Toward a History of American Criminal Law Theory

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“Toward a History of American Criminal Law Theory”©

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# Table of Contents

Introduction ........................................................................................................... 3

I. The Field of Truth ............................................................................................... 7
   a. A Note on Truth ............................................................................................. 7
   b. The Field of Truth ......................................................................................... 11

II. Approaches to Criminal Law Theory ............................................................... 30
   a. The Definitional Approach ........................................................................... 32
   b. The Structural Approach .............................................................................. 37
   c. The Normative Approach ............................................................................ 44
   d. The Historical Approach .............................................................................. 50

Conclusion .............................................................................................................. 54
Introduction

It is said that the study of the theory of criminal law is a young endeavor. What is meant by this, as George Fletcher comments, is that only in the late eighteenth century did people begin to seriously debate and disagree about the purposes of inflicting punishment on those who transgressed communal norms. Elsewhere, Nicola Lacey noted that the late twentieth century witnessed remarkably productive scholarship in criminal law theory in Britain. In her work, Lacey notes a number of fundamental theoretical approaches to criminal law theory that have only recently come to light. These include, for example, the focus on general questions of the nature of law versus a focus upon particular laws and legal institutions; descriptive versus prescriptive theories; and the distinction between normative and social functions of the criminal law.

Lacey also notes that criminal law theory includes “historical analyses of the development of criminal justice ideologies and practices.” She cites the work of Alan Norrie, who has indeed argued for a historicist approach to understanding criminal law theory. Gerald Leonard attempted to address this approach head-on. All of these scholars and more have moved the study of legal theory toward a greater appreciation of

2 Fletcher, supra note 1, at 689.
4 Lacey, supra note 3, at 295-96, 298.
5 Id. at 300.
the importance of historical analysis in understanding criminal law theory. Issues remain undeveloped, however, and more work needs to be done.

I intend to do some of that work in this article. I present what I call the Field of Truth, which is a structure that can help shape a universal paradigm with which to understand the history of criminal legal history. It does so by being a useful structure to explore the theory’s history, and by reflecting its development. I also want to discuss the theoretical work that has already been done and integrate this into the Field of Truth. This task will be constituted by a discussion of the important theoretical approaches inherent in criminal law theory, some of which Lacey has noted. Emerging from this discussion will be the need to develop a formal structure with which to approach the history of criminal law theory. The Field of Truth is such a structure.

In the section that follows, I describe the Field of Truth in detail. I want now to mention some of its necessary attributes. First, it is formal. By this I mean that it is a defined structure that can be adhered to throughout the study of the history of criminal law theory. This formality is necessary in order to provide some foundation from which to pursue the study and against which the study and the structure itself can be evaluated. It has been lamented that legal theory lacks a “commonly accepted theoretical core or paradigm and accepted standards and methods of . . . verification.” A formal structure is that core.

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8 Thomas S. Ulen, A Nobel Prize in Legal Science: Theory, Empirical Work, and the Scientific Methods in the Study of Law, 2002 U. ILL. L. REV. 875, 893 (2002); see also Fletcher, supra note 1, at 700 (Criminal theory today is “a potpourri of political theory. Everyone seems to pick and choose . . . assumptions as the choice suits their immediate purposes.”).
Second, the Field is integrative. By this I mean that it provides a neutral basis for evaluating the impact of all theories that concern the history of criminal law theory. For example, Michael Moore’s strict support for retribution would seem unable to coexist with Alan Norrie’s relational approach to blaming. It is clear, however, that retribution, the relational approach, and other methods and goals of sentencing and punishment have all enjoyed various levels of influence throughout American criminal legal history, often simultaneously. A structure to evaluate that history must not favor one theory over another, or exclude one as “false.” Rather, it must provide a forum in which the impact of each theory at any given moment in history can be accurately assessed. The Field does not declare a winner or the “true” theory, but rather maps the field of operant theories throughout time.

Third, the Field is history-focused. That is, it is crafted to facilitate a study of the history of criminal law theory. As suggested above, it does so in as neutral a way as possible. Therefore, it allows for the possibility that law progresses in a relatively linear fashion, in response to its own internal processes, and also for the possibility that it is entirely contingent upon its external time and place. It must also allow that theory can both create and reflect the law of which it is a part.

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10 ALAN NORRIE, *PUNISHMENT, RESPONSIBILITY, AND JUSTICE: A RELATIONAL CRITIQUE* 221 (Oxford University Press 2000) (Norrie argues for “a relational theory of blame which allocates responsibility for wrongdoing between an individual and a community.”).
Fourth, the Field is complete enough to reflect the range of elements operating within law and legal theory and thereby be useful. I will discuss this in depth below, but for now, this fourth requirement means two things. It means that the structure embraces all aspects of the field, including legal theories, legal practices, forces, argument, and “truth.” It also means that the structure is useful in that it helps others understand the legal system and operate more effectively within that system. As will be seen, the notion of usefulness is tied to the notion of a theory’s “truth.”

The Field of Truth is a formal conceptual approach to exploring the history of criminal law theory. It is effective in this because it illustrates the actual ways in which theories come into influence, establish themselves in the criminal law, interact with other theories, practices, and forces, and eventually lose influence and fade away. It is integrative, not exclusionary, because it seeks to determine the course of the life of theories and not their relative or absolute value. For example, the merits of communitarianism and the Kantian notion of the autonomous individual as a basis for the criminal law can be evaluated and compared. One can then be rejected as untrue, not preferred, less true, immoral, and so forth. The Field of Truth does not function in this way. It instead treats each theory the same, searching for the sources of the theory, how it came to influence, the extent and nature of that influence, its effect on society, society’s effect on it, and its loss of influence. The Field of Truth therefore intends to be a map of other theories throughout history, but as a theory itself, it is fundamentally descriptive

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and neutral. Its form seeks to be an objective evaluation of the history of criminal law theory.

Although it is a new approach to the history of criminal law theory, the Field of Truth has been implied by a number of legal theorists. It therefore responds to their work, just as it responds to the approaches to criminal law theory that these works relate. It also addresses the need to develop histories of criminal law theory by providing a formal and consistent, yet integrative structure that can be applied to the history and itself challenged and improved. This article, therefore, proceeds as follows: Part I describes in detail the Field of Truth, as well as the notion of “truth” used in this article. It will also point to implicit support for it in the works of contemporary and twentieth century theorists. Part II identifies the fundamental approaches criminal law theory and describes how they are integrated into the Field.

I. The Field of Truth

a. A Note on Truth

Truth is an elusive concept, if only because it means different things in different contexts. Take, for example, the following statements, all of which can be said to carry some “truth” value:

Gold is a yellow metal.

Two and two make four.

Sherlock Holmes is smarter than Watson.

Sexism is wrong.

The Constitution shapes contemporary legal opinions.

The law is shaped by its traditions, but also by novel realities that challenge it.
The question is, what is truth? Does truth lie only in an accurate observation of the physical world (Gold is a yellow metal)? Can we extend the possibility of a truth-statement to abstract universal concepts (two and two make four)? Can we further extend this possibility to fictional contexts (Sherlock Holmes is, within his own context and assuming his reality for a moment, smarter than Watson)? What of normative opinions (sexism is wrong)? Certainly some people think sexism is acceptable, and yet can there not be truth in a norm? Can merely observational opinions be true (the Constitution shapes contemporary legal opinions)? What, then, is the status of truth in more complex legal theories that attempt to explain what the law is about?

At every point, the “truth” of the above statements can be challenged. Gold is yellow only because people have named that color “yellow.” It could be the color “red,” or “carpet,” if we were inclined to call it that. Two and two make four only because mathematicians have created a system in which two and two are, indeed, four. Sherlock Holmes is smarter than Watson because Sir Arthur Conan Doyle made him so. Questioning the truth of these statements appears a little indulgent. After all, gold is indeed that particular color we all recognize, and we have agreed to call that color yellow, so let’s be done with it. Two and two make four because that’s what works—we’ve found mathematics consistent and useful, and we have confirmed time and time again and two and two do make four, and so we call that statement “true.”

I am not a mathematician, and so I won’t venture an argument that mathematics is entirely created by humankind, or, on the other hand, that it consists of universal truths. I will suggest, however, that most people consider correct mathematic equations and answers to be “true” because they are a theoretical system that accurately and repeatedly
reflects the reality as they perceive it. There are two apples on the table, and two on the counter. Put them together, and, time and time again, there are four apples. Mathematics is true because it has incredible predictive power and is therefore quite useful.

Good legal theory is no different. The better the theory is in reflecting reality, the more useful and “true” it will be. This is the basis of the “coherence” or “pragmatic” theories of truth that I apply in this article. They are two very closely related theories.

