal law: freedom. Criminal law—properly

84. See Dana K. Nelkin, *Moral Luck*, STAN. ENCYCLOPEDIA PHIL. (Apr. 19, 2019), <https://plato.stanford.edu/entries/moral-luck/> [https://perma.cc/WD85-YG72]; Kasper Lippert-Rasmussen, *Justice and Bad Luck*, STAN. ENCYCLOPEDIA PHIL. (Mar. 28, 2018), <https://plato.stanford.edu/archives/sum2018/entries/justice-bad-luck> [https://perma.cc/DSN7-QGEW].

conceived and carried out—serves our commitment to treat offenders as beings capable of self-determination. This view provides entitlement to punishment with moral salience. When framed as a means to advance positive freedom, criminal law as a choosing system has a purpose comparable to desert in a retributive theory of punishment, and to the advancement of social welfare in a consequentialist theory. This is to say that Hart's choosing system account of criminal law is a normative theory of punishment, not merely a conceptual description. More to the point, however, if criminal law serves positive freedom, the notion of entitlement to punishment loses much of its air of paradox.

Hart is not concerned with negative freedom as Isaiah Berlin described it.⁸⁵ “Political liberty in this sense is simply the area within which a man can act unobstructed by others.”⁸⁶ Instead, Hart's conception of criminal law presents it as a means to positive freedom. Berlin describes positive freedom in terms of a rational self:

The notion of liberty contained in [rationalism] is not the “negative” conception of a field (ideally) without obstacles, a vacuum in which nothing obstructs me, but the notion of self-direction or self-control. I can do what I will with my own. I am a rational being; whatever I can demonstrate to myself as being necessary, as incapable of being otherwise in a rational society—that is, in a society directed by rational minds, towards goals such as a rational being would have—I cannot, being rational, wish to sweep out of my way. I assimilate it into my substance as I do the laws of logic, of mathematics, of physics, the rules of art, the principles that govern everything of which I understand, and therefore will, the rational purpose, by which I can never be thwarted, since I cannot want it to be other than it is.⁸⁷

From here, however, Berlin goes on to describe, at length, and in detail how this idea of a free rational self can progress to the thought that I can free my true self from my less than rational self,⁸⁸ to the idea that my rational self is embodied in “a social ‘whole’ of which the individual is an element or

85. See generally ISAIAH BERLIN, *FOUR ESSAYS ON LIBERTY* 122 (Oxford Univ. Press 1969).

86. *Id.*

87. See BERLIN, *supra* note 85, at 144.

88. See *id.* at 132.

aspect,”⁸⁹ to the conviction that I can impose my will on recalcitrant human beings and “‘mould’ them to my pattern.”⁹⁰

This devolution, it might go without saying, is not the inevitable end of positive freedom as a value in criminal law as a choosing system (or elsewhere). Criminal law in Berlin’s imagined dystopian regime plainly comprises an economy of threats, goading people into compliance.⁹¹ The prohibitions in criminal law, its set of primary rules, would seem sufficient to do most of the tyrannical work. As we have seen, however, criminal law as a choosing system is embedded in rights construed as powers, and in legal systems containing secondary rules for the creation and exercise of these powers. “In brief,” Hart writes, “the function of these institutions of private law is to render effective the individual’s preferences in certain areas.”⁹²

If with this in mind we turn back to criminal law and its excusing conditions, we can regard their function as a mechanism for similarly maximizing within the framework of coercive criminal law the efficacy of the individual’s informed and considered choice in determining the future and also his power to predict that future.⁹³

What Hart describes here is autonomy by means of law, and autonomy is the animating idea of positive freedom, properly understood.

John Christman describes positive liberty in terms of autonomy, and, so described, it accords with Hart’s conceptions of rights and legal rules.⁹⁴ Christman reads negative liberty, as most do, as the removal of external constraints on thought and action.⁹⁵ Positive freedom, he argues, requires the removal of inner constraints as well.⁹⁶ The principal counterargument to this account of freedom begins with the “happy slave” objection.⁹⁷ By the logic

89. *Id.*

90. *Id.* at 146.

91. *Cf.* PUNISHMENT, *supra* note 1, at 40–41, 44 (arguing criminal law is not an economy of threats and does not goad people into obedience).

92. *Id.* at 45.

93. *Id.* at 46.

94. See John Christman, *Liberalism and Individual Positive Freedom*, 101 ETHICS 343, 344 (1991) [hereinafter *Liberalism*] (arguing positive freedom conceptualized in terms of self-governing free agents is “equivalent to the concept of individual autonomy.”).

95. *Id.*

96. *Id.*

97. *Id.* at 352–54.

of freedom from inner constraints, a slave who has reconciled himself to his condition is more free than a slave who recognizes the injustice perpetrated on him, because the internal constraints on the happy slave's thoughts and actions have been removed.⁹⁸ Christman responds to this objection by focusing attention on the reason that the happy slave is reconciled to his condition: his preferences have been formed by his enslavement.⁹⁹ Given this fact, he suffers no internal constraint, but he is not free.¹⁰⁰ Positive freedom is freedom from internal constraints other than those one chooses for oneself.¹⁰¹

Self-mastery means more than having a certain attitude toward one's desires at a time. It means in addition that one's values were formed in a manner or by a process that one had (or could have had) something to say about. It is in this way that positive freedom will be a property of the "true self," but this self need not be metaphysically set apart (e.g., from the "phenomenal" self) or ontologically mysterious.¹⁰²

Berlin regarded the notion of a true self as the first step on the road to tyranny.¹⁰³ If our preferences are the product of unimpeded self-reflection, however, and if this is the defining property of a true self, then tyranny is hardly inevitable.

