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Alexander B. Smith

Harriet Pollack

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THE REACH OF THE LAW: SIN, CRIME AND POOR TASTE*

ALEXANDER B. SMITH**

HARRIET POLLACK***

THE PAST DECADE has been a period of intensive reevaluation of the law. The criminal law, in particular, has been subjected to an especially intensive criticism. These attacks fall largely into two categories: criticisms of the legitimacy of our penal codes, and criticisms of their efficiency.

Starting with the Civil Rights Movement of the Kennedy era with its heavy emphasis on civil disobedience as a tool of protest, the legitimacy of many of our laws was called into question. When Rosa Parks sat in the front of the bus in Montgomery, Alabama, she was not simply breaking the law; she was pointing to a law that had no right to be. The mass protests against the Viet Nam War similarly were declarations of the demonstrators' belief that the War and the laws which supported it were wrong and illegitimate. Recent minority group protests such as the Gay Liberation Movement and the campaign for equal rights for women again are protests against laws that some groups feel are unfair and unjust.

At the same time that the legitimacy of the law has been challenged by dissident groups ranging from Black Liberationists to marijuana smokers, the efficiency of the law has been attacked by almost everyone. Every day brings its quota of newspaper stories relating to the failure of the police to deter crime, the iniquities and inequities of plea bargaining, the inordinate delays in bringing cases to trial, the shocking state of our prisons. Probably no individual in the United States could truthfully say that he is completely satisfied with our criminal justice system.

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**B.S.S., City College of New York; L.L.B., Brooklyn Law School; M.S., City College of New York; M.A., Ph.D., New York University; Professor of Sociology at John Jay College of Criminal Justice of the City University of New York; First Chairman of the Division of Social Sciences and the First Dean of Studies; former member of the Training Panel of the Office of Juvenile Delinquency, H.E.W., and in 1971 completed a report on police and prosecutors' attitudes toward enforcement of the Commission on Obscenity and Pornography.

***B.A., M.A., Hunter College; Ph.D., Columbia University; Associate Professor of Government at the John Jay College of Criminal Justice of the City University of New York; consultant to the President's Commission on Marijuana and Drug Abuse, 1972.

While the attacks on the legitimacy of our criminal law are basically substantive in nature, and the attacks on the efficiency of the law are procedural in nature, both groups of critics ultimately find themselves viewing a body of law and asking the same question: Should these laws continue to exist in their present form? Should we, for example, have laws which make consensual sodomy between adults a crime? Should we have laws which prohibit homosexuality, in view of the fact that many people consider sexuality private activity that should be beyond the reach of the law? Should we expend our resources attempting to eliminate nonheterosexual activities when many think that the pursuit and prosecution of homosexuals is a fruitless and counterproductive activity for our police and prosecutors? To respond to such inquisitives one must first formulate some kind of jurisprudential theory concerning the function of the criminal law in our society. Probably the purpose that would be most universally cited and accepted would be the protection of society against those individuals whose conduct society considers inimical to its best interests. The problem, of course, lies in defining that kind of conduct. The acceptability of conduct is culturally relative to some extent, and as social change occurs, old practices become acceptable and new practices become objectionable. Generally, conduct that is not acceptable will be labelled as deviant, and a certain proportion of deviant acts will be considered so serious as to warrant the label of crime. If, then, we wish to examine the content of our criminal codes we must first inquire into the nature of deviance.

Superficially, it is very easy to define deviance. A deviant person is one who does something we would not do. He is, in the words of Howard Becker, an outsider, one who is outside the consensus of what constitutes proper conduct.¹ The problem is that from at least one person's point of view we are all outsiders in one respect or another. Discussions of deviance, therefore, really turn on searches for universals, for modes of conduct that all human societies consider unacceptable.

In the classroom, anthropology professors like to upset their students by pointing out there there are no such universally disapproved modes of conduct. Even a killing that we would consider murder is acceptable in some societies: the infanticide practiced by the Spartans and the deliberate starvation of old people by Eskimos. In actuality, however, assaultive acts against the persons or property of others, such as murder, assault, rape, and robbery are considered taboo in almost all human societies, and people who perform such acts are clearly deviant. These acts, however, constitute only a tiny fraction of all the modes of conduct that our own and other societies have from time to time labelled as wrong.

¹ H. BECKER, *OUTSIDERS: STUDIES IN THE SOCIOLOGY OF DEVIANCE* (1963).

If today, we were to ask a middle-class, middle-aged white American what forms of overt behavior (outside of assaultive crime), he considered deviant, he might respond as follows:

Engaging in homosexual activity; reading sensual books or viewing pornographic movies; frequenting prostitutes; participating in sexual promiscuity outside of marriage, and fathering illegitimate children (especially if the children wind up on welfare).

Using drugs—not prescription drugs or over-the-counter items such as Alka Seltzer or Geritol or Vitamin E—but heroin, LSD, barbiturates or amphetamines.

Drinking excessively; eating enough to make you fat; smoking cigarettes (maybe); smoking marijuana (positively).

Not taking care of your obligations; being lazy or shiftless; losing money at gambling, and publicly using profanities.

