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ON CLASSISM AND DISSONANCE IN THE CRIMINAL LAW: A REPLY TO PROFESSOR MEIR DAN-COHEN*

Richard Singer**

I. INTRODUCTION

In a recent article, Professor Meir Dan-Cohen proposed analyzing legal systems by determining the degree to which there is not one set of rules aimed at all persons, but two sets—"rules of conduct," which purport to tell the general public what conduct is prohibited by the criminal law, and "rules of decision," which tell judges and other decision makers what the true rules of the criminal law are.¹ The distinction is based upon an observation, attributable to Bentham,² that to speak of "the law" as a unity is misleading, for there must be both rules which establish the norms of the law ("rules of conduct"), and rules which explain how those norms are to be implemented and enforced ("rules of decision"). An obvious illustration is found in a rule-penalty context. A ("conduct") rule that "Thou shalt not steal" gives no guidance as to what is to be done with the thief; similarly, a ("decision") rule that "all thieves should be executed" does not itself substantively define those to whom the punishment direction applies. Of course, there may be "mixed" rules, such as "All those who kill another person shall be put to death," but even then the rule is divisible into segments directed toward different audiences and for different purposes.

The distinction between substantive rules of conduct and pro-

* This article was the subject of faculty seminars at Rutgers-Camden and at Benjamin Cardozo Law School, and I thank all those colleagues who participated in those sessions. Additional thanks are due to Joshua Dressler, who reviewed an early draft of the paper.

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¹ Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625 (1984).

² Dan-Cohen, *supra* note 1, at 626 (citing J. BENTHAM, A FRAGMENT ON GOVERNMENT AND AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 430 (W. Harrison ed. 1948)).

cedural rules of penalty, however, is not the primary distinction which Dan-Cohen has in mind. Indeed, there is a serious question as to whether he considers sentencing or punishment law as a "rule of decision" at all.³ Instead, when Dan-Cohen uses the term "decision rule," it appears that he is concerned with substantive commands which entirely preclude punishment in a given situation.⁴ The paradigmatic case in his analysis would be a conduct rule declaring that all killings will be criminally punishable and a decision rule exempting killers with red hair. In Anglo-American criminal law, a decision rule establishing non-liability for a wrongful act is termed an "excuse," such as duress, or reasonable mistake. The importance of Dan-Cohen's exclusive focus on the substantive criminal law doctrines of mitigation or exoneration,⁵ rather than on sentencing processes, will become apparent later in the discussion.

Having established the "conduct-decision rule" dichotomy, Professor Dan-Cohen suggests that much could be learned about *real* legal systems if we posit an imaginary world in which no member of the general public would learn the true decision rules which guide officials when conduct rules are broken and then compare that world to ours.⁶ He terms the general public's total lack of knowledge of decision rules "acoustical separation."⁷ As the author states:

Imagine a universe consisting of two groups of people—the general public and officials. The general public engages in various kinds of conduct, while officials make decisions with respect to members of the general public. Imagine further that each of the two groups occupies a different acoustically sealed chamber. . . . Now think of the law as a set of normative messages directed to both groups. One set (conduct rules) is directed at the general public and provides guidelines for conduct. . . . The other set (decision rules) is directed at the officials and provides guidelines for their decisions.⁸

³ See *infra* note 78 and accompanying text.

⁴ Dan-Cohen, *supra* note 1, at 636-64.

⁵ See Dan-Cohen, *supra* note 1, at 636-64.

⁶ Dan-Cohen, *supra* note 1, at 630.

⁷ Dan-Cohen, *supra* note 1, at 630.

⁸ Dan-Cohen, *supra* note 1, at 630. Professor Dan-Cohen's observation that Talmudic law recognized this distinction, Dan-Cohen, *supra* note 1, at n.1, is clearly correct as far as it goes, but this is in part because "Jewish law is not confined within the boundaries of relations between man and man. [But includes] [m]atters concerning the relationship between man and God, which are actually matters between man and himself, between him and his religious and moral feeling . . ." Silberg, *Law and Morals in Jewish Jurisprudence*, 75 HARV. L. REV. 306, 311 (1961-62). Indeed, it was the aim of Jewish society that every citizen become "learned" so as to understand not only the "law of man" (conduct rules), but the laws of God (decision rules, including standards of morality); as Silberg puts it, the law "can have only one solid foundation: a common moral concept shared by all of the nation's individuals." *Id.* at 322 (emphasis added).

Dan-Cohen suggests some acoustic separation can be achieved through what he calls "selective transmission."⁹ Selective transmission occurs when the legislature (or the judiciary when it announces a new rule of law) speaks either in very vague terms, or uses apparently coherent language which can later be interpreted by the courts (or other decision makers) to achieve the true decision rule. In the first case, in order to preclude persons from conduct X, the legislature may write a statute so vague that the public will understand the statute as precluding conduct which is *not* X, but which is "nearly" X. This vagueness encourages what Dan-Cohen calls "safe-siding"¹⁰—avoidance of the possibility that one's actions might be interpreted as falling within the statutory prohibition.

If, however, one is arrested for violating the vague statute by performing non-X act Y, one will not be punished. Since the legislature has directed the decision rule to the courts,¹¹ they will interpret the statute narrowly, to apply only to conduct X. The person who has done Y, expecting to be punished because the vague statute appears to prohibit both X and Y, will find himself exonerated.

A second tactic suggested by selective transmission is the use of ordinary words in statutes which the legislature actually intends to be interpreted differently from ordinary usage.¹² Additionally, courts can still restrict the scope of a non-vague statute by imposing a *scienter* or *mens rea* requirement into a statute which does not appear on its face to require it.¹³ The purpose of this separation is

⁹ Dan-Cohen, *supra* note 1, at 652-58.

¹⁰ Dan-Cohen, *supra* note 1, at 650.

¹¹ Dan-Cohen, *supra* note 1, at 670.

¹² Dan-Cohen, *supra* note 1, at 652-58.

¹³ The Model Penal Code has provided a rule of interpretation, which is also a rule of substantive criminal law, with regard to this issue. Unless the legislature specifies a mental state, the minimal *mens rea* required is recklessness. MODEL PENAL CODE § 2.02(3) (1962). Of course, to the extent that the specific parts of the Code are "known" by the offender, one might expect him to know the general part provisions as well. Dan-Cohen's argument that judicial gloss is the remedy for the vagueness in decision rules, but that a requirement of *scienter* is the remedy for the vagueness in conduct rules is difficult to follow, particularly in light of his principal example. Dan-Cohen, *supra* note 1, at 658-64. His argument is that vagueness concerns about excessive prosecutorial or police power can be dealt with by judicial gloss restricting the discretionary power of decision-makers (*i.e.*, that when courts determine that X in a statute means Y, any later court will be reversed beyond its discretionary bounds, if it seeks to make X mean Y + Z). Similarly, where the concern is fair notice to the defendant of the content of conduct rules (the only rules of which a defendant is by hypothesis aware) a requirement of *scienter* as to all facts is sufficient, for it permits the defendant, who does not know that his conduct is viewed as immoral (much less illegal), an excuse.

Thus far, the analysis is at least somewhat understandable. However, Dan-Cohen then turns to a discussion of *People v. Hernandez*, 61 Cal. 2d 529, 393 P.2d 673, 39 Cal. Rptr. 361 (1964), in which the California Supreme Court held that a reasonable mistake

clear—to deter illegal and even near-illegal conduct. As the author puts it: “[T]he entire enterprise, central to the criminal law . . . [is] regulating conduct through deterrence . . .”;¹⁴ acoustic separation clearly assists this goal. Assume that society has determined that certain conduct, X, should be proscribed, but that if mitigating circumstance, Y, is present, the normal punishment should be abandoned (or halved, or whatever). Now, according to Dan-Cohen’s thesis, if the rule of conduct contains only the prescription against doing X, without indicating that Y is a mitigating circumstance, fewer people will be tempted to do X or even come close to doing X, since there appears to be no way to avoid the full impact of the criminal sanction. Thus, acoustic separation achieves maximum deterrence not only of actual criminal conduct, but also of dubious, though legal, conduct. If, however, someone transgresses the conduct rule, the fact-finder may apply a “decision rule” which permits, or even mandates, acquittal or alleviation of the penalty ostensibly required by the conduct rule. Assuming some relationship between the decision rule and fairness, a just outcome results.

In contrast, in a world without acoustic separation, the announced rule of conduct reveals the exemptive condition Y. Some

as to the victim’s age would be a defense in a prosecution for statutory rape. Dan-Cohen, *supra* note 1, at 656-58. This would appear to be a paradigm decisional rule undercutting the conduct rule. Yet Dan-Cohen refers to this opinion as making a “bold statement about the link between criminal *conduct* rules and substantive morality.” Dan-Cohen, *supra* note 1, at 658 (emphasis added). This is confusing for two reasons. First, the prior discussion would suggest that this opinion goes to a *decisional* rule, rather than a *conduct* rule. Second, this distinction appears to be buttressed by the fact that, as Dan-Cohen notes, the *Hernandez* opinion indicates that if the girl had not been seventeen, but “younger,” the defense of reasonable mistake of fact might not have been allowed. *Hernandez*, 61 Cal. 2d at 536, 393 P.2d at 677, 39 Cal. Rptr. at 365. If that is so, the ambiguity of the word “younger” as used by the court leaves open the possibility of a different decisional rule without modifying the conduct rule. That is, it would seem that the *conduct* rule would continue to read “Anyone who has sex with a woman under eighteen is guilty of statutory rape,” but that the *decisional* rule would read “Unless the girl is not too young and the defendant made a reasonable mistake as to whether she was too young.”

This, in turn, raises in a specific context the problem which, as I have tried to suggest, Dan-Cohen does not resolve. If we take him at his word that the *Hernandez* opinion announced a new *conduct* rule, then this means that *any* judicial opinion which declares a decision-rule exception to the statutory conduct rule itself becomes a conduct rule as soon as it is made public. If so, the announcement of any decisional rule immediately breaks the acoustic separation desired by Dan-Cohen and renders the distinction nugatory. On the other hand, he appears to argue that the arcane nature of judicial opinions allows them to be considered as decisional rules, even after publication. Thus he says: “[D]ecision rules, directed as they are to a professional audience, are not less effective or specific for being buried’ in the volumes contained in law libraries.” Dan-Cohen, *supra* note 1, at 661. If this is accepted, his point about the relationship which *Hernandez* bears to the changes in *conduct* rules is perplexing.