The coherence model of truth observes that truth pertains to the relationship between a thought and the reality that it is considering. It acknowledges that the thought is always less-than its reality, though its goal is to become more developed and coherent until it becomes identical to, or “one with,” reality. The ideal coherent theory, therefore is (1) comprehensive in that it includes all known facts, and (2) supports all judgments about the theory or facts. Truth, in coherence theory, is a matter of degree. A theory may not be completely true in that it is not one with its reality, but it may be partly true because is comprises a fairly coherent system. Coherence admits multiple competing interpretations of reality, because a theorist’s system of knowledge is “at least partly the product of [her] historical situation—of [her] subject position, [her] context. Thus truth is relative in some sense.” And yet, even coherence theorists continually seek a fuller, truer, therefore more objective theory.

Brand Blanchard breathed some life into the coherence theory, writing that the aim of thinking “is to achieve systematic vision . . . We think to solve problems . . . To

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14 *Id.* at 99.
15 *Id.*
16 *Id.* at 99-100.
17 *Id.* at 100.
18 *Id.*
19 *Id.* at 99.
think of a thing is to get that thing itself in some degree within the mind.” He went on: “thought is related to reality as the partial to the perfect fulfillment of a purpose. The more adequate its grasp the more nearly does it approximate, the more fully does it realize in itself, the nature and relations of its objects.” Blanchard defined truth as “an approximation of thought to reality.” For him, coherence didn’t require coherence with some inaccessible absolute, but with “the system of present knowledge.”

William James described a pragmatist’s notion of truth as “a property of certain of our ideas. It means their ‘agreement,’ as falsity means their disagreement, with ‘reality.’” For James, a “true idea” was incapable of copying its reality. “Agreement” for him meant that “true ideas” are ideas “that we can assimilate, validate, corroborate and verify.” Verification and validation themselves described an idea that is an “instrument of action . . . [an idea] that tell[s] us which [reality] to expect” in any given situation. In other words, an idea for James is true if it can predict reality. To this end, James wrote, “[o]ur ideas must agree with realities.”

I adopt the coherence-pragmatism model of truth for two obvious reasons. First, I am dealing with a theory of an area of law that itself is not a physical thing. Absolute notions of scientific truth will not, therefore, do. Second, theories are thoughts whose goal is to reflect their reality. The coherence-pragmatism model directly addresses this relationship. There are three less apparent reasons for which I prefer the coherence-

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20 Id. at 104-105.
21 Id. at 105.
22 Id. at 107.
23 Id. at 113.
24 Id. at 211.
25 Id. at 212-213.
26 Id. at 213.
27 Id. at 217.
pragmatism model. This model requires theory to be comprehensive, in that it contains all known facts. Although this ideal is impossible, it is sought by all legal theories. The model also requires theory to integrate all judgments about the theory and its reality. The Field of Truth is interested in integrating all competing legal theories. Finally, the coherence-pragmatism model admits multiple interpretations of the same reality because of inherent human subjectivity, but it also expects the human observer to seek and discover some portion of the objective truth of the reality observed. The Field of Truth also embraces all subjective theories, but also promotes itself as a structure representing objective reality.

Based on the coherence-pragmatism model, the Field of Truth can be thought of in two ways. For the purposes of this article, the Field can be seen as a paradigm designed to facilitate the study of the history of criminal law theory. It is a tool with which we can trace the courses that other criminal law theories have taken throughout history. It is not primarily a theory in itself. In developing the Field to best facilitate this study, however, the Field has become something else, in addition to being a practical paradigm. To be an effective tool, the Field must be comprehensive and integrative: it must reflect the objective reality as closely as possible. The Field itself therefore is also a theory. It stands alone as yet another ahistorical assertion of theoretical and legal reality, subject to the same criticisms as the theories that have come before it. Its test, under the coherence-pragmatism model, is how closely it relates to its reality and how useful it is in tracing that reality.

b. The Field of Truth
I define the Field of Truth as “a created structure that contains the psychic activities that have gained substantial legitimacy in all or part of a society’s collective consciousness, the objective realities concerned with these activities, and the forces that affect these activities and realities.” This structure is “created” because it, like all theories, is a human-conceived model that attempts to describe the real social phenomenon of theories’ advent, coming-into-influence, actual influence, and possible dying out. It hopes, therefore, to cohere to a substantial degree with the reality, and be useful to others. To the extent it does these things, it is a “true” theory.

Picture a field.²⁸ This field represents the universe of human existence and experience dealing with criminal law. There are fundamentally three things that exist on the field. They are (1) the psychic activities that have gained substantial legitimacy in all or part of a society’s collective consciousness, (2) the objective realities concerned with these activities, and (3) the forces that affect these activities and realities. These can be referred to as theories, facts, and forces. The field itself does not change over time; the theories, facts, and forces, however, do change. This change proceeds through time and thereby creates a history of criminal law theory. More on this below.

Theories that occupy the field have two necessary attributes. First, they are “psychic activities,” meaning simply that they are thoughts or beliefs that have no direct corporal or procedural embodiment. For example, many judges in a particular jurisdiction may hold a belief that rehabilitation works and that it should be the primary

²⁸ The term “field” is particularly apt for the purposes of the Field of Truth. “Field” is defined variably as “an area of land marked by the presence of particular objects or features,” “an area or division of an activity, subject, or profession,” “the sphere of practical operation,” “a region or space in which a given effect exists,” and “a complex of forces that serve as causative agents in human behavior.” Mirriam-Webster Online, http://m-w.com/dictionary/field (last visited Dec. 10, 2009).
goal of punishment. This is a theory because it doesn’t exist as a physical or procedural reality. It is, rather, an ethereal concept. Just any theory, however, cannot exist on the field. It must have gained substantial legitimacy in all or part of a society’s collective consciousness. This means that a critical mass of people must grant some type of legitimacy to the theory, such that it occupies the field and thereby has some influence over the contents of the field. A critical mass is reached when the presence of the theory on the Field and its influence is acknowledged by people who haven’t necessarily adopted it as their own. The theory is then able to radiate outward and influence the Field, and is not restricted to its own adopters.

Two notes ought to be made. First, the moral or scientific foundation (or lack thereof) of a theory doesn’t determine whether it will reach this critical mass. The body of beliefs held by white supremacist groups, for example, are for most of society immoral, unscientific, and wrong in every way. They are still, however, theories that occupy the field, because enough people have adopted them. Whether this strand of theory has any appreciable impact on criminal law today is doubtful. If one were to write the history of criminal law in the antebellum South, however, (or the North for that matter) one would be remiss to ignore the influence of violently racist beliefs and actions.

Second, the explicit, stated point of a theory may not be that which propels the theory onto the field or allows it to remain. This means that a theory that has occupied the Field may have unintended consequences. For example, the Supreme Court’s ruling in *Miranda v. Arizona* was intended to provide necessary protections to arrestees.29 The theory was that “the very fact of custodial interrogation exacts a heavy toll on individual

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liberty and trades on the weakness of individuals” and therefore “adequate protective devices [must be] employed to dispel the compulsion inherent in custodial surroundings." Miranda was immediately denounced by members of law enforcement as unworkable and dangerous. Over time, however, it has become a consensus that the Miranda requirements are not effective in achieving their stated goal. Today, therefore, most big city police administrators oppose overturning Miranda. Their supporting theory may be that Miranda is a tool by which police can induce confessions. In 2000, the Court may have adopted a new theory supporting Miranda: it has written that “Miranda has become embedded in routine police practice to the point where the warnings have become part of our national culture.” Thus, where once the supporting theory for Miranda was the need to protect criminal suspects, Miranda remains law

30 Id. at 455.
31 Id. at 458.
35 Id. at 890.
because it has become part of our national culture, or even, ironically, because it exposes suspects to the very threat it was designed to guard against.

In addition to theories, facts exist on the field. They are “objective realities concerned with” the theories, and so have two essential attributes. First, they are objective realities. This means that facts, contrary to theories, are corporal or procedural manifestations. Corporal facts are things like a legal opinion, the Constitution, or a system of trial, appellate, and supreme courts. Corporal facts are even the physical building that houses a court, legislature, or executive. Procedural facts are objective realities that are constituted in procedure, such as the process of obtaining a search warrant, the selection of Supreme Court justices, or the method by which an expert becomes qualified to testify at trial.

Second, facts are concerned with theories. By this I mean that every fact has a relationship with one or more theories. This relationship can cause the theory to influence the fact, or the fact to influence the theory. This is based on the simple notion that legal facts (as opposed to natural facts, such as the rotation of the earth or photosynthesis) are created by people for a specific reason, and that reason originates in people’s psychic activity—their thoughts, their ideas, their theories. Cyclically, people find inspiration for their theories from the facts that they observe. Therefore, facts are in a mutually affective relationship with theories.

Forces comprise everything that determines the course of the relationship between theories and facts. Forces can exist in the form that theories and facts take. For example, a force can be a vacuum that develops when a previously-held theory has been questioned. The National Academy of Science recently issued a study challenging the
validity of virtually every form of forensic science, finding that they were not actually “science,” as that term is defined.\textsuperscript{37} A theory prior to this report might have been stated to be, “forensic science provides highly accurate and probative evidence, and therefore ought to be readily admissible at trial.” A corresponding fact might be that many judges liberally allow forensic evidence and experts to be introduced at trial. The recent report challenges this theory and fact, and creates a vacuum. What are we now to make of forensic evidence? How do we treat it? How should we treat it? People will attempt to answer these questions with theories, and courts will attempt to reform their practices in response to the report. The vacuum will be filled with new or altered theories and facts.