If we accept this list as typical, it is as interesting for the conduct it omits as for that which it includes. Many acts which were in the past, or, are now attacked as highly immoral are not even mentioned: contraception, abortion, sexual and racial discrimination to mention a few. Middle America also seems unconcerned about profiteering, sharp-dealing, tax-evasion, consumer fraud and other forms of white collar crime. To be sure, if questioned specifically about these unmentioned acts, most middle Americans would disapprove of all (except for contraception, possibly), but the term “deviant conduct” would not bring the omitted behavior immediately to mind, as it does for the acts listed.

The reason for Middle America's selective perception of deviance lies in our description of a Middle American: middle-class, middle-aged and white. Through his eyes some acts affect his world adversely, others have little effect, and some are simply irrelevant. He doesn't care especially about racial or sexual discrimination because he is neither black nor female. He believes in sexual regularity because he is a family man and his world is stabilized by the nuclear families of his friends and neighbors. Furthermore, illegitimacy (as he sees it) is a direct, and undeserved burden on taxpayers such as himself because of its effect on the welfare rolls.

However, contraception doesn't seem wrong to him since his middle-class status was probably dependent on his success in limiting the size of his family. Even abortion has much to be said for it, since anyone can get into trouble, and perhaps abortion will limit the growing numbers on welfare. Questions of the propriety of tax evasion do not readily elicit a negative response because he is unaware of the activities of large-scale tax evaders, profiting from tax shelters created by a staff of legal experts, and small-scale tax evasion is probably a fairly common and

socially acceptable activity in his milieu. Sharp dealing (such as exploitive landlord-tenant or consumer-purchaser transactions) is likewise a means of earning a living for several middle-class individuals; and invariably, middle-class individuals are frequently fairly well able to compensate for the dishonest landlord or tradesman. However, the same Middle American considers individuals who take or sell drugs enormously threatening both because drug addiction frequently leads to assaultive or dangerous criminal conduct, and because drug addiction threatens the stability of the social system by its aberrant attitudes toward work and other social obligations. It would appear that if there is one thread which runs through the fabric of our Middle American scheme of desirable social conduct, it is the desire to maintain stability, to preserve the status quo. As a middle-class individual, one has achieved a desired goal and it is recognized that life is as satisfying for the Middle American as it might ever be. He fears any loss of what he has achieved. Change by itself is threatening and presents him with an uncomfortable situation.

The list of unacceptable conduct varies with the age and status of the individual compiling it. Inner-city blacks for example, might list racial discrimination first and might not list gambling at all. Marijuana smoking might be quite acceptable to middle-class university students, but tax evasion, sharp dealing and profiteering would be high on their lists of forbidden conduct. In the Bible Belt of the deep South blasphemy, secularism and atheism are still heinous offenses; yet, the relatively free use of firearms, "moonshining" and blatant racial discrimination are regarded with considerable tolerance.

It would appear that deviance is to a definite degree found in the eye of the beholder—but only to limited extent. All classes and status groups reject violent assaultive crime.² They differ, however, in respect to other types of unacceptable conduct, some of which in our system are illegal, some of which are immoral, and some of which are considered merely matters of good taste. In considering these widely varying perceptions of what constitutes deviant conduct, the basic question must be not which individual is right and which individual is wrong; but, what kinds of conduct society can tolerate and still exist as a viable society, and what kinds it cannot accept. Part of the answer must lie in one's perception of a desirable society. For our purposes, we are assuming an ideal closely

² An exception might be black revolutionaries such as George Jackson, who while imprisoned in San Quentin for armed robbery, wrote extensively on the place of blacks in white society. Jackson felt that because "Amerika" was "a society above society" in which blacks were "captive," they were under no obligation to obey the laws. All crime, therefore, was an act of rebellion. Even Jackson concedes, however, that non-economic crime, "the rape of a Black woman by a Black man," is an expression of racial violence turned inward. It is "autodestructive" and hence presumably wrong, even if understandable. Szulc, *George Jackson Radicalizes the Brothers in Soledad and San Quentin*, N.Y. Times, August 1, 1971 (Magazine), at 10.

akin to the traditional Jeffersonian model: an open society predicated on a belief in equality of opportunity and equality before the law with a reasonable level of material comfort and economic security for all. In such a society the question arises as to what types of behavior are necessarily "beyond the pale." In this connection, we propose to discuss three categories of deviant conduct: crime, sin, and actions which are in poor taste.

Deviance: Crime

It is quite clear that the front runners on any list would have to include murder, rape, arson, assault, robbery, burglary, and larceny as acts which are totally unacceptable, and if condoned, only on an ad hoc basis and under very special circumstances.³ We label these acts *crimes*, meaning that they are offenses against the public order and of sufficient severity that they must be dealt with punitively and coercively by the police, courts and prisons. Even those who commit them, in many instances agree that this type of conduct is wrong. A burglar does not want his house to be burglarized and, except in legends such as Robin Hood, robbers would not argue that what they do is legitimate. This type of conduct must be prohibited, because a viable society is not possible if such acts are to be tolerated. The control of such undesirable conduct, indeed, is one of the central problems faced by philosophers throughout history who have attempted to construct model societies. Whatever ideology they follow and whatever type of Utopian society they envision, they all have at least agreed that this type of conduct must be forbidden. While Hobbes and Locke, for example, were diametrically opposed in their perceptions of the fundamental nature of man and in their prescriptions for social control of human conduct, they agreed that the principal difficulty in human society is the regulation of assaultive, violent acts committed by one individual upon another.⁴

