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Dangerousness: A Theoretical Reconstruction of the Criminal Law

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DANGEROUSNESS: A THEORETICAL RECONSTRUCTION OF THE CRIMINAL LAW

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PART I**

Evening Twilight

HERE'S the delightful evening, the criminal's friend. It comes like an accomplice, with slinking wolf-like strides. The sky shuts slowly like a great alcove, and restless man turns into a wild beast.

O evening, pleasant evening, desired by him whose arms can truly say: 'Today we have toiled!'—Evening refreshes minds devoured by savage grief, or the poring scholar whose head begins to nod, or the back-bent workman returning home to bed. But now mischievous demons rouse lumpishly in the air, like men intent on business, and flounder in their flight against shutters and sheds.

Through glimmering gas-jets wincing in the wind, Prostitution lights up in the streets, like an ant-heap opening all its entrances and exits; it weaves its furtive passage everywhere, like an enemy planning a surprise attack; it burrows through the city's slime like a worm filching away men's food. Here and there you hear the whistling from kitchens, yapping of theatres, droning of orchestras; the cheap joints whose main attraction is gambling are filling with whores and their crony crooks, and the thieves, as well, who show no signs of idleness or mercy, will soon be setting to work, tenderly forcing doors and safes, so as to keep themselves for a few days and buy togs for their molls.

O my soul, withdraw into yourself at this grave hour, and stop your ears against this roaring din. It is the hour when the pangs of the sick grow sharper. Cheerless Night clutches them by the throat, they reach their destiny's end and draw nigh to the universal pit: the hospital is brimming with their sighs.—More than one will never again return to take the fragrant soup at the fireside, of an evening, beside the one he loves. And besides, most of them have never known the solace of a home and have never lived!

BAUDELAIRE (1852)

INTRODUCTION

THIS essay is an attempt to put together the outline of a theoretical reconstruction of the criminal law fully utilizing the concept of dangerousness. In doing this I have tried to look at both the existing structure and the ideal

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** The *Review* expects to publish Part II in a future issue. An introduction to Part II is set forth at the end of this essay.

structure in a broad way, and take into account what is known and what is reasonably suspected by empirical evidence. I have covered a good deal of ground because there is much ground to cover; the criminal law must be understood as a whole before it can be understood at all.

The essay begins with a look at the existing structure of the criminal law (the normal version) from a slightly different perspective. The normal version is founded on a series of propositions: dangerous behavior should be criminal; criminal behavior means the actor is dangerous; dangerous actors should be punished. I will try to show that these propositions are far too rigid to perform the proper functions of the criminal law, that they depend on a system of inferences which all but destroys the apparent reliability of the normal version, and that they are inconsistent with a rational conception of what disposition of offenders is supposed to achieve. Many of these shortcomings of the normal version show up when one compares uncompleted criminal conduct (attempt) with the theoretical concern of civil proceeding to commit the mentally ill. I will try to show that both these processes depend on an explanation of essentially ambiguous phenomena: physical behavior in the case of uncompleted criminal conduct, mental state in the case of civil commitment. Finally, I will argue that the weakness of the normal version derives in part from its failure to appreciate the significance of rejecting the notion of punishment as an end in itself. Once this notion is rejected modes of disposition can only be justified by their relation to some goal, such as the prevention of future criminal behavior.

A radical reconstruction of the criminal law must always take account of the moral foundations of the normal version as well as moral objections to the consequences of radical revision. This I have tried to do principally by responding to the claims that the revised version eliminates all notions of responsibility, is contrary to the interpersonal expectations of people living in Western societies, is damaging to the humanist conception of man as an end in himself, opens the door to arbitrary official interference, and has the effect of abolishing the ancient moral distinction between guilt and innocence. Necessarily, many of these claims require the preservation of the deterrent function of the criminal law, so I will examine again some of the more sophisticated defenses of the normal version in terms of deterrence. In particular, I will deal with the claim that the normal version performs a socializing function essential to the maintenance of social order, a claim which I will counter with some observations about the etiology of criminal behavior.