Theories and facts can also take forms that lead to other forces. Inertia is a force, for example, when one theory has dominated for a long time. The Kantian notion of the autonomous individual is such a theory. Despite convincing arguments that individuals become who they are in part because of the external world in which they live, the notion of the Kantian autonomous individual persists in the blaming process performed by the criminal justice system.\textsuperscript{38}

Forces can also emerge from individual or group action. The force of effective argument is one. Any advocacy group, from the National Association of Criminal Defense Attorneys to the National Governors Association, has a theory and certain facts to work with. These groups apply the force of argument to convince others to adopt their theories and thereby to shape the facts that inform their particular issues. In arguing,

\textsuperscript{38} \textit{Norrie, Crime, Reason, and History}, supra note 6, at 24 (“the general principles of the criminal law are crucially shaped by the law’s need to maintain its categories of individual responsibility in a world where actions are socially constructed and conditioned.”).
these groups may draw upon facts and theories that are already on the field, or they may
invent new argumentation. Although much of this new argument consists of an honest
attempt to bring a new, better theory onto the field,\textsuperscript{39} organizations such as Factcheck.org
operate to uncover specious argumentation.\textsuperscript{40}

Power is also a force. One’s personal and professional connections, wealth, and
knowledge can lead to the ability to move theories or facts onto the field. Bill Gates’
knowledge of computers and business have led in large part to the fact of the personal
computer revolution, which has in turn led to a new conception of society and the
world.\textsuperscript{41} As his success increased, so too did his wealth and influence. His power,
originally based in his knowledge, now has additional sources, and he is able to propel
new theories and facts onto the field more easily and effectively than someone who lacks
power.

At this point, then, we know that theories, facts, and forces reside on the field.

I want now to explore the nature of theories. There are three types of theories that
exist in the field. I call these types “created truths,” “actual truths,” and “moral
actualities.” These types occupy increasingly superior levels of prominence, so that
created truths are inferior to actual truths, and actual truths are inferior to moral

\textsuperscript{39}Marbury \textit{v. Madison}, 5 U.S. 137 (1803), for example, established the novel fact of
judicial review, together with the tripartite theory of government in which the judiciary
was equal in power with the executive and legislative branches. One can question
whether this arrogation of power was, in fact, an honest attempt to introduce a better
theory and facts. In hindsight, however, it appears so, and will, I hope, suffice as an
example for the reader.
\textsuperscript{40}FactCheck.org, http://www.factcheck.org.
\textsuperscript{41}Dean Calbreath, \textit{California’s Economy Might See Green Light}, \textit{The San Diego
actualities. Their relative superiority and inferiority are determined by the level of influence they have on the Field and the degree to which they are stably embedded.

“Created truths” are defined as “theories that are created by people and have occupied the field of truth, but lack the prominence and acceptance that characterize actual truths.” Created truths are often, but not always, relatively new, controversial, and/or not widely accepted. Much of the post-9/11 jurisprudence regarding terror consists in created truths. The legal aftermath of September 11 quickly presented us with a number of highly complex questions: whether the Guantanamo Bay facility, extraordinary rendition, and waterboarding are legal; the evidentiary value of confessions made under waterboarding and other mechanisms of torture; whether alleged terrorists should be tried in military tribunals or civilian courts; and many others. The answers to these questions have come fast, without the time or the calm repose in which to fully consider their wisdom or legality. Nonetheless, answers have

42 This hierarchy suggests Jerome Hall’s division of criminal law into rules, doctrines, and principles, which range from the specific to the general. JEROME HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 17-18 (The Bobbs-Merrill Company 2d ed. 1960). It also suggests Gerald Leonard’s notion of law’s “organizing principles.” Leonard, supra note 7, at 774.


47 See Boumediene, 128 S.Ct. 2229.
come, and these new and controversial answers are created truths. They have occupied
the field to a certain extent; whether they remain and evolve into actual truths, or are
rejected and leave the field remains to be seen.

“Actual truths” are defined as “theories that are created by people and have
occupied the field of truth, and are accurate predictors of behavior due to their wide
acceptance and utilization.” One actual truth is the theory that to obtain a guilty verdict
in a criminal case, the government must prove beyond a reasonable doubt the defendant’s
guilt.48 In re Winship provides a good example. On one hand, it created a truth by
holding that the reasonable doubt standard is a constitutional one.49 On the other hand,
the case reflected the same truth that had existed since the founding of the nation and
even before then.50 The theory embodied in the standard is an actual truth because it
predicts behavior: the Court in In re Winship was virtually certain to uphold the standard,
and every criminal case today demands that the standard be met to find the defendant
guilty. It is an actual truth also because it is widely accepted and utilized.

“Moral actualities” are defined as “theories that exist independent of people, and
prescribe either corporal facts, procedural facts, or both.” Moral actualities, therefore,
assume some moral imperative beyond that which people construct. They also prescribe

49 Id. at 364 (“Lest there remain any doubt about the constitutional stature of the
reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the
accused against conviction except upon proof beyond a reasonable doubt of every fact
necessary to constitute the crime with which he is charged.”).
50 Id. at 361 (“The requirement that guilt of a criminal charge be established by proof
beyond a reasonable doubt dates at least from our early years as a Nation. The ‘demand
for a higher degree of persuasion in criminal cases was recurrently expressed from
ancient times, (though) its crystallization into the formula ‘beyond a reasonable doubt’
seems to have occurred as late as 1798. It is now accepted in common law jurisdictions as
the measure of persuasion by which the prosecution must convince the trier of all the
essential elements of guilt.”).
facts, where created truths and actual truths are more likely to merely describe or predict facts. Throughout American, and indeed world, history people have posited the existence of such actualities in religion, reason, and science. Because they are supposed to exist independent of human activity, they are theories whether they occupy the Field of Truth or not. In addition, they do not necessarily describe the legal structure, because they exist independent of that structure. Rather, they prescribe corporal or procedural facts. In short, they say something about the rightness and wrongness of theories, facts, and forces. Put another way, the theories, facts, and forces that occupy the Field are human-made. Moral actualities, however, are supposed to exist outside of human creation—they are, as Ronald Dworkin would say, “mind-independent.”

Therefore, moral actualities exist independent of the human-made theories, facts, and forces that occupy the Field. Whether they have any influence, however, is another question. A moral actuality may, as Hart posits, not be on the Field because it hasn’t yet been adopted by people. Once it is adopted, it occupies the Field, just as actual and created truths occupy the Field.

The theory of justice is one such moral actuality. This theory simply commands people to seek justice. It is a moral actuality because every person seems to want it, even though their definitions of it differ, and they may seem to want it only for themselves. The theory of justice doesn’t seem to have been created by people. “Justice” as a concept seems to have existed when the first humans appeared, and has not subsequently

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53 Hart, supra note 11, at 181.
disappeared.\textsuperscript{54} This theory as a broad, undefined notion is uncontroversial, universal, and seems to exist independent of people. It prescribes corporal facts, such as a checked and balanced tripartite form of government, and it prescribes procedural facts such as due process. Depending on the time and place that applies the theory of justice, different facts are demanded. Certainly theories that derive from moral actualities may not themselves be moral actualities. The theory of justice has been used to promote or acquiesce to other theories that posit the superiority and inferiority of certain groups based on race,\textsuperscript{55} gender,\textsuperscript{56} and sexual orientation.\textsuperscript{57} These contextual forms of “justice” may depend on theories that are actual truths, or even created truths, and for many are simply wrong.

The concept of moral actualities—not the actualities themselves—may be controversial for some who don’t believe in a divine power or universal principles. This power or principles are not, however, necessary for the operation of the Field of Truth. Such beliefs are not absolutely necessary for the existence of moral actualities because most of us can point to some universal prescriptions, such as justice. One would be hard-pressed to argue that the notion of justice at some point did not exist until someone created it. One could make similar observations about concepts such as family, community, forgiveness, and retribution. These are concepts that seem to be a part of


\textsuperscript{55} See \textit{Plessy v. Ferguson}, 163 U.S. 537, 553 (1896) (“[T]he state regulates the use of a public highway by citizens of the United States solely upon the basis of race. However apparent the injustice of such legislation may be, we have only to consider whether it is consistent with the constitution of the United States.”).


human nature. Whether that nature originates in a god, natural law, or human creation may be practically irrelevant. What ultimately matters is that such concepts are so deep-rooted that we can refer to them as moral actualities. They may be akin to the theories that make up Dworkin’s “deep structure”58 or Leonard’s “organizing principles.”59 They are the unquestioned assumptions that shape our thinking about everything else.