Assaultive conduct is merely one category of crime. So-called "white-collar crime," while non-violent, is basically an attack on legitimate property arrangements in society.⁵ Acts such as tax fraud, stock manipulations, commercial bribery, misrepresentation in advertising and salesmanship, short weighting and misgrading of commodities, embezzlement, etc., are all considered methods of obtaining money or other property illegitimately. Since the function of an economic system is to

³ Reference here is to random acts by individuals or small groups such as gangs and omitting discussion of governmentally organized and sponsored violence such as that practiced during the Hitler period in Germany, the Spanish Inquisition, or any war. Whether this kind of organized violence is ever justifiable depends on one's politics, religion, nationality, and time in history.

⁴ THOMAS HOBBS, *THE LEVIATHAN*; JOHN LOCKE, *SECOND TREATISE ON CIVIL DISOBEDIENCE*.

⁵ See Sutherland, *Is "White Collar Crime" Crime?* 10 AM. SOCIOLOGICAL REV. 132-139 (1945).

prescribe how one may properly obtain property, white-collar criminals are subversive of accepted economic relationships. As subversives, they, like their more violent criminal counterparts, are a threat to a viable society and it would appear reasonable that their acts should be included in any penal code.⁶ Although the acts of white-collar subversives are subject to prescribed penalties, sometimes as severe as those for burglary or larceny, these subversive acts do not carry the stigma or the punishment of violent crimes.

Basically the law in this area is ambivalent. Property crimes are considered crimes, but they are not considered heinous if they do not involve violent or potentially violent conduct. It is significant to observe that the Soviet Union exhibits far less ambivalence in regard to so-called "economic crimes." Certain offenses, such as currency manipulation, are punishable by death sentences whereas certain types of homicide are treated relatively leniently. This would appear to reflect the orientation of the Soviet legal system toward the preservation of its economic and social system, rather than, as in the United States, toward the protection of individual rights.⁷

The inconsistency of the American system which punishes personal crimes more severely than property crimes is understandable when considered in light of its total social system. Whatever ambivalences exist, it is clear that non-violent crimes of property must be handled punitively, at least to the extent necessary to maintain the legitimacy of both our system of property rights and our system of law. The latent admiration of Americans for "Robber Baron" types may never disappear from our culture. Nevertheless, if our economic system is to be conducted in an orderly fashion, and if prohibitions on assaultive crimes are to be viewed seriously, then it is mandatory that there be reasonable enforcement of the laws relating to white-collar offenses.

As the public conscience increases in sensitivity criminal sanctions will be extended to manipulations which are now considered unsavory but not illegal. The basic theory behind the newly developing field of poverty law⁸ is founded on the extension of our criminal laws to include specific actions of landlords against tenants, and merchants against customers that have previously never been considered illegal. Can a landlord, for example, continue to demand rent from his tenants if he has previously

⁶ While many political theorists have attacked the American economic system and consequent property arrangements as illegitimate in terms of natural justice, no one has seriously suggested that the types of fraud usually encompassed by the term "white collar crime" are justified as an attempt to remedy economic inequality. The embezzlers and stock manipulators have not yet produced their George Jackson.

⁷ See H. Berman, *JUSTICE IN THE U.S.S.R.* (1963); John N. Hazard, *THE SOVIET LEGAL SYSTEM* (1969).

⁸ See J. TEN BROEK, ed., *THE LAW OF THE POOR* (1966).

failed to provide the agreed-upon level of services? Can a merchant misrepresent the quality of the merchandise he is selling, and demand continued performance of a time payment contract where the goods in question have already deteriorated? This type of activity is significantly permissible at present. The modern trend, however, would appear to be making this type of conduct illegal, and as such is indicative of our belief that even the non-assaultive crimes involving property are a diametric threat to the viability of our society.

Our penal laws contain prohibitions against both assaultive crimes against persons and property and non-assaultive crimes against property. Assaultive crimes offend our notions of natural justice and non-assaultive property crimes undermine our economic system. The penal code contains, however, strictures against a number of modes of conduct which are included because of a relatively parochial cultural determination that they are immoral: drinking, gambling, homosexuality, doing business on Sunday, prostitution, drug addiction, abortion, etc. At the time these prohibitions were enacted, the particular legislative majority which enacted them doubtlessly felt that they were preventing subversion of the legitimate social system that existed; yet, many societies quite similar to ours do, in fact, tolerate such prohibited conduct or handle it non-punitively. Many of our so-called parochial regulations are, moreover, both inconsistent and incomplete in their regulatory schemes. Prostitutes are punished, for example, but not their customers; heroin is forbidden, but not certain amphetamines; football wagering is prohibited; but not horserace wagering.

