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## In Dialogue with Criminal Responsibility

Nicola Lacey\*

In this response, Nicola Lacey enters into dialogue with the symposium contributors, identifying and commenting on some of the key themes which they have raised about the treatment of criminal responsibility in her book. These include the problematization of progress narratives; criminal law's capacity to counter – and to reinforce -inequality; the scope for further development of gender and comparative analysis; the appropriate degree of contextualization; and the relationship between historical interpretation and philosophical analysis in the methodology of criminal law theory.

It is one of the highest privileges of scholarship to have one's work the subject of serious critical engagement. Where that engagement comes from distinguished colleagues, and is framed in thoughtful and generous terms, the privilege is all the greater. I am, accordingly, exceptionally grateful to the contributors to, and editors of, this symposium on my book, *In Search of Criminal Responsibility*.<sup>1</sup> Reviews, of course, come in many forms, and can accordingly contribute to the enterprise pursued by a book in a number of different ways: contextualizing and drawing out themes which are implicit in a text, and which the author herself may not have fully explored or even been entirely aware of; identifying gaps and silences which invite further development; identifying weaknesses in an argument which provide occasion for clarification, correction or further elaboration. The essays in this symposium do each of these things; and in this brief response—which I regard very much in the nature of a further contribution to a continuing dialogue, rather than as in any sense a definitive “reply”—I will pick out a handful of key issues emerging from each of the essays—some of them indeed arising across the contributions.

### I: Problematizing Progress Narratives Criminal Law, Power and Inequality

In his elegant and incisive contribution, Ely Aaronson identifies three ways in which the argument of my book engages and problematizes a progress narrative which is explicit or, more often, implicit in much contemporary criminal law theory. His reconstruction of my argument, which generously situates it within a broader tradition in history and social theory, is immediately familiar to me, and his assessment is so fundamentally sympathetic that I find it very difficult to add anything by way of response. Yet it is worth saying that in framing his review around the (contested) notion of historical progress, Aaronson draws out something of which I was perhaps not fully aware as having had such a key position in my thinking. His interpretation helps me to understand the difficulty I found in balancing the need to organize the historical narrative which I presented within a set of developmental categories or broad periods, with the need to avoid that development seeming inevitable or necessarily tending towards progress or enlightenment. Criminal law, like all complex social institutions, develops unevenly; and, as Aaronson emphasizes, developments such as liberal conceptions of *mens rea* which are progressive from one point of view may be less so from another. A key example here, as both Aaronson and Blumenthal note, is the capacity of a formalized and doctrinally sophisticated set of legitimating principles which serve modern rule of law values to nonetheless obscure the power dynamics which imply the uneven impact of criminalizing power across the vectors of class, race and gender. But law's form, in its evolving stages,

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<sup>1</sup> Nicola Lacey, *In Search of Criminal Responsibility: Ideas, Interests and Institutions* (2016).

does indeed pose certain constraints as well as facilitating the exercise of legal power, and finding the right balance between a proper acknowledgment of the relatively autonomous dynamics of legal modalities and of the sway of extra-legal forces and interests in shaping the law's development and exercise strikes me as one of the key methodological challenges for ambitious legal scholarship. I will return to this issue below.

Aaronson also deftly identifies several important questions which my book raises, but does not resolve. Key among these is a question which is the object of an illuminating analysis in his own book:<sup>2</sup> that of whether the undoubtedly genuinely progressive intentions of criminal law reformers over the centuries could have been more fully realized through different institutional or doctrinal arrangements, or whether criminal law's inegalitarian dynamics are inevitable. To clarify, and without aspiring to make any real progress on that front here, let me say that I certainly do not want to turn away from the thought that criminal law and its doctrines can be reshaped in more or less progressive ways from a moral or political point of view, and should be framed in terms of values and ideals; indeed I am absolutely sympathetic to the thought that this normative project is one of the responsibilities of criminal law scholars.<sup>3</sup> But I do believe very firmly that that ethical project must go forward on the basis of as complete as possible an understanding of the socio-historical forces which condition the implementation and impact, as much as the form and content, of criminal law. Aaronson is right to acknowledge that some of these forces—particularly those which realize themselves in discretionary powers of one kind or another—can be extremely difficult to grasp, empirically, and to remind us that some matters are beyond our analysis. One good example is his persuasive suggestion that the incomplete institutionalization of capacity responsibility has been a product of budgetary constraints, via arrangements providing shortcuts to conviction, notably plea bargaining. It is hard to imagine how one would go about assessing the precise force of this motivation, or the strength of its perceived relationship with crime control and other imperatives among policy makers. But it seems to me that we should be slow to give up the attempt to glean what empirical insight we can, particularly in light of the increasingly sophisticated standards of socio-legal research training pertaining in much of the legal academy today. The big picture which I sketch in my book, in short, needs to be complemented by close-grained and particular socio-legal as well as historical research—indeed my own account could not have been constructed independent of the insights which I have gained from these genres of scholarship.