Earlier sections of this essay omit discussion of the question of what conduct should be considered dangerous in order to deal more clearly with the structure of the normal version. I will take this up following my discussion of deterrence. The question of what conduct should be dangerous will be examined from two perspectives: from the perspective of the individual in society (the "subjective" view) and from the perspective of society as a whole (the "objective" view). From both perspectives I will argue that the crucial criterion is

whether any particular mode of behavior generates fear rather than anxiety,[1] and does not merely cause annoyance or lend itself to some moral objection. In the course of this discussion I will also deal with the problem of the individual who is "dangerous to himself."

In the criminal law "dangerousness" should operate as the fundamental criterion in the formulation, application and execution of legal norms. Under the present system "dangerousness" is to some extent used in this way, but failure to appreciate the significance and usefulness of the concept results in a haphazard choice of means to social value ends, and a misplaced reliance on the "logic" of the system once it is set in motion. The concept of dangerousness implies a systematic orientation toward the prevention of future harmful conduct rather than a simple reaction to past events. In turn, a futuristic orientation implies a functional rejection of the notion of criminal responsibility as presently conceived.

I

In the traditional criminal law—which I shall call the normal version[2]—the concept of dangerousness justifies the legislative designation of specific behavior as criminal. That is, the legislator perceives a given mode of behavior as being dangerous to a given social value, and translates this perception into a norm proscribing that behavior. For example, the supposed danger inherent in an agreement between two or more persons to commit an illegal act justifies designating the agreement itself as a crime.[3] It then follows, in the normal version, that a particular actor is considered dangerous because he has engaged in the conduct legislatively designated as criminal. Since the behavior is criminal because it is dangerous, the actor, under the normal version, is himself considered dangerous and therefore liable to punishment. This sequence of propositions in the normal version may be stated in the following way: The legislative perception of dangerousness leads to criminal statutes; engaging in criminal behavior means the actor is dangerous; dangerous people should be punished.

Any one of these three propositions may be the subject of controversy: One may dispute the perception which leads to the criminal legislation; one may dispute the inference that the existence of a provable crime means the person is dangerous; or one may dispute the conclusion that dangerous people should be punished. In a later section[4] I will deal with the first area of controversy, but for the present I will focus on the inference of dangerousness from criminality and the conclusion of punishment.

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1. This distinction is developed at p. 23 *infra*.
2. The phrase is borrowed from J. GALBRAITH, THE NEW INDUSTRIAL STATE, ch. XIX (1967) and M. KADISH, REASON AND CONTROVERSY IN THE ARTS, ch. 2 (1968).
3. MODEL PENAL CODE, Tent. Draft No. 10 (1960), comments to § 5.03. *Cf.* United States v. Robel, 389 U.S. 259 (1967).
4. *See infra* p. 21.

II

If the normal version sequence of propositions operated logically, then in all cases of provable crime the inference of individual dangerousness would be drawn. Conversely, the absence of a provable crime would preclude such an inference. Only in this posture would the normal version be a mechanical system through which people with a potential for dangerous behavior are "distinguished" from the general population by a provable crime.

If the phrase "provable crime" referred only to the "act" implicit in the notion of dangerous behavior, it would be simple to show that the normal version does not operate as a logical system because not all people who engage in the same criminal "acts" can be regarded as equally dangerous. However, to retain the logic of the system the normal version incorporates into criminality the notion of mens rea which, it claims, distinguishes the dangerous from the not so dangerous as a matter of degree. Thus the normal version claim remains that an inference of dangerousness can be logically drawn from the fact of a provable crime as defined by the normal version. By definition, then, an actor who was under duress, or who had been provoked, or who was in a position requiring self defense, or who is immature, cannot be regarded as dangerous to the same degree as other criminal "actors." If the concept of mens rea is required in order to distinguish the dangerous from the not-so-dangerous and the non-dangerous as a matter of degree, the narrow question is whether the concept itself renders normal version inferences of dangerousness sufficiently reliable. Would a revised version which made an independent estimate of dangerousness, using the fact of a provable crime as a datum (whatever that may come to mean), be more reliable in terms of distinguishing the potentially dangerous from those who are not? I will leave these questions until a full account of the normal version has been set out.

