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AN INQUIRY INTO THE NATURE OF THE STATE AND ITS RELATION TO THE CRIMINAL LAW

By G. P. J. MCGINLEY*

I. INTRODUCTION

It seems paradoxical that Bentham, Austin, Kelsen and Hart should hold such pessimistic views on the nature of man, government and the state that they would believe that self-seeking individuals in the community will strive to fulfill themselves and often achieve that fulfillment with the aid of wicked immoral laws.¹ The apparent paradox lies in the fact that even with such views, these positivist thinkers advance a philosophy of law that legitimates the laws in question. There is, however, no paradox. It is because of these perceptions that the positivist school exists, and it is the positivists' refusal to distort these views for short-term ideological goals² that gives positivism its claim to being a school of jurisprudence of radical realism.³ In a broad sense this paper is an attempt to articulate some of the presuppositions of positivist thought. It deals with the forces of cohesion within the state institution, that lead to the maintenance of its authority and hence its power over the society that it governs. More specifically, however, the paper deals with the peculiar relation of these forces to criminal law.

The paper is in three parts. The first deals with the views of those jurists

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¹ Bentham's whole theory of utility seems to be based on the psychological view that man is a hedonistic egoist seeking after pleasure and avoiding pain: see Bentham, *An Introduction to the Principles of Morals and Legislation*, ed. Burns and Hart (London: Athlone, 1970) at 11; as to governments, Bentham considered them little better than bands of robbers preying on those over whom they had power: Bentham, "Plan of Parliamentary Reform," in 3 *The Works of Jeremy Bentham*, ed. Bowring (New York: Russell & Russell, 1962) 433 at 451-58; Austin, of course, shared many of the views of his mentor Bentham: Austin, *The Province of Jurisprudence Determined* (London: Lowe & Brydone, 1965) at 16, 185, 272; Kelsen thought that the idea that man could return to nature was based on the misconception that man is naturally good: Kelsen, *What is Justice?* (Berkeley: Univ. of Cal. Press, 1957) at 241; as to the idea of a collective unity in the state, Kelsen thought this to be no more than a facade that self-seeking interests used for their own purposes: Kelsen, *General Theory of Law and the State*, trans. Wedberg (Cambridge, Mass.: Harvard Univ. Press, 1949) at 184-85; Hart is more charitable on the nature of man: Hart, *The Concept of Law* (Oxford: Clarendon, 1961) at 191; however, he does believe that "[w]icked men will enact wicked rules which others will enforce": *op. cit.* at 206.

² The basic premise of cognitive jurisprudence is that to make any reforms in the legal system it is necessary to demonstrate what the system is actually doing. See, Lewellyn, *Jurisprudence* (Chicago: Univ. of Chicago Press, 1968) at 55-56.

³ Kelsen, *The Pure Theory of Law. Its Method and Fundamental Concepts* (1934), 50 L.Q. Rev. 474 at 482.

who assert that criminal conduct is generally to be determined by its ethical disvalue. This school of thought, represented by Hall,⁴ and more recently, Fletcher,⁵ will be called, for want of a more appropriate label, the moralist school. This initial inquiry is not designed to deny that criminal conduct can be, or generally is, immoral and harmful. Rather, it is designed to show that the moralists' focus on the attributes of immorality and harm is volitional in that it is an attempt on their part to impose a moral brake on the force in the state institution that leads its officials to punish any conduct that challenges the state's authority. In so focusing, however, they distort a central feature of criminal conduct for ideological goals.

The second part of the paper develops a cognitive theory of criminal law. It shows that the inherent feature of all criminal conduct is that it challenges the authority and hence the power of the state institution; and that it does this not because of the ethical quality of the act but rather because of the nature of the law forbidding it. It argues that in its criminal laws the state most nearly approaches the issuance of a categorical imperative to society. Criminal laws constitute commands so complete that their conscious contravention cannot, except in the rarest of circumstances, be contemplated. The explication of this thesis involves an inquiry into the nature of the state and the forces of cohesion that function within it. It will be argued that these forces operate to give the state entity, whatever its polity, its unique *telos*, namely, the maintenance of its authority and hence its power over the society that it governs. Criminal conduct contradicts this *telos* and, therefore, activates the forces that operate to maintain it.

The fundamental task from the perspective of a cognitive inquiry, therefore, is to determine the strength of the state's *telos* on the judicial organ of the state. This is the subject of the third part of the paper. It will be argued that while reason and morality, together with the judiciary's own interests in maintaining its authority *vis-à-vis* the other organs of the state, will somewhat retard the state's impetus to vindicate its authority, the substantive rules of the criminal law indicate nevertheless that the restraints are not as strong as the moralist school would have us believe.

II. THE MORALIST SCHOOL OF THOUGHT

Kelsen believed that every doctrine of natural law had its roots in volition rather than cognition and that when theorists of this school purport to explain the existing order they rather work to deny its reality.⁶ Kelsen's proposition is nowhere more apparent than in the criminal law theory of the moralist school. This is due, in part, to an almost irresistible impulse toward what Hayek called constructivist rationalization—the tendency to postulate theories in universal terms so as to purport to encompass all relevant empirical data.⁷ It is also, however, based on the remarkable faith natural law thinkers

⁴ Hall, *General Principles of Criminal Law* (2d ed. Indianapolis: Bobbs-Merrill, 1960) at 146.

⁵ Fletcher, *Rethinking Criminal Law* (Toronto: Brown, 1978) at 467.

⁶ Kelsen (1949), *supra* note 1, at 11.

⁷ Hayek, *Law, Legislation and Liberty* (London: Routledge & K. Paul, 1976).

seem to place in the capacity of ideas to influence human conduct; for example, believing that if judges are told frequently enough that immoral laws are not laws, they will eventually act in accordance with that principle.⁸ The first step in the volitional methodology of the school is to postulate a theory of what the criminal law ought to be. The theory is an abstraction only marginally related to the power structures within the community. It is a standard of justice that the state must meet if its laws are to be considered valid. Although this is volitional it is of course legitimately so. The next step, however, is to explain the positive law in terms of the abstraction—to imperceptibly elide “ought” to “is.”⁹ This, of course, creates a distortion. It is, however, a useful distortion for once it is understood, it begins to highlight the very features it wishes to deny. It is to this end that the general theory of the moralist school will be considered.

The first premise of moralist thinking is that criminal punishment is morally justified only when the defendant is morally culpable.¹⁰ What is perceived to be morally culpable, of course, varies with each theorist. Thus, Hall argues that punishment is valid only where the defendant voluntarily or recklessly committed a proscribed harm.¹¹ Fletcher argues that punishment is valid only in cases of wrongdoing that threaten or violate legal interests and that may properly be attributed to the defendant.¹² These tests, while superficially clear, really explain little or nothing about criminal culpability. As

⁸ See Hart (1961), *supra* note 1, at 205. See also Hart, *Positivism and the Separation of Law and Morals* (1958), 71 Harv. L. Rev. 593; Fuller, *Positivism and Fidelity to Law: A Reply to Professor Hart* (1958), 71 Harv. L. Rev. 630 on the issue whether positivism facilitated and natural law could have prevented Nazi excesses. Similarly, Fletcher argues that positivism “inhibits scholarly inquiry into the nature of criminal law and encourages legislatures to remake the criminal law according to their will.”: Fletcher, *supra* note 5, at 408. Similarly, criminal law as an institution of blame and punishment will be taken seriously only when “theorists turn to the criminal law as a body of ideas and practices with a reality deeper than the positive proscriptions of courts and legislators.”: *op. cit.* at 467. Hall is aware of the tendency to elide general principles: Hall, *supra* note 4, at 2. He goes on to say, however, that the subject matter of his treatise is the existing law: *loc. cit.*

⁹ Hume notes the tendency of the moralist school of thought to elide “is” to “ought” without explanation of the new relation: Hume, *A Treatise of Human Nature*, ed. Selby-Bigge (Oxford: Clarendon, 1888) at 469. Here the process is in the reverse, wherein the given theory gains support from the asserted empirical reference.

¹⁰ Fletcher, *supra* note 5, at 461-62, 800: “[P]unishment ought to be inflicted according to the offender’s desert. . .”; Hall, *supra* note 4, at 95, 243; 1 *The Complete Works of Edward Livingston on Criminal Jurisprudence*, ed. (New York: National Prison Association of U.S.A., 1873) at 235: “[M]oral guilt must be united to injury in order to justify punishment.”; Allen, *Retribution in Model Penal Law: The Principle of Aggravated Harm* (1975), 25 Buff. L. Rev. 1 at 11n. 32 citing *Durham v. U.S.*, 214 F.2d 862 at 876 (D.C. Cir. 1954) citing, *Holloway v. U.S.*, 148 F.2d 665 at 666-67 (D.C. Cir. 1945): “Our collective conscience does not allow punishment where it cannot impose blame.”; Hall, *Negligent Behavior Should Be Excluded From Penal Liability* (1963), 63 Colum. L. Rev. 632 at 636: “[n]o one should be punished unless he has clearly acted immorally, i.e., he voluntarily harmed someone. . . .”

¹¹ Hall, *supra* note 4, at 146.

¹² Fletcher, *supra* note 5, at 472, 473, 790.

Hume has pointed out, wrongness is not an intrinsic quality,¹³ nor is harm. Conduct is not wrong or harmful in itself; it is deemed to be wrong or deemed to be harmful by a person applying certain standards, having particular values or protecting certain interests. From a volitional perspective, therefore, the ultimate question is what criteria should the perfect adjudicator apply when dealing with conduct alleged to be criminal.

This, of course, is a central question in ethico-legal discourse.¹⁴ Two broad tests ultimately emerge: 1) common or anthropological morality (what the community actually thinks) and 2) critical or discriminatory morality (what the community ought to think).¹⁵ What is important about these tests is that they both present a standard that the state must meet if its criminal law is to be legitimate. They implicitly, and sometimes explicitly, deny that the state as an institution has any interest in enforcing criminal laws simply on the basis that the act challenged its authority and hence the authority of its functionaries. Thus one finds statements to the effect that the wrong or harm to the state involved in criminal conduct is a purely formal concept.¹⁶

Although it is not entirely clear, both Hall and Fletcher probably support a test of critical morality.¹⁷ This test gains a certain tactical advantage for the

¹³ Hume, *supra* note 9. Hume, of course, believed that moral distinctions are derived from a feeling of satisfaction in the contemplation of virtue and uneasiness in the presence of vice. This sense was, according to Hume, ultimately based on the concept of utility: *op. cit.* at 471.

¹⁴ See Devlin, *The Enforcement of Morals* (London: Oxford Univ. Press, 1965); Dworkin, *Taking Rights Seriously* (London: Duckworth, 1977); Hart, *Law, Liberty and Morality* (Oxford: Oxford Univ. Press, 1968).

¹⁵ Dworkin draws this distinction between anthropological and discriminatory morality. Anthropological morality is whatever attitudes a group displays about the rightness or wrongness of various forms of behaviour and may be based on prejudices, personal taste, arbitrary standards, etc.: Dworkin, *id.* at 248. Discriminatory morality is, however, based on reason, *i.e.*, "moral principles that underlie the community's institutions and laws.": *id.* at 80.

¹⁶ Fletcher refers to the incompatibility of the act with the norms of the legal system as a purely formal concept: Fletcher, *supra* note 5, at 458. Similarly, Hall refers to the inchoate offences (which are in fact, as will be seen, pure attacks on the state) as merely formal offences: Hall, *supra* note 4, at 220. Other moral theorists make similar comments. See Eser, *The Principle of "Harm" in the Concept of Crime: A Comparative Analysis of the Criminally Protected Interests* (1965), 4 *Duquesne L. Rev.* 345 at 348; Mueller, *Criminal Theory: An Appraisal of Jerome Hall's Studies in Jurisprudence And Criminal Theory* (1959), 34 *Ind. L.J.* 206 at 220.

¹⁷ Hall makes reference to the communities' "freely derived values": Hall, *supra* note 4, at 163; and the "conscience of the community": *op. cit.* at 164. He admits however, that "[a] particular community's attitudes are sometimes at odds with its values, as is often acknowledged by its more enlightened members.": *op. cit.* at 216. But he does not say how and when, if ever, this enlightened view is to be considered in terms of culpability if the penal laws are ultimately the best evidence of moral values. See *op. cit.* at 164. Fletcher is more obscure; he argues that wrongdoing is "a subtle problem of moral judgment," and that the incompatibility of the act with the norms of the legal system is a "purely formal concept.": Fletcher, *supra* note 5, at 458. He calls for a criterion of "transcendent notion of wrongdoing": *op. cit.* at 790, but ultimately he would validate (in most cases) the punishment of acts of conscience contrary to *valid* legal prohibitions: *op. cit.* at 86.

moralist position in that it appears to draw support from the community without being tied to any particular view the majority may have.¹⁸ This is fortunate from the moralist perspective because there is nothing to indicate that a society would be unwilling to punish conduct that was harmless but that irritated it.¹⁹ In short, therefore, the rational social values test is one that would remove the ignorance and prejudices of society and the authority and power values of the state from the determination of what is criminally culpable.