## II. Vectors of Power: Sexing the Subject of Criminal Law<sup>4</sup>

While Aaronson notes that my analysis gives a central place to the question of how the sway of powerful extra-legal interests shapes the trajectory of criminal responsibility, Sharon Cowan's "In Search of Connections" identifies a related (relative) silence in my book: and one about which I feel some perplexity. This is the question of gender, and of how gender dynamics have—or have not—shaped the conceptual structure and trajectory of criminal responsibility over time. I am particularly grateful to Cowan for this most exemplary instance of constructive critique, in which she imaginatively reconstructs my argument so as to draw out the connections between my analysis in this book and the feminist analyses of scholars such as Joanne Conaghan,<sup>5</sup> Ngaire Naffine<sup>6</sup> and Carol Smart<sup>7</sup>—each of whom have been key

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<sup>2</sup> Ely Aaronson, *From Slave Abuse to Hate Crime* (2014)

<sup>3</sup> Alan Norrie, *Criminal Law and Ethics: Beyond Normative Assertion and Its Critique*, 80 *Mod. L. Rev.* 955 (2017).

<sup>4</sup> Cf. Ngaire Naffine and Rosemary Owens (eds.) *Sexing the Subject of Law* (1997)

<sup>5</sup> Joanne Conaghan, *Law and Gender* (2013)

influences on my own work over the years. It has spoken to me very directly, not least because I read it—fortuitously—just as I was working on the draft of a paper in which I attempt to bring the analysis of my earlier book, *Women, Crime and Character*,<sup>8</sup> which traced the gender dynamics of criminal responsibility in law and literature from the early eighteenth to the late nineteenth century, up to the end of the twentieth century.

Cowan is generous in suggesting that the relative absence of attention to questions of gender in *In Search of Criminal Responsibility* was a product of the fact that that book already had a rather ambitious—indeed some might say unmanageable!—agenda, and itself engaged with a wide range of questions and genres of scholarship. And it is certainly true that, particularly because I wanted to write a book which would be readable and hence not too cumbersome, I resorted to a relatively parsimonious “case studies” approach to elaborating the argument. This reduced the opportunity for engagement with substantive questions—as also noted by Aaronson and Blumenthal—about the precise ways in which vectors of power such as gender, race and class affect the idea and implementation of doctrines of responsibility at particular times. But Cowan is absolutely right to imply that I could have made more, conceptually, of feminist theory in this book, and that my own approach in *Unspeakable Subjects*<sup>9</sup> would have tended in that direction. Even before I read her piece, I was subjecting myself to some fairly fierce cross-examination, as I drafted the new paper, as to why I had found it so hard to keep the feminist questions in view, and in effect exported them to a parallel set of projects. And I think there are some important lessons here. Perhaps the most obvious has to do with the constraining force of the literature with which one is primarily engaging—in this case, as Cowan notes, primarily a field of social theory and criminal law theory which remains heavily male-dominated. In this context, Cowan notes Sara Ahmed’s<sup>10</sup> strategy of eschewing citation of white male authors. This strikes me as an imaginative piece of academic activism, as well as a timely reminder that any bibliography is itself a contribution to the construction of a canon, and hence an exercise in power. As such, it brings with it a responsibility to consider carefully decisions about both inclusion and exclusion. But Ahmed’s does not seem to me a generalizable practice, for a number of reasons. First, powerful ideas do not disappear because particular groups ignore them. Fields of scholarship always bear the marks of their history, which cannot be escaped, and we have a political as well as an intellectual duty to engage with that history. Second, the overriding responsibility of those of us privileged to work in the academy is to explore all the insights available to us; and exclusionary citation practices—whether deliberate or subconscious—seem to me to be fundamentally at odds with that aspiration.