¹⁴ Dan-Cohen, *supra* note 1, at 671-72.

persons will then attempt to feign the condition Y, in order to perform the conduct and obtain the mitigated punishment. Moreover, even where the defense is not feigned, there may be a greater temptation when condition Y exists to do X even for persons who would otherwise refrain from doing X. Thus, in discussing duress, Professor Dan-Cohen asserts that "widespread knowledge of the availability of the defense . . . might move people to succumb to threats under circumstances in which such a decision, though personally rational, would be socially undesirable."¹⁵ So long as society announces both the rule of conduct and the rule of decision—"do not do X, unless Y"—people will either affirmatively seek to deceive the law or will not affirmatively strive to avoid doing X when caught in a situation in which Y is present.

The acoustic separation analysis appears to be a plausible description of a totalitarian regime. The Soviet Criminal Code, for example, prohibits "parasitism," or "antistate actions inflicting harm on the national economy of the USSR."¹⁶ The obvious vagueness of this statute leads to an inference that it may be used for political purposes, or more neutrally, to deter citizens from many acts which may or may not fall within the intendment of the statute. Because some decisions, even those of the highest courts, are not published, the decision rules are retained as the province of a select few, literally as well as metaphorically.

Dan-Cohen's target, however, is not a totalitarian system, but our own. The essence of his thesis is that these same techniques, often for the same purpose, characterize Anglo-American substantive criminal law. Dan-Cohen protests throughout the piece that he is not endorsing this system, but merely affording an understanding of it.¹⁷ In my own reading, however, he supports both selective transmission and acoustic separation, primarily as a means to deter persons from criminal and even near-criminal acts.

I disagree with both prongs of Dan-Cohen's paper. First, I do not believe that the Anglo-American criminal law system now operates as Dan-Cohen suggests. Second, a system should not operate that way, from either a utilitarian or a retributivist viewpoint be-

¹⁵ Dan-Cohen, *supra* note 1 at 670.

¹⁶ See Burford, *Getting the Bugs Out of Socialist Legality: The Case of Joseph Brodsky and a Decade of Soviet Anti-Parasite Legislation*, 2 AM. J. COMP. L. 465 (1974); Edict of the Presidium of the Supreme Soviet of the RSFSR (Aug. 7, 1975); Article, *A Crackdown on Parasites Begins*, 35 CURRENT DIG. OF SOVIET PRESS 5 (1983); Article, *Spelling out the Law Against Vagrants, Beggars and Parasites*, 37 CURRENT DIG. OF SOVIET PRESS 8, 22-23 (1985). See generally, Pomorski, *Crimes Against the Central Planner: Ochkovtiratel'stvo*, in SOVIET LAW AFTER STALIN, PART II 291 (1978).

¹⁷ See, e.g., Dan-Cohen, *supra* note 1, at 636-37, 677.

cause, in the long run, a system with acoustic separation and selective transmission is both disutilitarian and unjust. I shall discuss these criticisms in the order suggested.

II. ACOUSTIC SEPARATION AS A DESCRIPTION OF PRESENT SUBSTANTIVE CRIMINAL LAW

Professor Dan-Cohen states that his article merely attempts to show how the present substantive criminal law operates, and to provide a model by which to analyze the current system. His description fails, however, because neither the case law nor the trend of the law supports this assessment. Dan-Cohen purports to find support for his claim that present substantive criminal law reflects acoustic separation in three areas: (1) duress and necessity, (2) mistake of law, and (3) vagueness.¹⁸ Neither the doctrines nor the materials Dan-Cohen cites support his analysis. Ironically, he ignores areas of the criminal justice system from which he may have found support for his claims, particularly sentencing.

A. DURESS AND NECESSITY

Dan-Cohen frequently alludes, in a rather obscure fashion, to the doctrines of duress and necessity. In a section entitled "Application of the Model to the Criminal Law,"¹⁹ he seeks to substantiate his claim that there is acoustic separation in the criminal law. However, Dan-Cohen's entire discussion of necessity and duress is geared to an *exception* to the decision rule.²⁰ I shall discuss that exception later; the point here is that, upon close reading, Dan-Cohen does not in fact seek support for his primary thesis in duress and

¹⁸ Dan-Cohen, *supra* note 1, at 658-67.

¹⁹ Dan-Cohen, *supra* note 1, at 636-64

²⁰ Dan-Cohen assumes that it is possible, or even right, to consider duress or necessity as a "defense" rather than as a negation of an element of the offense. See P. ROBINSON, *CRIMINAL LAW DEFENSES*, ch.2 (1983). Early common law writers such as Blackstone, Coke, Hale and Hawkins, all saw these "situational excuses" as "negating" free will, which in turn "negated" mens rea. Dan-Cohen's contention that the question has been mooted "for centuries" is simply wrong, as is shown by the fact that he is forced to retreat to James Fitzhughes Stephen, a famous judge and writer of the late nineteenth century, to find support for the view that duress should not operate as a defense. See Dan-Cohen, *supra* note 1, at n.16. The language of negating mens rea may be fictitious, but the point is well-taken that persons acting under these circumstances are *not* morally blameworthy and hence not deserving of punishment. If that view were taken today, it would be unconstitutional to place the burden of proof relating to these "defenses" upon the defendant. See *Mullaney v. Wilbur*, 421 U.S. 684 (1975). Professor Dan-Cohen's whole spectrum of defenses would rapidly be reduced to "gratuitous" defenses. It is important to note that Dan-Cohen assumes that these "defenses," including some justifications, do not entail elements of the offense.

necessity law, but rather, seeks indirect support by negative inference.

Dan-Cohen's discussion of cases under the necessity and duress rubrics form an underlying contention which is never fully explicated in his article. This contention can be reasonably articulated as follows: (1) in a system of acoustic separation, decision rules are not intended for the general public; (2) when a member of the general public learns or can learn of the decision; rules, he should thereafter be precluded from relying on the decision rule; (3) some cases in the necessity-duress spectrum demonstrate the second part of this argument; (4) consequently, the first part must also be present; (5) therefore, American criminal law has acoustic separation. I wish first to explore the empirical claim that necessity and duress "defenses" are made unavailable to persons who either know, or can know, that the defenses (decision rules) exist. Here the author points essentially to two groups of cases: prison escapes and the duty to testify.

1. Prison Escapes

Professor Dan-Cohen first points to the so-called "prison escape" cases, in which a prisoner who has been threatened with death or rape can plead necessity in response to a charge of escape.²¹ The courts have on occasion surrounded the defense with rigid requirements.²² In particular, Dan-Cohen points to *People v. Lovercamp*,²³ where the court established five "inflexible" criteria that must be met before a jury will be allowed to consider the defense. Dan-Co-

²¹ Dan-Cohen, *supra* note 1, at 641.

²² *Cf.* State v. Horn, 58 Haw. 252, 566 P.2d 1378 (1977); *People v. Unger*, 66 Ill. 2d 333, 362 N.E.2d 319 (1977); *State v. Reese*, 272 N.W.2d 863 (Iowa 1978).

²³ In *People v. Lovercamp*, 43 Cal. App. 3d 823, 118 Cal. Rptr. 110 (1974), the court established five criteria which it required the defense to meet prior to even allowing the case to go to the jury. One criteria is that the defendant surrendered himself to authorities immediately following the escape. *Id.* at 832, 118 Cal. Rptr. at 115. Leaving aside the obvious question of whether such a requirement makes the escape a futility, surely the defendant is to be forgiven if he fears that (a) he will be returned to the same prison from which he escaped and which, by another criterion of *Lovercamp*, was already unresponsive to his fears and complaints and (b) he may meet with even less receptivity after his escape, at least prior to the trial for his escape. For these reasons, some courts after *Lovercamp*, in opinions not cited by Professor Dan-Cohen, rejected the rigid "rules" of *Lovercamp* even when they used these rules as "standards." *E.g.*, *State v. Baker*, 598 S.W.2d 540 (Mo. App. 1980). The most impressive of these decisions was *United States v. Bailey*, 585 F.2d 1087 (D.C. Cir. 1978), *cert. denied*, 440 U.S. 963 (1979), in which a two-to-one majority held that the entire question of the defendant's volitional responsibility should be submitted to the jury without restriction. In reversing the decision, the United States Supreme Court avoided this issue, by interpreting the statute in question to make failure to turn oneself in a *separate* crime or offense. *United States v. Bailey*, 444 U.S. 394 (1980).

hen states that the court reached this holding because the prison community, like the community of officials, "is highly attuned to legal pronouncements affecting it,"²⁴ and thus prisoners cannot be allowed the defense under the same generous terms that others have.

There are several specific problems here. First, the analysis ignores the fact that only fifteen years ago the courts simply disallowed the defense entirely, refusing even to consider the possibility of a necessity-type defense, much less a "mens rea," "subjective-responsibility" approach.²⁵ In the last decade and a half, faced with persuasive evidence both of the physical compulsions in prisons and of the inability of prison officials to counter such threats, a number of courts have allowed the defense.²⁶ Moreover: (1) the requirements essentially track the requirements of all necessity/duress defenses;²⁷ (2) some courts have already rejected the criteria as rigid, and simply allow the case to go to the jury with the criteria as guidelines;²⁸ (3) the simple and important fact is that the courts have publicly *loosened*, not rigidified, their position on this point in the past decade.²⁹

Additionally, Professor Dan-Cohen misperceives the reason why some courts have been reluctant to grant a potential defense to prison escapees. His view is that this reluctance is due to a fear that the prisoner has not resisted the prison threat sufficiently, and has too readily relied on the defense. It seems much more plausible, and is much more consistent with the actual language of courts adopting the *Lovercamp* rules, to argue that it is not excessive reliance upon the defense in situations which actually involve threats of rape or worse, but fear that escapees will fabricate the threat itself that has caused courts to hesitate before granting the defense. In the closed prison society, threats are more difficult to prove (or dis-

²⁴ Dan-Cohen, *supra* note 1, at 642.

²⁵ *E.g.*, State v. Green, 470 S.W.2d 565 (Mo. 1971), *cert. denied*, 405 U.S. 1073 (1972).

²⁶ *E.g.*, Helton v. State, 311 So. 2d 381 (Fla. App. 1977); State v. Horn, 58 How. 252, 566 P.2d 1378 (1977); People v. Harmon, 394 Mich. 625, 232 N.W.2d 187 (1975). *See generally* Comment, 127 U. PA. L. REV. 1142 (1979). *See also*, Gardner, *The Defense of Necessity and the Right to Escape from Prison—A Step Towards Incarceration Free From Sexual Assault*, 49 S. CAL. L. REV. 110 (1975).