III

The normal version requires that criminality be the sine qua non of dangerousness. That is, provable crime (as defined by the normal version) is the necessary condition to a finding of dangerousness. But even the normal version recognizes that there are people and modes of behavior which appear to be highly threatening even though no provable crime exists in the normal version sense. As in the case of "non-dangerous criminal acts," the normal version handles the "dangerous non-criminal act" by redefining the notion of a provable crime in order to bring within its logic those people who are "mentally" dangerous but who have not committed a criminal "act."

The effort to stay within the logic of the normal version is exemplified by the definition of "uncompleted criminal conduct" as fully developed by Professor Wechsler and reflected in the Model Penal Code.[5] According to this theory, non-

5. Wechsler, Jones, and Korn, *The Treatment of Inchoate Crimes in the Model Penal*

criminal *conduct* is explicitly considered to be merely a datum from which dangerousness may be inferred as a pre-condition to finding a provable crime. That is, a finding of dangerousness depends on the "criminal purpose" of the individual (his "intent" in normal version terms) as inferred from the absence of substantial ambiguity in the datum-conduct.[6] In this situation a double inference is required. If the defendant's datum-conduct is unambiguous in the sense that it is the kind of conduct which cannot be rationally explained except in its relation to completed normal version crime, the conduct itself may be considered dangerous and therefore constitute a provable crime in the proscriptive legislative sense.[7] If found guilty of an "attempt" dangerousness may again be inferred: The fact of a provable crime means the actor is dangerous.

The strain on the normal version from this formulation of uncompleted criminal conduct is apparent. No "act" is legislatively made criminal prior to the event. Instead, an ad hoc "legislative" type judgment must be made as to whether or not the conduct in question is unambiguous in its relation to a normal version crime. The conduct becomes dangerous in the legislative sense because it cannot rationally be explained otherwise than in its relation to "completed" criminality. Once the conduct in question is found to be dangerous in this legislative sense it becomes a normal version crime. Since mens rea is essential to a conviction, it may simply be inferred from the dangerousness of the conduct. However, in this situation mens rea is in no sense an additional factor "discovered" as a prerequisite to conviction, but a justification built into normal version attempt. The normal version can then claim, as it does in other

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Code of the American Law Institute: Attempt, Solicitation, and Conspiracy, 61 COLUM. L. REV. 571 (1961).

6. The Wechsler formulation requires that the act be "a substantial step in a course of conduct" and be "strongly corroborative" of criminal purpose. I cannot see how this formulation avoids tautology. If the act (taken as a unit) is a substantial step in a course of conduct which is clearly criminal, it is necessarily strongly corroborative of a criminal purpose. If an act is strongly corroborative then it is, by definition, a substantial step. The all important criminal purpose is established by inference from conduct which is a substantial step, i.e., conduct which is strongly corroborative. Thus the Wechsler formulation, while appearing to be defining two distinct elements which are established by independent data, really only requires a single element: conduct which is relatively unambiguous in its relation to completed criminality. Lack of ambiguity entails the conclusion that the conduct is a substantial step, and clears the way for an inference of criminal purpose. Mens rea, in Wechsler's law of attempt, is a pure fiction.

Furthermore, to the extent Wechsler's system relies on conduct to prove criminal purpose and therefore dangerousness, the formulation makes important probability estimates which are entirely implicit. The notion of conduct which is unambiguous in its relation to completed criminality (strongly corroborative of criminal purpose) implies a probability estimate: a given mode of conduct will more often lead to completed criminality than not. Wechsler's entire system with respect to attempts, solicitation and conspiracy depends on such estimates. (In this connection *see* the analysis in Cole, *Windfall and Probability: A Study of "Cause" in Negligence Law*, 52 CALIF. L. REV. 459, 498-512 (1964). Wechsler's use of attempted stautory rape cases is particularly illustrative of these observations. With those cases, *compare* State v. Green, 388 P.2d 362 (Mont. Sup. Ct. 1964).