Returning to the substantive issue, it is fair to note the sheer intellectual challenge of keeping going at the work of exposing the underlying dynamics which implicitly shape the operations of legal power, and doing so against the grain of conventional scholarship. And there are, it is true, some advantages to focusing on specific dynamics or issues in particular parts of one’s work. But, given the synthetic ambition of *In Search of Criminal Responsibility* to draw the various dynamics which shape legal concepts’ development together, gender -as well as race and class—should have had a more prominent place, not least because my relatively brief treatment of gender risks obscuring an implicit gendering male of—

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<sup>6</sup> Ngaire Naffine, *Feminism and Criminology* (1997); *Law’s Meaning of Life: Philosophy, Religion, Darwin and the Legal Person* (2009).

<sup>7</sup> Carol Smart, *Women, Crime and Criminology* (1976); *Feminism and the Power of Law* (1989).

<sup>8</sup> *Women, Crime and Character: From Moll Flanders to Tess of the d’Urbervilles* (2008)

<sup>9</sup> Nicola Lacey, *Unspeakable Subjects: Feminist Essays in Legal and Social Theory* (1998).

<sup>10</sup> Sara Ahmed, *Living a Feminist Life* (2017).

particularly some—paradigms of responsibility. At the very least, I might have followed up my argument about the belated inclusion of women within legal conceptions of personhood with an additional case study illustrating the continuing force of gender assumptions in the judicial interpretation of responsibility—with cases on the defenses available to women who defend themselves against domestic violence just one example of a rich area for such a study.<sup>11</sup> Similarly, the stark racial disparities in the use of imprisonment and of other state powers such as stop and search would have provided a pertinent case study in relation to racialized practices of responsibility-attribution set within the context of criminalization.<sup>12</sup>

### III. Complementing Historical Interpretation with a Comparative Perspective

Michele Pifferi deftly puts his finger on another approach whose importance is acknowledged in my book, and which I might usefully have developed further: that of the comparative analysis of the trajectory of criminal responsibility over time in different systems. Comparative and historical scholarship offer complementary ways of illuminating the broad forces which shape the development of legal institutions and legal ideas, as well as of alerting us, through the perspective afforded by spatial or temporal distance and variation, to the contingency of arrangements which have become so familiar that we may no longer ask ourselves about their conditions of existence. As in the case of Cowan's point about gender, I would like immediately to acknowledge the force of Pifferi's argument that a comparative dimension would have enriched my analysis. Indeed my original plan for the book envisaged a comparative element setting the English trajectory in the context of those in the United States on the one hand and in Germany on the other. This selection of cases would have afforded further critical purchase on the causal hypotheses ventured, particularly in chapter 5, by enabling me to set them in the light of two systems with a range of cultural, institutional and political similarities and differences over the relevant period. In the end, the scale of the task even of putting together the historical analysis of England and Wales was such that I abandoned the comparative dimension, while noting its relevance and explanatory potential.<sup>13</sup>

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<sup>11</sup> Hilary Allen's *Justice Unbalanced: Gender, Psychiatry and Judicial Decisions* (1987) remains one of the most instructive analyses of the gendering of the defences and hence of the subject of criminal law. For recent feminist scholarship on criminal law, see also Choice and Consent: Feminist Engagements with Law and Subjectivity (Rosemary Hunter & Sharon Cowan eds., 2007); Helen Baillot et al., Research Briefing: Rape Narratives and Credibility Assessment (of Female Claimants) at the AIT (2012); Vanessa Munro, Shifting Sands? Consent, Context and Vulnerability in Contemporary Sexual Offences Policy in England and Wales, 26 Soc. & Legal Stud. 417 (2017); Louise Ellison & Vanessa Munro, Taking Trauma Seriously: Critical Reflections on the Criminal Justice Process, 21 Int'l J. Evidence & Proof 183 (2016); Louise Ellison & Vanessa Munro, "Telling Tales": Exploring Narratives of Life and Law Within the (Mock) Jury Room, 35 Legal Stud. 201 (2015).