²⁷ The general requirements for a duress or necessity plan are that there be an immediate threat of serious bodily harm or death, and that there be no viable alternatives available to the defendant other than the criminal act. Viability may be tested in various ways; in the prison context, it would seem to suggest, for example, that the prisoner have complained to the proper officials without success and without protection. *See generally* W. LAFAVE & A. SCOTT, CRIMINAL LAW 374-88 (1972).

²⁸ *See* Comment, *supra* note 26; Note, 26 BUFFALO L. REV. 413 (1979).

²⁹ *See supra* note 26.

prove) than in society at large. Courts are not concerned that prisoners will be forced to escape once threats are made, but rather that they will simply lie about the presence of threats. Dan-Cohen's contention that these cases support his view that the law denies a decisional rule to those who are aware of it is thus largely refuted, rather than supported, by this line of cases. If the courts were supporters of acoustic separation, they would either continue to deny any defense, or certainly embrace it more slowly than has been the case.

2. *The Duty to Testify, and to Testify Truthfully*

Dan-Cohen's second example of the denial of a necessity or duress defense to those who could know the decision rule is a single case in the area of the duty to testify. In *People v. Carradine*,³⁰ the defendant was threatened with death if she testified in court. When indicted for failing to testify, she claimed duress, but the court denied the claim.³¹ Dan-Cohen's premise is that since the defendant could have obtained legal protection (and thereby understood the law) the law properly denied her claim of duress.³² There is a difficulty here, however, which is only obliquely acknowledged. Two leading cases—dealing not with refusal to testify but with actual perjury—have each allowed a defense of duress.³³ Yet, one would expect that if a poor, frightened person who has never been near a court of law is not afforded a defense of duress because she could have obtained legal advice, then those who actually lie in court would certainly be denied such a defense. Dan-Cohen relegates these cases, which are much more important, and more widely discussed, to a footnote.³⁴

I do not suggest these two perjury cases epitomize the law of duress; but I do suggest that reference to one case is simply insufficient support for Dan-Cohen's assertion. At the very most, the cases split over whether persons who are, or could become, familiar with the law are denied a duress defense; at the least, it is *Carradine* that is aberrant.

B. MISTAKE OF LAW

The first area from which Professor Dan-Cohen can fairly begin to claim support is the mistake of law. There is, as he says, an al-

³⁰ 52 Ill. 2d 231, 287 N.E.2d 670 (1972).

³¹ *Id.* at 234, 287 N.E.2d at 672.

³² Dan-Cohen, *supra* note 1, at 642-43.

³³ *Hall v. State*, 136 Fla. 644, 187 So. 392 (1939); *R. v. Hudson* [1972] 2 All E.R. 244 (C.A.)

³⁴ Dan-Cohen, *supra* note 1, at 643 n.44.

most universal sense that if laymen know anything about the criminal law, it is that "ignorance of the law does not excuse."³⁵ Yet the author suggests that this Draconian conduct rule is weakened in practice by a number of rules or exceptions.

He lists several exceptions: (1) the offense is *malum prohibitum*; (2) the charge is based on a regulation; (3) the subject matter is not likely to be legally regulated; (4) the statute in question does not serve an important interest; (5) *mens rea* is negated by the ignorance of law; (6) the offense charged is a specific intent crime; (7) the ignorance pertains to a non-criminal law; (8) the defendant relied on an authoritative source of law; and (9) the charge is based on an omission.³⁶

If these exceptions were as well established as Dan-Cohen suggests, or if they were established at all, they would provide strong ammunition for his claim that the conduct rule is disturbingly misleading. Alas, it is not so. Many of the cases cited as supporting the alleged exceptions to the doctrine either do so in dicta,³⁷ or worse, in negative implications from the direct holding that a mistake of law is no defense. Moreover, the author is guilty of double or triple-dipping. Cases cited for the proposition that *mens rea* can be negated by a mistake of law (exception five)³⁸ are also cited for the proposition that a specific intent can be negated by a mistake of law (exception six).³⁹ Indeed, the cases are ones in which the court found that a specific intent *was* the *mens rea* required. Moreover, most of the cases which would support this position, only some of which are cited in the author's exception,⁴⁰ are mistaken "claim of right" cases⁴¹ in which the mistake is regarding a non-criminal law;

³⁵ Dan-Cohen, *supra* note 1, at 645-46.

³⁶ Dan-Cohen, *supra* note 1, at 646.

³⁷ *E.g.*, *St. Johnsbury Trucking Co. v. United States*, 220 F.2d 393 (1st Cir. 1955).

³⁸ To support this "exception," the author cites three cases. Two of these, *Long v. State*, 44 Del. 262, 65 A.2d 489 (1949), and *State v. Collins*, 15 Del. 536, 41 A. 144 (1894), are from the same jurisdiction and do not appear to have been followed in any other state. The third, *State v. Sawyer*, 95 Conn. 34, 110 A. 461 (1920), is a typical "claim of right" case where a landlady seized chattels belonging to a former tenant because she believed that the tenant had damaged the apartment and was obligated to pay for the damage.

³⁹ *See* cases cited, *supra* note 38. Only *Hargrove v. United States*, 67 F.2d 850 (5th Cir. 1933), is added to the cases cited.

⁴⁰ Dan-Cohen, *supra* note 1, at 641.

⁴¹ These cases invoke mistaken claims of rights where the defendant believes that as a result of property law or contract damage law he may take or retain control over property which "legally" belongs to the victim. Claims of lien, or of inheritance, are among these cases. *See, e.g.*, *Brown v. State*, 28 Ark. 126 (1873); *State v. Newkirk*, 49 Mo. 84 (1871); *Goforth v. State*, 827 Tenn.(8 Hum.) 37 (1847). These cases are indeed anomalous, but they hardly constitute a movement away from the doctrine.

yet ignorance of a non-criminal law is yet another of the author's exceptions (exception seven).⁴² There is surely nothing wrong with having cases do double duty if the propositions for which they are used are different; when the cases are merely restatements of the first proposition, however, it is unproductive.

Moreover, the listing of "different" rules suggest many exceptions; in fact, to the extent that there are cases which support these analyses at all, they are scant indeed, as even his footnotes show.

Moreover, at least some of the cases cited by the author are directly opposed to one or more of his exceptions. Two cases heavily relied on are *Lambert v. California*⁴³ and *Reyes v. United States*.⁴⁴ Indeed, these two cases together are either the sole or primary citations for three of the nine alleged exceptions to the rule; no other cases are cited. Scrutiny of the decisions, however, shows them to be far less supportive than alleged. *Lambert* involved an ex-felon who, having moved to Los Angeles after release from prison, was charged with violating a city ordinance which required all ex-felons staying in the city for more than five days to register with the police.⁴⁵ *Lambert's* conviction was reversed by the United States Supreme Court on the grounds that she should have been permitted to introduce evidence that she was unaware of the duty to register.⁴⁶ *Lambert* does in fact suggest an amelioration of the mistake of law doctrine.

The *Reyes* case, however, far from supporting the notion that the courts have recently ameliorated the rigid dogma of mistake of law, reinforces that doctrine, even though the facts of the case are even more appealing than *Lambert*. The defendant in *Reyes* was convicted in 1943 of possession of a small amount of marijuana.⁴⁷ Fourteen years later he took a short trip to Mexico.⁴⁸ He failed to register with border police, and in so doing violated a statute requiring such registration by persons convicted of drug related crimes.⁴⁹ Rejecting all argument that *Lambert* applied, the Ninth Circuit affirmed the defendant's conviction.⁵⁰ *Reyes* is an even more sympathetic defendant than *Lambert* who, after all, was convicted of a felony. Moreover, *Lambert* had lived in Los Angeles when con-

⁴² Dan-Cohen, *supra* note 1, at 646.

⁴³ 355 U.S. 225 (1955).

⁴⁴ 258 F.2d 774 (9th Cir. 1958).

⁴⁵ *Lambert*, 355 U.S. at 226.

⁴⁶ *Id.* at 229.

⁴⁷ *Reyes*, 258 F.2d at 776.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.* at 783-85.

victed of the felony;⁵¹ fourteen years intervened between Reyes' minor conviction and his trip to Mexico. Lambert had been convicted of a state crime, and failed to obey a registration ordinance of the city of Los Angeles in that same state;⁵² Reyes's marijuana conviction was in California, but his failure to register was condemned by federal law.⁵³ Finally, at the time that Reyes was convicted in 1943, there was no federal registration requirement—the statute was passed subsequent to his conviction.⁵⁴ Yet, despite these possible “exceptions” to the mistake of law doctrine, the Ninth Circuit affirmed Reyes' conviction for failing to register.⁵⁵ It is difficult to see how this case, either in its holding or reasoning, can support any exceptions to the “no mistake” dogma. Yet Dan-Cohen relies heavily on it in arguing that there are such exceptions, and that they support the “acoustic separation” analysis.⁵⁶

A similarly disturbing pattern is found in other cases cited. One of the exceptions suggested by Dan-Cohen is that mistake of law may be a defense if the offense is *malum prohibitum*.⁵⁷ Yet, as the author himself notes,⁵⁸ the courts in many cases, including some cited by him in support of other exceptions,⁵⁹ have found mistake of law to be a defense by construing a statute to *remove* the offense from the *malum prohibitum* group and into the *malum in se* group. The courts then hold that the offense requires a specific intent. This specific intent (exception six) can be defeated by a mistake of law. For example, in *United States v. Chicago Express*,⁶⁰ the court expressly concluded, in requiring *mens rea*, and hence allowing a mistake or ignorance of the law defense, that “Congress . . . removed violations of the relevant regulations from the classification familiarly known as offenses *malum prohibitum* . . .”⁶¹ In short, the court was acknowledging that where the violation is regulatory, the defendant will (contrary to another alleged exception)⁶² normally be liable, but

⁵¹ *Lambert*, 355 U.S. at 226.

⁵² *Lambert*, 355 U.S. at 226.

⁵³ 258 F.2d at 776.

⁵⁴ *Id.*

⁵⁵ *Id.* at 785.

⁵⁶ See Dan-Cohen, *supra* note 1, at 645-48.

⁵⁷ Dan-Cohen, *supra* note 1, at 647 n.54.

⁵⁸ Dan-Cohen, *supra* note 1, at 647.

⁵⁹ For example, the “charge based on a reputation exception.” Dan-Cohen, *supra* note 1, at 647 n.55.

⁶⁰ 235 F.2d 785 (7th Cir. 1956).

⁶¹ *Id.* at 786.