7. The act of flight subsequent to the commission or accusation of a crime is the prototype ambiguous act. *See* 1, J. WIGMORE, EVIDENCE § 173 (3d ed. 1940); S. FREUD, *Psycho-Analysis and the Ascertaining of Truth in Courts of Law*, 2 COLL. PAPERS 13, 23 (1906); Miller v. United States, 320 F.2d 767, 773 (D.C. Cir., 1963).

cases, that individual dangerousness may be inferred from the fact of a provable crime. This is true, certainly in the normal version law of attempt, because it is a tautology.

But there are instances in which the very ambiguousness of the conduct seems to make it threatening. This is generally true where the behavior of an individual appears to be so unreasonable in its context that it raises the question whether the individual can be "counted on" to behave lawfully in the future. Real doubt that he can be "counted on" in this sense raises the possibility that he might be dangerous—but even the normal version notion of uncompleted criminal conduct provides no means for making a reliable determination.

Here the determination of dangerousness may be made through "civil" commitment of the mentally ill. No effort is made in this situation to assimilate this category of person or behavior into the normal version by, for example, limiting commitment to those persons who would have been found "guilty, but insane" had they in fact committed a provable crime as defined by the normal version. Rather, in these cases the conduct is taken as a datum, but not for the purpose of rendering it into an act dangerous in itself—as in the case of uncompleted criminal conduct. The conduct in these cases is too ambiguous to justify disposition within a matrix of normal version theory and lay experience. The relevant matrix for considering dangerous but not criminal cases must be one of scientific theory and specialized experience—psychology and psychiatry—in order to supply the data necessary to rationally justify disposition. The datum-conduct never comes to be considered dangerous "in itself," but is used in order to (reliably) determine whether or not the *person* is dangerous "in himself." Civil commitment, in this posture, is the reciprocal of the law of attempt as formulated by the normal version. That is, civil commitment infers the possibility of future dangerous conduct from a finding of a dangerous mental condition, where the normal version infers mens rea from a finding of dangerous conduct.

IV

Having considered now both the center and the fringes of the normal version, I can consider the basic question: Does the incorporation of mens rea into the normal version definition of crime render normal version inferences of individual dangerousness sufficiently reliable?

The statement "criminality implies dangerousness" could be defended as a logical statement (either true or false) only on the hypothesis that the legislative definition of normal version criminality is sufficiently precise to preclude "illogical" cases. That is, all cases in which the crime of murder in the first degree has been proved must involve comparably dangerous actors for the normal version assertion to be reliable. If we know from experience that illogical cases are not precluded, then the normal version statement must be one of probability and not logic. The normal version claim, therefore, can be taken to

mean that all persons convicted of a particular offense are probably equally dangerous.

Primarily, the actual consequences of normal version dispositions demonstrate that its *initial* classification of comparably dangerous offenders is highly unreliable. For example, in California the crime of selling narcotics to a minor by an adult carries a statutory sentence of from 10 years to life with a minimum eligible parole date of 10 years. Yet for those released in 1965 who had been convicted of this offense, more than half had served only 4½ years and none had served more than 8½ years. The point here is that, absent some post sentencing inquiry into the dangerousness of the individual, the normal version probability statement "criminality implies dangerousness" in itself is unreliable.[8]

Second, the "mental element" in normal version criminality must, in most cases, be inferred from the "circumstances." That is, for the purpose of establishing a normal version provable crime the "mental state" of the actor at the time of the act must be known. Of course, this can only be known by inference even where there is a confession. But since the only purpose of the inference is to classify the actor in accordance with normal version categories, the scope of relevant evidence as to mental condition is constricted in order to be manageable within a matrix of common experience. Generally, only that behavior which relates to the particular event (the datum-conduct) is relevant for this purpose.[9] This is made abundantly clear in the normal version concept of uncompleted criminal conduct discussed above: The relevant mental state of the actor is inferred from the absence of ambiguity in the datum-conduct. But, I submit, the handling of the "non-criminal but dangerous" individuals in "civil" commitment cases contradicts the necessity of this constriction of the relevant evidence in the normal version inference of mental state. Civil commitment procedures show that it is both possible and necessary to determine dangerousness by using more than the datum-conduct as a basis for inference in the later cases. Why is it either not possible or not necessary to do so where the datum-conduct is less