Deviance: Sin

Many types of conduct were originally thought of as sinful, and *religiously* prohibited. Our use of secular law to regulate conduct is a result of a policy established at a time when the authority of the state was used to enforce the rules of an established church. Although that epoch is long past, we still can perceive our cultural heritage most clearly in the laws we inherited from the Puritan theocracy in New England. We maintain (or have maintained in the recent past) laws against blasphemy, obscenity, contraception, Sabbath-breaking, extramarital sexual relations, lewdness, homosexuality, gambling, and drunkenness.⁹ We have further

⁹ For an excellent discussion of the philosophical problems involved in these areas, see: *Miller v. California*, 93 S. Ct. 2607 (1973); *Roe v. Wade*, 410 U.S. 113 (1973); *Doe v. Bolton*, 410 U.S. 179 (1973); *Stanley v. Georgia*, 394 U.S. 557 (1969); *Ginsburg v. United States*, 383 U.S. 463 (1966); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Robinson v. California*, 370 U.S. 660 (1962); *McGowan v. Maryland*, 366 U.S. 420 (1961); *Gallagher v. Crown Kosher Market*, 366 U.S. 617 (1961); *Roth v. United States*, 354 U.S. 476 (1957); see also, *Symposium: The Right to Treatment*, 57 *Geo. L.J.* 673 (1969).

inherited a distrust of self-indulgence and hedonism: even a wealthy individual is expected to be constructively, if not gainfully employed.

Actually, our heritage is a reflection of a cultural milieu where religion existed as a dominant element. As our culture has changed, as religion has waned in importance, as our economic system has developed, as scientific discoveries have occurred, and as improved communications and the development of the mass media have reduced both social and cultural isolation, our feelings about what constitutes sin have undergone a marked reevaluation. Certain behavior, such as blasphemy, has become virtually acceptable today; other behavior, such as the use of heroin, is still prohibited. Our feelings about other forms of conduct, such as gambling, drinking, homosexuality and abortion,¹⁰ have become highly ambivalent. Particular modes of this conduct are still subject to criminal sanctions. However, certain modes are not. If we remove the religious component, the criterion for judging whether the particular conduct in question should be forbidden should be determined by whether there is *any demonstrable, objectively measurable social harm resulting from such conduct*. To determine this, each mode of conduct must be separately considered, and evaluated. If this were a totally rational world, we would expect that there would be a correlation between the prohibition of conduct and its objective harmfulness. Unfortunately, this is not a totally rational world, and the correlation can not be established.

Of all the various modes of conduct in this culturally determined category, drinking is probably the most detrimental while also the most widely accepted. Alcohol is involved in at least half of all fatal automobile accidents, a majority of private airline crashes, thousands of industrial accidents, millions of lost man-days annually, etc. We have approximately seven million alcoholics in the United States who are unable to support their families, perform their jobs, or function normally in the community. Alcohol use is involved in 55 per cent of the arrests made by the police in the United States.¹¹ From a medical point of view, even moderate drinking puts a strain on the liver, and complicates many other diseases such as diabetes and heart disease.

Yet alcohol consumption is widely accepted in the United States today, and absolute abstainers constitute only a small minority of the population. Historically, the temperance movement waxed and waned in strength for over a century before it culminated in the "noble experiment" of prohibition in 1920. Within a few years after the enactment of the 18th amendment, however, it became apparent that prohibition was a

¹⁰ Note for example, attempts by Connecticut and several other states to avoid compliance with *Doe v. Bolton* and *Roe v. Wade*.

¹¹ President's Commission on Law Enforcement and Administration of Justice. *Task Force Report: Drunkenness* (1967).

disaster and since repeal in 1933, the temperance movement appears to be all but moribund. Drinking thus, has been handled both coercively through the criminal sanction (in the past) and non-coercively (at present), and while our current non-coercive approach has fewer adverse side effects in the form of enforcement difficulties and police corruption, nevertheless, alcohol abuse still presents an enormous problem which has not been reflected in the public attitude toward it.

Even of a greater permissive nature than our attitude towards drinking are our feelings about cigarette smoking and overeating. The medical evidence against both smoking and obesity is overwhelming. Although both are major public health problems, to forbid such conduct by law would be both ludicrous and horrifying in terms of civil liberties. Even attempts to regulate cigarette advertising have met with tremendous resistance. While there is considerable consensus that people ought not smoke or get obese, many, if not a majority of the population do. The number of Americans who neither smoke nor are overweight is probably a minority, yet, medically and sociologically speaking, both are serious harmful practices.

In contrast to drinking, smoking and overeating, there is no medical evidence that moderate marijuana smoking is harmful, nor is there medical evidence of physiological harm due to reasonable heroin consumption.¹² However, it is undoubtedly true that many heroin or marijuana users exhibit undesirable psychological symptoms. It is unclear, however, whether these symptoms are a result of drug use, or whether both drug use and behavioral dysfunction result from a prior existing pathological, psychological or sociological condition. Most of the other adverse sociological effects of drug use such as crime, prostitution, etc., are a consequence of our present coercive handling of the drug problem rather than drug use per se.¹³ In terms of societal attitudes, however, there are few modes of conduct that are looked upon with more social disapproval than heroin use, and only recently is a similar attitude toward marijuana lessening. Our method of handling drug use has, moreover, in certain respects been precisely opposite from our method of handling alcohol: alcohol, which formerly was handled punitively is now handled non-punitively; opiates and marijuana which were formerly handled non-punitively are now handled punitively.

Neither punitive handling nor extreme social disapproval has produced a decline (or even a stabilization) of the number of marijuana and heroin users in the United States. Where, in 1967, it was estimated that there were one hundred thousand heroin addicts in the United

¹² See BECKER, *supra* note 1.