⁶² Dan-Cohen, *supra* note 1, at 647 n.55. *Chicago Express*, although cited in this footnote, is not directly cited as the “exception”; the author merely lists it among “other cases on the subject.”

that where Congress has explicitly removed the instant situation from a mere regulatory infraction, ignorance of the law may be a defense. Thus, the case, far from supporting the exception which Dan-Cohen asserts, seems to undercut it totally.

Another of the cases cited, again for two propositions, is *State v. Collins*.⁶³ This is a report of the proceedings in the trial court. The instructions to the jury are reported;⁶⁴ the jury acquitted the defendant on a charge of embezzlement.⁶⁵ While I would not suggest that a trial court's opinion, or even instructions, cannot be useful, it seems to stretch the argument to the breaking point to cite this case as a foundation for the "exceptions" to a dogma which has been generally accepted for at least two hundred years.

In short, there is actually very little precedent, and certainly very little cited by Dan-Cohen, which supports the exceptions which he so bravely enlists in support of his notion that there are "hidden" decisional rules which undermine the unthinking application of the mistake of law doctrine. Meanwhile, the doctrine itself continues its unhappy vitality.⁶⁶

⁶³ 15 Del. 536, 41 A. 144 (1894).

⁶⁴ *Id.* at 539-42, 41 A. at 145-46.

⁶⁵ *Id.* at 542, 41 A. at 146.

⁶⁶ One of the more ludicrous recent cases is *United States v. Freeman*, 535 F.2d 1251 (4th Cir. 1976) in which the court declared that an ordinary person is charged not merely with knowledge of state statutes (civil and criminal) but with every regulation found in the Code of Federal Regulations as well.

Some of the cases on "mistake of law" regarding regulations can be explained on the basis that the defendants engaged in activity which they know, or should have known, can be regulated. This puts criminal liability on a negligence basis. *See, e.g., United States v. International Minerals & Chemical Corp.*, 402 U.S. 558 (1971); *United States v. Freed*, 401 U.S. 601 (1970).

However distasteful criminal negligence may be as a basis of liability, it is understandable. Unfortunately, as Justice Stewart noted in *International Minerals*, the rationale extends even to non-corporate entities ("Mom and Pop") who inadvertently get caught in the regulatory net. *International Minerals*, 402 U.S. at 569 (Stewart, J., dissenting). It is these actors, who are not even negligent, who are impaled on the doctrine as it now stands.

The "regulation" cases are best understood not as *mistake of law* cases, but as real *ignorance of the law* cases. Ignorance of the law is precisely that—a total unawareness that the act which one intends to perform is, or might be, covered by law, common or codified. The doctrine that ignorance of law was no defense (taken, erroneously, by Coke and then Blackstone from the argument of a lawyer in a reported civil case, Plowden 343), might have made some sense when the criminal law accurately reflected moral notions. A claim that one did not know that murder, or theft, or rape, was against the law was so patently unreasonable that it could be summarily dismissed. For true ignorance of law cases see, *In re Etienne Barronet*, 118 Eng. Rep. 337 (1852); *R. v. Esop*, 173 E.R. 203 (1836); *R. v. Bailey*, 168 Eng. Rep. 651 (1800); *Ham qui tam v. McClaws*, 1 Bay's (SC.) 93 (1789), *R. v. Ross* [1945] 3 D.L.R. 574 (B.C. Co. Ct.). To cover such cases, the Model Penal Code provides a defense if the rule or statute in question has not been published, MODEL PENAL CODE § 2.042(3)(a) (1962). Mistake of law cases, how-

C. THE ROLE OF THE VAGUENESS DOCTRINE

More persuasive is Dan-Cohen's position on the role of the vagueness doctrine. The real impact of the void-for-vagueness rule, he suggests, is that it allows the legislature to speak in very sweeping language, thus deterring borderline conduct, but empowers the courts to strike down or narrow the language, as applied in situations where the conduct is either *de minimis* or innocuous in fact.⁶⁷ While this interpretation is attractive, it fails, however, to note that many vagueness cases invalidate the statute (the overly broad threat) rather than the application itself.⁶⁸ Indeed, while I have not done a quantitative study, my sense is that more vagueness decisions invalidate statutes on their face than as applied. Surely if the common law constitutional courts were interested in retaining acoustical separation as Dan-Cohen believes, they would invalidate the application of the statute, leaving its overly broad threat on the books to intimidate others. Nevertheless, there is some legitimacy to Dan-Cohen's reading of this area of the law and it is the strongest argument Dan-Cohen develops to support his general thesis that present substantive criminal law illustrates a system in which there is acoustic separation and selective transmission. Still, on the whole, I find this section of his argument unconvincing.

Moreover, in two of the main areas discussed, duress and necessity, and mistake of law, the newly reinvigorated "subjectivist bug" has been active.⁶⁹ In recent years: (1) duress has, for the first time, been allowed as a defense to a charge of murder;⁷⁰ (2) reasonable

ever, generally involve reliance upon someone else's interpretation of a rule which the actor knows arguably applies to his proposed conduct. See MODEL PENAL CODE § 2.041(3)(b). See also Creme, *The Ironies of Law Reform: A History of Reliance on Officials as a Defense in American Criminal Law*, 14 CAL. W.L. REV. 48 (1978). In the recent regulation cases, the claim is phrased under "mistake," but the underlying essence is ignorance—that it is simply impossible for any person to be familiar with the tomes of federal and state regulations. To this, the Court in *International Minerals*, 402 U.S. 558, responded that corporations engaged in the business of interstate shipping of materials know that the Interstate Commerce Commission regulations pervade the activity and therefore, are put on actual, as well as constructive, notice that they might be subject to regulation for any specific shipment.

⁶⁷ Dan-Cohen, *supra* note 1, at 658-65.

⁶⁸ See, e.g., *Papachristou v. Jacksonville*, 405 U.S. 156 (1972).

⁶⁹ Wells, *Swatting the Subjectivist Bug*, CRIM. L. REV. 209 (1982).

⁷⁰ In *Director of Public Prosecutions for Northern Ireland v. Lynch* [1975] A.C. 653, the Appellate Committee of the House of Lords held for the first time, by a three-to-two majority, that an accomplice to murder could raise duress as a defense. In *Abbott v. The Queen*, [1976] 3 All E.R. 140, however, the Judicial Council of the Privy Council, sitting on appeal from Trinidad, distinguished *Lynch*, and held that the defense of duress was not available if the defendant personally killed the victim. The facts of the case are detailed in V. NAIPAUL, *THE RETURN OF EVA PERON AND THE KILLINGS IN TRINIDAD* (1980). The point here, however, is that English jurisprudence has "softened" in the

reliance upon authority has been explicitly established as a potential defense in mistake of law cases;⁷¹ (3) honest, yet unreasonable mistake of fact as to age, or consent, has been allowed as a defense to sexual offenses;⁷² and (4) the rigid boxes of the common law, as to provocation and mitigation defenses to manslaughter have been shattered.⁷³ Dan-Cohen acknowledges none of these developments.

D. ACOUSTIC SEPARATION IN THE PRESENT SYSTEM—UNCITED SUPPORT FOR THE THESIS

Intriguingly, Dan-Cohen fails to treat in any significant way the areas of present criminal procedure which might in fact reflect the "bark-bite" philosophy of acoustic separation. Surely plea bargain-

past decade. Further, the Model Penal Code would allow duress as a defense to all crimes. See MODEL PENAL CODE § 2.09.

⁷¹ See *United States v. Barker*, 514 F.2d 208 (D.C. Cir.), cert. denied, 421 U.S. 1013 (1975). Accord MODEL PENAL CODE § 2.04(3)(b).

⁷² *Hernandez*, 61 Cal. 2d 529, 393 P.2d 673, 196 Cal. Rptr. 361. Cf. *People v. Olsen*, 149 Cal. App. 3d 125, 196 Cal. Rptr. 491 (1983), rev'd, 36 Cal. 3d 638, 205 Cal. Rptr. 492, 685 P.2d 52 (1984).

Dan-Cohen discusses the "age mistake" cases at length, arguing that they are not in fact symptomatic of a new emphasis on mens rea, but merely of a change in social mores as to sexual liaisons. Dan-Cohen, *supra* note 1, at 656-58. He argues that even in those cases allowing a reasonable mistake defense (e.g., *Hernandez*), the clear implication of the opinion is that if the age were substantially lower (e.g., ten), mistake would not be a defense. Dan-Cohen, *supra* note 1, at 658. This, he argues, suggests that the more recent cases reflect a change in morality that intercourse with "young women" may be acceptable. Dan-Cohen, *supra* note 1, at 657. Thus, the "mens rea" of which Bramwell spoke in *Regina v. Prince* is "general knowledge of immorality, if not illegality;" since the line of "immoral" conduct has changed, Dan-Cohen sees *Hernandez* as "comport[ing] rather than conflict[ing] with Bramwell's reasoning in *Prince*." Dan-Cohen, *supra* note 1, at 656. He does not, however, consider the application of this theory to the decision in *Morgan* that any honest mistake as to consent no matter how unreasonable, is a full defense to rape. *D.P.P. v. Morgan*, [1975] 2 All E.R. 347. See Singer, *The Resurgence of Mens Rea: II—Honest But Unreasonable Mistake of Fact*, 27 B.C.L. REV. — (1987) (forthcoming).

⁷³ In the last quarter century, nearly all of the inflexible doctrinal "boxes" of provocation-manslaughter have fallen. In 1957, England legislatively abolished the need for legally "adequate" provocation, see 1957 Homicide Act, sec. 3, and in 1978, the House of Lords effectively finished the job in *D.P.P. v. Camplin*, [1978] 2 W.L.R. 679. In America, the Model Penal Code achieved a similar result, although its position has not been universally adopted. See MODEL PENAL CODE § 210.3(1)(b). The general problems of manslaughter, as well as the recent movement toward virtually total subjectivity, are covered in Singer, *The Resurgence of Mens Rea: I—Provocation, Emotional Disturbance, and the Model Penal Code*, 27 B.C.L. REV. 243 (1986). The revival of subjectivism as the major focus of the criminal law is far too complex a topic to discuss here. In the above cited article I have attempted to trace the history of provocation, and the recent changes which have occurred therewith. I hope to pursue some of the other recent changes in future articles. My point here is simply that even as a description of what courts do today, Professor Dan-Cohen's article is misleading, both because it does not adequately discuss the cases which take a different view, and because it fails seriously to recognize these cases as the symptoms of a more important change occurring in the criminal law.

ing and sentencing are two areas where the law in its majesty threatens substantial penalties, but allows and even encourages far lighter sanctions. Indeed, Dan-Cohen's point might be well taken if it related more to sentencing and did not purport to explain substantive criminal law doctrines. Thus, for example, in *Regina v. Dudley and Stephens*,⁷⁴ the two defendants, found guilty of capital murder, were essentially pardoned as everyone knew they would be.⁷⁵ In several cases where defendants have killed "thin skulled victims," the courts have affirmed the harsh doctrine that lack of knowledge of this condition is irrelevant to liability, but have surreptitiously imposed sentences closer to assault than to homicide.⁷⁶

Although Dan-Cohen occasionally mentions sentencing,⁷⁷ he generally shies away from an extended discussion. Perhaps he avoids sentencing issues because these areas of attempted acoustic separation demonstrate the insidiousness of the very system he supports; a system in which persons familiar with the decision rules are able to manipulate the process to obtain unfair advantage. I do not wish to discuss here whether recent sentencing "reforms" have altered this bark-bite system;⁷⁸ I simply suggest that it is here, and not in the substantive criminal law, that Dan-Cohen might have found more fertile ground to sustain his thesis.