8. Anna Freud has warned against the use of overt behavior to categorize individuals for the purpose of diagnosis. A. FREUD, NORMALITY AND PATHOLOGY IN CHILDHOOD 108-47 (1965). See also E. ERIKSON, IDENTITY: YOUTH AND CRISIS 252-56 (1968). In his recent paper, Joseph Goldstein suggests that "this warning does not lead to the conclusion that all legislatively defined categories—such as thief, murderer, rapist, conspirator, juvenile delinquent, or committable mentally-ill person are inappropriate for all purposes. It may be a useful and workable legislative strategy to create such categories as a basis for sorting out those who are entitled to one legal process or another or who may or may not be considered appropriate objects of community anger. But it is a limitation of the strategy that such categories cannot serve as a basis for determining who shall be provided with what therapeutic regime or assigned what institutional setting for rehabilitative purposes." Goldstein, *Psychoanalysis and Jurisprudence*, 77 YALE L.J. 1053, 1070 (1968). As I am arguing here, there are categories of conduct which are useful as data for the limited purpose of justifying initial control, but not as a basis for inferring dangerousness.

9. "The potential significance of drunkenness for this purpose [exculpation] is the same as that of ignorance or mistake of fact—namely, that it may negate *a mental state that otherwise would be established circumstantially by proof of defendant's conduct.*" Wechsler, *Codification of Criminal Law in the United States: The Model Penal Code*, 68 COLUM. L. REV. 1425, 1440 (1968) [emphasis supplied].

ambiguous—in the normal version sense of uambiguousness? The normal version reply can only be that where the datum-conduct is relatively unambiguous an inference of "bad" mental state is sufficiently reliable. The reliability of the normal version determination of dangerousness, then, is a function of the relative ambiguity of conduct. The probability statement "criminality implies dangerousness" is reliable only to the extent the datum-conduct contains a "sufficient" amount of information to enable an inference of dangerousness. This renders the normal version quite inadequate.

Recent inter-disciplinary research, such as James Marshall's "Intention—In Law and Society," introduces substantial evidence that human intent involves psycho-social situations which are not reflected by mens rea, and which cannot be administered within the present framework of contentious litigation. Marshall seems to conclude that, as a consequence, the criminal process must ask two distinct questions: Was the defendant historically involved in the act to an extent sufficient to impose causative responsibility, and what mode of disposition will remove his dangerous tendencies? In effect the argument is "not that the presence or absence of the guilty mind is unimportant, but that mens rea has, so to speak . . . got into the wrong place."[10]

Marshall brings together contemporary psychological and sociological material bearing on the question of "free choice"—the phrase he uses to define the legal significance of "intent." The thrust of this evidence is that psycho-social dynamics always operate to limit the fund of alternatives from which any particular individual is able to choose.[11] Therefore, to the extent a choice pattern is either assumed or imposed upon an individual a finding of intent is artificial and not a finding of fact.[12]

Marshall makes the normative argument that if the legal concept of free choice does not comport with the scientific understanding of that phenomenon, the legal process is unrealistic—or, more significantly, unjust. The injustice arising from this failure to fully utilize the data available from the social and biological sciences leads Marshall to conclude that the existing modes of legislative definition and judicial determination must be revised.

The simple requirement that the psycho-social situation of the defendant be taken into account might not necessitate radical revision of the criminal law process were it not for scientific doubts about the validity of imposing moral judgments on offenders. That is, the psycho-social situation of the *trier* may lead to moral judgments based on irrelevant, inaccurate or even "immoral" perceptions. If this is so, no process which implies a finding of fault can be deemed reliable within the limits of tolerance—whatever one assumes those limits to be.