<sup>12</sup> Coretta Phillips & Ben Bowling, Ethnicities, Racism, Crime and Criminal Justice, in *The Oxford Handbook of Criminology* ch. 8 (Alison Liebling et al. eds., 6th ed. 2017).

<sup>13</sup> Aspects of the relevant American history have recently been explored in Thomas Andrew Green's *Freedom and Criminal Responsibility in American Legal Thought* (2014), which is mainly focused on ideas; and George Fletcher's *Rethinking Criminal Law* (1978)—a book which Alessandro Spina rightly identifies as a key influence on my thinking—set U.S. and German developments in comparative dialogue. See also Markus D. Dubber & Tatjana Hörnle, *Criminal Law: A Comparative Approach* (2014). My own work in the political economy of punishment (*The Prisoners' Dilemma: Political Economy and Punishment in Contemporary Democracies* (2008)) has taken a consistently comparative approach, on

So I am grateful to Pifferi for showing in his fine review just how fruitful such a comparison can be. I was particularly instructed by his illustration of the ways in which the earlier construction of a set of general doctrinal principles in countries of continental Europe such as Italy related to projects of state building and the constitution of sovereign authority—a theme which also resonates nicely with Lindsay Farmer’s argument, in his outstanding recent monograph, about the close relationship between criminalization and the formation of modern states.<sup>14</sup> Pifferi’s insight about the relationship between the systematization of criminal law doctrines and the development of law faculties in universities is similarly significant, and is consistent with Farmer’s and my interpretations of the later emergence of systematized responsibility doctrines in England and Wales. A further insight provided by Pifferi, which my theoretical framework would readily embrace, is the way in which ideas—such as ideas about criminal pathology and responsibility—travel across jurisdictions, where their impact is filtered through existing institutional structures, understandings and interests. Pifferi’s argument makes me wonder, though, whether I gave sufficient emphasis to the dual track ideas about responsibility or of the corresponding institutional arrangements for responsibility-attribution—a development which I did note, as of the late nineteenth century, but which a comparative dimension such as that provided in his recent book<sup>15</sup> might have led me to develop as a more central part of my own account.

#### IV. Critical Legal History, Contextualization and Criteria of Fit and Selection

Like Pifferi, Susanna Blumenthal approaches my book, in significant part, from the perspective of history. While I make no claim to disciplinary expertise in history, I have learned a huge amount from historical scholarship; so I am really gratified that such distinguished legal historians see value in the conceptual framework developed in my book for historical scholarship, and I much appreciate the generosity with which they say so. Blumenthal quite rightly identifies the influence on my thinking of the critical legal history mapped out by scholars like Robert Gordon<sup>16</sup>—insights which I began to glimpse through discussions at a critical legal studies reading group in Oxford thirty years ago, but which did not really come to the surface of my thinking until I had the good fortune to work alongside Lindsay Farmer at Birkbeck College in the mid-1990s. And Blumenthal quite rightly sees as key to my approach an insistence on mapping out a middle path between a radical contingency thesis which might undermine the very enterprise of theorizing a specific concept or social practice, and the more conceptually fixed approach typical of analytical jurisprudence and moral or political philosophy. Blumenthal is, I think, sympathetic to this methodological aspiration, but as a meticulous historian herself,<sup>17</sup> she very justly questions whether I have provided a thick enough characterization to establish the patterns of development which I identify, while also deftly putting her finger on the places at which the tensions inevitable in such a “middle path” approach surface in my narrative. For example, her argument that religion does not drop out of the picture, notwithstanding a degree of

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which I draw in framing the explanatory hypothesis set out in chapter 5 of *In Search of Criminal Responsibility*.

<sup>14</sup> Lindsay Farmer, *Making the Modern Criminal Law: Criminalization and Civil Order* (2016).

<sup>15</sup> Michele Pifferi, *Reinventing Punishment, A Comparative History of Criminology and Penology in the 19th and 20th Century* (2016).

<sup>16</sup> Robert W. Gordon, *Critical Legal Histories*, 36 *Stan. L. Rev.* 57 (1984).