III. ACOUSTIC SEPARATION AS A MODEL OF A DESIRABLE SUBSTANTIVE CRIMINAL LAW

A. TOWARD A CLASSIST SOCIETY

1. *Of Leakage in a World of Acoustic Separation*

Although Dan-Cohen posits a world of "perfect acoustical separation," such a world is impossible both in fact and in theory. Even if it were possible to speak of the "general public" and "officials" as

⁷⁴ 14 Q.B.D. 273 (1884).

⁷⁵ See *infra* text accompanying notes 96-101.

⁷⁶ For example, in *State v. Frazier*, 339 Mo. 966, 98 S.W.2d 707 (1936), the defendant struck the victim once in the jaw with his fist. Because the victim was a hemophiliac, a fact unknown to defendant, the victim died. *Id.* at 972, 98 S.W.2d at 710. The defendant was convicted of manslaughter, but the actual penalty imposed was a fine of \$400 and six months in jail. *Id.* at 969, 98 S.W.2d at 709. Six months, surely not by coincidence, was the usual penalty for mere assault. MO. REV. STAT. §§ 565.070, 585.011 (1936).

⁷⁷ Dan-Cohen, *supra* note 1, *passim*.

⁷⁸ In the past ten years, as a result of a number of pressures, some from retributivists, see R. SINGER, *JUST DESERTS* (1979); A. VON HIRSCH, *DOING JUSTICE* (1976), legislatures and others have been ostensibly regularizing their sentences to reflect a concern with the crime and less concern with individualized factors relevant to the offender. It is at least arguable, however, that the disparity which generated much of this movement has simply been repackaged in a more modern and impartial-appearing garb.

two separate classes for some kinds of conduct, the fact is that some leakage of the decision rules to members of the general public is inevitable. First and most obvious, is the fact that in the United States at least, publication of opinions, both by professionals and the press, is widespread. Even if these materials are usually only read by lawyers (laymen evidencing better sense), the decision rules are available to any member of the general public who wants to read them. Second, and perhaps more important operationally, *some* decision makers, such as jurors, are members of the general public, at least in the current Anglo-American system of criminal justice. If decision rules are to be applied before conviction,⁷⁹ the jurors must be told of the decision rules as well as of the conduct rules. When most members of the community have the opportunity to sit on juries, there is substantial leakage.⁸⁰ This means, as a matter of definition, that while *some* actors will be aware of the decision rules, which allow leniency to offenders, other actors will not be so aware.

More perfidiously, some members of the groups to whom the decision rules are addressed are likely to be able to take unfair advantage of this knowledge. Officials, after all, will also be part of the audience for whom the rules of conduct are promulgated. The interdictions against stealing, killing and tax fraud will surely be aimed at them as much as against the members of the "general public." Even leaving aside the effect of comradery among officials, which would be likely to lessen the punishment when one of their own kind is accused and convicted, the ability of officials to avoid either accusation or conviction, *not* because of corruption, but because of their superior knowledge of the law, will result in an unequal and unfair application of both the excusing condition and the law itself. Indeed, to the extent that Professor Dan-Cohen is correct, and members of the general public will be deterred from violating the conduct rule because there appears to be no recognition of mitigating or excusing conditions, these conditions will be applied *only* to the knowledgeable.

Nor are officials the only parties who will be favored by knowledge of the rules of decision. All those who by their participation in

⁷⁹ See *supra* note 14 and accompanying text.

⁸⁰ A cynic might argue that, at least until very recently, juries were composed primarily of white, male, middle class (or higher) citizens who closely parallel those who would be privy to the decision rules anyway. However, two decades of jury reform, both judicial and legislative, have resulted in more diverse juries. See, e.g., *Batson v. Kentucky*, 106 S. Ct. 1712 (1986); *Taylor v. Louisiana*, 419 U.S. 522 (1975); *Duncan v. Louisiana*, 391 U.S. 145 (1968); *People v. Harris*, 36 Cal. 3d 36, 679 P.2d 433, 201 Cal. Rptr. 782, *cert. denied*, 105 S. Ct. 365 (1984); Jury Selection and Service Act of 1983, 28 U.S.C. §§ 1861-69 (1982).

the decision-making process are made aware of the substance of the decision-making rules, will *eo ipso* be made part of the favored class. Thus, judges, legislators, lawyers, their secretaries and assistants, and all others who participate in this process will be aware of the dissonance between the law on the books and the law in action. This establishment of a two-class society of actors is scarcely consonant with a democratic theory of government.⁸¹

The difficulty runs even deeper, however, particularly if the theory of acoustic separation is to be defended, as Professor Dan-Cohen defends it, on utilitarian grounds.⁸² In addition to the class of officials, the very "class" that Professor Dan-Cohen would probably be most anxious to deter—the "habitual" or "professional" criminal—will, as a matter of course, soon discover the discrepancies as well. Such an offender will learn that there is a conflict between the conduct rules and decision rules each time he is prosecuted, becoming privy to the legal dissonance as are the officials themselves. This knowledge will, of course, spread rapidly through the prison system, and hence become familiar lore to every member of the very class targeted for specific deterrence. Officials, or others of the "knowledgeable class," may be unwilling to act upon their recognition of the differences between decision and conduct rules, but it surely is unlikely that habitual and professional criminal will be so self-censoring.

Intriguingly then, it would appear that the acoustical separation supported by Professor Dan-Cohen would thus result in a three-tiered society: (1) the "general public," which is usually law-abiding, aware of the more stringent and Draconian conduct rules, but unaware of the lenient decision rules; (2) the professional criminal

⁸¹ The author seems to totally ignore this point. He says that the "acoustic separation ensures that conduct rules cannot, *as such*, affect decisions; similarly, decision rules cannot, as such influence conduct. The two sets of rules are independent." Dan-Cohen, *supra* note 1, at 631-32 (emphasis added). This simply misses two critical facts: (1) officials are also members of the general public; (2) a "decision rule" which instructs the official to punish a person who steals *implicitly* suggests that there is a conduct rule which prohibits stealing. Thus, Kelsen is really correct as quoted by Dan-Cohen. See Dan-Cohen, *supra* note 1, at 627 n.3. See also, H. KELSEN, *GENERAL THEORY OF LAW AND STATE* 61 (1945).

Dan-Cohen's attempt to refute this is unsuccessful, since Kelsen is wrong only in a world of strict liability—where the defendant is not even aware of the reason for his punishment. It is *possible*, however, that the phrase "as such" in the quote above from Dan-Cohen is intended to mean far less than it suggests, *i.e.*, that although an official faced with a decision rule which says "Punish all who steal" does not *know* that there is "as such" a conduct rule prohibiting stealing, he merely infers that to be the case. Since the inference would (in a non-strict liability world) always be accurate, the "as such" limitation seems to dissipate rather rapidly.

⁸² Dan-Cohen, *supra* note 1, at *passim*.

who, because of his awareness of the leniency of the decision rules, is able to manipulate the system to his own advantage, both by his actual awareness of the dissonance, and by a threat to inform the general public of the dissonance; and (3) officials and others who, while similarly aware of the decision rules, are less likely to use this knowledge to their own personal advantage. To the extent that the criminal and the official act in collusion, each for his own reason, to keep the general public in the dark about the true rules of law, it will appear to the general public that these two groups are, to some degree, in a conspiracy against the general good. The disutility of this perception is apparent.

2. *Dan-Cohen's Apparent Proposal to Stop Leakage—Burning Down the House to Roast the Lamb*

To this critique, Dan-Cohen's response, oblique as it is, is that the way to prevent leakage, or unfair advantage by those aware of the decision rules, is to deny the mitigating decision rule in all cases in which any person is aware of the rule. Thus, he suggests that defenses like duress "melt away as soon as one relies upon them. An individual who would not have committed an offense but for his knowledge of the existence of such a defense cannot, in most cases, avail himself of the defense It is doubtful that expectations [of exculpation] are worthy of protection."⁸³

As already argued, his citation to the prisoner escape cases as support for the proposition that this is how the substantive criminal law now operates is simply wrong. But even more troublesome are broader weaknesses in the notion that those who are aware of the more lenient decision rules *should* forfeit their right to have them applied. Since it would be almost impossible to prove that the "knowledgeable" defendant did in fact rely on the supposed mitigation or exoneration, Professor Dan-Cohen appears to endorse automatic preclusion of the defense whenever there is a "hint" of relevant knowledge on the part of the defendant.⁸⁴ Thus, apparently, if a criminal law professor faced a threat of death unless she raised a grade, the professor, when prosecuted for this offense, would be deprived of the defense of duress because she knew of its availability. This is patently unfair. Even if a defendant injured an innocent individual, not because the defendant knew that the law would exculpate him but due to the exigency of the moment, he

⁸³ Dan-Cohen, *supra* note 1, at 671. See Fletcher, *Rights and Excuses*, 3 CRIM. J. ETHICS 17 (1984).

⁸⁴ Dan-Cohen, *supra* note 1, at 671.

surely should not be precluded from so acting, or from benefiting from the defense. Perhaps it is possible to conceive of a demanded criminal act and a threatened harm *so* evenly balanced that the reasonable person might find herself in equipoise and where the knowledge that the law would protect her if she committed the criminal act might tip the scales. Further, it is possible in such a case, that the reliance upon the duress defense should, as a matter of policy, be denied. But even if that were a possible case, it is so extraordinary as to avoid the main purpose of the inquiry, which is to guide *everyday* behavior. Moreover, significant disutility could arise if people could themselves impose effective strict liability upon any official by simply making threats against the official.