As an ideal, the position that punishment should only follow wrongdoing that causes or threatens to cause a social harm, as determined by rational values and standards, is incontrovertible.²⁰ It is also, undoubtedly, the rationale behind the creation of many penal laws. The volitional thrust of the moralist position, however, leads the moralist to assert that this ideal is in fact the primary if not the sole reason why penal laws are enforced.²¹ They would reject any distinction between the reason for the creation of criminal laws and the reason for their enforcement. Thus their cognitive interpretation of the

¹⁸ Moral theorists make a great deal of the concepts of community values and community fears. Thus, Hall bases his whole principle of the moral wrong of crime on the idea that the wrong contravenes the objective morality of the community "as that is expressed in its penal laws.": Hall, *supra* note 4, at 164. He never, however, adequately deals with the question why the crimes and standards of liability that he disagrees with should not also reflect the common conscience of the community. See note 16, *supra*.

Of course, the idea that there are community values or whether they are of any real value in determining moral guilt is a matter of some debate. See Hart, "Punishment and the Elimination of Responsibility," in *Punishment and Responsibility* (Oxford: Oxford Univ. Press, 1968) 158 at 171; Cohen, *Moral Aspects of the Criminal Law* (1939), 49 Yale L.J. 987; Hughes, *Criminal Responsibility* (1963), 16 Stan. L. Rev. 470 at 481; Kelsen, *The Pure Theory of Law and Analytical Jurisprudence* (1941), 55 Harv. L. Rev. 44 at 46-47. All of these writers cast doubt on the utility of the concept.

Another use to which the community is put is to explain crime in terms of the harm it causes to the community by the fear that it generates in society. Thus, Nozick argues that crime can be distinguished from civil wrongs by the fear it produces in the community. See Nozick, *Anarchy, State and Utopia* (New York: Basic Books, 1974) at 65-66. Similarly, Fletcher defines manifest criminality as an external activity that is unnerving to the community embodied in the hypothetical observer who must be frightened or perhaps merely suspicious: Fletcher, *supra* note 5, at 232-33. See also Mueller, *supra* note 16. This idea of community fear is such an odd one and so inconsistent with ordinary perceptions of human nature that one wonders whether it is seriously put forward. Undoubtedly some crimes will produce fear in the victim. However, the emphasis that the media and popular entertainment place on recounting and re-enacting criminal activity indicates that society if anything gains more of a morbid enjoyment from the more spectacular crimes than fear. Indeed some sociologists claim that deviant behaviour of this sort benefits rather than harms society in terms of the social solidarity that is produced by the interest generated. See Durkheim, *The Division of Labor in Society*, trans. Simpson (New York: Free Press, 1968) at 70-110; Erikson, *Wayward Puritans: A Study in the Sociology of Deviance* (New York: John Wiley, 1966) at 4.

¹⁹ Mead, *The Psychology of Punitive Justice* (1918), 23 Am. J. Sociology 577. See also Erikson, *id.* at 8.

²⁰ It may be asserted, however, that the acceptance of a democratic system of government requires the rejection of critical morality.

²¹ This is Devlin's position. See Devlin, *supra* note 14, at 12. See Fletcher, *supra* note 5, at 472; Hall, *supra* note 4, at 213, 243.

positive law denies that once a criminal law issues from the state a new and powerful force emerges for its enforcement and that this force is unrelated to the moral quality of the forbidden act, but this interpretation is concerned with its quality as an attack on the authority of the state. It is, of course, the very existence of this force that leads the moralists to posit their moral criterion in the first place and leads them, in the second place, to interpret in a manner consistent with the moralist thesis those cases that highlight its presence.

The cases that indicate the existence of the authoritative force of the state are those in which defendants are punished, although it is arguable that they are morally innocent. These can be grouped into four types. First, there are those involving acts which, though criminal, are performed for a good or even a heroic motive, such as crimes committed out of religious or political conviction.²² Not only might a solid moral defence be made for defendants engaging in this type of conduct, but their activities might also be said to be ultimately socially beneficial.²³ Second, there are crimes *malum prohibita* which by definition are not considered to be immoral and in which the harm is generally the obstruction of some government policy or simply administrative convenience.²⁴ The third type are those crimes and defences that require that some external objective standard be met by the defendant. These crimes, in the words of Allen,

[throw] into the maw of criminal liability persons whose devotion to the moral postulates of the community is as strong as that of the judges who sentence them but who, because of defects of perception, judgment, or intelligence, are unable to reach the levels of care attained by their neighbors.²⁵

²² Religious beliefs: *Reynolds v. U.S.*, 98 U.S. 145, 25 L. Ed. 244 (1878); *U.S. v. Kauten*, 133 F.2d 703 (2d Cir. 1943); *Wong v. State*, 192 Ind. 524, 137 N.E. 49 (1922). Political beliefs: *U.S. v. Simpson*, 460 F.2d 515 (9th Cir. 1972); *U.S. v. Kroncke*, 459 F.2d 697 (8th Cir. 1972); *U.S. v. Moylan*, 417 F.2d 1002 (4th Cir. 1969), *cert. denied* 397 U.S. 910; *State v. Marley*, 54 Haw. 450, 509 P.2d 1095 (1973); *Commonwealth v. Hall*, 322 Mass. 523, 78 N.E.2d 644 (1948); *People v. Roberts*, 211 Mich. 187, 178 N.W. 690 (1920); *State v. Ehlers*, 98 N.J.L.R. 236, 119 A. 15 (1922); *State v. Gann*, 244 N.W.2d 746 (N.D. 1976); *Carew v. State*, 471 S.W.2d 860 (Tex. Cr. App. 1971); *Morgentaler v. The Queen*, [1976] 1 S.C.R. 616, 53 D.L.R. (3d) 161, 20 C.C.C. (2d) 449; *R. v. Simpson* (1915), 84 L.J.K.B. 1893, [1914-15] All E.R. Rep. 917, 11 Cr. Rep. 718; see also *Everett v. U.S.*, 336 F.2d 979 (D.C. Cir. 1964); *In Re Pres. and Dir. of Georgetown College* 331 F.2d 1000 at 1009n. 18 (D.C. Cir. 1964) *cert. denied* 377 U.S. 978 (1964); *R.I. Recreation Center v. Aetna Cas. & Sur. Co.*, 177 F.2d 603, 12 A.L.2d 230 (1st. Cir. 1949); *State v. Fuller*, 203 Neb. 233, 278 N.W.2d 756 (1979).

²³ The most serious crimes are sometimes those acts that in the judgment of enlightened and heroically unselfish people will best promote the common good, for example, criticism of the errors of established governments or churches. The history of martyrs of religion and science amply indicates that acts deemed criminal at a given time in a given community often turn out to be of the greatest value for human life.

Cohen, *supra* note 18, at 996. Might not similar arguments be made of the Vietnam War protests and many other forms of civil disobedience for social purposes?

²⁴ *Andrus v. Allard*, 444 U.S. 51, 62 L. Ed. 210 (1979), proscribes commercial transactions in parts of protected birds even though the birds are taken lawfully before the effective date of the act.

²⁵ Allen, *Criminal Law and the Modern Consciousness: Some Observations on Blameworthiness* (1977), 44 Tenn. L. Rev. 735 at 753.

Finally, there are those crimes of strict and vicarious liability. It will be shown later²⁶ that all of these offences challenge the authority or power of the state and are punished essentially for this reason.

Although positions vary with specific offences, there are three basic approaches adopted by the moralists in response to these cases. One is to assert that these are merely penumbral aberrations that do not detract from the central thesis that crime involves morally culpable conduct.²⁷ As indicated above, however, the moralist thesis is not simply an assertion that crime often involves moral culpability but is also a denial of the significance of the force of authority within the state itself. These cases, therefore, in reality highlight the central distinction between positivist and moralist thought. It is precisely the fact that these acts are morally neutral and yet punishment still results that indicates there is more to criminal conduct than mere wrongdoing that causes harm.

Another approach is either to deny that the conduct is criminal, or to assert that it is immoral. Thus, Hall denies the criminality of negligence and strict liability offences.²⁸ Similarly, both Hall and Fletcher occasionally make statements that are no more than assertions that the conduct is wrong. Thus, Fletcher states at one point that every proscribed act "is at least a nominal act of wrongdoing."²⁹ Hall similarly asserts that the knowledge that conduct is proscribed gives it its moral disvalue.³⁰ This approach reminds one of Kelsen's proposition that all moral arguments are merely refined and elaborate versions of "bravo" and "phooey!"³¹

The third approach is more substantial and is intimately connected with the concept of harm. Basically it involves the correlation of moral wrongdoing with the voluntary, reckless or negligent commission of a harm. Thus, Professor Hall argues that it is the perpetration of harm that gives those acts performed with a good motive their ethical disvalue.³² Similarly, Fletcher defines wrongdoing in terms of violations of or threats to legal interests.³³ It is clear, however, that many criminal acts, performed with either good or bad motives, may produce no harm at all³⁴ (as this term is commonly used) or may in fact produce a beneficial result. There is the classical example where the defendant maliciously burns his neighbor's fields and inadvertently causes a fire break

²⁶ See text accompanying notes 92 ff., *infra*.

²⁷ See Hall, *supra* note 4, at 95, 220; Wasserstrom, *H.L.A. Hart and the Doctrine of Mens Rea and Criminal Responsibility* (1967), 35 U. Chi. L. Rev. 92 at 95.

²⁸ Hall, *id.* at 3-4, 135-39; Hall, *Theory and Reform of Criminal Law* (1978), 29 Hastings L.J. 893 at 897.

²⁹ Fletcher, *supra* note 5, at 458. He admits it may be muted on occasions.

³⁰ Hall, *Ignorance and Mistake in Criminal Law* (1957), 33 Ind. L.J. 1 at 35-36.

³¹ Kelsen, *supra* note 18.

³² Hall, *supra* note 4, at 95, and Hall quotation, *supra* note 10.

³³ Fletcher, *supra* note 5, at 473.

³⁴ The inchoate crimes of criminal attempts, solicitations, conspiracy, perjury, forgery and possession of burglary tools may all be performed without inflicting any mental or physical harm. Similarly, crimes of strict liability may occur without producing any immediate harm or injury other than frustrating government policy.

that saves the neighbor's life and property.³⁵ More realistically, however, is the case for the harmlessness of euthanasia. The victim consents, and needless pain and suffering are eliminated. The act could be considered beneficial. One needs to understand, therefore, what is meant by harm in order to see whence the moral disvalue is derived.

Although the idea of harm is central to moralist thinking, it has become such an abstract concept that some consider it useless in determining the characteristics of criminal wrongdoing.³⁶ The abstraction is necessary for the moralist thesis, however, in order to encompass those crimes that produce no immediate injury other than the injury of disobedience to the authority of the state.³⁷ In order to encompass such crimes, the moralists developed the concept that the harm of crime is harm to social values and interests.³⁸ Values and interests are then defined in broad terms such as life, property, honour and reputation.³⁹

The initial difficulty with this concept is in determining how a social value or interest can be harmed by conduct that merely contradicts it. The idea seems to be Bentham's notion that if individuals are permitted to engage in harmful conduct without punishment, then others will also be encouraged to do so. Thus, the community value in question will be lost.⁴⁰ Similarly in the case of inchoate crimes, unless defendants are punished it is assumed they will continue in their course of conduct and eventually harm the value in question. This assumption, of course, places a great deal of faith in the criminal law as the supporter of social mores.⁴¹

If one assumes, however, that values can be harmed, one still does not know wherein the harm lies in those acts of humanity or of political or moral conviction that could be said to have produced social benefits. The problem lies essentially in determining how the social value is to be ascertained so that a defendant can be judged a saint or sinner. Clearly, in a pluralistic society there are unlikely to be very many coherent values that are ascertainable. Hall argues that the values can be determined with certainty only from the penal law itself.⁴² Thus the circle closes! Conduct is immoral if it voluntarily causes harm; it is harmful if it attacks social values; social values can only be determined with certainty by the penal laws themselves. Therefore conduct is presumed to be harmful to social values if proscribed. Apart from evidencing an

³⁵ See Robinson, *A Theory of Justification: Societal Harm as a Prerequisite for Criminal Liability* (1975), 23 U.C.L.A. L. Rev. 266 for a discussion of this hypothesis.

³⁶ Drane and Neal, *On Moral Justifications for the Tort/Crime Distinction* (1980), 68 Calif. L. Rev. 398 at 403-406.

³⁷ Hall, *supra* note 4, at 218-19.

³⁸ *Id.* at 215.

³⁹ *Id.* at 215-16; Mueller, *supra* note 16.

⁴⁰ Bentham (1961), *supra* note 1. See also *Report of the Royal Commission on Capital Punishment* (Gower's Report) (Cmd. 8932, 1953) at 20, para. 59: "The fact that men are hung for murder is one great reason why murder is considered so dreadful a crime."

⁴¹ Kelsen believed religion to be a more effective sanctioning system than the legal order: Kelsen (1949), *supra* note 1, at 20.

⁴² Hall, *supra* note 4, at 21.

almost Kantian faith in the ability of the law to reflect social values, this rationalization also, of course, collapses the morality-harm distinction.⁴³

The problems that arise when volitional jurisprudence turns cognitive is illustrated by what has happened to the harm standard. It is a standard by which the state is to be restrained. However, the attempt to encompass those crimes that do not fit within the thesis has made the standard so vacuous that from a volitional perspective it is no standard at all.

The view advanced thus far is that there are forces in operation in the state that move to have criminal laws enforced regardless of the ethical or consequential quality of the contravening conduct. It is suggested that this perspective is shared by moralist thinkers, and that in order to restrain these forces they set up standards which they argue must be met if punishment is to be morally justified. To the same end, however, they deny the significance of these forces by interpreting those cases that reveal their presence as if they were either aberrational or consistent with their own thesis. In doing this, they distort the essential quality of criminal conduct.