¹³ For the best discussion of drug use and its attendant problems see Edward M. Brecher, et al., *LICIT AND ILLICIT DRUGS* (1972).

States, of whom fifty thousand were in New York City, five years later the estimates had precisely tripled: three hundred thousand in the United States and one hundred fifty thousand in New York City.

In contrast to our attitudes towards alcohol and drug use, which have fluctuated between acceptance and rejection, our attitudes towards deviant sexual conduct have become consistently more permissive. During the 18th and 19th centuries in the United States, the etiquette of behavior between men and women reflected a society that placed a high value on pre-marital chastity and monogamy. Divorce was frowned upon, and pre-marital sexual intercourse (except possibly for young men who were sowing their "wild oats"), was strictly prohibited. Prostitution, at least from the middle-class point of view, was considered degrading and abhorrent, and the "fallen" woman became a stock figure in literature. In the same period, homosexuality seems to have been considered so dreadful that there appears to have been neither public discussion of the subject nor literary reference to the problem, with the exception of some very guarded indirect references.

Presently we have become permissive with regard to pre-marital sex; we tend to sanction divorce; we have ambivalent attitudes toward prostitution; and, we are slowly coming to a reluctant acceptance of homosexual conduct. Certain of these attitudinal changes have been reflected in changes in either the criminal law or its application; others have not. Nevertheless, few individuals would dispute the proposition that our attitudes towards sexual conduct have changed substantially, even if the conduct in question has not.

To understand this phenomenon one must appreciate that the older rules for sexual conduct were established in a society which had vastly different needs: until the 20th century the need was for more population rather than less; venereal disease was an uncontrollable plague, and production of goods and services was directly dependent on the family in a system that no longer exists. Twentieth century advances in public health and medical knowledge have changed much of this.

Medical knowledge and technology have reduced the previous rationale for monogamous units to antiquity. Where one hundred years ago, a couple might have to produce ten or a dozen children in order to remain with four or six live adult children, today the parents of two can reasonably expect to raise both children to adulthood. Where, previously men buried two or three wives in childbirth, and women survived two or three husbands killed by typhoid, yellow fever, or industrial accidents, the thrice-married individual today is most likely to be a divorced rather than a widowed individual. Where sexual promiscuity previously produced an unwanted pregnancy, or even the more unwanted venereal disease, with minimal care today's so-called promiscuous individual need suffer neither; and if he or she is careless, the consequences may still be avoided through

abortion and medical care. Perhaps most significant of all is that where formerly children represented a source of income and social security for one's old age, children today are economic liabilities, at least until they reach adulthood, and sometimes thereafter.

In the face of these substantial scientific and technological changes, it is understandable that many of the older rules of sexual conduct are anachronistic. This is not to say that our commitment to monogamous unions, as the basis of our family structure, has decreased. Nor does it imply that actual sexual practices (as opposed to the accepted social standards for what those practices should be) have changed very much. What it would appear to indicate is that deviation from these sexual norms is accepted more readily and less fearfully than was previously the case. We are no longer hysterically defensive about our rules of sexual conduct because we no longer see deviations from those rules as subversive of the entire social order. We no longer need a strict sexual code to provide for population maintenance or growth, industrial or agricultural production, or as a prophylactic against rampant venereal disease. Our family structure, and thus our sexual code, is adhered to more for the fulfillment of the individual than for societal needs. Under these circumstances the desire of some individuals to find personal happiness through pre-marital sex, homosexuality, prostitution, etc., becomes less terrifying and, if not acceptable, is at least understandable.

Gambling, however, is a mode of conduct which probably has come closest of all to casting off the stigma of immorality inherited from the past. American attitudes toward gambling have always been ambivalent. We even find during the Puritan period mention of gaming and lotteries at the same time the churches were exhorting against such worldly pleasures. Gradually, however, our attitudes have mellowed towards gambling as a result of a general relaxation in the personal standards of behavior, and possibly because of the possibilities of relief for the hard-pressed taxpayer through state-sponsored lotteries. In any case, at the present time, not only does Nevada have legalized gambling, and New York State have O.T.B. (a public corporation to conduct off-track betting), but increasingly the criminal justice system is refusing to apply its resources to enforce anti-gambling laws. The police protest openly at the futility of picking up insignificant gamblers who are engaged in no more than the employees of O.T.B. (off-track betting).¹⁴ Further, the courts handle such gamblers as are prosecuted in a perfunctory and minimally punitive manner.

The substantial change in public opinion, the negative attitudes of police and prosecutors toward gambling law enforcement, combined with

¹⁴ Statement by New York City Police Commissioner Patrick Murphy, Police Department Public Information, Press Release No. 111, November 18, 1971.

public awareness of the fact that illegal gambling is a major source of income for organized criminal syndicates, appears to be hastening the day when many if not all gambling statutes will actually be repealed. There is virtually no effective interest group in the United States today that has espoused the cause of retaining gambling laws. Public apathy and the fear of criticism by zealots are apparently the major factors retarding legislative repeal today.