Further, Dan-Cohen's analysis is premised on the assumption that legally sophisticated actors will, because of their knowledge of the decision rules, act differently under pressure than the general public. This assumption may have some validity in non-emergency situations like mistake of law cases. Intuitively, however, it is unlikely that it is a fair description of the situations on which the author focuses, where the actor, in the author's own words, is "caught in circumstances of emergency, high pressure, and emotion."⁸⁵ This assumption is so counter-intuitive that the burden should be on Professor Dan-Cohen, rather than upon his critics, to demonstrate its validity.

Additionally, Dan-Cohen's proposed solution of denying defenses to those with knowledge of the decision rule carries the seeds of its own destruction. If the official, prisoner, or criminal knows of the decision rule's existence, he also knows (by that very rule) that he cannot avail himself of it. The "melting away" forecast by Dan-Cohen therefore itself melts away. The defense may be asserted, since a person who knows that he may not use a defense could not have knowingly relied on that defense when acting in a situation under duress or necessity. Therefore, it could be said that the official, prisoner, or criminal had no knowledge of the decision rule.⁸⁶ This conundrum seems solveable only by a Gordian knot solution, which can just as rationally allow the defense as deny it.

Finally, Professor Dan-Cohen's unwillingness to grant threatened officials the benefit of a more lenient decision rule fails to recognize, as even Justice Holmes recognized, that "[d]etached reflection cannot be demanded in the presence of an uplifted

⁸⁵ Dan-Cohen, *supra* note 1, at 641.

⁸⁶ I am indebted to my colleague David Blich for this observation.

knife.”⁸⁷ That is, the very predicate of deterrence—a fairly reasonable, rational human being—is simply not present when a person is under duress, or felonious assault. The moral response (assuming that we can ourselves decide what it is) can only be taught from outside the criminal law entirely.⁸⁸

These critiques may be wrong, but Professor Dan-Cohen’s article never fully addresses the specter that his position raises: that there will be two (or three) classes of actors, with varying abilities to obtain the benefits of the morally-based decision rules. Either officials and others will be able to take advantage of the decision rules and act “above” the law as articulated in the conduct rules, or (as Dan-Cohen appears to suggest) they will be deprived entirely of the mitigation of the decision rules. In that event, the behavior of officials will be assessed by the conduct rules, while the behavior of the general public will be measured by the less harsh decision rules. Officials (and other knowledgeable) will thus be punished for what we acknowledge as morally excusable behavior.

B. OF DISSONANCE IN THE CRIMINAL LAW

1. *Utilitarian Losses and Critiques*

Although he is clear that there are two sets of “rules,” Professor Dan-Cohen is far less clear about the sources of these two sets of rules, and the relationship between the sources themselves. There are, it seems to me, two possible models: (1) the conduct rules reflect a need for deterrence and other utilitarian goals while decisional rules are based primarily upon retributivist principles, reflecting true morality, or (2) the conduct rules reflect moral consensus, while decisional rules are based upon extra-legal considerations (such as mercy) and concerns of a “higher morality.”

Although Professor Dan-Cohen does not make clear what he believes to be the sources of these rules, it appears, on balance, that he ultimately embraces the first alternative. I will first explain the difficulty I have being sure of his view, and then address the problems which either of these two possibilities raise.

Professor Dan-Cohen urges that any policies which the legislature wishes to adopt in its enunciation of the conduct rules are perfectly acceptable.⁸⁹ This positivist view is totally incompatible with

⁸⁷ *Brown v. United States*, 256 U.S. 335, 343 (1921).

⁸⁸ Of course, a person who kills in actual, or perceived, self-defense or under duress, is not morally blameworthy (unless one views negligence as morally blameworthy). Hence punishment could never be explained on a retributivist basis.

⁸⁹ Dan-Cohen, *supra* note 1, at 630-31.

the notion that the source of conduct rules is a shared moral perception. His interpretation that, in reality, conduct rules are based on utility and not on morality is strengthened by his willingness to deny some justifications as “defenses” incorporated into the conduct rules.⁹⁰ Thus, he says that:

At least in some cases, the test of necessity should be the actor's willingness to face . . . the threat of criminal punishment unmitigated by the prospect of legal reprieve . . . [n]ecessity defenses arising out of situations of self interest . . . should be governed by rules that in a world of acoustic separation would be conveyed solely to officials.⁹¹

The conduct rules would speak in harsh terms, not even acknowledging a defense of self-defense, and certainly not of the defense-of-others. Indeed, in a discussion of the defense-of-others rules, Dan-Cohen argues that “lawmakers may conclude that the danger to innocent people of this unprofessional use of force outweighs its possible law enforcement benefits.”⁹² In short, the conduct rules appear to be based purely on deterrence, a reading which seems to be confirmed by his position that *if* acoustic separation were abandoned as a strategy, and conduct and decision rules made coterminous, “revelation of the decision rule would diminish the deterrent effect of the criminal law”⁹³

If that is the view Dan-Cohen holds of the respective sources of the two sets of rules, there are several problems. Many of these are normative, and will be discussed later.⁹⁴ Here, the utilitarian objections can be raised: Dan-Cohen ignores the “Bumble effect” of such a system. If conduct rules are stated harshly, in the hope they will be utilitarian, then decision rules are, or probably will be, more lenient,⁹⁵ because they reflect the actual moral consensus of the community about excusing and justifying conditions. To the extent that officials are not allowed to inform the general public that the wide disparity between these sets of rules is fictitious, the general public will conclude, as did Mr. Bumble, that the law is hopelessly out of touch with the general community. This will engender disrespect for both the law and the legal system. The disutility should be sufficient to urge caution in endorsing acoustic separation, if this is what Dan-Cohen perceives that separation to require.

There is another reason why acoustic separation will not be util-

⁹⁰ Dan-Cohen, *supra* note 1, at 638 & n.29.

⁹¹ Dan-Cohen, *supra* note 1, at 638.

⁹² Dan-Cohen, *supra* note 1, at 643.

⁹³ Dan-Cohen, *supra* note 1, at 672.

⁹⁴ See *infra* subsection 2. This obviously suggests that the conduct rule itself is drawn with regard to the deterrent effect.

⁹⁵ Dan-Cohen, *supra* note 1, at 671.

itarian, if the decision rules are informed by a shared morality. If, in order to prevent leakage through the jury, officials make increasing numbers of decisions, these officials may, either for their professional gain or for self-esteem, announce to the public the dissonance between the conduct and decision rules. *Regina v. Dudley and Stephens*⁹⁶ exemplifies this position. The facts of the case are so well-known that they need little repeating here: cast adrift in a lifeboat on the Atlantic Ocean, and in desperate need of food, Dudley, "with the assent of Stephens," killed one of the two others in the life boat.⁹⁷ When they returned to England, Dudley and Stephens were both indicted for murder.⁹⁸ The Home Department insisted on indictment, apparently because there had been a number of similar incidents in the previous years.⁹⁹ The newspapers severely criticized the government for bringing any charges against these men.¹⁰⁰ As the London Times then put it, "in this instance it would be impossible . . . to allow the Law to take its course."¹⁰¹

The procedural posture of the case reflects this notoriety. Even if, as one student note would have it,¹⁰² Baron Huddleston used the case as a method of demonstrating the need for appellate review of criminal cases,¹⁰³ it is also true that the government, especially the judiciary, used the case to announce strict and unyielding rules for conduct on the high seas.¹⁰⁴ The case essentially turned on a pure

⁹⁶ 14 Q.B.D. 273 (1884).

⁹⁷ *Id.* at 274.

⁹⁸ *Id.* at 275.

⁹⁹ A SIMPSON, CANNIBALISM AND THE COMMON LAW 195 (1984).

¹⁰⁰ A SIMPSON, *supra* note 99, at 195.

¹⁰¹ Comment, *In Warm Blood: Some Historical and Procedural Aspects of Regina v. Dudley & Stephens*, 34 U. CHI. L. REV. 387, 396 (1967)(quoting The Times (London), Nov. 7, 1884, at 10, col. 2).

¹⁰² Comment, *supra* note 101.

¹⁰³ *Dudley and Stephens* was the first case in nearly a century to avoid a general jury verdict, and to require instead a special verdict, by which the jury reached no conclusion as to the guilt of the defendants, but only "found the facts" (which were, in fact, drafted by Baron Huddleston and forced upon the jury). 14 Q.B.D. at 279 ("[U]nder the direction of my learned Brother [Huddleston at Exeter], the jury returned a special verdict . . .").

¹⁰⁴ As Professor Simpson has brilliantly shown, A. SIMPSON, *supra* note 99, the rule in *Dudley and Stephens* was laid down, not really by the courts, but by the Home Office and major shippers, who wished to send a clear message to sailors that cannibalism was simply not to be condoned under any situation. As Simpson shows, the "law of the sea" excused cannibalism in life-boat situations if the victim had been selected by lot, which did not occur in *Dudley and Stephens*, but did occur in other cases. *Id.* at 95-195. Indeed, one of "problems" for the Crown was that *Dudley and Stephens* did not present a "dice-throwing" case, and therefore, in its holding, the decision could not reach such a situation. Nevertheless, Chief Judge Coleridge went out of his way, in dictum, to make it clear that not even selection by lot would be tolerated. *Dudley and Stephens*, 14 Q.B.D. at 285. Simpson found, however, that the "message" which the Home Office wanted sent,

question of law. And of the law there could be no doubt—necessity, even in extremis, would not be recognized as a defense to the killing of an innocent person. Lord Coleridge's opinion rings with declarations of the need for the rule of law even in the most trying of circumstances, and concludes with the hollow-sounding apologia familiar to all who have read the case: "We are often compelled to set up standards we cannot reach ourselves, and to lay down rules which we could not ourselves satisfy."¹⁰⁵

Of course, immediately after the court rendered its strident guilty verdict, Dudley and Stephens received the Queen's pardon.¹⁰⁶ Every case book notes this, thereby underscoring the illusory nature of the opinion.

Few cases could so nicely illustrate Professor Dan-Cohen's "bark and bite" system. Lord Coleridge announced, with all the majesty which the black robes could afford, harsh conduct rules drafted for deterrence which no person could follow. And the executive branch, unseen by the public eye, surreptitiously exonerated Dudley and Stephens by applying a decisional rule tinged with mercy and empathy.