The next part puts forward a theory of criminal law that is based on the nature of the state. It argues that the state is an institution that governs by maintaining a position of institutional supremacy in the society that it rules. The state does this by consistently punishing those who challenge that authority. It is able to do this because of the linguistic rule-following tendencies of its officers. For reasons that will be given, state functionaries tend to activate laws punishing offenders even though they may personally disagree with those laws. It will be argued that this linguistic rule-following gives the state its *telos* for maintaining its societal ascendancy. It will be argued that criminal conduct attacks this ascendancy not because of the moral or harmful quality of the act but rather because the law that forbids it puts the state's authority directly on the line. In order to explicate this theory, it is necessary to examine first the state itself and then the nature of criminal laws.

III. A COGNITIVE THEORY

The different perceptions of the nature and functioning of the state as viewed by positivist and natural law thinkers are well illustrated by the following quotation from Fuller:

[T]he analytical positivist sees law as a one-way projection of authority, emanating from an authorized source and imposing itself on the citizen. It does not discern as an essential element in the creation of a legal system any tacit cooperation between lawgiver and citizen; the law is seen as simply acting on the citizen—morally or immorally, justly or unjustly, as the case may be.⁴⁴

Professor Fuller's observation involves what might be called an ideologi-

⁴³ Fletcher's position is somewhat obscure. He defines wrongdoing in terms of threatened harm to legal interests: Fletcher, *supra* note 5, at 472-73. But what is a legal interest? Is it what the judge or legislature says it is, or is it some external evaluation of the defendant's conduct? Fletcher never deals with this issue. He asserts that a violation of any proscription is a nominal case of wrongdoing: *op. cit.* at 458; and he also denies an excuse to those who violate *valid* legal prohibitions: *op. cit.* 806. But again it is not clear what this assertion means. This lack of clarity is due primarily to the fact that Fletcher has no moral or political theory of criminal law: *op. cit.* at 395 n.2.

⁴⁴ Fuller, *The Morality of the Law* (New Haven: Yale Univ. Press, 1963) at 192.

cal elision common to natural law thinking. He essentially asserts that the ideological premise on which the political community is based and from which it draws its legitimacy (in this case democracy) is also the major influential force within the system; that the state simply mirrors the ideology which supports it. This movement from the values of the system to its functioning omits from consideration the operational force of the state itself. This is a force that is unrelated to the polity of the society in question but that is common to all state entities. As indicated above, this elision is primarily designed to impose a moral brake on the force itself, but in so doing it tends to distort the nature of the criminal law. In order to understand the nature of crime, therefore, it is necessary to view the state without its ideological trappings and to consider in what way all state entities are able to maintain a position of pre-eminence in society.

The *raison d'être* of the state is to govern and in this context it can be defined as a complex set of institutional arrangements that have developed in society for that purpose. The institutions operate through the continuously regulated activities of individuals functioning as office holders.⁴⁵ The state is essentially, therefore, the official activities of these office holders.⁴⁶ While the state has appeared in many forms, both autocratic and democratic, and has pursued various goals, good and bad, and although its authority has been vindicated by a variety of theories, its one constant feature is that in every society it stands at the apex of power and authority.⁴⁷ There is no other authority within a society that is recognized as its equal.⁴⁸ All the business of ruling is performed either by it, or with its consent. Its functionaries expect and, for the most part, obtain total obedience to the laws made in its name.⁴⁹

⁴⁵ This definition is taken from Poggi, *The Development of the Modern State* (London: Hutchinson, 1978) at 1. See also Bendix, *Nation Building and Citizenship* (New York: Wiley & Sons, 1964) at 129.

⁴⁶ Austin categorized the state as the "person or body of individual persons, which bears the supreme powers in an independent political society.": Austin, *Lectures on Jurisprudence* (4th ed. London: John Murray, 1885) at 249. Gray defines the state as "a personified abstraction—it is an idol, a dumb idol whose use is to give a title to its law-making and judgment-giving priests . . .": Gray, *The Nature and Sources of Law* (New York: MacMillan, 1921) at 70. "[A] State means, conceal it how you will, a lot of individual selves . . .": Dicey, *Law and Public Opinion* (2d ed. London: MacMillan, 1962) at lxxx. See also Malinowski, "Introduction," in Hogbin, *Law and Order in Polynesia* (New York: Cooper Square, 1972) xvii at xxxi; Radcliffe-Brown, "Preface," in Fortes and Evans-Pritchard, *African Political Systems* (London: Oxford Univ. Press, 1940) at xxiii: "There is no such thing as the power of the state, there are in reality powers of individuals."

⁴⁷ This statement is true when all organs act *in toto*. Paley, thus, describes the power of the state in the following terms: "absolute, omnipotent, uncontrollable, arbitrary, despotic, and . . . alike so in all countries.": Paley, *Moral and Political Philosophy* (New York: Garland, 1978) at 449. Accord, Gray, *id.* at 70: "The true view seems to be that the power of the state is unlimited"; at 89: "[C]learly law is at the mercy of the State.": Laski, *Authority in the Modern State* (New Haven: Yale Univ. Press, 1919) at 26-27: "Limitation of any kind it does not . . . admit . . . [It] has rarely hesitated to claim paramount authority.": Poggi, *supra* note 45, at 1: [It] reserves to itself the business of rule over a territorial bounded society, it monopolizes, in law and as far as possible in fact, all faculties and facilities pertaining to that business."

⁴⁸ Poggi, *id.* at 117.

⁴⁹ MacIver, *The Web of Government* (rev. ed. New York: Free Press, 1965) at 10, 58-59. Merriam, *Political Power* (New York: Collier, 1964) at 128-29.

This central feature of all state entities raises a question that is basic to this part. How is this ascendancy maintained? Ostensibly it is achieved by monopolizing the means of domination within the community: setting up instruments of coercion and punishment backed by a centrally directed, permanent military force in the hands of the principal government.⁵⁰ The mere creation of instruments of coercion cannot, however, explain their constant functioning. Even from its early beginnings, the state must have been an institution of some complexity,⁵¹ involving many officers that the personal charisma or threats of the rulers could not always be expected to influence. Nor could the daily activities of administration and government be constantly supervised and directed by those in power. As the state grew in size and complexity, actual power over the activities of these proliferating and ever-changing functionaries diminished as the chain of command lengthened.⁵² Despite this growth, and despite the fact that these functionaries could not always be expected to share similar values and views, states maintain this *telos* of retaining the supremacy of power. That this retention occurs in every society, whatever its political structure or underlying values, indicates that there must be strong cohesive forces operating on the individual members of the state's institutions that lead them to obey the rules requiring them to punish those who question the authority of the state. What then are the forces that lead these officers to obey the rules that give the state its unity of purpose? Putting the question in the context of Professor Fuller's observation, what would lead state functionaries (judicial or otherwise) to act on an order requiring them to bring about the punishment of someone who had challenged the institution's authority despite the fact that the conduct was neither immoral nor harmful?

The answer to this question must lie initially in the explanations given for the general phenomenon of obedience to authority, and particularly obedience to the authority of the state. Empirical research by psychologists reveals an alarming propensity in people to obey commands of an authority figure, even to the extent of inflicting serious pain on innocent victims.⁵³ This revelation tends to support the thesis of some thinkers that obedience to the state has become an instinct inbred in the human race by countless ages of subservience to its authority.⁵⁴ Indeed the Scandinavian realists assert that in

⁵⁰ Max Weber listed the pre-conditions on which the modern Western state is based as the monopolization of means of domination. The conditions consist of the creation of a centrally directed and permanent system of taxation; the creation of a centrally directed and permanent military force in the hands of a central governmental authority; monopolization of legal enactments and the legitimate use of force by the central authority and the organization of a rationally oriented officialdom, whose exercise of administrative functions is dependent upon the central authority. See Bendix, *Max Weber* (Garden City: Doubleday, 1962) at 383.

⁵¹ See Diamond, *Primitive Law Past and Present* (London: Methuen, 1971).

⁵² Bell, *Power, Influence and Authority* (New York: Oxford Univ. Press, 1975) at 87.

⁵³ Milgram, *Obedience to Authority* (New York: Harper and Rowe, 1974). It is interesting to note in this regard that other researchers have found more resistance to authority in children. Piaget, *The Moral Judgement of the Child*, trans. Gabain (London: Routledge & K. Paul, 1972) at 275-94.

⁵⁴ Bay, "Civil Disobedience Prerequisite for Democracy in Mass Society," in Hanson and Fowler, *Obligation and Dissent* (Boston: Little, Brown, 1971) at 30; Maine,

reality there are no rules but simply habitual behaviour accompanied by a feeling of being bound to obey authority.⁵⁵

If there is such an instinct to obey authority, there is no reason to assume that officials—judicial or otherwise—are any more immune to it than those outside the system. In fact, history has shown that forms of government can change on a constitutional and legislative level without much change in judicial or administrative personnel or in the organizations.⁵⁶ *De facto* authority exercised for a sufficient period will become *de jure* and, as Kelsen has pointed out, the legal character of the existing political order tends to be presumed as self-evident by those functioning within it.⁵⁷

A more specific rationale for obedience given by Raz,⁵⁸ Dahl⁵⁹ and Bryce⁶⁰ is simple indolence. In the words of Bryce: "To most people, nothing is more troublesome than the effort of thinking. They are pleased to be saved the effort. They willingly accept what is given to them because they have nothing to do further than receive it."⁶¹

One merely has to read the works of McDougal and Lasswell to get an idea of the difficulties and complexities involved in making what they consider to be a socially correct decision. One can then appreciate how much easier it is to be a linguistic rule-follower.⁶²

Insofar as possible, one tends to think of officials as industrious, diligent people, as undoubtedly many of them are. When one considers, however, the instances of slavish adherence to outmoded rules, one might wonder how much of this diligence is due to misplaced wisdom and how much is due to the real difficulty and effort involved in developing a new rule.⁶³ It is interesting, in this context, to note that Cardozo believed that it was only "when there is

Popular Government (New York: H. Holt and Co., 1886) at 63; Russell, *Power* (New York: W.W. Norton, 1933) at 19, 204; Weber, *Law in Economy and Society*, ed. Rheinstein (Cambridge: Harvard Univ. Press, 1954) at 328.

⁵⁵ Hägerström, *Inquiries Into the Nature of Law and Morals*, ed. Olivecrona, trans. Broad (Stockholm: Almqvist & Wiksell, 1953); Lundstedt, *Legal Thinking Revised* (Stockholm: Almqvist & Wiksell, 1956); Olivecrona, *Law As Fact* (London: Stevens, 1939).

⁵⁶ See *Madzimbamuto v. Lardner-Burke N.O.*, [1969] 1 A.C. 645, [1968] 3 All E.R. 561, [1968] 3 W.L.R. 1229 (P.C.). For the capitulation of the Rhodesian High Court to the new order; see also Hopton, *Grundnorm and Constitution: The Legitimacy of Politics* (1978), 24 McGill L.J. 72; see also Ebenstein, *The Pure Theory of Law: Demythologizing Legal Thought* (1971), 59 Cal. L. Rev. 617 at 648 for a comment on the fourth Weimar Republic.

⁵⁷ Kelsen, *supra* note 3, at 484.

⁵⁸ Raz, *The Authority of Law* (Oxford: Clarendon, 1979) at 25.

⁵⁹ Dahl, *After the Revolution* (New Haven: Yale Univ. Press, 1970) at 8.

⁶⁰ Bryce, *Studies in History and Jurisprudence* (Oxford: Clarendon, 1901) at 469.

⁶¹ *Id.*

⁶² Lasswell & McDougal, *Criteria for a Theory About Law* (1970-71), 44 S. Cal. L. Rev. 362 at 390-94.

⁶³ See LaFave & Scott, *Handbook on Criminal Law* (St. Paul: West, 1972) at 266-67, 534 for statements that judges still apply the year and a day rule for homicide.

no decisive precedent, that the serious business of the judge begins,"⁶⁴ and that nine-tenths, perhaps more, of the cases that come before the courts are predetermined "by inevitable laws that follow them from birth to death."⁶⁵

Two additional reasons given for obedience are deference and fear. Deference is the tendency to assume that the individual or group issuing the command has greater wisdom or more expertise than the recipient.⁶⁶ Another form that deference can take is in the assumption that the process by which a rule or decision is made ensures that the decisions themselves will be competently made.⁶⁷ The refusal of the federal courts to consider the wisdom of legislative enactments is probably due in part to this aspect of obedience.⁶⁸ Insofar as fear is concerned, great emphasis is placed on the fact that many officials cannot be dismissed from office and, therefore, are supposed to be immune from this sort of pressure. Fear, however, need not be simply of loss of office. It may be generated by the fear of displeasing or of losing the respect of one's colleagues by a mistaken innovation.⁶⁹ This sort of pressure is recognized by the moralist thinkers when they support judges who move courageously in the face of legislative enactments.⁷⁰

Apart from the factors that generally lead people to obey instructions rather than to follow their personal inclinations, there are two considerations that operate specifically on individuals who are functionaries of the state. One is that the legitimacy of official action is derived in part from its impartial, unbiased application.⁷¹ This factor, of course, will lead to a studied disregard of person and circumstance by officials, and this disinterest in turn will lead to a mode of thinking that ignores personal feelings in all cases—even those where justice might require one to act contrary to the rule in question. The second reason for official rule-following is connected with the transference of authority from the state to the official. As one political scientist puts it:

Even the smallest functionary or bureaucrat clothes himself with the importance attaching to the system he helps to administer, seeking to impress on those who need its services the sense of their dependence on the agent who renders them. So from the least to the greatest the institutional system lends to those who superintend it a dignity and worth not their own.⁷²

⁶⁴ Cardozo, *The Growth of the Law* (New Haven: Yale Univ. Press, 1924) at 60.