We now have a near-complete picture of the Field of Truth as it exists at any given point in time. We need to move now to a discussion of the progression through time of the Field. As I note above, the Field itself never changes. Rather, the theories, facts, and forces that occupy the Field shift position or prominence, leave the field, and are joined by other theories, facts, and forces that newly-occupy the Field. Before exploring that which is beyond the borders of the Field, we ought to discuss three types of theories, facts, and forces that shape the course of the Field’s progression through time. The three types are gatekeepers, referees, and executioners.

Gatekeepers are theories, facts, or forces that must be satisfied before a new theory can occupy the Field. One distinctly American gatekeeper theory is the belief that all people are equal under the law. This theory has given rise to the Fourteenth Amendment60 and subsequent jurisprudence. Assume that there is a theory whose proponents seek to place on the Field. That theory is, “racial differences among people indicate substantial differences in the ability to perform certain tasks. Therefore, employers ought to be able to take race into account when hiring.” This theory will have an exceptionally difficult time occupying the Field, in part because the Field is guarded

59 Leonard, supra note 7, at 774.
60 *Takahashi v. Fish and Game Comm’n*, 334 U.S. 410, 420 (1948).
by the legal equality gatekeeper. This is not to say that gatekeepers are insurmountable; appellate attorneys make much of their living on circumventing them. Proponents of the inequality theory posited above would have to show—among other things—that their theory satisfies the Court’s strict scrutiny.\textsuperscript{61} If they can show that, other gatekeepers may very well prevent their theory from occupying the Field. For example, the social norm that inequality is wrong may prevail where the same legal norm failed. \textit{Korematsu v. United States}\textsuperscript{62} has never been overruled, but social norms may prevent the establishment of similar concentration camps in the future where the law would seem to allow it.

Referees are theories, facts, or forces that operate to mediate the negotiation among theories that have occupied the field. Referees generally operate when two or more other theories are vying for a particular space on the field. Consider, for example, the Congressional mandate in the early 1980s to create what would become the Federal Sentencing Guidelines.\textsuperscript{63} The referee theory that emerged was that a federally mandated system of sentencing “will assure the ends of justice by promulgating detailed guidelines prescribing the appropriate sentences for offenders convicted of federal crimes.”\textsuperscript{64} The two competing theories in contention were (1) that disparities in sentencing, often along racial lines, required a uniform system of sentencing, and (2) that judicial discretion remained critical so that defendants’ particular circumstances could be considered.\textsuperscript{65} The referee theory set the rule that any new system would be federally mandated and

\textsuperscript{62} \textit{Korematsu v. United States} 323 U.S. 214 (1944).
\textsuperscript{65} \textit{Id.}
systematized. The question for each competing theory was how to best achieve its result within the context of this rule.

Executioners are theories, facts, or forces that operate to remove theories from the field. *United States v. Booker*\(^{66}\) is an example of such an executioner. In *Booker*, the Supreme Court held that every fact used to calculate a sentence must be proven to the fact-finder beyond a reasonable doubt.\(^{67}\) The Court thereby extended the theory of the reasonable-doubt standard reflected in *In re Winship*, and in so doing established that theory on a greater part of the field. The Court also, however, made this theory an executioner of the theory that “a federally mandated system of sentencing is the best way to secure justice for defendants.” By holding that the Federal Sentencing Guidelines must be advisory, and not mandatory, the Court removed the “federally-mandated system” theory from the field, or at least substantially weakened it. *Booker* also expressed a new referee theory that any fact used to enhance a sentence ought to be proven beyond a reasonable doubt. This theory imposed new rules for the field such that the theory of judicial discretion in sentencing was able to retake some of the field lost when the mandatory Guidelines were imposed.

We have now reached the border of the Field, and find that gatekeepers and executioners stand guard over its contents. The former looks outward into the future for theories seeking to occupy the Field. The latter looks inward and sits near the past, ready to evict moribund theories from the Field and retire them to history. Note that this description suggests that one Field follows another through time. This is, as mentioned above, an inaccuracy, but one that facilitates representation of the Field. It serves the

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\(^{67}\) *Id.* at 244.
study of history to think in terms of epochal snapshots, and not the more accurate
constant, ever-evolving progression of history. A more accurate depiction of the Field is
one long band, representing the progress through time of human existence. That portion
of the band we call the “present” would be cordoned off. Within this cordon would be
the Field of Truth, which contains all of the theories, facts, and forces that currently
operate. Theories therefore would have a life both before they occupy the Field and after
they have left it. The only difference is that when they are not on the Field, they do not
affect society—legal or otherwise—external to it.

Two questions arise. First, what is the location of a theory not on the Field? A
tory whose time has not yet come to occupy the Field nonetheless exists in the mind of
the theorist. Can this theory be said to have already occupied the Field once it occurred
to the one, lone theorist, or must the theory gain some additional support to be said to
have occupied the Field? Second, can the borders of the Field of Truth move? It is
commonly believed that we know more now, and can perceive so much more of our
world, than could people in the Middle Ages. Is our Field of Truth larger, or is it
merely fuller? What does this mean for the Field of Truth as a theory reflecting objective
reality? I pose these questions here because they are important for further enrichment of
the Field of Truth. They will, I hope, point the way for future research, by myself or
others.

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68 David C. Lindberg, *The Medieval Church Encounters the Classical Tradition: Saint
Augustine, Roger Bacon, and the Handmaiden Metaphor, in When Science &
These questions also provide a context for what we must now discuss, which is the life of a theory, including how it comes into being, occupies the Field, interacts with other theories, and ultimately, perhaps, leaves the Field.

How a theory comes into being is, on one level, as mysterious a process as is the mystery of life (or god, if one is inclined in that direction) itself. Commentators have acknowledged law’s enigmatic nature and relation to notions of a divine power. Ronald A. Cass has written that “[o]ur Constitution has become a secular ‘Bible’ to the American people. Law is the touchstone for resolving the major issues of public life. Judges and lawyers have become the priests and acolytes of our secular religious order—the order of a constitution-based, law-based society.” William Prosser, in turn, remarked that he had “never seen any reason why law should make any more sense than the rest of life.” In one sense, then, the source of legal theory, as a product ultimately of individual inspiration, remains a mystery.

On a more mundane level, however, theory comes into being in ways familiar in the context of the Field of Truth. The creation of a theory—again, the product of individual inspiration—has two sources. The first source is extant theory, fact, and force. The theorist takes her inspiration from these things that are already on the Field, and she is bounded in part by their demands. Her inspiration also, however, arises from her sense upon looking at objective reality that “something isn’t right.” She notes the gaps, inconsistencies, and so forth in current reality, and imagines a better way of ordering

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70 Id. at 145.
71 Id. at 2 (“the rule of law is not an entirely empty vessel into which any desired meaning can be poured.”).
things. Perhaps she imagines this better way based on a separate area of law, a personal experience, or a field entirely different than law altogether. What matters is that she has looked at objective reality and imagines a different reality. Thus a theory is born.

The theorist will next attempt to place her theory onto the Field of Truth. She will, in other words, seek to gain recognition and acceptance for her theory. She may do so by writing a law review article, arguing a case, lobbying a legislature, or she may take any other action that allows others to apprehend her theory. If the theory, the argumentation, or the force in support of the theory is compelling, the theorist will succeed in placing her theory on the Field by having it adopted by other people.

Her theory will, of course, have to pass gatekeepers. It must also relate in some way to the facts, or else the theory will not take root. Her theory should also reflect the theories that have come before, either as an extension of those theories into new areas or as a conscious rejection of those theories upon some principle that itself is compelling. Also, her theory will meet other theories that have occupied the field. Some of these theories will be in direct competition with her theory, and the two will vie for prominence. Other theories will be parallel theories: they will exist simultaneously, but will not be in competition with each other. Her theory, and all of the theories on the field, will engage in a constant interplay. Gerald Leonard addressed this interaction. He wrote that throughout a particular historical period, there exists “the apparently inevitable coexistence . . . of sometimes inconsistent approaches to criminal justice. Some might wax while others waned, but the history was always one of cultural negotiation between, rather than reconciliation of, the various approaches and theories.”

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Leonard, supra note 7, at 745.
A final note on “truth” is in order. In this article, I apply the coherence-pragmatism approach to truth. For the purposes of evaluating a theory of the legal system, this approach is fitting. There are, of course, other such approaches. I would like to suggest that perhaps the most popular approach to “truth” assumes that there is an objective reality that our statements can fully reflect. This is a closed approach because it depends upon complete and conclusive statements. If it is “true” that gold is a yellow metal, then the inquiry is over. We don’t need to ask about the fundamental nature of “gold,” the importance of the fact that we have named the color of gold “yellow,” but could have named it “streetcar” or something else, or the meaning of the term “metal.” This popular approach to “truth” assumes a shared society, with common norms and meanings. Based on this popular approach, one can say, “Communism is a bad form of government,” and most Americans would readily agree. “That’s the truth,” many will remark.

If a theory is popularly “true,” then it has an incredible advantage in its quest to occupy the Field because it is a closed theory. It is “closed” because it does not need to justify itself to any theory or fact external to it. The more a theory relies on popular truth, the more it relies on unquestioned assumptions or, stated more cynically, blind faith. Relying on such assumptions, the theory itself is likely to be accepted without question. Such popular truths abound in our criminal justice system, and they are the “truths” that must be challenged. The popular truth that “sex offenders are unrepentant, incurable, and will almost inevitably recidivate” is one such truth, but, studies show, is utterly false.