Deviance: Poor Taste

In contrast to actions which are considered crimes and/or sins, there are some aspects of human behavior which are considered matters of taste, and which even when disapproved, are rarely regulated by law. Manners and style are subdivisions within this category. Pants on women were once an object of scandal, and girls' bobbed hair during the 1920's was viewed as dubiously as boys' long hair in the 1960's. In Puritan New England it was a misdemeanor for a man and woman to kiss in public even if they were married; today, we hardly pause over more overt expressions of affection, although we become increasingly offended as the conduct becomes more explicitly sexual. Adults smile benignly at little Boy Scouts and Girl Scouts in their uniforms, but glare at black-jacketed Hell's Angels and similarly dressed members of black and Puerto Rican youth gangs. Frenchmen may kiss each other heartily; American men may not. It has become well accepted by our society to wear a cross or a mezuzah, but a swastika armband, a hooded sheet, or a clenched-fist salute are perceived with considerable hostility and, under certain circumstances, are forbidden by the authorities.

To the visitor from the planet Mars these inconsistencies can be very confusing. Why, for example, is it permissible for adults to wear skimpy bathing suits in public but never their underwear? To our populace, however, it is not confusing at all, although few people when pressed could rationalize all the idiosyncracies of manners and style that go to make up taste. It is clear that to a vast degree these modes of conduct are cultural accidents. Pants are no more ordained by nature for men than skirts are for women, and in some tribal societies men wear skirts and women pants. There is nothing in the shape of a cross that necessarily suggests Christianity, nor in the shape of the swastika that necessarily suggests Fascism. Handshaking is neither more nor less rational as a method of greeting than a kiss on the cheek, or a deep curtsy. While such deviations in conduct may be irrational, the inferences drawn from them may be highly rational. The wearing of the swastika by American fascists is a reliable indicator of a belief in racial inequality, along with a totalitarian system of government, etc. A man who appears in public in a woman's dress is probably a sexual deviant. What we object to in these modes of conduct, therefore, is that they suggest or anticipate other actions to which we take exception.

Certain modes of conduct are in a sense symbolic conduct, symbolic of some type of overt action to which there is or may be a rational objection. Thus, the objection to the swastika is in reality an objection to fascism, and the more closely the swastika is related to fascism, where we object to fascism as a mode of conduct, the more we will object to the swastika. Many modes of dress are objectionable because they appear to anticipate undesirable sexual conduct: slacks and bikinis on women, long hair and feminine-looking clothing on men. Interpersonal conduct, that is, modes of greeting and communicating with each other, are evaluated by our interpretation of the hidden messages those modes send out. When attempts are made to change matters of manner and style, objection is frequently vigorous because such changes are considered as a precedent to changes in more serious forms of non-symbolic conduct.

At the point where the symbolic conduct is recognized as having lost its symbolism its opposition often dissipates. In Victorian times a woman who showed her ankles freely was considered a fast woman, aggressively inviting promiscuous conduct. When enough women started to wear short skirts without the anticipated undesirable sexual conduct resulting, short skirts became acceptable. The first men wearing long hair in the current style were considered to have homosexual tendencies. When the majority of young men adopted the longer hair style, long hair as a symbol of homosexuality disappeared.

The problem with regard to matters of taste is to recognize, first of all, that they are cultural accidents and may be intrinsically quite irrational. We must also recognize, however, that such conduct is symbolic conduct and may be the surface manifestation of invariably more meaningful attitudes and actions. In regulating matters of taste the problem is to comprehend when the surface conduct is truly symbolic, and when it has lost its symbolism. If the symbolism is extant, and if the conduct to which it refers is truly detrimental, then it is conceivable that even symbolic action may need to be regulated socially.

If deviance then, does not lie entirely in the eye of the beholder, what is it? Albert K. Cohen defines it as "behavior which violates institutionalized expectations . . . expectations which are shared and recognized as legitimate within a social system."¹⁵ This is an admirable definition, but in practical terms its difficulties lie in determining precisely what the institutionalized expectations are and how legitimate their existence is. Nevertheless, in many situations there is widespread agreement, even by the actor himself, that a particular mode of conduct

¹⁵ A. Cohen, *THE STUDY OF SOCIAL DISORGANIZATION AND DEVIANT BEHAVIOR*, in *Sociology Today; Problems and Prospects*, 462 (Robert K. Merton, Leonard Broome and Leonard S. Cottrell, Jr., eds., 1959).

is deviant. Burglars know that what they are doing is wrong, cigarette smokers know they are ruining their health, alcoholics know they are bringing grief to themselves and their families, fat people know they are shortening their lives, and drug users know that their euphoria is false and that addiction is really an unsatisfactory way of surviving. Why then do people rob, drink, smoke, overeat, and take drugs? If they themselves recognize the legitimacy of society's institutionalized expectations, why do they engage in modes of conduct which violate those expectations? They deviate because society places tremendous stresses on every individual, and when those stresses become too great, individuals make adjustments in their conduct which may, from a medical, psychological, or sociological standpoint be highly unsatisfactory, but which may nevertheless be the optimum that they are able to achieve at that particular moment. *Deviance is, in short, an attempt to cope. From this point of view, almost everyone is deviant in some respect.* Almost everyone smokes, overeats, drives too fast, drinks too much, or does something else which is personally or socially destructive.