⁶⁵ *Id.*

⁶⁶ Bryce, *supra* note 60.

⁶⁷ Dahl, *supra* note 59.

⁶⁸ Tribe, *American Constitutional Law* (Mineola, N.Y.: Foundation, 1978) at 451-53.

⁶⁹ Empirical research indicates that institutional pressures on judges are not insignificant and hence they have a tendency to agree more than disagree. See Grossman, *Social Backgrounds and Judicial Decisions: Notes for a Theory* (1967), 29 J. Pol. 334; Grossman, *Social Backgrounds and Judicial Decision-Making* (1965-66), 79 Harvard L. Rev. 1551. See also Austin, 2 *Lectures on Jurisprudence*, ed. Campbell (5th ed. London: John Murray, 1885) at 647.

⁷⁰ See Eser, *supra* note 16, at 355.

⁷¹ See Bendix, *supra* note 50, at 481-86.

⁷² MacIver, *supra* note 49, at 36. See also *id.* at 430; Maine, *Ancient Law* (3d ed. London: John Murray, 1866).

Thus the officials have a vested interest in maintaining the authority that elevates them above their fellow citizens. Also, they tend to operate in a way that will check assaults on the authority through which they derive their own status. By defending their personal authority, they feed the overall authority of the state. This tendency to defend authority when it is challenged probably lies at the base of those constitutions that distribute power between various organs of the state. The hope is that in defending the authority of a particular organ against the encroachments of the others, the state as a whole will be restrained from unduly oppressing the society it governs.

The tendency to love power and dignity even though it is not derived through personal merit will be even stronger in higher level functionaries. As Russell has pointed out, these people strive to achieve these high positions precisely because they tend to love power more than others do.⁷³

Against such inducements towards linguistic rule-following by officials, the moralist school would pit morality and reason. These are both, of course, two-edged swords that can work in favour of strict rule-following as well as against it. It would be just as wrong to deny their influence on functionaries as it is to ignore those features of official behaviour that led Austin to deny the efficacy of moral arguments on the hangman.⁷⁴ The volitional goals of moralist thinking, however, lead them to ignore or deny the authoritarian structure of the state and of official action and to argue for the moral character of law precisely in order to increase the strength of the moral influence on the state's officials. It is this tendency that leads them to insist that crime is essentially moral wrongdoing that causes harm, rather than conduct that strikes deeply at the *telos* of the state itself.

The position may now be capsulated: it is argued that the state as an institution has a *telos* in maintaining its position as the supreme authority in the society that it governs; that it achieves and maintains this position by consistently punishing those who question that authority; and that this in turn is achieved by maintaining forces of coercion and punishment within the society that are operated by officials, who for the reasons given, tend to be linguistic rule-followers who will activate those instruments of coercion and punishment against individuals who challenge the state's institutional position. To the extent that reason and morality have an impact on official activity—against upholding the authority of the state—they will tend to weaken the state's superior position. As the state consistently maintains its ascendant position, however, one can assume that the forces in favour of the *telos* are stronger than those that operate against it.

The third part of this paper examines the extent to which the judiciary, traditionally the most independent members of the state organization, act as a moral brake against the thrust of these forces. Before doing this, however, it is necessary to consider the particular relation criminal laws bear to the state's authority.

⁷³ Russell, *supra* note 54, at 161.

⁷⁴ Austin, *Province of Jurisprudence Determined* (New York: Humanities Press, 1965) at 185.

Historically, criminal laws emerged with the early state and, interestingly enough, focused primarily on acts questioning the authority of its head in the form of breaches of the King's peace.⁷⁵ As the vindication for the exercise of power by the state changed from the divine right of kings to the democratic rights of the people, so too did criminal conduct become ostensibly offences against the people. At all times, however, whatever the immediate rationale for power, the offence is essentially an offence against the state's authority. Clearly the state is much more concerned with the enforcement of its criminal laws than with its civil laws. The enforcement of the latter is left primarily in the hands of the injured party to institute the proceedings and to execute the judgment. This usually occurs no matter how socially harmful or immoral the breach may have been.⁷⁶ With the criminal law, on the other hand, the position is reversed. Not only does the state maintain a police force whose primary purpose is to ensure that its criminal laws are obeyed, but it also prosecutes and punishes on its own initiative.⁷⁷ It does so whether there is a victim,⁷⁸ whether that victim has been compensated, or has subsequently condoned the harm⁷⁹ or whether the defendant has been punished civilly or even criminally (by another state entity) for the conduct in question.⁸⁰ The state, in fact, acts to all intents and purposes as if it were the injured party. The perceived injury is not derived from the harm to any victim or moral wrongdoing of the defendant, as the former may not be present and the defendant may have been sanctioned for the latter. It is, of course, the thesis of this article that the wrong and harm is to the state as an institution of government. The harm lies in the fact that criminal conduct challenges the institutional supremacy of the state by questioning its authority. This challenge occurs because criminal laws are commands issuing from the state to the society, and these commands, unlike other laws, grant no choice in whether they should be obeyed. If choice is exercised where none is given, the authority by which the state governs is damaged unless the power on which that authority is based is exerted against the defendant. Criminal conduct activates the institutional forces that exist in the state to maintain that authority.⁸¹

In order to explicate the significance of criminal conduct as a direct at-

⁷⁵ Diamond, *supra* note 51, at 273; Holdsworth, 2 *A History of English Law* (4th ed. London: Methuen, 1927) at 50-51; Pollock and Maitland, *The History of English Law* (2d ed. Cambridge: The Univ. Press, 1898) at 22.

⁷⁶ LaFave & Scott, *supra* note 63, at 10-13.

⁷⁷ *Bass Angler Sportsman Soc'y v. U.S. Steel Corp.*, 324 F. Supp. 412, *aff'd.*, 447 F.2d 1304 (5th Cir. 1971); *Eacret v. Holmes*, 215 Ore. 121, 333 P.2d 741 (1958). Some theorists distinguish crime from civil wrong on the basis of the state's execution of the court's judgment without being moved to do so. See Pollock, *The Distinguishing Mark of Crime* (1959), 22 Mod. L. Rev. 495.

⁷⁸ This is true with inchoate crimes, offences against public morality and public welfare offences.

⁷⁹ *Chick v. Wingo*, 387 F.2d 330 (6th Cir. 1967); *Gilbert v. U.S.*, 359 F.2d 285 (9th Cir. 1966); *Hess v. State*, 4 Md. App. 508, 243 A.2d 651 (1968); *State v. Odom*, 86 N.M. 761, 527 P.2d 802 (1974); LaFave & Scott, *supra* note 63, at 408-13.

⁸⁰ *U.S. v. Vaughan*, 491 F.2d 1096 (5th Cir. 1974); *U.S. v. Finley Coal Co.*, 345 F. Supp. 62 (E.D. Ky. 1972).

⁸¹ See text accompanying note 50, *supra*.

tack on the ascendant position of the state over society, it is necessary to indicate how the authority is raised and challenged. In one sense authority defines its own parameters in that it cannot be questioned until it is first exerted. This principle is illustrated by the implications raised by the reverse of the maxim *nullum crimen nulla poena sine lege*. Thus the state cannot punish when it has not proscribed; but by the same token, its authority cannot be questioned until it has proscribed. In this sense the correlation between disobedience and criminal conduct is indicated by the fact that one cannot commit a non-existent crime because one cannot question non-exerted authority.⁸²

How then is authority exercised? The answer to this extremely difficult question would seem to be that authority is exercised when a command is given and the primary reason for obedience is that it was commanded by the person or entity commanding it.⁸³ This conclusion in turn is indicated by the categorical nature of the command, coupled with the threat of a sanction for non-compliance. It should be noted that the mere threat or imposition of a sanction does not necessarily indicate that authority has been either raised or challenged. A choice may still have been given even though a penalty was threatened or imposed. The following examples will illustrate the propositions:

The defendant is told that if he does X he will suffer sanction B. Defendant does X. In doing X the defendant was not questioning the authority of the entity imposing the penalty because the entity impliedly gave him a choice. In doing X all the defendant did was to raise questions about the efficacy of the penalty B in inducing people not to do X.

Let us now assume that the defendant is commanded never to do X on pain of penalty B. In this instance the defendant is given no choice as to whether to do X or not, so that in doing X, he not merely raises questions as to the efficacy of penalty B in preventing X but, more important, he challenges the authority of the commanding entity to forbid him to do X—penalty or no penalty. In doing this he indicates that the command is not a sufficient reason for its obedience and, therefore, challenges the authority of the commanding entity to issue the command itself.

Although the distinction is a subtle one, it is vital in distinguishing civil from criminal wrongs. With civil wrongs, a penalty is threatened but only to give the defendant a reason for not choosing to perpetrate the wrong.⁸⁴ In other words, the defendant is still given a choice, so that exercise of the choice does not question the state's authority. The difference is probably best illustrated in the distinction between civil and criminal contempt. With civil contempt, the defendant has the choice of complying with the plaintiff's order or enduring the penalty. The presence of choice is highlighted by the fact that once the defendant complies with the order, the penalty is removed. With criminal contempt, on the other hand, the defendant either directly questions the court's authority by conduct that scoffs at it in court, or, by some other conduct somehow indicates to the court that the defendant is not simply resisting

⁸² *Zaimi v. U.S.*, 155 A.D.C. 66, 476 F.2d 511 (D.C. Cir. 1973).

⁸³ See Bell, *supra* note 52, at 39; Hobbes, *Leviathan* (Oxford: Blackwell, 1960) at 166; Lucas, *The Principles of Politics* (Oxford: Clarendon Press, 1966) at 16; Raz, *supra* note 58, at 13-15.

⁸⁴ Bell, *supra* note 83, at 37.

the plaintiff but is questioning the authority of the court to issue the command.⁸⁵ In that situation, the penalty is categorically imposed.

Some theorists have suggested that the criminal law also presents a choice to the defendant in that he can commit the offence if he is prepared to endure the penalty.⁸⁶ This line of reasoning fails to draw the distinction between having a choice and being given one. The state clearly does not give a choice whether to commit a crime, although such a choice must necessarily exist for an act of disobedience to occur. That the state does not give a choice is indicated by two factors. First, the state maintains a police force, one of whose primary purposes is to stop people from breaking the criminal law. Crimes must be performed surreptitiously not simply because they will be punished but also because they will be prevented if anticipated. This limitation applies to all crimes from the largest to the smallest. Purely civil wrongs, on the other hand, can ordinarily be performed openly and with impunity no matter how harmful or immoral they may be. The second indicator of the absence of a given choice is the fact that the state will punish those who even attempt to perpetrate the more serious offences. Attempt is, in fact, a pure exercise in disobedience. It is for this reason that the general concept of attempt is not to be found in the civil law. If a choice is given, attempting to exercise it cannot be a wrong to the state or to any unharmed plaintiff.

The nature of a crime may now be stated: criminal conduct is that conduct which challenges the authority of the state by contravening a categorical imperative wherein the state demands obedience on the basis that the state itself has commanded obedience. Conduct that is contrary to such a command attacks the state in its major motivational force, namely, the maintenance of its institutional supremacy in the society that it governs. The nature of the disobedience will depend on the nature of the command. The command may be to engage in, or to refrain from, certain conduct; it may be to be aware of certain facts, or to maintain a particular standard of care. Clearly, intentional acts or omissions will attack the authority of the state regardless of any good motive with which they may have been done. However, failing to be aware of a command or failing to be aware that one's conduct does not meet a required standard of alertness challenges the position of the state as surely as do direct attacks. Apart from a direct challenge, authority tends to be jealous of its position and will bear down heavily on suspected infringements. It is somewhat ironic, in this regard, that crimes of strict liability are in reality the crimes that come closest to a categorical imperative in the Kantian sense, admitting few defences to their contravention.

Thus far an attempt has been made to show that moralist thinking, as with positivist thinking, is concerned with the forces of cohesion that function within the state for the maintenance of the state's supreme position within the

⁸⁵ *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 55 L. Ed. 797 (D.C.C.A. 1911).

⁸⁶ DeBoisblanc, *The Dilemma of the Disobedient: A Solution* (1966-67), 41 Ind. L. J. 521 at 524; Hart, "Legal Responsibilities and Excuses," in *Punishment and Responsibility*, *supra* note 18, at 44.

society that it governs. The moralists are concerned to restrain this force with a moral, intellectual brake, but in so doing they distort the nature of the operation of the force on the state and the significance of that force to the criminal law. Criminal conduct is conduct that challenges the state's authority not because of its intrinsic quality but rather because of the nature of the law that it contravenes. The third part of this paper will examine the extent to which the judiciary has acted as a moral brake on the state's *telos*. This inquiry essentially involves an investigation of the imperative at its weakest point—acceptable defences. The maintenance of the state's authority will obviously be strengthened by an attitude of stringency towards defences and it will be weakened by a liberality towards them. Thus, by examining judicial attitudes towards defences one will be able to gauge the effectiveness of morality as a restraint on the ascendant thrust of the state.