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73 Christopher G. Bown, Book Note, Erotic Innocence: The Culture of Child Molesting, 2 J.L. & FAM. STUD. 199, 208 (2000); James F. Quinn et al., Societal Reaction to Sex
To the contrary, most sex offenders are particularly aware of the wrongness of their acts, and want and are amenable to treatment. Most types of sex offenders have the lowest rates of recidivism among the universe of convicted criminals.  

These popular truths provide the fuel for progress in the history of criminal law theory. Our yearning to uncover actual, universal truth has led to dogmatic statements disguised as “truth,” but it has also been the nature of historical progress in the criminal law. Progress consists in revealing as false that which was thought to be true by positing in its place a greater truth. H.L.A. Hart observed that “the development of law, at all times and places, has in fact been profoundly influenced both by the conventional morality and ideals of particular social groups, and also by forms of enlightened moral criticism urged by individuals, whose moral horizon has transcended the morality currently accepted.” For Hart, morality and therefore, I would argue, the search for universal truth, drives the law: “[t]hough the law of some societies has occasionally been in advance of the accepted morality, normally law follows morality.” The objective fact of the legal system interacts with our search for universal truth. Theories play a part in that. They are true if they reflect reality and are useful. They may also be true,

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76 HART, *supra* note 11, at 181.

77 *Id.* at 196.
however, if they pull the legal system into the future and toward a more enlightened structure. This search for universal truth may be at the heart of the history of criminal law theory.

II. Approaches to Criminal Law Theory

This article lays out a workable structure with which to explore the history of criminal law theory. As I explored extant theories, the Field of Truth began to come into relief. I took one idea from this theorist, a structure from that theorist, and tried to detect the common attributes in all of the theories I explored. What ultimately emerged was the Field of Truth. The Field, therefore, should not be exceptionally different from what has come before it. In fact, it should be an explication of theorists’ implied views on the historical development of criminal legal theory.

In the work of other theorists, I identify four approaches to or perspectives on criminal law theory. It is important to explore how each of these approaches are integrated in the Field. Each of these approaches exists along its own axis, with one view counterbalancing its opposite on the other end. Despite their opposition, each view has an intrinsic relationship with its opposite. Recent scholarship acknowledges that the borders between the pairs are more porous than heretofore recognized. I therefore refer to these as dyadic approaches.

The primary dyad asks the simple, yet elusive, question, “What is theory?” One member of the dyad argues that theory is, by definition, descriptive, objective, and representative of the legal system. The other member of the dyad argues that theory is prescriptive, subjective, and creates the legal system it discusses. As these extreme views
exist on either end of a continuum, most theories lie somewhere in the middle. I call this dyad the definitional approach to criminal law theory.

The second dyad questions the structure of criminal law. One member of the dyad sees in criminal law a system that is internally coherent, consistent over time, logically organized and justified, and has a deep underlying structure that grounds and maintains these traits. The other member of the dyad sees a system that is internally incoherent, contingent on external realities and therefore inconsistent over time, illogical and contradictory, and lacking any real foundation. This dyad is the structural approach to criminal law theory.

The third dyad examines the sources of criminal law. One member of the dyad sees divine or natural law as the source, and the other member sees law as created by people based on some imperative of political or social expediency. The first member of this dyad is a premodern notion of law that has lost much ground. However, its notion of a universal truth abides in theories that hold to or seek a normative or moral basis for law. Although these middle-road theories may not speak in terms of divinity or natural law, they adopt other language that suggests a transcendent set of rules to be adopted by earthly legal systems. This dyad is the normative approach to criminal law.

The fourth dyad looks into law’s progression through time. One member of the dyad sees criminal law as progressing through time in a linear fashion, getting gradually better, and approaching, but perhaps never reaching, the perfection—and end—of law. The goal is, therefore, to produce a theory that reflects that perfection and that is therefore ahistorical, and perfectly applicable for all times and places. The other member

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78 See generally, Stephen M. Feldman, American Legal Thought from Premodernism to Postmodernism (Oxford University Press 2000).
of the dyad sees criminal law as contingent upon its time and place, and not necessarily progressing inevitably to a better system. Because time and place determine the law, the end of law is impossible. The goal is therefore to understand criminal law within its historical context. This dyad is the historical approach to criminal law.

a. The Definitional Approach

In order to construct a structure that helps us trace the history of criminal law theory, it is necessary to define what “theory” is. The answer is not obvious. There is, for example, a major divergence between proponents of descriptive theories and proponents of prescriptive theories. Jerome Hall and Michael Moore exemplify the descriptive/objective/representative approach to theory. Hall wrote, for example, that theory “signifies the knowledge of a subject, acquired without any practical objectives in view; and it is especially concerned with the ultimate ideas which comprise the foundation of a science or social discipline.”\(^79\) Similarly, Moore wrote that theory is “a set of general statements that aim at justifying, explaining, or describing some more discrete legal phenomena, be it a doctrine, an area of law, or a particular case decision.” A theory is “a set of general statements doing one of these three tasks.”\(^80\)

Hall and Moore, therefore, would apparently argue that theory must be descriptive, rather than prescriptive. That is, it cannot recommend a course of action, but must merely explain current reality. They would also suggest that theory must be objective to the extent possible. The theorist’s own position must be excluded from the analysis, and she must not have any “practical objective”—or agenda, to use a

\(^79\) HALL, supra note 42, at 1.
contemporary term—in mind when doing theory. This position cannot, however, maintain itself.

Hall noted that it is “extremely difficult . . . to exclude one’s values from the construction of his theory of penal law . . . [P]erhaps, the most that should be expected is that such ‘preferences’ and their implications be articulated.” Unlike Hall, Moore never suggested that a theorist not have an agenda. He argued that a purely descriptive theory is important so that it can effectively justify extant legal doctrine and extend it into uncharted territories. Clearly, then, even ardent descriptivists acknowledge that a theorist’s subjective outlook will shape her analysis of the objective legal reality. She will inevitably have an agenda.

Nicola Lacey acknowledges this, writing that the notion that theories “can be divided neatly into descriptive and prescriptive has been thoroughly questioned.” She goes on to compare theorists with map-makers. Map-makers, she writes “presuppose an institutional conception of their subject matter.” In other words, theorists’ “moral or political presuppositions generally color the starting point of empirical and conceptual analyses, shaping what we ultimately produce.” Theorists both construct and represent the legal system, and in doing so, they “have the power to stipulate meanings, and . . . to enforce their usage within a certain discursive arena.”

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81 HALL, supra note 42, at 2-3.
82 Moore, supra note 80, at 733, 735.
83 Lacey, supra note 3, at 296.
84 Id. at 302.
85 Id. at 303.
86 Id.
87 Id. at 305.
Lacey has identified a way to integrate both ends of the definitional dyad. She states that law and, by extension, legal theorists, can prescribe and create law. In other words, their subjective treatment of the law can re-create law. She also notes, however, that this creation, this stipulation of meaning, is done “within a certain discursive arena.” Although she doesn’t define this arena, its very image suggests boundaries, rules, and therefore meanings that are possible, and meanings that are impossible to bring into reality. Stanley Fish picked up on this relationship, writing that

objectivity is impossible because we always are already interpreting, [but on the other hand,] the individual interpreter or reader is never unconstrained—never free merely to impose her personally preferred meanings on the text. Rather, the interpreter always is limited by the practices of her interpretive community, which impart ‘assumed distinctions, categories of understanding, and stipulations of relevance and irrelevance.’