There are, however, two difficulties. First, it was well understood by all, including Dudley and Stephens, that they would receive a pardon.¹⁰⁷ The newspapers, which had urged the pardon upon the government, virtually assured their readers—as well as the defendants—that the government would in the end find a way to avoid the harshness that the court's rhetoric demanded.¹⁰⁸ Any question as to whether the hangman awaited these two unfortunate defendants was dispelled by a second fact, which is the gist of these immediate comments, that although it was the custom of English judges to wear black hats whenever they announced the death sentence, the judges who marched to the bench on the day of the *Dudley and Stephens* case wore no such hats.¹⁰⁹ Thus did they inform the defend-

and which it believed was sent by the opinion in *Dudley and Stephens*, was never received; so far as Simpson could discover, later wrecks which resulted in cannibalism continued without apparent concern as to what would happen if the lifeboat ever reached shore. A. SIMPSON at 258-61. Indeed, to the extent that his research developed any data (even soft) on this question at all, Simpson finds that most people after *Dudley and Stephens* believed the crime of the defendants *not* to be cannibalism, but failing to throw lots. A. SIMPSON, at 253. Thus, the effort of the Home Office, and Judge Coleridge, was apparently unavailing.

¹⁰⁵ *Dudley and Stephens*, 14 Q.B.D. at 288.

¹⁰⁶ *Id.* at 288 n.2.

¹⁰⁷ See Comment, *supra* note 101, at 404.

¹⁰⁸ Comment, *supra* note 101, at 404.

¹⁰⁹ See Comment, *supra* note 101, at 404. Yet another example of judges insisting on the "letter of the law" while hoping, indeed expecting, that the defendant would receive

ants that the words that they uttered (the "conduct" rule) were meaningless?

The failure of the judges to wear the traditional hats has substantial significance for Dan-Cohen's theory. It shows that there was tremendous leakage—from every possible source—between the two "classes." Even the officials who pronounced the harsh conduct rules, the judges of the higher court, wished to inform the public that, however rigorous their language, they were humane persons whose moral judgments coincided with the *decision* rule they expected would be applied, and not the *conduct* rule they announced.¹¹⁰ At the very point that the reason for acoustic separation becomes most compelling in Dan-Cohen's view, the dissonance between the announced rule and the actual rule impels those who are aware of the dissonance to inform the general public that the conduct rule will not be enforced. No official is pleased when he must announce a rule with which he disagrees and which he knows will not be enforced. When that rule, moreover, is in discord with the underlying moral consensus (which, after all, is *arguendo* the basis of the decision rule) the need to divulge the attempted subterfuge will be greatest. The process of acoustic separation simply will not work.

A similar result occurs in the case of euthanasia, which Dan-Cohen surprisingly does not discuss. Virtually every study of eutha-

executive clemency, is given by Seidman, *Mens Rea and the Reasonable African: The Pre-scientific World-View a Mistake of Fact*, 15 INT'L. COMP. L.Q. 1135 (1966), where British judges in African colonies would insist on the need for "deterrence" even where the defendant had done something perfectly acceptable by native standards, and then would urge clemency. This is institutionalized in Northern Nigeria, where the Minister for Internal Affairs requires the native court to furnish information in *every* capital case, including: (a) the state of culture of the *deceased* (b) an assessment of the influence of the accused's environment on misbehavior (c) whether the murder is in any way connected with witchcraft (d) the connection, if any, with local custom, belief, or superstition. *Id.* at 1161-62.

Dan-Cohen does cite *Dudley and Stephens* in a footnote, but only to note that the court there "relegated the matter to the clemency of the Queen." Dan-Cohen, *supra* note 1, at 640 n.35. This hardly captures the factual setting of *Dudley and Stephens*, and omits entirely the felt need of the court to make clear that the rule of law which it established in that opinion would not carry the usual punishment.

¹¹⁰ This too gets lost in the article. Thus, Professor Dan-Cohen says that "[e]liminating the defense [of duress] from the conduct rules addressed to the public allows the system to reap the benefits of maximum obedience to the law." Dan-Cohen, *supra* note 1, at 633. There are ambiguities in this statement which need clarification. If "the law" (as defined by the decision rules) is that duress is a defense, then there is not "maximum" but "excessive" obedience to the law, and excessiveness which in some instances may turn out to be counterutilitarian. If, on the other hand, the point is that by threatening even those who would benefit by a duress defense, we eliminate fabricators of the defense, then "the law" means "the law as defined by the conduct rule." Then, it would seem, the decision rule is really "extra legal," if not illegal.

nasia has found that instances of euthanasia are either not prosecuted at all or, if prosecuted, result in acquittals.¹¹¹ Again, though harsh conduct rules are announced, the principal decision makers are anxious to inform the public that the conduct rules are dissonant with true moral precepts (decision rules). Thus, if Dan-Cohen sees the source of conduct rules as non-shared deterrence goals, the system will collapse.

On the other hand, there are passages and hints in Dan-Cohen's article that the conduct rules should reflect the general moral consensus, and that decision rules are to be even more lenient.¹¹² While this is difficult to square with Dan-Cohen's refusal to allow even justifications to be part of the conduct rules,¹¹³ it is a useful avenue to explore. The author's strongest statement of the position that it is the conduct rules which should reflect a moral consensus comes in the analysis of *Regina v. Prince*,¹¹⁴ where the defendant was guilty of taking a girl under sixteen from her parents, even though the jury found that his mistaken belief that she was over the age of sixteen was reasonable. Critics of that decision have concluded that either Lord Bramwell did not mean what he said when he declared that Prince had mens rea, or did not understand the meaning of the term. Dan-Cohen argues that these critics do not themselves understand Bramwell's point.¹¹⁵ Quoting at length from the opinion in *Prince*, Dan-Cohen argues that Bramwell saw the taking away of a girl as the key immoral conduct.¹¹⁶ Thus, since Prince knew that he was taking away a girl (of whatever age), he had the "general mens rea" of moral blameworthiness—*i.e.*, he knowingly violated the community norms reflected in the statute. Thus, the statute declared the morally-based conduct rule ("Do not remove a girl"); her age was, in fact and in moral consensus, peripheral at best.

This interpretation of Dan-Cohen's piece can be strengthened from other segments of his article. For example, he declares that "whereas a conduct rule may be fully coextensive with the relevant

¹¹¹ See Sanders, *Euthanasia: None Dare Call It Murder*, 60 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 351 (1969); Silving, *Euthanasia: A Study in Comparative Criminal Law*, 103 U. PA. L. REV. 350 (1954); Note, 39 NOTRE DAME LAW. 46 (1959). There is one exception: *People v. Roberts*, 211 Mich. 187, 178 N.W. 690 (1920), where the defendant was found guilty of first degree murder when he provided his wife with poison so that she could commit suicide. However, the defendant in *Roberts* pleaded guilty to a murder indictment and the only issue in the case was the degree of murder of which he was guilty.

¹¹² Dan-Cohen, *supra* note 1, at 673-77.

¹¹³ Dan-Cohen, *supra* note 1, at 639 n.33.

¹¹⁴ 2 L.R.-Cr. Cas. Res. 154 (1875)

¹¹⁵ Dan-Cohen, *supra* note 1, at 655.

¹¹⁶ Dan-Cohen, *supra* note 1, at 662. Dan-Cohen rightly notes that Bramwell italicizes the word several times.

moral precept, the corresponding decision rule need not be.”¹¹⁷ At another point, he argues that some parts of the criminal law which address the general public “codif[y] aspects of conventional morality.”¹¹⁸ The inference that Dan-Cohen believes that most conduct rules reflect the moral consensus of the community, which can be drawn from the *Prince* discussion, is undercut by two observations. First, in a recap of the analysis of *Prince*, the keypin assumption—that conduct rules are coterminuous with moral norms—seems to be missing, for Dan-Cohen argues that, in light of *Prince*, “[w]e may now generalize this illustration and say that the defendant’s state of mind satisfies the mens rea requirement in a criminal statute if the defendant perceives the facts and that nature of his conduct in terms of the statute’s ordinary-language description of them.”¹¹⁹

In other words, since Prince knew that he was taking a “girl” out of her father’s custody, and understood the statute as prescribing that action, he had a “sufficient” mens rea. But the analysis has problems: (1) if Prince “knew” that the conduct rule (statute) prohibited taking the girl out of custody, he also “knew” that it only prohibited taking girls less than sixteen out of custody; therefore, Prince had no mens rea as to girls over sixteen; (2) more importantly, Dan-Cohen seems to have totally ignored the requirement (contained in his initial discussion) that the conduct be, on some level, immoral. If the defendant had no doubt as to the meaning of the statute, there is no vagueness or other objection *even if* his exact conduct was not precisely proscribed. Immorality as a basis for conduct rules appears to have disappeared.

If the source of the conduct rules is the general community moral consensus, and if decisional rules reflect a different consensus, what is the source of these rules of leniency by which the stringency of the conduct rules is relaxed? Dan-Cohen never answers this question. Yet the question must be asked, and at least tentatively answered. There is only one possible answer—the decision rules reflect the “higher morality” of the decision makers.

These (higher) decision rules can take the form of either discretionary acts of mercy or the structured application of a consensus among law-makers. If the essence of the decisional rules is that they

¹¹⁷ Dan-Cohen, *supra* note 1, at 650 (emphasis added). It is difficult to know whether the “may” in this sentence is proscriptive or descriptive; *i.e.*, whether a conduct rule MUST be fully coextensive (in which case, one would assume, it is the same as a decision rule) or simply could be in some cases, but need not be in all. It would appear, as suggested in the text, that the latter is the proper interpretation, but there is certainly some ambiguity in this sentence.

¹¹⁸ Dan-Cohen, *supra* note 1, at 662 n.103.

¹¹⁹ Dan-Cohen, *supra* note 1, at 662.

reflect a felt need for mercy, then it is awkward to call them “rules,” for it is the very nature of mercy that it is not rule-bound. Mercy is handed out unequally, since by definition it is not required as a part of a just system (although it may well be a desirable and even critical ingredient of a humane system).¹²⁰ But Dan-Cohen does not seem to contemplate the fact that decisional rules can be arbitrary, because he thinks that the very essence of decisional rules is to limit official caprice.¹²¹ Such a position brings us again to the issue with which this section began—the establishment of a classist society in which the moral values of some persons are seen as “higher” than those of the rest of society. The argument is not merely that one group cognitively knows the “better” (moral) rules, while the other group (the general public) is deceived, but rather that the first group—comprised of state officials—is the only group that knows the substantively “good” and “moral” rules. If the jury refuses to exculpate the defendant by applying a valid decision rule, the decision/rule-maker should override the jury’s refusal to nullify. This would be acceptable only if the moral sense of the decision-makers is better than that of the jury. It is difficult to gauge the moral sense of the jury if it is either not informed of its nullification power or is strongly admonished to follow the “law” (conduct rules) even if that law is adverse to community mores.¹²² To posit a system of governance on the premise that juries will overcome their own sense of fairness and follow an unfair law, particularly in criminal cases, is unfounded in the absence of empirical evidence that juries ignore their own moral values. This view is so inherently anti-democratic that even Dan-Cohen refuses to embrace it.