Before dealing with this inquiry, however, one last point must be made. It might be thought that this interpretation of the nature of crime should be evidenced by one similar response in criminal punishment. If there is only one sin which is cardinal—disobedience—then there should only be a cardinal punishment—death. There have been instances in history when the standard of punishment has not been far from this point.⁸⁷ Apart from these instances, there are two responses to this argument. First, there is nothing illogical in having grades of disobedience; the fact that one act is considered more serious than another does not detract from the seriousness of the latter. Second, in one sense the state does treat all criminals in the same way. It stigmatizes them with the conviction itself. Although it has been pointed out that a conviction involves certain material disadvantages,⁸⁸ some commentators believe the conviction itself is the essence of criminal punishment.⁸⁹

IV. THE JUDICIAL MAINTENANCE OF THE STATE'S AUTHORITY

From the perspective of morality the judicial attitude towards the categorical imperative of the criminal law has not been impressive. *Malum prohibita* offences have been permitted to proliferate.⁹⁰ Punishment, sometimes severe,

⁸⁷ Colquhoun, *A Treatise On the Police of the Metropolis* (6th ed. London: Baldwin & Son, 1800) at 437, lists about 160 capital offences in England in the eighteenth century.

⁸⁸ Cohen and Rivkin, *Civil Disabilities: The Forgotten Punishment* (1971), 35 Fed. Prob. 19 at 20.

⁸⁹ Gardner, *Bailey v. Richardson and the Constitution of the United States* (1953), 33 B.U. L. Rev. 176 at 181, 193.

⁹⁰ See Note, *Corporate Crime: Regulating Behavior Through Criminal Sanctions* (1979), 92 Harv. L. Rev. 1227 at 1229n. 5, for indicators of the increasing use of criminal sanctions to enforce regulatory statutes. See also Naftalis, *White Collar Crimes* (Philadelphia: A.L.I., A.B.A., 1980). Similarly, courts indicate that the legislatures have great latitude in determining what shall be criminal. See e.g., *U.S. v. Vargas*, 380 F. Supp. 1162 (1974); *State v. Scofield*, 7 Ariz. App. 307, 438 P.2d 776 (1968); *People v. Anderson*, 6 Cal.3d 628, 493 P.2d 880, 100 Cal. Rptr. 152, cert. denied, 406 U.S. 958 (1972); *U.S. v. Moses*, 339 A.2d 46, cert. denied, 426, U.S. 920 (D.C. 1975); *Mallory v. State*, 91 Idaho 914, 435 P.2d 254 (1967); *People v. Wedlow*, 17 Mich. App. 134, 169 N.W.2d 145 (1969).

has continually been imposed in cases of strict and vicarious liability.⁹¹ Objective standards have been imposed on those who may have been unable to meet them.⁹² Neutral terminology has needlessly been read in favor of authority rather than of individual culpability.⁹³ Good motive and innocent mistake alike have on occasions been ignored.⁹⁴

While these tendencies are unfortunate from a moral viewpoint, from the perspective of authority they indicate that the cohesive forces in the state are in fact functioning to maintain its *telos*. The true strength of the imperative, however, is best tested at its weakest point—the general defences of the criminal law. It is here that the state is foregoing punishment and, presumably, weakening its authority and hence its power.

The initial significance of the general defences lies in the fact that they

⁹¹ *E.g.*, *U.S. v. Park*, 421 U.S. 658, 44 L. Ed.2d 489, *rev'ing* 499 F.2d 839 (1975); *Morissette v. U.S.*, 342 U.S. 246, 96 L. Ed. 288 (1952).

Vicarious liability for acts of employees: *e.g.*, *Morissette*, *op. cit.*; *U.S. v. Harry L. Young & Sons*, 464 F.2d 1295 (10th Cir. 1972); *State v. Barry*, 255 Iowa 1329, 125 N.W.2d 833 (1964); *Commonwealth v. Minicost Car Rental, Inc.*, 354 Mass. 746, 242 N.E.2d 411 (1968); *City of Kansas City v. Hertz Corp.*, 499 S.W.2d 449 (Mo. 1973); *Commonwealth v. Koczwar*, 397 Pa. 575, 155 A.2d 825, *cert. denied*, 363 U.S. 848 (1959).

Significant penalties: *e.g.*, *U.S. v. Int'l. Minerals & Chem. Corp.*, 402 U.S. 558, 29 L. Ed.2d 178 (1971); *People v. Wells*, 261 Cal.2d 468, 156 P.2d 979, Cal. Rptr. 400 (1945); *State v. Hennessy*, 114 Wash. 351, 195 P. 211 (1921). See also LaFave & Scott, *supra* note 63, at 220n. 12.

⁹² *E.g.*, *U.S. v. Hernandez*, 608 F.2d 741 (1979); *U.S. v. Patrick*, 542 F.2d 381 at 387 (7th Cir. 1976), *People v. Villegas*, 29 Cal. App.2d 658 at 663, 85 P.2d 480 at 482 (1938); *Ross v. State*, 169 Ind. 388, 82 N.E. 781 (1907); *Commonwealth v. Welansky*, 316 Mass. 383 at 398-99, 55 N.E.2d 902 at 910 (1944): "But even if a particular defendant is so stupid . . . that in fact he did not realize the grave danger [he is guilty of manslaughter] if an ordinary normal man under the same circumstances would have realized the gravity of the danger."; *State v. Brown*, 561 S.W.2d 388 (Mo. 1977); *People v. Strong*, 356 N.Y.S.2d 200, 45 N.Y. App. Div. 18 (1974). See also *Arizona v. Starks*, 122 Ariz. 531, 596 P.2d 366 (1979); *Fuller*, *supra* note 22; *Hall*, *supra* note 10, at 637.

⁹³ Thus, statutes requiring some type of fault, by means of words such as "permits" or "knowingly," have been interpreted to hold employers liable for conduct that they were unaware of or had expressly forbidden: see *Harry L. Young & Sons*, *supra* note 91; *Minicost Car Rentals*, *supra* note 91. Vicarious liability has been imposed where nothing in the relevant statute indicates that it should. See *Morissette*, *supra* note 91. Neutral terminology has been read as imposing strict liability: *e.g.*, *Koczwar*, *supra* note 91. Knowledge has similarly been interpreted as meaning the capacity to obtain knowledge: *e.g.*, *U.S. v. Jewell*, 532 F.2d 697 *cert. denied*, 426 U.S. 951 (9th Cir. 1976); *State v. Perkins*, 181 La. 997, 160 So. 789 (1935). "Wilfully" has, by the same token, been interpreted to mean merely intending the act and not intending to violate the law: *e.g.*, *State v. Hall*, Idaho 478, 413 P.2d 685 (1966). Similarly, malice has been construed to mean the intentional performance of the act without lawful justification or excuse and not as meaning wickedness of mind: *e.g.*, *State v. Dunn*, 199 N.W.2d 104 (Iowa 1972).

⁹⁴ Motive: see cases, *supra* note 22. See also *U.S. v. Howard*, 504 F.2d 1281 (8th Cir. 1974), for a recent reaffirmation of the irrelevance of motive. Innocent mistake: see *State v. Einhorn*, 213 Kan. 271, 515 P.2d 1036 (1973); *Hopkins v. State*, 193 Md. 489, 69 A.2d 456 (1950); *State v. Goonan*, 89 N.H. 528, 3 A.2d 105 (1938); *Manahan v. State*, 188 Tenn. 394, 219 S.W.2d 900 (1949).

constitute a formal exculpation of the defendant's conduct. Accordingly, this gives them a heightened potential for weakening the state's authority. Because of this danger, their use has been avoided on occasions and the defendant exculpated in a surreptitious fashion. Such an avoidance may occur outside of the judicial purview when police and prosecutors fail to act against a particular breach.⁹⁵ It may occur with judicial connivance when a particular imperative has been narrowly interpreted or an exception implied to indicate that the command was never abrogated.⁹⁶ Similarly, the courts have permitted disobedience to be hidden in a jury acquittal;⁹⁷ or, they themselves have mitigated punishment after the conviction has been secured and the state's authority vindicated. By the same token, courts may attempt to avoid a conflict altogether by imposing hurdles that must be overcome by those who wish to question the validity of a particular command.⁹⁸ This activity is, of course, morality at work. From the perspective of the defendant the danger of these methods lies in the uncertainty of their application and efficacy. Insofar as the state is concerned, they work to maintain its authority by concealing the fact that disobedient conduct has gone unpunished. With the acceptance of a defence, however, no concealment occurs, since the state openly admits that the defendant has in some way abrogated the imperative. It is important, therefore, for the purpose of gauging the strength of the force of authority within the state, to determine the extent to which the judiciary is willing to sustain a general defence.

In order to understand the defences from the perspective of the state, it is necessary first to articulate two general principles of authority and then to examine their operation in the context of the judicial function. These principles will highlight the operation of authority generally and will also clarify some of the paradoxes of the defences themselves.

It is clear that the power of authority is inevitably eroded if contravening conduct is not met with an exercise of that power against the offender. Thus authority must constantly and vigilantly vindicate itself. It is also clear that while authority defines its own parameters (in that it cannot be questioned until exerted), it also, by the same token, determines its own vulnerability. Because of this second consideration, pragmatism demands that there be recog-

⁹⁵ Comment, *Private Prosecution: A Remedy for District Attorneys' Unwarranted Inaction* (1955-56), 65 Yale L.J. 209 at 211-15. Cf., *City of Merced v. City of Merced*, 240 Cal. App.2d 763 at 766, 50 Cal. Rptr. 287 at 289 (5th Dist. 1966) (duty of prosecutor to prosecute regardless of public sentiment); Davis, *Discretionary Justice* (Baton Rouge: Louisiana State Univ. Press, 1969) at 87.

⁹⁶ As will be seen, it is a typical judicial technique to narrow the scope of the command so as to exclude the conduct in question. One method of doing this is to require specific intent. For a classical example of this, see *R. v. Steane*, [1947] 1 K.B. 997, [1947] 1 All E.R. 813, 32 Cr. App. Rep. 61 (C.C.A.); see also *Browning v. State*, 31 Ala. App. 137, 13 So.2d 54 (1943); *R. v. Bourne*, [1939] 1 K.B. 687 at 695, [1938] 3 All E.R. 615 at 621.

⁹⁷ *Duncan v. Louisiana*, 391 U.S. 145 at 153, 20 L. Ed.2d 491 at 498 (1968). See Kalven & Zeisel, *The American Jury* (Boston: Little, Brown, 1966); Curtis, *The Trial Judge and the Jury* (1951-52), 5 Vand. L. Rev. 150 at 157-58.

⁹⁸ E.g., *Younger v. Harris*, 401 U.S. 37, 27 L. Ed.2d 669; *Boyle v. Landry*, 401 U.S. 77, 27 L. Ed.2d 696; *Zemel v. Rusk*, 381 U.S. 1 at 19, 14 L. Ed.2d 175 at 191.

dition that it is gratuitously destructive for authority to expose itself where disobedience is highly probable.⁹⁹ It is the interaction between these two principles of vindication and vulnerability that produces the pressure-cooker effect of the criminal law. The first leads the state to bear down heavily on individual members of society to obey unquestioningly the imperative. The second releases the pressure in narrow and carefully defined circumstances when it is advantageous to the state to do so. The defences perform this latter function.

The major defences of the criminal law are generally organized into three categories. First, there are those defences that relate to the defendant's capacity to commit a crime. These include; insanity, intoxication and infancy. Second, there are the defences that constitute an excuse for the offence; namely, duress,¹⁰⁰ provocation, mistake, consent and entrapment. Finally, there are defences that are put forward as a justification for the conduct in question. These are; self defence, defence of others, defence of property, necessity¹⁰¹ and acts in furtherance of public and domestic authority.

Capacity, of course, means a capacity to obey. While disobedience is initially determined by the import of the command it also implies a basic ability on the part of the defendant to meet its minimum requisites. Some individuals, therefore, because of temporary or permanent mental or physical disabilities are *ab initio* incapable of challenging authority. It is understandable, therefore, that in clear cases of this sort¹⁰² the state has no interest in punishing. While marginal benefits¹⁰³ may arise through punishing all objective acts of disobedience, these advantages are offset by the state's need to conserve its forces of coercion and punishment for use against direct attacks on its authority.¹⁰⁴ Even in these cases, however, application of the first principle of authority is evident.

Little need be said regarding the defence of infancy because the development of a separate system for disciplining juveniles has made it more or less redundant.¹⁰⁵ It should be noted, however, that the defence was not always available.¹⁰⁶ When it became so, the state pressed its claim for obedience at the early age of seven, at which time the presumption of incapacity dissipated.¹⁰⁷

Insanity and drunkenness are more fruitful areas of inquiry. The

⁹⁹ See Bell, *supra* note 52, at 36.

¹⁰⁰ Not unreasonably, LaFave & Scott refer to this defence as a justification: *supra* note 63, at 377. Cf. Miller, *Criminal Law* (St. Paul: West, 1934) (classified as an excuse).

¹⁰¹ Miller, *id.* at 168, classifies this defence as an excuse.

¹⁰² As opposed to negligent acts where incapacity would obviously be more easily feigned and difficult to disprove.

¹⁰³ See Hart, "Prolegomenon to the Principles of Punishment," in *Punishment and Responsibility*, *supra* note 18, at 44.

¹⁰⁴ See e.g., Tenn. Code Ann. §§33-402-33-407 (requiring insane defendants or their relatives to pay for the cost of institutionalization).

¹⁰⁵ E.g., *Borders v. U.S.*, 256 F.2d 458 (5th Cir. 1958).

¹⁰⁶ Binavince, *The Ethical Foundations of Criminal Liability* (1964-65), 33 *Fordham L. Rev.* 1 at 18.