<sup>17</sup> Susanna L. Blumenthal, *Law and the Modern Mind: Consciousness and Responsibility in American Legal Culture* (2016).

secularization through the nineteenth century, is well taken, and although I did allude to this in my discussion of the lessons to be learned from Robert Louis Stevenson's famous *The Strange Case of Dr. Jekyll and Mr. Hyde* (1886),<sup>18</sup> Blumenthal is undoubtedly right that there is a great deal more to be said on this subject. It is also a fair observation that in a theory with as many moving parts as mine has, distinguishing cause from effect can be difficult—though my response would be that this a product of the real complexity of the world rather than necessarily a flaw in the model. Likewise, although—as I emphasize—ideas, interests and institutions are intimately interconnected, it seems an exaggeration to me to suggest that ideas and interests cannot be usefully distinguished for the purposes of the argument.

Let me take in a little more detail three points on which Blumenthal raises really important issues with which I would like to engage. First, she argues that I do not always follow my own methodological injunctions—as for example in failing to note that the language of “responsibility” in fact postdates the establishment of what I have labelled a pattern of character responsibility attribution in English criminal law. Blumenthal is quite right to suggest that this raises some question about my claim to be taking a Wittgensteinian approach to language. On the other hand, given the absence of established doctrinal discourses structuring mid-eighteenth-century practices of attribution in most English criminal trials, any approach to, as Blumenthal puts it, “making sense” of the relevant practices is inevitably in the business of a form of reconstruction in conceptual terms which may not appear on the surface of the relevant practices. This raises deep methodological questions about which there is doubtless much more to be said. Second, Blumenthal makes the telling point that although I criticize analytic theories for losing sight of the key question of what criteria of accountability should hold between their theories and the phenomena which they theorize, my own approach is also parsimonious in its elaboration of those criteria. I want to acknowledge the importance of this point, and while I would maintain that the criteria of interpretive fit which I sketch and draw upon in the book are a real advance on the approach in much jurisprudence, there is productive scope for a much fuller discussion. So I am particularly grateful to her for this provocation to greater methodological development; it is one which would go to the core of the enterprise in which both of us are engaged. Finally, Blumenthal suggests that my contextualizing method, with its emphasis on change and contingency, may be corrosive of what she, like Aaronson and Cowan, sees as the normative concerns of my project. Clearly, from the point of view of an objective position in ethics, my approach in this book is unsatisfactory. But this does not concern me unduly, because I am of the view that our normative commitments are simply ones for which we have to argue, without the security of faith in an objectively existing ground independent of those arguments and commitments—but with a keen eye on the socio-economic and institutional preconditions for their realization (hence, once again, my resistance to the idea of a clear dichotomy between conceptual and historical/socio-legal analysis). The strength of Blumenthal's point really lies elsewhere, in the claim that I should have done more to elaborate those commitments and, meshing with Aaronson's point, to explore how far they might be met under the various historically existing constellations of power, ideology and institutional structure.

## V. Interpretive Institutional History and Philosophical Analysis

These last two concerns raised by Blumenthal also arise for Alessandro Spina, albeit from a different methodological direction. Spina approaches the assessment of my book from the perspective of a philosophically motivated criminal law theory; a method which places a very

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<sup>18</sup> Lacey, *supra* note 1, at 74-78.

high value on analytic rigor and coherence. From this point of view, he identifies two main problems with my account. First, he finds the categories within which I present the evolution of practices of criminal responsibility-attribution—particularly those distinguishing between capacity and character as the organizing ideas behind those practices—lacking coherence in that they include within their reach rather different approaches. Second, he is perplexed by my insistence that criminal responsibility is socially constructed around a relatively thin conceptual core which threads differently conceived and institutionalized versions together over time. In making these points, Spena, like Blumenthal, is touching on some of the key methodological debates of criminal law theory—indeed of legal theory more generally—today, as well as some of the most important methodological commitments of my book. So I am very grateful to him for doing so so clearly and incisively, and for giving me the opportunity to sum up the key issues, as I see them. I doubt that what I can say here will convince him, but I do hope that it will clarify the points at issue between us.