¹²⁰ This is Dean Morris’ explanation for the insanity defense. See N. MORRIS, *MADNESS AND THE CRIMINAL LAW* (1983).

¹²¹ See Dan-Cohen, *supra* note 1, at 668.

¹²² The process of jury nullification supports the view that conduct rules do not always reflect community moral judgments. Dan-Cohen uses the argument over whether the jury should be informed of its power to nullify as an instance of acoustic separation; but this, again, suggests that it is the conduct rules which the jury is supposed to apply, whereas the decision rules are to be applied by another authority at a late, postverdict, stage. Professor Dan-Cohen’s article is, again, ambiguous on the role which jury nullification should play in an acoustically separated society, but it seems to suggest that he does not see the jury as applying ultimate normative rules. See Dan-Cohen *supra* note 1, at 635 n.21. Even when the jury has felt compelled to follow “the law,” rather than enforce its own moral judgments, there have been indications of its unhappiness with the rigors of the “conduct rules” which Dan-Cohen so strongly supports. Thus, for example, Friedland records the case of John Albert, in which the jury returned a verdict of murder. M. FRIELAND, *A CENTURY OF CRIMINAL JUSTICE* (1984). However, “petitions to commute the sentence were sent to the Minister of Justice by all twelve jurymen, by the major [sic] and aldermen of Toronto, by the three Toronto M.P.’s, by many of the police officers in Toronto, and by a large number of influential citizens.” *Id.* at 237-38.

A final utilitarian concern about the efficacy of acoustic separation is the possibility that not all decision-makers will hear the proper rule. If the law giver articulates a harsh conduct rule expecting all judges or juries to excuse offenders under a more lenient decision rule when there is evidence of, for example necessity, it is still possible that the judge or jury will only hear or follow the conduct rule. If, whether due to selective deafness or ignorance, the decision-maker applies only the conduct rather than the decision rule, clearly unequal punishments will result. It is not at all uncommon for defendants to receive sentences, particularly from new judges or in distant parts of the jurisdiction, which are fully supported by the conduct rule, but which are not intended to be applied because of an unwritten decision rule which is more lenient.

Similar disparities may also arise from purposeful manipulation. Since, as a matter of "law," the actor is not entitled to the decision rule (if he is so entitled, then acoustic separation is illegal), he may be deprived of the mitigation unless he succumbs to pressures from a person in the official decision-making chain. Thus, legislatures may enact "habitual offender" statutes that establish an "extra penalty" for the persistent recidivist. But these statutes are often applied only to those who refuse to comply with other "conduct" rules, such as the procedural rule that "thou shalt plea bargain."¹²³ If the habitual offender fails to plea bargain, then the prosecutor may actually employ the recidivist sanction, in a way clearly contrary to the intent of the legislature.

In conclusion, let me reiterate my understanding that Professor Dan-Cohen's view is that the conduct rules are informed by and reflect considerations of utility, while the decision rules reflect a moral consensus, probably among officials and, to the extent that it can be ascertained, the consensus among the non-official general public. Even if he takes the other view that conduct rules are based on "common morality," while decision rules reflect a "higher" view, the result is unacceptable. I have already suggested some utilitarian problems with this proposal. I turn now to normative concerns raised by the suggestion.

¹²³ It seems clear that these statutes are used almost exclusively in cases where, as threatened by the prosecutor, as in *Bordenkircher v. Hayes*, 434 U.S. 357 (1978), the defendant refused to bargain. See Note, *A Closer Look at Habitual Criminal Statutes*: Brown v. Parrat and Martin v. Parrat, *A Case Study of the Nebraska Law*, 16 AM. CRIM. L. REV. 275 (1979).

2. *The Denial of the Rule of Law: The Final and Conclusive Argument Against Acoustic Separation*

The core of the problem with Dan-Cohen's position is that it advocates falsehood precisely where truth is not only desirable from a utilitarian standpoint, but demanded from a moral standpoint. As a general matter, rules of law should reflect the community sense of acceptable conduct. The rules should, however, not overstate the restrictions upon conduct, lest the rules chill what is acceptable conduct. Clearly this is true in those areas of autonomy, such as contractual relationships, where even Dan-Cohen would agree activity is desirable. While no one endorses coercive bargaining behavior, there is relative agreement that hard bargains, fairly reached, are the most economic. Rules of conduct which chill such hard bargaining would be uneconomic.

The same cannot be said of criminal activity, at least criminal activity which threatens physical well-being. Even if, for example, we will grant some concessions to a polluter who has been unable to obtain emission controls, we may not from a utilitarian viewpoint wish to inform him of possible excuses. But there are countervailing moral concerns that outweigh whatever utilitarian benefits are achieved by this disingenuousness.

First, many modern criminal scholars, particularly H.L.A. Hart, view the criminal law—and the restrictions on its reach—as a protector of the individual's freedom of action¹²⁴ rather than as the protector of victims, as does Dan-Cohen. The rules of notice and vagueness, for example, which Professor Dan-Cohen discusses,¹²⁵ assure an individual in planning his conduct that certain acts fall outside the reach of the criminal law. For those for whom autonomy is a precious right, even when that autonomy comes close to criminality, the bark-bite philosophy espoused by Professor Dan-Cohen is on shaky ground.¹²⁶

Dan-Cohen's response to this critique is totally off-point. He says: "When decision rules are more lenient than the relevant conduct rules, as in our duress example, [n]o one is likely to complain

¹²⁴ H.L.A. HART, PUNISHMENT AND RESPONSIBILITY (1968).

¹²⁵ Dan-Cohen, *supra* note 1, at 658-64. See *supra* text accompanying notes 67-73.

¹²⁶ Compare Silberg's explanation of the "rigidity" of Talmudic law, which often eschews vague "standards" by adopting apparently arbitrary "rules." Silberg, *supra* note 4, at 325

If the goal envisioned by the legislator, the ideal toward which he aspires, is not the post factum solution of conflict between man and man but the prospective ruling for moral behavior by each individual, then the consideration of precision and clarity prevails, and the inevitable result is legal formalism.

about the frustration of an expectation of punishment."¹²⁷ This, however, is surely wrong. The most obvious complainant will be the victim. While the victim cannot be said to have "relied" upon the conduct rule, he surely will be annoyed, or worse, when he learns that there is no penalty, or a lesser penalty, attached to the violation of the conduct rule than he was led to believe.¹²⁸ Moreover, those who abstained from those acts which the decision rules make legal may also complain that they would have engaged in equally legal behavior (which by hypothesis is both blameless and utilitarian) had they known. Finally, as indicated, the offender who is not afforded the leniency will also complain.

Dan-Cohen responds that the person who did not act because of the criminal law's apparent rigidity cannot complain (anymore than could the brother of the rebellious son) of the mercy bestowed by the decision rules upon one who did not follow the law's constraints by the decision rules. After all, says the author, one to whom the law was fairly applied cannot legitimately be embittered because a higher, better, more lenient non-law was applied to someone else.¹²⁹

This position has many difficulties. First, it is a sterile positivist position as to what "law" means in the term "rule of law." Dan-Cohen holds that decision rules are rules that bind their audience, as opposed to simply unleashed discretion.¹³⁰ In light of this assumption, it is unpersuasive to say that only conduct rules count as "law" because only conduct rules are promulgated by legislation. If the criteria by which conduct is judged and sanctioned consists of both conduct and decision rules, both must constitute the "law" in the term "rule of law." Any position short of this makes a mockery of the notion of law. This is not merely, as Dan-Cohen seems to believe, a question of fairness. Rather, it is a core question of whether the term "rule of law" means anything more than what the king (or some other decision maker) says it means.

Dan-Cohen clearly disagrees with this view. He says, for example, that "by definition conduct rules are all one needs to know in order to obey the law."¹³¹ Yet taken to its limit, this would suggest

¹²⁷ Dan-Cohen, *supra* note 1, at 671.

¹²⁸ To the extent, of course, that the victim does not feel victimized, this will not be true, *i.e.*, if the decision rule reflects a common morality, the victim will not be upset. For example, if the defendant robbed under duress, *and* the decision rule accords with common morality, the victim will agree with the decision rule, even if he is somewhat perplexed as to why the "rule of law" has not been followed.

¹²⁹ Dan-Cohen, *supra* note 1, at 671.

¹³⁰ Dan-Cohen, *supra* note 1, at 650.

¹³¹ Dan-Cohen, *supra* note 1, at 673.

the acceptability (if not desirability) of a conduct rule which simply said "Do nothing which judges (or the king) will dislike." Then if decisional rules later allowed defenses or mitigation, the actor-citizen could not complain because, after all, he had obeyed the law. There were, however, some things which he could have done because judges would in fact not have disliked them. This is surely a skewed notion of what a "rule of law" means.

Informing a person of the rules governing her conduct is not a purely utilitarian activity; it has normative ramifications as well. The concepts of a right to be punished, a right to be informed, of rules which affect one's conduct, are a part of one's personhood; a willingness to ignore those rights, and treat the actor as a pawn bespeaks a lack of a normative appreciation of her humanity.

A second difficulty is whether the decision rules are to be applied before or after guilt determination. This may stem more from ambiguity than from Dan-Cohen's actual position on the issue. Dan-Cohen hints, on a number of occasions, that the application of decision rules can occur after the determination of guilt, during the punishment-determination processes. This would surely be a more effective method of retaining acoustic separation than announcing the decision rule publicly. But if that is the case—and again I stress that I believe he is ambiguous on this—then the defendant who is about to receive the benefit of the lenient decision rule has been unjustly convicted and stigmatized as a criminal. This improper stigmatization is a normative wrong which no amount of utilitarianism can assuage. Yet Dan-Cohen does not address this concern at all.

In summary, the argument for accoustical separation—for a "bark and bite" system of criminal justice—fails on both utilitarian grounds and normative grounds. It is important that clear rules of permissible behavior are announced to us and to all other people who are interested, for they tell us and the others who we are, and what we stand for. Perhaps we will not like what we see, viewing it as either too harsh or too lenient.