10. B. WOOTTON, CRIME AND THE CRIMINAL 53 (1963).
11. *Cf.* S. HALLECK, PSYCHIATRY AND THE DILEMMAS OF CRIME ch. 6 (1967).
12. "Actually, the person whose criminal behavior is primarily engendered by poverty or persecution may be motivated by forces which are just as powerful and unrelenting as those which motivate the emotionally disturbed offender. Crime may be necessary for survival in either case." *Id.* at 211.

Taken together with the complexities inherent in any "realistic" inquiry into the defendant's intent, this failure of reliability means that a fundamental revision of the criminal law system is essential. The suggestion that the trial process be confined to an inquiry into historical involvement, and that all questions of intent be considered as only relevant to sound disposition, achieves this result.

The normal version response to these criticisms dovetails with the objection I assume it would make to my characterization of the third normal version proposition: "dangerous people should be punished." The normal version claim here would be that even if its inference of dangerousness from the fact of a provable crime is not highly reliable, there are ways of differentiating punishment to reflect "dangerousness" subsequent to the formal imposition of sentence. I will deal with this claim first by considering the meaning of the third normal version imperative, then by considering the implications of reliance on a post sentencing process.

My characterization of the third proposition "dangerous people should be punished" is unfair (and inaccurate) to the extent that the "modern" normal version no longer regards punishment as an end in itself but as a means to some other end. This development is significant in relation to the concept of dangerousness. So long as punishment was an end in itself, something regarded as "good," it was not necessary to ask whether punishment served any practical social purpose. When punishment is regarded as a means to some independent end, one may legitimately open up argument as to the nature of the end and its relationship to punishment as a means. If the ends question can be opened for argument, then it is valid to claim that the concept of dangerousness should be carefully and consistently applied as the criteria for determining the mode and extent of coercive disposition.

The normal version reply is that subsequent to sentencing, institutions such as parole boards and adult authorities perform this precise function: the mode of disposition and its duration is determined according to the "needs" of the person—which includes an estimation of his dangerousness.

If this is true as a practical matter, then it can be asked whether the concept of mens rea performs any function at all in the normal version definition of criminality. On the one hand, if the normal version definition of criminality truly separated the dangerous from the not-so-dangerous and the non-dangerous, then the post sentencing procedure would be superfluous. On the other hand, the necessity of a post sentencing procedure renders superfluous the incorporation of the concept of mens rea into the normal version definition of criminality. The normal version performs a task which should be comprehensive and fully integrated by piecemeal and fragmented procedures. Would it not be better, then, to eliminate mens rea from the definition of criminality, and save all such evidence relevant to the question of disposition (the ends question) for a separate proceeding to fully and adequately determine dangerousness?

V

I will deal with the difficulties in this suggestion by responding to two "horrors": The first is the spectre of the "criminal" who goes free because he is found to be not dangerous in the sense of his potential for future criminal behavior. The second is the spectre of the man who has "done nothing wrong" but who exhibits a substantial potential for future dangerous behavior.

The normal version has not recognized the implication in its rejection of punishment as an end in itself. Where punishment is an end in itself the fact of a provable crime can validly serve as a necessary and a sufficient condition for punishment. With the rejection of punishment as an end in itself the question arises where a provable crime is a sufficient condition for coercive disposition. The answer to this question depends on the nature of the end. If the systemic goal is the prevention of dangerous behavior in the future, reliance upon the fact of a provable crime as a sufficient condition for punishment can be justified only by establishing a causative relationship between the coercive disposition and the future conduct. Given this goal, the retention of punishment can be rational only if it is a practical or a scientific means to an independent end—the prevention of future dangerous conduct. The normal version fails to see that this change in the function of punishment changes the "purpose" of the entire process. When punishment is considered good in itself the process as a whole looks backward in time. But if punishment is merely a means to a pragmatic end (preventing dangerous behavior) the process as a whole becomes forward looking. If the process is forward looking the fact of a provable crime cannot be a sufficient condition for punishment unless, in the particular case, there is potential for future dangerous behavior, and unless punishment eliminates that potential in some way.