¹⁰⁷ *State v. Milholland*, 89 Iowa 5, 56 N.W. 403 (1893).

*M'Naghten*¹⁰⁸ test of insanity as initially posited is an example of the first principle of authority exercised in its most extreme form. The issue was not whether the defendant was insane but rather whether the insanity was of a sort that prevented the defendant from challenging the state's authority. Thus, if the defendant had been aware or could be presumed to have been aware of the fact¹⁰⁹ that the conduct was legally proscribed, the defence was unavailable even though he was acting under some insane delusion that the conduct was otherwise necessary.¹¹⁰ The cognizance of the authority of the command indicated to the courts that the contravention constituted disobedience in that the authority was not seen by the insane defendant as a sufficient reason for obedience in itself. Once the courts had reluctantly accepted the idea that cognizance of the command was not necessarily an indicator of an ability to conform with that knowledge, it was inevitable that authoritarian thought would produce a test demanding an absolute inability to conform. This was a test of irresistible impulse that could not be controlled even in the presence of police officers.¹¹¹ The logic of authority is immutable: if the defendant had the capacity to brood or the capacity to conform he also had a capacity to obey. As he had a capacity to obey he also had a capacity to disobey, which in turn meant that the state's authority was ultimately challenged by the conduct.

Those jurisdictions that have adopted tests premising culpability on an ability to perceive the moral wrong of the conduct, together with a substantial capacity to comply with that perception, have somewhat alleviated the press of the first principle. These tests, however, are still concerned with the defendant's disobedience rather than with whether he is in fact insane.¹¹² This difference in emphasis is illustrated by a comparison of a liberal version of the *Model Penal Code* test¹¹³ with that of the ill-fated *Durham* test.¹¹⁴ *Durham*, in a somewhat Hegelian conceptualization, asks whether the disease produced the act. It focuses on the insanity of the defendant and the relationship of that insanity to the defendant's conduct. Thus, by ignoring questions of cognition and control the test fails to raise the issue of disobedience altogether. The *Model Penal Code*, on the other hand, still tests insanity in terms of disobedience—albeit at a potentially lower standard than that of *M'Naghten*. The

¹⁰⁸ *M'Naghten's Case* (1843), 10 Cl. & Fin. 200, 8 E.R. 718 (H.L.).

¹⁰⁹ The Judges in *M'Naghten* were anxious to point out that even with the insane, mistake of law is no defence: *id.* at 210 (Cl. & Fin.), 723 (E.R.).

¹¹⁰ *E.g.*, *State v. Andrews*, 187 Kan. 458, 357 P.2d 739 (1961); *R. v. Windle*, [1952] 2 Q.B. 826, [1952] 2 All E.R. 1, 36 Cr. App. Rep. 85 (C.C.A.). Another version of rational insanity reasoning is that which would permit the defence if the defendant's conduct would have been justified had the delusion itself been a reality: *e.g.*, *Freeman v. State*, 132 Ga. App. 742, 209 S.E.2d 127 (1974).

¹¹¹ *U.S. v. Kunak*, 5 U.S.C.M.A. 346, 17 C.M.R. 356 (1954). See also *Herron v. State*, 287 So.2d 759 *cert. denied*, 417 U.S. 972 (Miss. 1974).

¹¹² "So long as there is any chance that the preventive influence may operate, it is essential to maintain the threat. If it is not maintained, the influence of the entire system is diminished upon those who have the requisite capacity, albeit that they sometimes may offend.": Wechsler, *The Criteria of Criminal Responsibility*, (1954-55) 22 U. Chi. L. Rev. 367 at 374; see, *e.g.*, *U.S. v. Ettore*, 387 F. Supp. 582 (E.D. Pa. 1975).

¹¹³ *Model Penal Code*, (10 U.L.A.) §4.01.

¹¹⁴ *Durham v. U.S.*, 214 F.2d 862, 45 A.L.R.2d 1430 (D.C. Cir. 1954).

test is whether the defendant lacks a "substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law."¹¹⁵ To the extent that the defendant must meet the fact finders' concept of substantial capacity, the test is objective and its rigour indeterminate. Nor is it determined whether the defendant must have substantial capacity to appreciate the legal or moral wrongness of his conduct. Those jurisdictions that have adopted a moral wrong test have significantly lowered the standard of disobedience required for culpability; however, it is still a test of disobedience. Thus, the court adopts what it believes to be the defendant's moral standard and holds him to it. Ultimately, the result of the test is that authority is exercised against those who are insane but who have a substantial capacity to obey the command even though absent their insanity they might not have acted as they did. The *Durham* test attempts not to punish in this latter case.

With intoxication the position is much the same. The question is whether the defendant's conduct constituted disobedience to the state regardless of his impaired or aberrational status. The issue of disobedience is again determined by the import of the command. Thus, if the command forbids conscious performance of a particular act, and the defendant, though intoxicated, consciously performed it, the conduct constitutes disobedience regardless of the fact that the defendant would have acted differently if he were sober.¹¹⁶ Similarly, if the command is to maintain a particular standard of care or to be aware of certain laws, the defendant's voluntarily depriving himself of the capacity to meet the standard is simply another form of disobedience that is prohibited.¹¹⁷ On the other hand, the command may prohibit a premeditated determination to disobey the state¹¹⁸ or it may prohibit conduct generated by a specific intent.¹¹⁹ If the intoxication is perceived in either case as having prevented the defendant from compassing the command as given, the conduct will not constitute disobedience no matter how harmful it may have been. Such conduct is interpreted as not questioning the state's authority simply because it falls outside the parameters of the command. From the perspective of morality it is difficult to differentiate these cases; however, from the perspective of authority the distinction is clear.

The capacity defences indicate the intensity of the state's need to vindicate its authority, even against those with limited capacity to obey. The aberrational quality of the conduct and the reduced mental status of the defendant mean little if disobedience, sometimes under the most stringent of standards, is seen to be present in the conduct in question.

¹¹⁵ *Model Penal Code*, (10 U.L.A.) §4.01.

¹¹⁶ LaFave & Scott, *supra* note 63, at 342; Wharton, 1 *Criminal Law and Procedure* (Brooklyn: Foundation, 1957). This rule is also implicit in the refusal to accept the defence in cases where the defendant "blanked out": *Bishop v. U.S.*, 107 F.2d 297 (D.C. Cir. 1939); *People v. Kelly*, 10 Cal.3d 565, 516 P.2d 875, 111 Cal. Rptr. 171 (1973).

¹¹⁷ *People v. Garcia*, 250 Cal. App.2d 15, 58 Cal. Rptr. 186 (1967); *Embry v. State*, 310 P.2d 617 (Okla. Crim. App. 1957).

¹¹⁸ *E.g.*, *State v. Wilson*, 234 Iowa 60, 11 N.W.2d 737 (1943); *Commonwealth v. Rogers*, 351 Mass. 522, 222 N.E.2d 766 (1967).

¹¹⁹ *U.S. v. Scott*, 529 F.2d 338 (D.C. Cir. 1975).

When one considers the excuses of the criminal law, the press and paradox of authority are again vividly exposed. Excuses, unlike justifications, are admitted violations of the criminal law that the state does not punish; the conduct is wrong but defensible. Why, then, would the state excuse? Professor Fletcher, once more taking the issue outside of the context of state authority, answers that excuses excuse because of the existence of a special condition that arouses compassion;¹²⁰ that the wrongful act reflects a limited temporal distortion of the actor's character¹²¹ and that in some sense the wrongful act was involuntary.¹²² It has been shown that in some cases of insanity the state is prepared to punish even where there is a limited capacity to obey. With drunkenness it punishes temporary distortions. Moreover, compassion in general plays little part in the determination of guilt.¹²³ In fact, when considered from the perspective of morality, excuses make somewhat of a poor showing.

Some excuses are in fact not excuses at all but are in reality simply explanations which, if accepted, should negate wrongdoing absolutely. With mistake of fact, for instance, the defendant explains that his conduct did not in any way correlate with his mental perception of surrounding circumstances. It is suspicion that puts the defendant in a defensive posture and requires him to indicate to the state that the conduct was not in fact authority-questioning. Once this is shown, the conduct is simply not wrong.¹²⁴

Insofar as mistake of law is concerned, the judiciary has, for the most part, been prepared to impose the burden of knowledge on society and has pressed the authority of the state to the extent of permitting conviction despite a legitimate and honest mistake.¹²⁵ When the defence has been held to be available it is because knowledge was perceived to be an element of the command or because the defendant was responding to the state's authority in a more immediate fashion by acting in accordance with the instructions of one of its officials.¹²⁶ In both mistake of law and mistake of fact, therefore, the mistake causes the conduct to fall outside the parameters of the command.

In situations in which there is, in fact, a perception of the criminality of the act, one finds the state responding in a morally paradoxical fashion. Thus

¹²⁰ Fletcher, *supra* note 5, at 808.

¹²¹ *Id.* at 802.

¹²² *Id.* at 802-806.

¹²³ See *R. v. Dudley and Stephens* (1884), 14 Q.B.D. 273 at 280, [1881-85] All E.R. Rep. 61 at 67-68, 52 L.T. 107 at 113, where Lord Coleridge makes the much maligned statement: "We are often compelled to set up standards we cannot reach ourselves, and to lay down rules which we could not ourselves satisfy." See also *Everett*, *supra* note 22; *Kelly*, *supra* note 116, for the effect of compassion on punishment but not guilt. For the inefficacy of compassion, see *Starks*, *supra* note 92, and cases cited at note 22, *supra*.

¹²⁴ *People v. Chavira*, 3 Cal. App. 973, 83 Cal. Rptr. 851 (1970); *People v. Famalett*, 346 N.Y.S.2d 957, 75 Misc.2d 360 (Dist. Ct. 1973).

¹²⁵ *U.S. v. Barker*, 514 F.2d 208 (D.C. Cir. 1975); *Hopkins v. State*, 193 Md. 489, 69 A.2d 456 (1949); *State v. Western Union Tel. Co.*, 12 N.J. 468, 97 A.2d 480 (1953); *People v. Bock*, 69 Misc. 543, 125 N.Y.S. 301 (Co. Ct. 1910) *aff'd*, 148 App. Div. 899; *Koczvara*, *supra* note 91; *Manahan*, *supra* note 94.

¹²⁶ *LaFave & Scott*, *supra* note 63, at 356, 368.

while crimes motivated by noble sentiment receive short shrift,¹²⁷ conduct produced through base fear will on occasion be excused.¹²⁸ Another oddity is the fact that while fear produced through duress will excuse most crimes other than homicide,¹²⁹ provoked anger will excuse no crime but will mitigate a homicide.¹³⁰ One would think that logically there would be little reason for distinguishing between emotional states that distort the defendant's character, particularly when they are reasonable responses to events outside of the defendant's control. Another peculiarity is that while most courts have accepted duress as an excuse, there has been some reluctance to accept necessity as a justification.¹³¹ This difference is odd because in the former case the defendant is acting, albeit unwillingly, to achieve the larger criminal goal of his coercer whereas in the latter he is not. However, when these defences are viewed from the authority perspective of the two principles enunciated above,¹³² the paradoxes resolve themselves.

Duress and provocation are, in fact, excellent examples of the tension created between the state's need to vindicate its authority and its need to protect itself from unavoidable disobedience. The force of the first principle, however, tends to ensure that the second will take effect only in narrowly defined circumstances.

Insofar as duress is concerned, it is logical that an institution that relies on threats of pain and suffering for obedience will be more susceptible to a defence that is based on fear than to one based on altruistic motivation. The judiciary, therefore, treats the defence initially as a contest between competing authorities. Thus, the coercer must exceed the state in terms of ferocity of threatened punishment for disobedience¹³³ and the danger must be immediately impending¹³⁴ so that if it is removed the authority of the state is ex-

¹²⁷ See note 22, *supra*.

¹²⁸ LaFave & Scott, *supra* note 63, at 374.

¹²⁹ *Id.* at 375-76.

¹³⁰ *Id.* at 572.

¹³¹ *U.S. v. Berrigan*, 283 F. Supp. 336 (D. Md. 1968); *Marley*, *supra* note 22; *Frasher v. State*, 8 Md. App. 439, 260 A.2d 656 (1970); *Commonwealth v. N.Y. Cent. & H.R.R. Co.*, 202 Mass. 394, 88 N.E. 764 (1909); *People v. Brown*, 70 Misc.2d 224, 333 N.Y.S.2d 342 (Sup. Ct. 1972), *Gann*, *supra* note 22; *Harris v. State*, 486 S.W.2d 573 (Tex. Crim. App. 1972); *Butterfield v. State*, 167 Tex. Crim. 64, 317 S.W.2d 943 (Tex. Crim. App. 1958); *State v. Moe*, 177 Wash. 303, 24 P.2d 638 (1933); *Dudley and Stephens*, *supra* note 123. See Glazebrook, *The Necessity Plea in English Criminal Law* (1972), 30 Camb. L.J. 87.

¹³² See text preceding note 99, *supra*.

¹³³ See, e.g., *People v. Richards*, 269 Cal. App.2d 768, 75 Cal. Rptr. 597 (1969); *People v. Hart*, 98 Cal. App.2d 514, 220 P.2d 595 (1950). Cf. *Gillars v. U.S.*, 182 F.2d 962 (D.C. Cir. 1950); *People v. Lovercamp*, 43 Cal. App.3d 823, 118 Cal. Rptr. 110 (1975); *Steane*, *supra* note 96. See also *People v. Moore*, 40 Mich. App. 383, 198 N.W.2d 775 (1972); *State v. Amundson*, 69 Wis.2d 554, 230 N.W.2d 775 (1975); *The Model Penal Code*, (10 U.L.A.) §2.09 provides the defence where the threat was such that "a person of reasonable firmness in his situation would have been unable to resist."