Other theorists have recognized this interaction between description and prescription, objectivity and subjectivity, and representation and construction. Peter Fitzpatrick has offered an interesting Freudian analysis of this dyadic relationship. Whatever its psychoanalytic merits, Fitzpatrick’s work provides an effective integration between law as determined, fixed, and proceeding from the law that came before it, and law as responsive, flexible, and changing. He wrote that

[i]n order for this law, and ‘not men’, to rule, it had to be coherent, closed and complete. If it were not coherent but contradictory, something else could be called on to resolve the contradiction. If it were open rather than closed, then something else could enter in and rule along with law . . . [But

88 Id.
89 FELDMAN, supra note 78, at 153.
90 David J. Herring, Legal Scholarship, Humility, and the Scientific Method, 25 QLR 867, 872 (2007) (“The law reflects, and at times constructs, social values.”).
92 Id. at 3-76.
law] cannot . . . simply secure stability and predictability but also has to do the opposite: it has to ensure that law is ever responsive to change, otherwise law will eventually cease to rule the situation which has changed around it.\footnote{Id. at 71.}

What, then, is theory? It can be both objective and subjective; descriptive and prescriptive; and representative and creative. As such, a broad definition is necessary. To pick up on Fitzpatrick’s Freudian theme, I submit that theory is the “dream-thought” to the legal system’s “dream-content.” In \textit{The Interpretation of Dreams}, Freud wrote that one’s dream-content consists of her dream’s manifest content—what the dreamer saw as she dreamed. The dream-thought, on the other hand, is the dream’s latent content. “It is from these dream-thoughts and not from a dream’s manifest content that we disentangle [the dream’s] meaning.”\footnote{SIGMUND FREUD, THE INTERPRETATION OF DREAMS 311 (James Strachey ed., trans., Avon Books 1965).} Freud went on:

\begin{quote}
The dream-thoughts and the dream-content are presented to us like two versions of the same subject-matter in two different languages. Or, more properly, the dream-content seems like a transcript of the dream-thoughts into another mode of expression, whose characters and syntactic laws it is our business to discover by comparing the original with the translation. The dream-thoughts are immediately comprehensible, as soon as we have learnt them. The dream-content, on the other hand, is expressed as it were in a pictographic script, the characters of which have to be transposed individually into the language of the dream-thoughts. If we attempted to read these characters according to their pictorial value instead of according to their symbolic relation, we should clearly be led into error.\footnote{Id. at 311-312.}

This analogy is apt for our current purposes. The dream-content of criminal law consists of everything we can readily observe: statutes, case law, rules of evidence, sentencing regimes, elements of a crime, \textit{mens rea}, etc. These are the facts on the Field of Truth. The dream-thought of criminal law consists of the ideas, principles, and goals
that inform the law’s dream-content. This is theory. It includes things such as the Kantian notion of the autonomous individual and the principle that government must serve and protect its citizens, as well as the critical legal studies view that law serves entrenched powers against those who have historically been marginalized.

I define theory as “the created structure that contains the psychic activities that have gained substantial legitimacy in all or part of a society’s collective consciousness, the objective realities concerned with these activities, and the forces that affect these activities and realities.” Theory is the dream-thought that determines the dream-content that are the facts on the Field. The Freudian analogy isn’t perfect, however, because facts can also determine theory.

This definition of theory is well suited to the Field of Truth. It is a neutral and broad definition that allows for all types of theories—legal and otherwise—to be included within its scope. When non-legal or non-traditional theories appear, therefore, the Field of Truth can include them and evaluate their impact on legal reality. It also allows for the existence of theories that do impact legal reality (have occupied the Field), have in the past impacted it but no longer do (have departed from the Field), and may in the future impact it (are attempting or may attempt to occupy the Field). This broad definition means that concepts not normally considered theories have a place in evaluation based on the Field of Truth concept. For example, antebellum justifications for slavery\(^\text{96}\) and the

early twentieth century eugenics movement are normally seen not as theories but as something else, something more sinister and duplicitous. The Field of Truth does not, however, primarily consider a concept’s moral or truth value (although such values are considered as forces, gatekeepers, and so forth). Rather, it considers the impact that psychic concepts had on the legal system at a given time. As psychic concepts that had a relation of reflection or influence with the criminal legal system, justifications for slavery and the eugenics movement should be considered theories. In considering them as theories, the Field of Truth can trace the history of criminal law theory with a view to what theories actually had an impact on the legal system.

The Field also allows for continuity with the past, but also for apparently radical breaks with it. Lacey and Fish observe that people create new legal structures, but must do so within the limits set up by objective reality. I acknowledge this by observing that the course of a theory’s life before, during, and after its appearance on the Field must have some causal relationship with what came before it or what it meets in its journey. Also, however, the theory can emerge and change based on hidden or surprising causations. Things can suddenly emerge that allow theories to come into being that are exceptionally different than what came before. This doesn’t mean that they are unrelated to their past. They still operate within their objective reality; the only difference is that that objective reality has been exceptionally altered.

b. The Structural Approach

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The structural approach to criminal law theory asks two questions. First, does criminal law have a structure that is consistent in that it operates by universal or virtually universal principles? Second, if these principles exist, what is their nature?

The answer to the first question depends upon the existence or non-existence of predictable rules or, at least, guidelines by which the criminal law operates. If the rules and/or their application operated in a certain way in the past, and they operate or are applied that way today, we might conclude that the criminal law does have a consistent structure. To the extent that human nature doesn’t change appreciably over time, human reactions to objective reality and subjective motivations also don’t change. It seems likely, then, that to the extent that human nature is consistent over time, then human institutions, like the system of criminal law, also will be somewhat consistent. Finding consistency can be tricky, however, because the way one looks at an objective reality will be determined by what one hopes to see, and what one is focusing on.

Consider the American criminal trial. The rules have remained relatively consistent over time. The rules of evidence, burden of proof, separate roles of the judge, jury, and attorneys, the right to appeal, and so forth have not changed radically since the founding of the country. These rules are applied without exception in every criminal trial. One could look at these facts, determine the theories upon which they are based, and conclude that the theories have remained in force and they have been consistently applied. One could also, however, examine conviction rates along race or class lines and
learn that great disparities exist. That person might then question whether the rules—or their application—are in fact consistently in force.

Alan Norrie has explored this prismatic view of consistency in the law. He observes that “criminal law is neither rational nor principled . . . It is not that there is no rationality or principle in the law at all, but rather that the elements of reason and principle are constantly in conflict with other elements in the law itself.” He goes on to argue that traditional legal scholarship is founded on the notion that criminal law is based on natural and ahistorical theories. They are not “seen as the product of a particular kind of society generating particular historical forms of social control peculiar to itself.” Norrie promotes a theory that appreciates the connection between legal systems and the societies in which they exist. Because the criminal law grows out of the society in which it exists, the “shape” of criminal law is taken from “a particular historical epoch and . . . [the] fundamental features of the social relations of that epoch. Its principles, therefore, are historic and relative rather than natural and general.” “History,” Norrie writes, “explains the ‘method behind the madness’.”

Norrie’s work is reflected in the Field of Truth in four ways. First, the Field doesn’t assume that any particular form of order—such as reason or natural law—is determinant. The Field, rather, explores the theories, facts, and forces, and tries to let observation of these elements, and not preconceived notions, drive the study of theory.

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99 NORRIE, CRIME, REASON, AND HISTORY, supra note 6, at 7-8.
100 Id. at 8.
101 Id.
102 Id.
103 Id. at 14.
Second, Norrie’s approach is historicist and indeed acknowledges that history is central to understanding criminal law. The Field is designed precisely to explore that history. Third, Norrie’s view is that criminal law theory is embedded in its social milieu and affected by it. The Field is designed to facilitate the exploration of the effect that facts have on theory, and that theory has on facts. Fourth, Norrie finds social and political conflict, as well as struggle and contradiction, at the center of the development of criminal law.\textsuperscript{104} The Field acknowledges that the history of criminal law theory is not always (or ever) a straight line, unencumbered by roadblocks, detours, and other hindrances. Rather, the Field is meant to reflect the multitude of theories on the Field and that are vying for a place on it, and the nature of the contact among these theories. Sometimes this contact is integrative and cooperative, but perhaps more often, this contact is defined by struggle for predominance and contradiction, when two or more competing theories have occupied the field and exert influence over facts.

Where Norrie finds consistency of a historically unacknowledged type, Thomas S. Ulen simply finds that legal theory lacks any “commonly accepted theoretical core or paradigm and accepted standards and methods of empirical or experimental verification.”\textsuperscript{105} He argues that “there is no accepted theory of law that applies to every legal system and to which legal scholars in every country can appeal in explaining the particular institutions or rules of their own systems.”\textsuperscript{106} Note that Ulen doesn’t deny that the law lacks any consistency. He argues, rather, that there is no consistent structure by

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\textsuperscript{104} \textit{Id.} at 8.
\textsuperscript{105} Ulen, \textit{supra} note 8, at 893.
\textsuperscript{106} \textit{Id.} at 896.
\end{flushright}
which we can measure law. This means that we cannot determine whether or not law itself is a consistent system.

Ulen advocates for a more scientific approach to law, and observes that “the predominant direction of change in legal scholarship and specifically, the role of theory,” has been toward this scientific approach.\(^{107}\) The Field of Truth is able to move criminal law theory closer toward Ulen’s vision. He would like to see a paradigm that can be applied universally to understand various forms of law in various locations.\(^{108}\) This paradigm would not contain any assertion as to the nature of the law, but would be a structure that can be applied to discover or explain that nature.\(^{109}\) This structure, therefore, would have some coherence-pragmatic truth value. The Field of Truth is such a paradigm because it reflects the development of criminal law theory and is useful in exploring it.