Unfortunately, Christman overlooks the role of ordinary legal rules and rights in the maintenance of positive freedom:

Seeing freedom as more than a set of opportunities created by removing constraints from the path of thought and action—even "constraints" defined in a robust and nuanced manner—is to set out a view of human agency as a set of powers and abilities, ones regarding the development and expression of authentic and effective self-government. Certain political institutions and policies may well remove or minimize

98. *Id.* at 352.

99. *See id.* at 346 ("As my remarks so far have suggested, I would urge that what is needed is an account, at the level of preferences, of what processes of self-change preserve autonomy and which ones do not . . .").

100. *See id.* at 344.

101. *Id.*

102. *Id.* at 346.

103. *See* BERLIN, *supra* note 85, at 146.

constraints faced by an agent but do nothing to establish or protect those powers.¹⁰⁴

Hart demonstrated, however, that establishing and protecting these powers is precisely what law does.¹⁰⁵ Hart's jurisprudence sets out, in Christman's words, "a view of human agency as a set of powers and abilities, ones regarding the development and expression of authentic and effective self-government."¹⁰⁶

Under the ideal of positive freedom then, punishment is justified if a crime is an act of self-determination and, in this limited sense, a product of one's true self. A person who chooses punishment by offending is not a fair candidate for punishment if her reasons for offending were not her own. If her conduct is the result of duress, necessity, self-defense, mistake, mental illness, involuntary intoxication, or profound, voluntary intoxication, then it is not self-determined. The ideal of positive freedom rules out punishment in such cases—not because a suspension of an offender's negative freedom is not deserved for a violation of another person's negative freedom—but because the offense is not a product of self-determination or an exercise of positive freedom. (This connection between Hart's choosing system and positive freedom, incidentally, explains his decision to begin his account of criminal law as a choosing system with an examination of defenses instead of offenses.¹⁰⁷)

The connection between Hart's choosing system and positive freedom also sheds light on deterrence. The determination of one's own authentic freedom presumably entails avoiding punishment. The happy inmate is no more free than the happy slave. The preservation of personal liberty, though, is only part of a larger project of securing one's own responsible agency in thought and desire as well as action. Some critics of positive freedom—such as Berlin, when he raises the specter of tyranny—argue that it entails a requirement of having "correct" beliefs, because otherwise one's freedom would be pointless.¹⁰⁸ Responding to this argument, Christman writes:

104. John Christman, *Saving Positive Freedom*, 33 POL. THEORY 79, 87 (2005) [hereinafter *Positive Freedom*].

105. See THE CONCEPT OF LAW, *supra* note 59, at 89.

106. *Positive Freedom*, *supra* note 104, at 87.

107. See PUNISHMENT, *supra* note 1, at 44.

108. See, e.g., Paul Benson, *Freedom and Value*, J. PHIL., Sept. 1987, at 465, 469.

What is ignored here is the special and intrinsic value that is contained in self-government itself. Just imagine being without it. What comes to mind as sorely lacking is *not* just the particular acts that could be carried out if it were returned, but the capacity for character formation and self-identity, which are themselves intrinsically valuable.¹⁰⁹

As Hart says, criminal law does not simply goad and threaten individual actors.¹¹⁰ It is a structure for choice, and by virtue of this a structure for self-determination and responsibility. If I do not steal the cash out of the register when the store clerk's back is turned, it is not because I fear punishment; it is because it never occurs to me to do so.

An entitlement to punishment sounds odd if we are committed to understanding punishment only in terms of desert and consequences. If we understand punishment to be the product of choices made under a legal structure that enables self-determination and preserves positive freedom, however, to say that one is entitled to punishment seems quite apt.

VII. CONCLUSION

Entitlement to punishment is a feature of criminal law as a choosing system. We impose punishment when an offender initiates an ordered sequence of rights—power, claim, duty, power, liability—by means of committing a crime. This sequence ends with the offender's holding both a claim to be punished and a liability for punishment. This pair of legal relations is not a right to punishment, because it is more than a claim with a corresponding duty. To hold this claim and this liability to punishment in tandem, as cognate legal relations, is better described by the more comprehensive term “entitlement.”

Entitlement to punishment describes the way criminal law's rules work. To commit a crime is to invoke secondary legal rules—criminal prohibitions and prescribed sentences, taken together—and thereby to change not only one's own legal position, but also the position of the state. Our reasons to punish come down to legal relations and legal rules for creating them, and the autonomy and self-determination that such a system of criminal law preserves. Neither desert nor good consequences is part of this account of how and why we punish. It is enough to say that an offender is entitled to punishment.

109. See *Liberalism*, *supra* note 94, at 358.

110. See PUNISHMENT, *supra* note 1, at 50.

Entitlement to punishment is, furthermore, a more accurate and honest description of the reason we punish than desert is. The belief that legal punishment is imposed because and only when it is deserved obscures the extent to which legal punishment is a consequence of moral luck. The word “entitlement” better describes the situation of a person who has entangled himself in criminal law’s stringent rules as a consequence of his limited power to overcome unpredictable outcomes, his circumstances, the influences on his character, or his personal history. Entitlement to punishment directs our attention away from the question of desert and toward criminal law’s moral luck problem because it is divorced from a retributive conception of punishment.

Finally, entitlement to punishment reflects the moral salience of criminal law. Because it is embedded in law as a choosing system, entitlement to punishment conveys respect for the rationality of criminal offenders and their capacity for self-determination—particularly when the choosing system is cast as part of a conception of positive liberty centered in autonomy. We are entitled to punishment because we are entitled to meaningful freedom.