Deviant conduct, moreover, is not necessarily related to personality abnormality. That is, if each individual who acted in a deviant manner were considered abnormal, the definition of abnormality would be so broad as to be virtually meaningless. Without becoming involved in the ongoing controversy over what constitutes personality abnormality, for our purposes, we shall define as psychotic an individual who is out of touch with reality with respect to time, place or circumstance. All other individuals, *i.e.*, all those who are in touch with reality are non-psychotic. Within this non-psychotic group there are numerous neurotic individuals, *i.e.*, individuals who can cope with reality but at some psychic cost. Some neurotics develop facial tics; some develop stomach ulcers; others indulge in various forms of deviant behavior. It is difficult to determine in any particular group which individuals are neurotic and which are not, partly because the criteria for neurotic behavior are ill defined, and partly because neurotic and normal behavior are not clearly separated from each other, but in fact form a continuum. The kinds of deviant behavior we have been analyzing exist throughout society and are widely dispersed among all groups: psychotic, neurotic and normal. However, the degree of social destructiveness exhibited by various kinds of deviant behavior is not necessarily related to the degree of personality disorganization of those performing such behavior. The Puerto Rican boy in the *barrio* who conforms to the drug-taking habits of his peers may be far less "neurotic" than the successful entrepreneur who is thirty pounds overweight and smokes three packs of cigarettes a day.

The foundations of deviant behavior, thus, lie not so much in personality as in society. It is the stresses that society creates interacting with the personality of a given individual that is the determining factor

in behavior, whether deviant or otherwise. This is not to imply, however, that deviance is mechanically foreordained by the individual's place in society. While there probably exists a causal relationship between poverty and crime, for example, not every poor person becomes a criminal, and middle-class children with every advantage sometimes do become criminals. No individual, no matter how demanding the claims that society makes upon him, ever entirely escapes some degree of personal responsibility for his behavior. It may be very difficult for an individual to avoid socially disapproved, or socially destructive conduct, but the fact that individuals under the most adverse circumstances have survived crushing pressures is indicative of the fact that behavior is more than mechanically determined. The assumption that there is some area in which free will operates with regard to human behavior is, moreover, an assumption that is absolutely basic to any type of free society. To deny this assumption is to accept the legitimacy of infinite bureaucratic manipulations of individuals for their own so-called "good." If an individual is a robot, then "Big Brother" must be the robot-master. It is the continuing belief that the individual manifests a certain value and is able in some degree to affect his personal destiny which vigorously preserves any democratic faith.

If deviant behavior, thus, is an attempt to acclimate, the precise form that deviance manifests depends on the total circumstances of the individual concomitant with the opportunities that his culture provides him. Ninety-eight-pound weaklings do not become burglars because it takes physical strength, coordination and stamina to be a competent burglar. Adolescents with difficulties in isolated rural communities may burn down barns, but they do not become drug addicts because drugs are not available in such communities and barns are. Jews seldom become alcoholics but have a strong tendency to overindulge in food. Food rather than drink will normally be chosen as the vehicle for deviance simply because it is a form of deviance more acceptable to Jewish culture. Deviants, on the other hand, who wish to shock society by their behavior will choose a mode of conduct that is as abrasive or unacceptable as possible. Thus, rebellious adolescents in our culture will smoke hashish and in a Moslem society will drink whiskey. Before the discovery of tobacco there were no smokers; before the development of the distillation of spirits only wine and beer were consumed. In the 19th century Jesse James held up railroads and stagecoaches. Today we have airplane hijackers. Our social culture provides the mechanism for deviance as well as the pressures that create deviance. The individual's personality, physical make-up and environment determine the form that the deviant conduct will assume, or whether an individual will become deviant at all. Aggressive tendencies, for example, may, in the ghetto, be translated into rape or assault; in a middle-class community they may be transmuted into the ambition that leads to professional accomplishment

and advancement; in a wartime army, such aggression may produce a Congressional Medal winner.

While insight into the nature of deviant conduct and its causes is interesting intellectually, in practical terms such insight is useful primarily in answering the most important question of all: What do we do about deviant behavior in society? This question is essentially similar to the new mother's inquiry about what to do with her crying baby. What one does about a crying baby depends upon why the baby is crying; what society does about deviant conduct depends on what kind of adaptation the deviant is attempting to make by his deviance.

Conclusion:

By and large efforts to control deviant conduct by reforming the individual involved have not succeeded. Such efforts fail because the roots of deviance lie in the individual's effort to acclimate to social and psychological pressures that he cannot manage by any other means. If these pressures cannot be relieved deviant conduct will not cease because of exhortations on the part of well-meaning therapists and social workers. To recognize the limited value of exhortation, however, does not mean that we can or should cease our attempts to structure a rational policy for the control of deviance. If the foregoing analysis is correct, certain conclusions seem implicit.

1. The most serious form of deviant conduct is crime. In the handling of criminals we must recognize that physical punishment, such as imprisonment, serves almost one function exclusively: restraint.¹⁶ Putting a man in prison effectively takes him off the streets, and keeps him away from the rest of the community. This is a policy which is entirely appropriate for all offenders whose conduct is violent or potentially violent. No viable community can exist if this type of offender is permitted to remain at large. We must recognize, however, that imprisonment is simply a holding action, and does little or nothing towards reforming the criminal himself. This fact is borne out by statistics relating to the careers of those who have been released from penitentiaries, as well as the testimony of thousands of convicts and ex-convicts. Imprisonment, on the whole, tends to embitter the prisoner and educate him toward new and better means of committing crime. Again, this does not mean that we should destroy our penal institutions or abandon incarceration as a means of punishment for criminal acts. It simply means that we must understand that we are keeping wild animals in the zoo but not taming them.