¹³⁴ *D'Aquino v. U.S.*, 192 F.2d 338 (9th Cir. 1951); *People v. Otis*, 174 Cal. App. 119, 344 P.2d 342 (Cal. Dist. Ct. 1959); *People v. Robertson*, 543 P.2d 533 (Colo. App. 1975); *Nall v. Commonwealth*, 208 Ky. 700, 271 S.W. 1059 (1925).

pected to reassert itself on the defendant.¹³⁵ Additionally, the defendant is not to gratuitously¹³⁶ place himself in a position where this conflict of authority can arise.¹³⁷ If he does so he is apparently culpable no matter how desirable the subsequent conduct may be.

The test, therefore, is one of competing threats with the state remitting when the coercer's threats can be expected to have greater impact on the defendant than its own. The remission only occurs, however, when the defendant did not bring about the contest in the first place. Some courts have carried this competing-fears concept to the extent that the defence is unavailable when the defendant acts altruistically rather than in a fearful fashion. Thus, they would prohibit the defence where the defendant acts to save the life of someone other than himself or, in some instances, a close relative.¹³⁸ Presumably, the logic is that the absence of immediate fear indicates the presence of altruistic disobedience, which in turn questions the state's authority.

While fear is necessary for the defence, fear by itself will not suffice. Not only must the threat be of a certain type,¹³⁹ but it must also be objectively believable.¹⁴⁰ If these standards are not met, the defence is unavailable no matter how frightened the defendant actually was.¹⁴¹ Once again the judiciary has been prepared to impose the burden of obedience on those with a limited capacity to obey.

In the competing-fear situation the second principle of authority is clearly evident in the state's willingness to excuse only in narrowly defined circumstances in which it is believed that the defendant would not in any event have obeyed the command. In some jurisdictions, however, a genuine fear produced by significant threats will still not suffice to excuse. These are the jurisdictions that will not admit duress as a defence in the case of serious crimes.¹⁴² This

¹³⁵ *Lovercamp*, *supra* note 133; *Otis*, *id.*; *State v. St. Clair*, 262 S.W.2d 25, 40 A.L.R.2d 903 (Mo. 1953); *State v. Kearns*, 25 N.C. App. 445, 213 S.E.2d 358 (1975).

¹³⁶ Some courts have held this to be so even though the initial act was innocent. See, e.g., *R. v. Hurley*, [1967] V.R. 526 (St. Ct. Vict.).

¹³⁷ *U.S. v. Agard*, 605 F.2d 665 (2d Cir. 1979); *State v. Patterson*, 117 Or. 140, 241 p. 977 (1925). *Model Penal Code*, (10 U.L.A.) §2.09(2) provides that the defence is not available where "the actor recklessly placed himself in a situation in which it was probable that he would be subject to duress." *People v. Rodriguez*, 30 Ill. App.3d 118, 332 N.E.2d 194 (1975).

¹³⁸ See *R.I. Recreation Center*, *supra* note 22; *Jackson v. State*, 504 S.W.2d 448 (Tex. Crim. App. 1974); *Hurley*, *supra* note 35; *LaFave & Scott*, *supra* note 63, at 376.

¹³⁹ I.e., violence of some sort: see *Phillips v. U.S.*, 334 F.2d 589 (9th Cir. 1964); *People v. Patton*, 25 Ill. App.3d 840, 322 N.E.2d 592 (1975); *Patterson*, *supra* note 137; Perkins, *Criminal Law* (2d ed. Mineola, N.Y.: Foundation, 1969) at 954; *Model Penal Code*, (10 U.L.A.) §2.09(1).

¹⁴⁰ *Moore v. State*, 23 Ala. App. 432, 127 So. 796 (1929); *Model Penal Code* (10 U.L.A.) §2.09(1).

¹⁴¹ *Patrick*, *Starks*, *Villegas*, *supra* note 92; *Fuller*, *supra* note 22.

¹⁴² *LaFave & Scott*, *supra* note 63, at 376, 377. The *Model Penal Code*, (10 U.L.A.) §2.09(1) and §210.6(4)(f), however, permits duress in the case of murder if a person of reasonable firmness in the situation would have been unable to resist the threat.

caveat, coupled with the requirement of a genuine threat of death or serious bodily injury if the defendant does not comply, results in a situation where the defence is only admitted when the defendant essentially makes a valid choice of competing evils. The defendant, therefore, will be excused only when he could not reasonably be expected to obey the state's command and when the act itself was objectively correct.

Some courts have limited the excuse even further in that they would exculpate only in situations in which the coercer could be punished for the actual offence committed. This limitation manifested itself in the rule, now abandoned,¹⁴³ that the defence was available only if the defendant performed the specific crime ordered by the coercer.¹⁴⁴ Although this particular rule is excessive, it should be noted that, unlike necessity, in the majority of duress situations the state should have the coercer to punish for the breach and can thus vindicate its authority in this fashion.

With duress, therefore, there is the situation where conduct that is not particularly laudatory is exculpated primarily because the state believes it cannot match the fear inspired by the coercer; but in any event, the defence is limited to situations where the danger would objectively be considered significantly serious and imminent. In some jurisdictions the defence also requires that the choice of evils be a correct one. This hardly amounts to compassion for temporary distortions of character.

When duress is compared with provocation, it would appear that, from the perspective of a morality that is concerned with individual culpability, little distinction could be drawn among reasonable responses to emotional states produced by stimuli outside of the defendant's control. If the idea is, as Professor Fletcher has suggested,¹⁴⁵ that excuse is permitted because the defendant's character was distorted by the circumstances, one might ask why the evaluation should go further than determining that the stimuli was present and that the distortion occurred. The actual result of a genuine emotional response should be irrelevant.

From the perspective of authority, however, there are valid reasons for distinguishing the two defences. As indicated by the duress defence, the state will relax the demand for complete obedience only when there is reason for doing so other than the likelihood that the defendant will not have the capacity to obey. Thus with duress the state potentially has the coercer to punish for the breach and when all the *caveats* are applied the conduct will, disobedience aside, constitute a correct choice of evils. With provoked anger resulting in a homicide, however, neither of these features will be present. There is no one other than the defendant who can be held criminally responsible for the conduct. Moreover, the death of a human being through anger will inevitably mean that the choice of evils was invalid. For these reasons and despite the admitted incapacity of the defendant provocation will not excuse in the case

¹⁴³ *Lovercamp, supra* note 133.

¹⁴⁴ *Richards, supra* note 133; *Rodriguez, supra* note 137.

¹⁴⁵ *Fletcher, supra* note 5, at 802.

of homicide. This does not explain, however, why it mitigates when duress does not; nor does it explain why lesser offences provoked by anger will not be excused or punishment mitigated while the same offences, produced by duress, will be exculpated completely.

The reasons for these apparent aberrations lie in the concept of authority itself. In the case of a provoked homicide, for example, the victim will have encouraged the breach of the peace (although not necessarily by criminal conduct)¹⁴⁶ that brought about his demise. The victim's conduct, therefore, is disturbing to the state in that it induced the authority-questioning conduct of the defendant. In this sense, therefore, the defendant's conduct is marginally beneficial to the state. In the case of a homicide produced by duress, however, not even this marginal benefit is present since the victim in the majority of cases will be an innocent cause of the crime.

The defence of provocation producing a lesser offence is unavailable because, if the defendant was sufficiently in control to avert the homicide, he was sufficiently in control to obey the state. Thus, while the second principle of authority will produce a mitigation in the case of uncontrollable fury, the first principle will clamp down where control is evident. This result obtains even though morally the defendant acts in a better fashion by exercising some control than one who capitulates completely to a coercer and perpetrates the same offence.

Those jurisdictions that have adopted the *Model Penal Code's* provisions on duress¹⁴⁷ and provocation¹⁴⁸ have alleviated the imbalance to some extent. Under the duress provision, coerced homicide will now excuse; however, the defendant's conduct is still judged by objective standards. Provocation still merely mitigates, and then only in the case of homicide. Slightly more logical are those jurisdictions that mitigate both coerced and provoked homicide rather than mitigating in one case and completely exculpating in the other.¹⁴⁹

Insofar as the defence of consent is concerned, the absence rather than the presence of consent indicates the integral relationship of criminal conduct to state authority. When the defence is available, it is because the absence of consent is an element of the command; thus, the presence of consent draws the conduct out of the parameters of the particular imperative so that the defendant's conduct, even though immoral, does not constitute disobedience.¹⁵⁰ When the command does not require absence of consent, however, there is no defence. In the latter instance it is the authority-challenging nature of the conduct as determined by the command rather than its effect on the victim that gives the act its criminal significance. Thus, once the state's authority is challenged, prior consent or subsequent condonation by the victim is obviously irrelevant.

¹⁴⁶ See Perkins, *supra* note 139, at 53-69, although in many cases the conduct of the victim will be criminal.

¹⁴⁷ *Model Penal Code*, (10 U.L.A.) §2.09.

¹⁴⁸ *Id.*, §210.3(1)(b).

¹⁴⁹ *E.g.*, 40 Minn. Stat. Ann. §609.20 (West 1964); 41 Wis. Stat. Ann. §939.46(1) (1958).

¹⁵⁰ *Don Moran v. People*, 25 Mich. 356 (1872).

Entrapment, on the other hand, presents an interesting example of the state's *telos* working to such an extent that it begins to undermine the very authority that it seeks to protect. In these cases the search for disobedience reaches such an intensity that it begins to stimulate the very disobedience that it seeks to check. It is an obvious corollary of the second principle of authority that a state's authority is unnecessarily exposed when agents of the state encourage disobedience in those who had no intention of ever questioning that authority.¹⁵¹ In some jurisdictions, the press of authority is such that disobedience even under these circumstances will meet with vindictory action.¹⁵² From the perspective of the state, however, it is obviously the better position to discourage this gratuitously destructive activity by refusing to convict in cases in which the seeds of disobedience were not evident in the defendant.

The position on excuses can now be summarized. Some excuses are in reality not excuses at all, in that the defendant has perpetrated no criminal wrong. It is simply the suspicion of the state that puts the defendant in a defensive posture requiring him to indicate in some way that his act was not authority-challenging.¹⁵³ When genuine excuses are permitted, they tend to be under circumstances in which it would be destructive of the state's authority not to exculpate. Thus excuses may excuse so as to deter the state's own agents from stimulating authority-challenging conduct themselves. Also, conduct may be excused because emotional pressures exist in the defendant to an extent that makes obedience unlikely. In the latter case, however, the state with judicial assistance will tend to exculpate completely only in narrowly defined circumstances in which it can vindicate the breach against another and where the choice of evils will be a valid one. In addition to these stringent requirements, objective tests are employed so that those who are factually incapable of obedience are judged by standards that they cannot possibly meet. When there are no significant benefits to the state in the exculpation, the most that can be expected—even in the case of a reasonable emotional response—is a mitigation of the punishment.

In terms of punishment there is obviously little to distinguish a justification from an excuse. In either case, the successful plea will exculpate. From the perspective of morality and authority, however, the distinction is an important one. Thus, in the case of an excuse the defendant's conduct is deemed to be wrong but not punishable.¹⁵⁴ With a justification, however, the adjudicator commends, or at least asserts that what the defendant did was correct and proper.¹⁵⁵ From a moral point of view, it is better to be justified than excused. From the perspective of authority, however, the position is the reverse. The state can excuse and still assert that its authority is a sufficient reason for obedience; the conduct is still deemed wrong, but punishment is simply remitted. With justification, on the other hand, validating the act im-

¹⁵¹ *Sherman v. U.S.*, 356 U.S. 369, 2 L. Ed.2d 848 (1958).

¹⁵² *Goins v. State*, 192 Tenn. 32, 237 S.W.2d 8 (1951).

¹⁵³ *Patterson v. N.Y.*, 432 U.S. 197, 53 L. Ed.2d 281 (1971).

¹⁵⁴ Hart, *supra* note 103, at 13-14; Austin, *A Plea for Excuses* (1956-57), 57 Proc. Aristotelian Soc'y 1.

¹⁵⁵ Hart, *id.*; Austin, *id.*

plies that the authority may be legitimately contravened. It is important, therefore, to determine under what circumstances the state will justify the abrogation of its command.

When viewed from the perspective of the state's authority, justifiable contraventions of the criminal law tend to be acts that will support rather than abrogate that authority. The justifiable act tends to be one that the state would have ordered, either because it is directed against one who is acting against the authority of the state by committing a criminal act, or because the conduct is seen as in some other way beneficial to the state's power structure. Moreover, the ulterior intent with which the defendant acts in many of these cases will cause the conduct to fall outside the parameters of the command in question.

The primary example of acts directed against wrongdoers or other enemies of the state in support of the state's authority are, of course, acts done in the furtherance of public order. These are either the acts of agents of the state or acts done at their direction.¹⁵⁶ A more indirect support of authority is that derived from self-defence, defence of others and defence of property. For the most part the victim in these cases will be someone engaged in criminal conduct so that the defendant's act is one that the state itself would probably have ordered.¹⁵⁷ The defendant's motivation is not, of course, to support the state, but to defend some interest. This factor, however, will tend to make the conduct only marginally authority-questioning.¹⁵⁸ It is the suspicion of the state that puts the defendant in the defensive posture that requires him to indicate that the conduct did not constitute disobedience but was motivated primarily by the defensive intent. In addition to these two features, there remains the fact that overriding personal interests will often be concerned so that in the majority of cases it will be unlikely that a state command prohibiting the conduct will be obeyed.