Despite its pretentions toward being something new, the Field of Truth also embraces traditional notions of legal theory. Ronald Dworkin seems to have kept the natural law/rationalist flame alive with his notion of law’s deep structure.\(^{110}\) Dennis M. Patterson recognizes Dworkin’s deep structure and adds a normative element, writing that “[t]here is a right answer to the meaning and truth of our assertions about what law and politics require. The route to true propositions is through discovery of the true meaning of our terms.”\(^{111}\)

\(^{107}\) Id. at 876.
\(^{108}\) Id. at 893.
\(^{109}\) Id. at 896.
\(^{110}\) Dworkin, supra note 58.
\(^{111}\) Patterson, supra note 52, at 549.
To the extent that deep structures and correct answers exist, the Field is designed to embrace them. This is not to say the Field makes the search for them easy, but that all of the elements necessary for the search are at hand. Deep structures can be found by exploring the constant interchange between theories, facts, and forces, and how, over time, each has affected the other. By exploring the history of criminal law theory, one can begin to detect patterns, and such patterns are likely to lead to some underlying theoretical bases for the criminal law. These bases may be or may lead to the deep structures. Of course, we may find that these bases are contingent on time and place. We may therefore reject the notion of deep structures, or, as Norrie might do, we may look for deep structures in non-traditional locations.

H.S. Tur has expressed skepticism that any general theory of criminal law can be found in a common law system. This is so because the development of common law is largely ad hoc and pertinent only to the facts of the particular case being considered. On the other hand, the common law has developed a substantial and consistent body of precedent, so that any deviations that emerge from that which has come before usually follow limited and predictable paths that often merely extend an extant rule. Tur’s skepticism, furthermore, may have carried more weight in the early days of the country, when Keynote book searches and the WestLaw and Lexis databases didn’t exist. With

these innovations came the ability to consult the entirety of legal rulings and arguably resulted in the coagulation of disparate common law trends.

Nevertheless, the Field is able to embrace and test Tur’s viewpoint. Assume that the common law has prevented the development of any general theory of criminal law. This would be reflected on the Field as facts (common law legal opinions) changing through time in ways that do not match the progress of theoretical legal work. If these trends don’t reflect each other, then the causal relationship between them is to be doubted. If they do reflect each other, then we ought to question Tur’s concern that the common law and consistent legal theory are mutually exclusive.

Stephen Feldman has outlined a structuralist history of legal theory. He argues that premodern American legal thought consisted of a belief in natural or divine law, discoverable by human reason. The legal system should, therefore, reflect god’s law. As the country edged into modernism, legal thinkers started to embrace an instrumental and pragmatic conception of law. Modernist thinkers were more secular than their premodern counterparts. The search for an objective truth, however, remained, and called for the use of reason and logic to discover consistent legal principles. An appreciation of inevitable subjectivity gradually crept in, and with it came deeply inconsistent notions of law. With the social upheavals in the 1950s and 1960s, followed by the critical legal studies movement, legal theorists had a difficult time

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115 Feldman, *supra* note 78.
116 *Id.* at 50.
117 *Id.* at 74-75.
118 *Id.* at 84.
119 *Id.* at 93, 97.
120 *Id.* at 115, 126.
finding any rational and transcendental ground for the rule of law. As illuminating as his study is, Feldman does not quite answer the two questions posed by the structural approach. He discusses Americans’ perception of the (in)consistency of the law, not the reality of its condition. He therefore does not (and does not intend to) explore whether the law actually has a consistent structure, and, if it does, what that structure is.

Feldman’s work suggests both a profound consistency in the legal system, but also a changing manifestation of that consistency. The Field of Truth is designed to explore both the nature of legal theory and the facts. It also can be used to explore how theory manifests facts, and how facts manifest theory. This relationship is central to an exploration of the history of criminal law theory, as well as to the question of whether the criminal law is a consistent system. The Field can be applied to determine whether the legal system is consistent, what the nature of that consistency is, and how it may change over time.

c. The Normative Approach

The normative approach to legal theory searches for the sources of law. It is “normative” because it is in the sources of law that one finds social norms, or assertions of right and wrong. Feldman argues that premodern America found the source in divine or natural law, discoverable by reason. Postmodern America, in contrast, realized law’s inevitable subjectivity and inconsistency. Despite this, Feldman argues that even critical legal theorists are modernist because they find a universal truth in law’s

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121 Id. at 137, 148.
122 Id. at 50.
123 Id. at 115, 126.
fundamental contradictions, and work toward societal reform for the benefit of all.\textsuperscript{124} Even for the crits, “[m]odernist progress could march onward.”\textsuperscript{125}

Feldman’s work suggests that theory has never been able to adopt only a natural/divine law base or a contingent/created base. The work of other theorists confirms this. Carl Joachim Friedrich’s work indicates that both bases have operated throughout history.\textsuperscript{126} H.L.A. Hart’s primary assertions regarding law were mostly of a natural and ahistoric sort. His theory was stated in terms suggesting that it was true for all times and ages, at least in democratic countries.\textsuperscript{127} On the fringes of his writing, however, he discussed historical events, such as stages of law\textsuperscript{128} and enlightened morality gradually informing accepted morality and thus eventually changing the law.\textsuperscript{129} His views on sexually deviant “crimes,” for example, indicated that he was not entirely happy with the criminal law of his time, and foresaw a better future.\textsuperscript{130} One of his rules that comprises the law, the “rule of change,”\textsuperscript{131} requires for its operation the passage of time and thus the importance of history. Alan Norrie’s primary focus, on the other hand, is that law is contingent because it is tied to historic social and political conflict.\textsuperscript{132} This, however, is also a statement of universality because it rests on the consistent operation of conflict. This, for Norrie, is a universal, ahistoric truth.

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\textsuperscript{124} Id. at 131-32.
\textsuperscript{125} Id. at 132.
\textsuperscript{126} FRIEDRICH, supra note 51.
\textsuperscript{127} HART, supra note 11, at 78-79, 92-94, 103, 107.
\textsuperscript{128} Id. at 165-67.
\textsuperscript{129} Id. at 181, 196, 199.
\textsuperscript{130} Id. at 170.
\textsuperscript{131} Id. at 93.
\textsuperscript{132} NORRIE, CRIME, REASON, AND HISTORY, supra note 6, at 8, 13.
\end{flushleft}
Roscoe Pound observed twelve separate conceptions of law. Six of these conceptions locate the source of law in a divine entity or in a natural, eternal, or immutable moral code. As divinely or naturally ordered, these conceptions of law are the epitome of a normative legal system. Two of Pound’s conceptions have human beings “discovering” a system of precepts or principles that measure human behavior by the imperative of freedom or reason. These conceptions are interesting because they apparently abandon notions of a divine entity or natural law and elevate the role of human beings in formalizing legal structures. Despite this, these conceptions still require that law somehow exist independently of human activity. Like an uninhabited continent, law exists always, and is waiting for people to discover it. Three of Pound’s conceptions consider that law is entirely created by human beings as a social contract, as rules created by the sovereign authority as to how people should conduct themselves, and as rules created by the dominant class in furtherance of its own interest. These conceptions, of course, see law as entirely human-created.

Pound’s final conception is most interesting. He describes law “as made up of the dictates of economic or social laws with respect to the conduct of men in society, discovered by observation, expressed in precepts worked out through human experience of what would work and what not in the administration of justice.” With this conception, Pound envisions a system of law that is both discovered (“discovered by observation”) and created (“precepts worked out through human experience”), and that is both normative (“the dictates of economic or social laws”) and functional (“what would

133 POUND, supra note 12, at 26-28.
134 Id. at 28-29.
135 Id. at 27, 29.
136 Id. at 29.
work and what not”). Whether or not a divine entity or natural law affects legal systems, Pound recognized that the opposing dyads within the normative approach can and do operate together.

The Field of Truth recognizes that theories are both discovered and created, and that once-controversial ideas can come to be accepted norms. Theories inevitably proceed from what came before them, but they also contain elements that are created. Challenging beliefs can emerge on the field as utopian and unwanted fantasies, such as Martin Luther King, Jr.’s vision of an integrated America. Such beliefs can, however, evolve into lasting norms—and even reflections of an immutable morality—that move facts in their direction.

Norms do exist in law, passed down from the past through human understanding of what is right and wrong, and what is effective and ineffective. Transgressions of these norms can also have staying power and create new norms. This process is why racial segregation was once uncontroversial, but is now virtually eliminated, at least in the law. This process also suggests that “morality” plays an intimate role in advancing law throughout history. Whether that term is described in terms of a divine entity, reason, the golden rule, or whatever, one would be hard-pressed to find anyone who doesn’t believe in right and wrong. One who is engaged in the practice or study of law will inevitably import these notions into her conception of the law. The role of morality, which I define as “the pursuit of right and wrong,” ought to be examined.