It follows then that imprisonment, except for the purpose of protecting the community from the offender, is utterly pointless. To put

¹⁶ See MENNINGER, *THE CRIME OF PUNISHMENT* (1966).

gamblers, pornography peddlers, non-violent drug users, alcoholics, and homosexuals in prison is farcical at best and sadistic at worst.

2. To reform the deviant as opposed to simply restraining him, some sort of non-physically coercive pressure must be applied. This pressure may take various forms: for example, for criminals, probation or parole counseling, educational or vocational rehabilitation, or psychiatric therapy; for alcoholics, Alcoholics Anonymous, individual or group counseling or chemotherapy; for drug addicts, drug-free communities such as Synanon, heroin or methadone maintenance programs, psychotherapy, etc. The degree of success that these programs are likely to have depends, at least in part, on how successful the therapist is in educating the offender in managing his problems by means other than through the conduct that we find objectionable. Unfortunately, the reality of the deviant's situation may frequently be the strongest impediment to reform of his conduct. Probation and parole workers, for example, are frequently unable to convince the incompetent burglar that he would be better off as an honest man, because the truth of the matter is that (especially if he is semi-literate, poor and black), he may *not* be better off if he were an honest man. It is hard to convince such an individual that he should not desire material affluence when the entire society around him is structured in praise of material affluence. Under these circumstances, we must recognize that unless we give up our materially oriented society (which is highly unlikely), or we reduce the disparity of status and opportunity between the bulk of our population and the poor (which at this moment seems only a little less unlikely) we are not likely to achieve any real degree of success with probation and parole.

The same principles apply in the handling of drug addicts and alcoholics. If we cannot relieve sociological and psychological pressures that force such people to take refuge in the surcease provided by such consciousness-altering chemicals, alcoholics and heroin users will continue to remain addicted. Again, the roots of such conduct frequently lie in the well-known evils of poverty, racism, broken homes, etc. Again, long-range social efforts to control such conditions are mandated if we expect to eradicate this type of conduct.

3. The amount of pressure, coercive or non-coercive, that society should apply to a deviant depends on how destructive his conduct is to the entire community. This destruction must be tangible and demonstrably measurable rather than a behavior preference that exists in the minds of some or many individuals. Violent criminals, as indicated above, must be restrained. With regard to others, the extent of the pressure should vary from intensive efforts in behalf of alcoholics and drug addicts whose conduct manifests itself in intense pain and suffering to their families as well as to themselves, to relatively mild pressures on overeaters or smokers. While it is true, for example, that overeating and smoking are

physically harmful, it is also true that in the absence of a Utopian society the pressures which are generated upon each individual must have some outlet, and to abrogate an outlet like smoking or overeating may simply force an individual into some other tension-releasing syndrome which may produce more destruction or deviance. A certain amount of tolerance toward mildly deviant conduct is probably essential in a society as complex and imperfect as our own.

4. In the light of the above, it is apparent that we should resort to the criminal process sparingly and as a final solution to the managing of deviant conduct. Punishment, after all, is only a makeshift measure. We divert the offender off the streets in order to provide the community with a breathing period, or in the hope that the offender will eventually grow physically or emotionally weak as he matures and will lack the energy to continue his anti-social conduct. All deviants cannot be accommodated by these means. If society perceived this as its only solution it would be not only an enormous waste of social resources and the human talents that accompany these resources, but would be destructive of the basic ideal of an open, free, pluralistic society. If we are not going to imprison, there is far less impetus for the use of the criminal process. Drug addicts and alcoholics, for example, can be managed, at least as effectively, medically. Gamblers and homosexuals probably should not be considered at all, except insofar as they seek assistance, since their conduct is only minimally destructive to the community at large.

To sum up, deviant conduct is ubiquitous in a society such as ours. While to some extent, deviance lies in the eye of the beholder, certain forms of conduct which are objectively and measurably harmful to the community, or which violate rational institutionalized expectations, are always deviant. The roots of deviance are fostered in sociological and psychological pressures generated within the individual by social forces frequently beyond his control. Since, however, the very concept of a free society is based on the responsibility of each individual for his own conduct, the responsibility for the control of deviant conduct lies with both the individual and the community at large.

Deviance is an attempt, on the part of the individual, to survive the pressures that beset him and he can be neither punished nor persuaded out of or away from his unacceptable conduct unless alternative methods of existing are feasible and made available to him. Physically coercive punishment must be used only as a last resort and for the protection of the community, for it has almost no rehabilitative effect, and serves in fact only to keep the offender outside of the community. It is for this reason the criminal process should be reserved almost exclusively for those individuals who either must be restrained at all costs, or whose conduct is so seriously disruptive of the peace and good order of the community (such as swindlers and embezzlers who commit non-violent

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property crimes) that rehabilitative counseling should be carried on in a semi-coercive setting, such as probation. For all others, we should either attempt education and persuasion by appropriate therapists; or for those whose conduct harms really no one but themselves, *we ought to leave them alone*, recognizing that to some extent we are all deviants.