First, as Spena himself concedes, I make no secret of the fact that both my capacity and my character categories embrace strikingly different practices of attribution, as they have evolved and been institutionalized at different points in their history—and sometimes even at the same time, as competing interpretations struggle for dominance in treatises and court rooms, and often establish dominance over particular areas of the law. I am also happy to acknowledge—as Aaronson also notes—that the fair opportunity version of the capacity approach has some resonance with character approaches. I can do so because it is nonetheless the case that, as H.L.A. Hart's classic statement<sup>19</sup> makes so absolutely clear, this conception relates fundamentally to what counts as a truly agentic choice, and hence engages the values of agency which identify the capacity approach on my view. My judgment, overall, was that the character-capacity typologies were helpful in identifying distinctive impulses which may characterize the criminal law *understood in the light of its principal social roles and preoccupations*: the impulse to think about, and attribute, responsibility in terms of conditions pertaining in one way or another to agency; and that to do so in terms pertaining fundamentally to an evaluation of the character of the offender—whether inferred from individual actions or seen in terms of some conception of types or classes. So while I can appreciate both the conceptual elegance of, and the logic behind, Duff's well known distinction between action-based and agent-based principles,<sup>20</sup> I was simply making the judgment that, relative to my project of trying to produce a broad characterization and explanation of the development of English criminal responsibility over time, the character-capacity typology shed new and greater light, for the reasons elaborated throughout the book.

I imagine that Spena and I will have to agree to differ on this point, and I certainly do not want to claim that my theory is the only way of cutting the conceptual cake here. Nor do I mean to suggest that the questions he raises are anything other than key ones—as indeed the overlap between his concerns and those of Blumenthal suggests. But my ambition was not to produce another refined philosophical analysis of responsibility; rather, it was to try to capture something of the life of criminal responsibility conceived as a thoroughly institutionalized social phenomenon, nested within a complete set of institutional structures whose development in the context of the flux of interests and ideas is constantly driven by two key practical imperatives: the (increasing, under democratic conditions) need for criminal law to produce a narrative capable of legitimating its power; and the need to generate protocols coordinating the forms of knowledge which must be assembled precedent to a conviction; each of these imperatives being itself nested within a broad vision of criminal

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<sup>19</sup> H.L.A. Hart, *A Prolegomenon to the Principles of Punishment*, 60 *Proceedings of the Aristotelian Society* 1 (1959).

<sup>20</sup> R.A. Duff, *Choice, Character and Criminal Liability*, 12 *Law & Phil.* 372 (1993).



law as engaged in a project of governance, and hence intimately linked with the development of the modern state.

This, if you like, functional and institutional approach—again, it is one which my work shares with that of other “contextualist” scholars like Lindsay Farmer<sup>21</sup>—also underpins my response to Spina’s second discomfort: that with my inclination to see the conceptual core of responsibility as relatively thin. As I argue at length in chapter 6, without an acknowledgment of the historicity of legal concepts such as responsibility, legal theory’s claim to be producing accounts “of” particular legal phenomena—as opposed to concepts of philosophical interest only—remains obscure. There is, of course, room for disagreement about just how thin the core concept needs to be; and, as Blumenthal points out, about just which features of a complex social institution should be regarded as core. But this dilemma, which I propose to resolve through a reflexive method, is one which analytical jurisprudence itself has to face—as indeed its less doctrinaire exponents, H.L.A. Hart key among them,<sup>22</sup> have long acknowledged. In short, while I have been an avid and often appreciative consumer of philosophically sophisticated legal theory throughout my career, my project in this book was a different one: and I am grateful to Spina for throwing these methodological differences into such sharp relief.

In conclusion: In a world in which widely stated claims about the declining importance of nation states are belied by burgeoning criminalizing power in many countries, the explanatory and normative tasks of criminal law theory seem more important than ever. Happily, the intellectual tools which scholars are bringing to these tasks are ever more sophisticated, and the insights which are being generated by criminal law scholarship’s engagement with a range of disciplines in the humanities and social sciences suggest that the field is ripe for further development. So I would like to conclude by thanking each of the commentators for demonstrating this point with such insight and eloquence—and for responding to my book with the sort of generous scholarly imagination which has allowed them to set out so many of the key challenges still waiting to be met.

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<sup>21</sup> See Farmer, *supra* note 12.

<sup>22</sup> See H.L.A. Hart, *The Concept of Law* chs. 1 & 10 (1961).