The concern of the state for its own interest rather than the position of

¹⁵⁶ LaFave & Scott, *supra* note 63, at 389, 402-407.

¹⁵⁷ The requirement in all three defences is that the conduct be directed against what the defendant reasonably believed to be an unlawful assault or an unlawful trespass. This will tend to mean that the act will be directed against a criminal act: *Commonwealth v. Edwards*, 448 Pa. 79, 292 A.2d 361 (1972); LaFave & Scott, *supra* note 63, at 391-402. It may, however, be directed against conduct that is purely tortious or even innocent if the defendant misperceived the situation. In this regard it is interesting to note that the early common law distinguished between justifiable crimes and those that are simply excusable. Those that were justified were: the execution of a sentence of death pronounced by a competent tribunal; the killing of an enemy on the field of battle as an act of war and within the rules of war; arresting a felon, preventing his escape or recapturing him after escape and preventing the commission of a felony perpetrated by violence or surprise. Typical instances of excusable homicide were killings by misadventure by a madman and certain kinds of homicides committed in self-defence. See Perkins, *supra* note 139, at 892. In all cases now, however, the conduct will still be that which the state would order its officers to resist either because of its criminal or dangerous quality.

¹⁵⁸ The true nature of the defendant's conduct in cases of self-defence, defence of property and defence of others is that he is defending; the conduct, therefore, *ipso facto*, is not an attack on state authority other than in the sense that the defendant may be aware that under normal circumstances his conduct would be impermissible.

the defendant is still evident here. With self-defence, for example, if the defendant disobeyed the state by initiating the assault and the victim responded reasonably, it matters not that the defendant's conduct ultimately became motivated by self-preservation.¹⁵⁹ Also, if the defendant's response in any of these defences is deemed unreasonable, the fact that he actually believed that the conduct was necessary becomes, if anything, merely a mitigating factor.¹⁶⁰ These considerations again can result in the punishment of mistaken altruism and where there is genuine incapacity to obey.

The concern that the victim may be, in fact, an authority-challenger has led courts on occasions to deny these defences when the defendant responded reasonably but the victim was in fact acting lawfully.¹⁶¹ The tendency now, however, is to validate reasonable responses.¹⁶² These defences, therefore, have two aspects that make them justified in the eyes of authority. First, they are directed against an individual who appears to be challenging the authority of the state. Second, because defendants tend to be motivated primarily by an intent to preserve a legitimate interest—life or property—they will at most contravene the command in a purely formal sense. In addition, the threat to the interests involved will, in the majority of cases, make it unlikely that a command to the contrary would be obeyed. Such is the press of the state's authority, however, that again courts were at times not prepared to admit justifiable acts against wrongdoers that were motivated purely by altruism. The absence of self-interest indicated paradoxically that the conduct was challenging authority because of the capacity in the defendant to conform to the law. Thus, as with duress, defence of others was sometimes limited to close relatives.¹⁶³

Bearing in mind the beneficial aspects of self-defence, defence of others and defence of property to the state's authority it is useful to consider those justifications when the victim is not a wrongdoer but where the state perceives itself to have benefited in some other fashion. This situation arises with the defence of domestic authority and necessity. Little need be said about the former defence. It is clear that the authority of the state is benefited when discipline is maintained among juveniles and others by those immediately responsible for them. To this end, the state permits reasonable force to be

¹⁵⁹ Thus, self-defence is said to be available only when the original attack of the defendant was not felonious: *Commonwealth v. Blackman*, 446 Pa. 61, 285 A.2d 521 (1971). If the initial attack of the defendant was not of a felonious nature but the victim responded unreasonably, the defendant because of his own culpability is not always completely exculpated but rather the offence is reduced to manslaughter. See *State v. Gordon*, 191 Mo. 114, 89 S.W. 1025 (1905). Cf. *Model Penal Code*, (10 U.L.A.) §3.04(2)(b), which would allow a perfect self-defence in this situation.

¹⁶⁰ *E.g.*, *Burton v. State*, 254 Ark. 673, 495 S.W.2d 841 (1973). In these cases the honesty of the belief that the conduct was necessary negates malice and thus takes the conduct out of the parameters of the command. Some jurisdictions even in this type of case, however, would condemn the conduct as murder: *e.g.*, *People v. Manzo*, 9 Cal.2d 594, 72 P.2d 119 (1937).

¹⁶¹ *E.g.*, *People v. Johnson*, 2 Ill.2d 165, 117 N.E.2d 91 (1954); *People v. Young*, 11 N.Y.2d 274, 183 N.E.2d 319 (1962).

¹⁶² *E.g.*, *Young, id.*; see also LaFave & Scott, *supra* note 63, at 398.

¹⁶³ LaFave & Scott, *id.* at 393, 399.

used to carry out those responsibilities. More problematical is the defence of necessity. Conduct that falls within the purview of this defence may be motivated by self-interest, as when the defendant perpetrates a crime to avert some natural calamity about to befall him;¹⁶⁴ or, it may be motivated by pure altruism, as when he commits the offence for the benefit of others.¹⁶⁵ Whatever its basis, the defence has not always been accepted by the courts.¹⁶⁶ The reason for this lack of acceptance is apparent. The conduct, by definition, will not be directed against a wrongdoer who is himself challenging the state's authority. Similarly, if there are no personal interests involved, the conduct becomes suspect for its lack of compulsion. Finally, unlike duress, there is no one against whom the state can vindicate its authority, except the defendant. Set off against this is the fact that emergencies will arise where valuable interests can be saved only by conduct abrogating a command. The press of authority, however, is such that there is an inherent reluctance to admit openly that even in these cases the command may validly be contravened—hence the disparagement of the defence.¹⁶⁷

Where the defence is accepted, it is so narrowly circumscribed that it prevails only in cases in which the state has not made a clear value choice, the value choice of the defendant was objectively correct and the danger was immediately impending so that the state could not itself act. The conduct, of course, must be motivated by a desire to achieve the benefit gained.¹⁶⁸ These limitations tend to make the defence available only in situations in which the defendant acts as an officer of the state would have acted had he been present to deal with the crisis.

Justifiable conduct can now be summarized. It is conduct that either directly or indirectly supports the authority of the state instead of challenging it. It supports authority primarily because it is conduct that the state directs or would have directed its agents to perform had they been present at the time of the event. For the most part, the conduct is directed against individuals who are themselves breaking the criminal law. Once again, however, the press of the state's authority is apparent. If the advantages do not accrue, as when the victim could not reasonably have been a wrongdoer, or if authority is in fact challenged, as when the beneficial result is achieved fortuitously, then the defence will not prevail regardless of societal benefit or individual incapacity.

When one considers the general defences of the criminal law as a whole,

¹⁶⁴ *Moore*, *supra* note 141; see also *id.* at 397; *Miller*, *supra* note 100, at 216.

¹⁶⁵ *E.g.*, *Bourne*, *supra* note 96.

¹⁶⁶ As in the classical case of *Dudley and Stephens*, *supra* note 123.

¹⁶⁷ See text accompanying note 131, *supra*.

¹⁶⁸ This was the view expressed by the Criminal Law Commission of 1845: *Second Report*, Parl. Pap. (1846) XXIV 107, Art. 19. See also Hale, 1 *Historia Placitorum Coronae* (Philadelphia: Small, 1847) at 54; Blackstone, 4 *Commentaries*, at 32. The drafters of the *Model Penal Code* have included a choice of evils defence in §3.02, which at least nine states have accepted in varying forms. See 8 Colo. Rev. Stat. §18-1-702 (1978); 7 Del. Code Ann. tit. 11, §463 (1953); 7A Hawaii Rev. Stat. tit. 37, §703-302 (1976); Ill. Ann. Stat. Ch. 38, §7-13 (Smith-Hurd 1973); 16 Ky. Rev. Stat. §503.030 (1975); N.Y. Penal Law §35.05(2) (McKinney 1975); Pa. Cons. Stat. Ann. tit. 18, §503 (Purdon 1973); Tex. Penal Code tit. 1, §9.22 (Vernon 1974); Wis. Stat. Ann. §939.47 (West 1957).

it is apparent that there is little weakness in this area of the imperative of the criminal law. The insane, the intoxicated, the mistaken and the emotionally disturbed are similarly scrutinized for disobedience, sometimes under the severest of standards. The reasonable and the abjectly unreasonable are alike sacrificed for the benefit of the authority of the state. When benefits accrue and authority is vindicated, capitulating fear is excused while controlled anger is punished. Altruism is always suspect. Justifiable breaches of the law, in reality, support rather than challenge the authority of the state. When one considers these meagre defences and the standards under which they have been admitted, the judiciary rather than constituting a moral brake to the carriage of the state appear rather as its postillions stringently maintaining the velocity of its *telos*. In this regard, one must not be misled by the cases wherein courts invoke constitutional provisions to restrain legislative and executive activity in the criminal sphere, as this is authority rather than morality at work. As indicated above,¹⁶⁹ implicit in a distribution of powers is the idea that the impetus of authority will lead individual functionaries to resist the encroachments of others and in so doing restrain the general *telos* of the state from bearing down on society as a whole. The extent to which this is achieved is obviously an important question but outside the purview of this paper. It is interesting to note, however, that when the conflict occurs the moral position of the defendant tends to become irrelevant.¹⁷⁰ Also, as might be expected, the strictures imposed by the judiciary on the legislature *vis-à-vis* society will not always correlate with those that they impose on themselves when defending societal assaults on their position.¹⁷¹ Similarly on other occasions the ambivalence created by conflicting authority goals becomes manifest when a constitutional doctrine conflicts with a major general premise of authority.¹⁷²

V. CONCLUSION

It is implicit from the position taken in this paper that the writer considers that the retreat of positivism from the position of Austin may have gone too far. It is true, as Hart has pointed out, that some laws simply regulate the internal operations of the state and that others are simply intended to guide individuals in their conduct and, to this end, are choice-oriented.¹⁷³ The criminal laws, however, intrinsically constitute commands issuing from the state to society, denying choice and demanding obedience. The psychological nexus that concerned both Kelsen¹⁷⁴ and Hart¹⁷⁵ is supplied in a passive form by the

¹⁶⁹ See text accompanying note 52, *supra*.

¹⁷⁰ *E.g.*, *Brewer v. Williams*, 430 U.S. 387, 51 L. Ed.2d 424 (1977).

¹⁷¹ *U.S. v. United Mine Workers of Am.*, 530 U.S. 258, 91 L. Ed. 884 (1947).

¹⁷² *E.g.*, *Lambert v. Cal.*, 355 U.S. 225, 2 L. Ed.2d 228 (1957). Initially, Douglas J. framed the question for decision in terms of ignorance, asking whether due process permits criminal liability for a person who lacked probable and "actual knowledge" of the violated statute. Immediately, however, the focus of the opinion turned to the question of *mens rea*. The felon-registration ordinance did not specify an intent requirement, and Mr. Justice Douglas declared that, as a general rule, criminal statutes need not require intent.

¹⁷³ Hart, *supra* note 1, at 26-48.

¹⁷⁴ See Kelsen, *supra* note 18, at 55.

¹⁷⁵ Hart, *supra* note 1, at 54.

linguistic rule-following tendencies of functionaries and in an active form by their desire to maintain their own authority by maintaining the authority of the state. The will that gives the command its psychological force is evidenced by the policeman apprehending, the prosecutor prosecuting, the judge convicting and the gaoler punishing. Its strength is indicated by the reluctance of these functionaries to vitiate the categoric nature of the imperative, or if they do so, to do it in a clandestine fashion. Insofar as the legitimacy of the authority of the state is concerned, it is asserted here that it is derived from the perennial consistency of sanctioning rather than from the transient supporting dogma. In reality, therefore, when stripped of its miranda¹⁷⁶ the only distinction between the authority of the robber and the authority of the state is that the ascendancy of one is temporary while the ascendancy of the other is permanent. Indeed, the state itself implicitly recognizes its substantial similarity with the robber in the manner in which it deals with situations of duress.

This portrayal appears to paint an excessively black picture, but such a conclusion is not intended. One must recognize that the force of the state's authority, brought about by the authority-biased, linguistic rule-following tendencies of its functionaries, will mean that the positive law will tend to be the law that will ultimately prevail. This result does not mean that the law itself must necessarily be a bad law, or that where interpretation is possible the law will be interpreted in a wicked manner. The morality of the law's application is determined by the intelligence, diligence, and moral worth of the functionaries creating and applying the rules. Natural law philosophy, however, seems to premise the whole of its thought on the idea that good laws make good people and that morally sound laws will produce a morally sound society. This premise is held even though history consistently has shown that the same constitution can be used for evil as well as for good. The reality is, in fact, the reverse. It is good people that make good laws; the essential importance lies not in the positive laws themselves but in the moral qualities of those who create and administer them. Rather than urging that morally unsound laws are not laws at all, we should urge those who create and administer them to do so in a morally sound manner. For ultimately, it is, after all, the letter that killeth and the spirit that giveth life.¹⁷⁷

¹⁷⁶ See Merriam, *Political Power* (New York: Collier, 1964) at 109. "Miranda" is used by Merriam to describe the symbols of power with which the state adorns itself. It means literally "things to be admired."

¹⁷⁷ See 2 *Corinthians* 3:6.