Hart found that morality played a central role in the progress of law throughout history. He wrote that morality ought to play a role in law when it can be justified not based on its own internal rules, but on the “critical principle . . . that human misery and
the restriction of freedom are evils."\textsuperscript{137} Despite this conditional acceptance of morality in law, Hart also wrote that our notion of justice—that which is “just” and “unjust”—“is a distinct segment of morality.”\textsuperscript{138} Elsewhere, however, Hart separated morality and law as distinct types of social phenomenon.\textsuperscript{139}

Hart separated law and morality in the context of defining the purpose of legal theory, which is “to advance legal theory by providing an improved analysis of the distinctive structure of a municipal legal system and a better understanding of the resemblances and differences between law, coercion, and morality, as types of social phenomena.”\textsuperscript{140} Hart was suggesting that law and morality are strictly separate phenomena, but that they are inevitably tied together, and morality inevitably informs the law in the context of law’s progression through history. He has written of the progress of law that “the development of law, at all times and places, has in fact been profoundly influenced both by the conventional morality and ideals of particular social groups, and also by forms of enlightened moral criticism urged by individuals, whose moral horizon has transcended the morality currently accepted.”\textsuperscript{141} He went on: “[t]hough the law of some societies has occasionally been in advance of the accepted morality, normally law follows morality.”\textsuperscript{142} Furthermore, “[t]he law of every modern state shows at a thousand points the influence of both the accepted social morality and wider moral ideals. These

\begin{enumerate}
\item\textsuperscript{138} Hart, supra note 11, at 153.
\item\textsuperscript{139} Id. at 17.
\item\textsuperscript{140} Id.
\item\textsuperscript{141} Id. at 181.
\item\textsuperscript{142} Id. at 196.
\end{enumerate}
influences enter into law either abruptly and avowedly through legislation, or silently and piecemeal through the judicial process.”

The Field of Truth reflects Hart’s paradoxical approach to morality in the law. The Field acknowledges the existence of moral actualities, which are theories that—whether by conforming to the dictates of a deity or some earthly norm—apparently do not change over time. Such moral actualities reflect the seemingly universal belief that there is a right and a wrong, i.e. that morality exists. They also assert that morality is intrinsic in legal systems, and yet is distinct from them. Finally, the Field acknowledges that manifestations of morality change over time, and that what was once deemed moral (antimiscegenation policies, for example) is now deemed quite immoral. Enlightened morality pushes accepted morality off of the Field.

This process, however, is not simple. Nor is it uncontroversial—we all want a “moral” system of justice, but we differ greatly on what that system looks like. We also tend to suspect the motivations of others who disagree with us on moral issues. We disagree, at base, on what morality is. Hart writes that

In the criticism of law, there may be disagreement both as to the appropriate moral standards and as to the required points of conformity. Does the morality, with which law must conform if it is to be good, mean the accepted morality of the group whose law it is, even though this may rest on superstition or may withhold its benefits and protection from slaves or subject classes? Or does morality mean standards which are enlightened in the sense that they rest on rational beliefs as to matters of fact, and accept all human beings as entitled to equal consideration and respect?

With this passage, Hart describes the difficulty of determining what morality is, but simultaneously posits what he considers to be the objective definition of morality. In

\[\text{Id. at 199.}\]
\[\text{Id. at 201.}\]
this way, he both describes and reflects the difficulty when one deals with morality in the law. The Field of Truth provides a framework for confronting this difficulty. It defines moral actualities in a way that embraces the possibilities of divinely-ordained morality and enlightened morality discovered by human beings. It also defines actual truth to cover the existence of socially accepted morality. It does not declare a certain theory or belief to be good or bad (moral or immoral), or to come from a deity, human discovery, or human creation. It simply maps out the course of the theory or belief through history and on the Field. It is therefore limited to understanding the history of legal theory, but it does so in a way that embraces all of the apparently contradictory notions of the normative approach to legal theory.

d. The Historical Approach

The fourth dyad examines law’s progression through time. Law is viewed on one hand as proceeding through history in a logical, linear fashion. On the other hand, law is also viewed as being contingent on other forces, and therefore not developing in an internally logical manner.

Hart suggested that the law not only develops in one direction, but that that direction is toward a constantly better form of law. This development is characterized by increasing complexity, greater democracy, and ever-enlightened moral thought. He wrote that early societies had rules as “the only means of social control” and that there might be nothing corresponding to the clear distinction made, in more developed societies, between legal and moral rules. When this early stage is passed, and the step from the pre-legal into the legal world is taken, so that the means of social control now includes a system of rules containing rules of recognition, adjudication, and change, this contrast between legal and other rules hardens into something definite. The

\footnote{Id. at 165, 167, 181, 196.}
primary rules of obligation identified through the official system are now set apart from other rules, which continue to exist side by side with those officially recognized.\textsuperscript{146}

Hart’s notion of the law’s development is that of a linear, logical development, in which law proceeds from “lesser” to “greater.” In mathematical terms, the Hartian notion of law’s development holds that law at time zero is $x$, in which $x$ is defined as having a certain level of democracy, justice, complexity, and so forth. Law at some point after time zero—time 2010, for example—is $x + y/x$, meaning that law proceeds from $x$ to something that is still $x$, but a greater portion of $x$. That is, law at time 2010 has become more democratic, just, and complex.

The implication of a Hartian notion of law’s development is that the legal system is primarily a self-determining system. In other words, the legal system is the cause of itself and of other facts in society. It may be acted upon by external sources, but it retains the ability to mediate its own change; it determines itself, and is not determined by anything else. Therefore, law can proceed from $x$ to $x + y/x$, and not to something else entirely.

The other member of the historical dyad sees law as contingent, and not developing in an internally logical manner. This is Norrie’s view. One cannot find in legal systems an internal consistency, because legal systems are determined by externalities, namely historical social and political conflicts.\textsuperscript{147} He explicitly rejects the Hartian notion, writing that “[t]o the extent that lawyers think historically about the law, they tend to think in terms of the slow evolution of legal forms from the crude to the

\textsuperscript{146} Id. at 165.

\textsuperscript{147} NORRIE, CRIME, REASON, AND HISTORY, supra note 6, at 8.
sophisticated, and not in terms of the particular connections between different legal forms and different kinds of society.”

Norrie argues that by looking to the structure of the law itself, we can understand its inconsistencies. He doesn’t deny that a certain logic informs law’s development through history, but he does say that to find it, we have to look not at law directly, but at the “particular, historically developed social relations” in which law has operated. Stated mathematically, the contingency view of law holds that law is a function of history. Law may be $x$ at time zero, but it is $x$ only because the historical reality at time makes it so. At some later point in time, a change in the historic reality may make law $x + y/x$, or something else entirely. Law, as a function of history, is altered fundamentally.

I am uncomfortable with both Hart’s and Norrie’s positions. Hart, as a modernist, held out law as a largely independent source of influence that had the power to determine itself and the world around it. I don’t think it is realistic to divorce and elevate any social institution from its temporal and spatial location in the way that Hart did. On the other hand, Norrie seems to have subjugated law almost entirely to its location. This approach is also inadequate, because the law, at least in America, covers virtually every aspect of life. It is said that Americans are litigious. I think the more accurate statement is that Americans view the world in terms of law—in terms of rules and their exceptions, justice, and right and wrong. In such a society, the legal system will inevitably expand and have enormous influence. That system will have great power to affect itself and the

148 Id. at 8.
149 Id. at 13.
150 Id.
facts around it, but its legitimacy is ultimately founded on its ability to address issues arising in every area of society. Law must, therefore, respond to these areas.

The Field of Truth acknowledges that law is a powerful, but not the only, determining factor. The history of criminal law theory must, therefore, encompass criminal law theories, but it must also recognize external theories, facts, and forces. The Field adopts Gerald Leonard’s vision of multiple “mainstreams” of the history of criminal law theory,152 as well as his Hartian belief that there are “organizing principle[s]” informing the law.153 The Field also, however, recognizes that the criminal law has always operated in relation with external theories, and has been affected by them. The criminal law has, therefore, sometimes taken the lead to determine itself, and sometimes has been determined by external facts. The Field is designed to reflect this.

This article picks up where Leonard’s work left off. Where Leonard’s conception of the history of criminal law theory was somewhat embryonic and anecdotal, this article proposes a theory that is more formal and encompassing. For example, Leonard finds sources of theory in treatise writers like Blackstone154 and postmodernists like Foucault,155 but he does not place these theorists in a formal structure. He does, however, point toward the Field of Truth in recognizing that numerous and often inconsistent approaches to criminal law have often coexisted and gained or lost influence as time passed.156 He also notes “mainstreams” of the history of criminal theory,157 which are reflected in the Field’s appreciation that theories coexist and compete for space. This

152 Leonard, supra note 7, at 798.
153 Id. at 774.
154 Id. at 705.
155 Id. at 736.
156 Id. at 745.
157 Id. at 798.
article is an answer to Leonard’s complaint that “[t]he history of criminal theory in the twentieth century has never been adequately treated.”  

Conclusion

There seems to be relative consensus that legal theory lacks a consistent paradigm with which to explore questions. This lack has led to calls that legal theory is “unscientific,” and is part and parcel to observations that criminal law theory is a young endeavor. This article advances criminal law theory by proposing the Field of Truth. The Field is a functional tool or a map that can be used to guide one’s exploration of the history of criminal legal theory. It is also, hopefully, a description of the reality of legal theory’s historical progression. The Field is “true,” in the coherence-pragmatism sense, if it is a useful tool and if it reflects, at least in part, the reality it describes.

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158 *Id.* at 804.
159 Ulen, *supra* note 8, at 876, 893.
160 ELLIS & ELLIS, *supra* note 1, at ix; Fletcher, *supra* note 1, at 689.