In consequence, both the proposition "criminality means dangerousness" and the proposition "dangerous people should be punished" are statements of probability relating to the future and not logical imperatives. The horribleness of the two "horrors" noted above arises from lack of confidence in the justifiability of making statements of probability undisguised by moral condemnations. The normal version tolerates its faulty assumptions about dangerousness only because the practical effect of its judgments on future conduct is of secondary importance to its desire for moral righteousness.

VI

An explicitly futuristic system—what I shall call the revised version—would eliminate the notion of mens rea from the definition of criminality.[13] Revised version criminality would include only an enumeration of datum-conduct which is considered dangerous in the legislative sense. As a matter of process, the initial inquiry would ascertain only whether a given defendant was

13. WOOTTON, *supra* note 10 at 52-53.

historically involved in the datum-conduct in question. If the given defendant is found to have been historically involved in the datum-conduct, then a further proceeding would be necessary to determine the sense in which and the extent to which the particular defendant is dangerous. In this proceeding all information which is relevant to the task of assessing the character problems of the defendant and the probability of his engaging in future dangerous behavior would be considered. In this way the essential task of arriving at the best mode of disposition can be performed unclouded by rules of evidence and problems of testimonial competence which are designed to serve other purposes.

But the revised sequence does not in terms account for dangerous individuals who have *not* engaged in the datum-conduct enumerated as dangerous in the legislative sense. The principal reason for this is that on the basis of existing information the extent to which persons presently subjected to "civil" commitment have not engaged in normal version criminal "acts" is unclear. If it be found that for the most part such persons have engaged in the datum-conduct envisioned by the revised version, then no special provision would have to be made for this type of dangerousness. On the other hand, if there are a sufficient number of instances of dangerous behavior where there has been no datum-conduct in the revised version sense, then either those persons would have to be considered without the realm of legal concern as a matter of policy, or brought within the revised version. The latter could be done by substituting a probable cause proceeding for the initial stage proceeding in revised version criminality. The probable cause proceeding would require sufficient showing of potential dangerousness to "bind-over" the individual for a full determination of dangerousness in a second stage revised version proceeding.

Whether one accepts this brief sketch of the revised version or does not see it as a preferred alternative to the normal version, the question remains: What constitutes dangerousness and how can that potential (for it is not an entity or a thing or even a quality) be estimated? At present we have only negative information: the normal version punishes in some cases where punishment is unnecessary and in others where it obviously does no good in terms of future behavior. A real concern with dangerous behavior, as distinguished from a concern which merely masks a primary interest in vengeance, must see that whatever "other" aims the criminal law may have,[14] concentrated attention is due to the problem of dangerousness.

VII

The revised version does not totally eliminate the notion of responsibility from the criminal law. "Causal responsibility" is reflected in the revised version first stage proceeding to determine historical involvement. "Capacity responsibility" is reflected in the second stage proceeding to determine the individual's

14. Hart, *The Aims of the Criminal Law*, 23 L. & CONTEMP. PROBS. 401 (1958).

potential for dangerous behavior.[15] Admittedly, the revised version does not reflect any other sense of the term responsibility. This does not mean, however, that the revised version cannot reflect the moral outrage of the community which may be aroused by a particularly intolerable crime. On the contrary, the revised version contemplates that within the second stage proceeding proper consideration will be given to the moral seriousness of the offense within the context of any contemplated therapeutic regime.[16] In addition, the moral outrage of the community may have relevance independent of therapy. Two exemplary hypothetical situations may help to clarify this latter area of relevance.

Suppose a case involving a particularly intolerable offense committed by an individual found to have a low potential for future dangerous behavior. It may be necessary, in such a case, to provide for a period of incarceration even though the individual has a low potential for dangerous behavior. This "cooling off" period would allow for the satisfaction of public moral outrage, and provide an opportunity for therapeutic measures which will increase the reliability of the original estimation that the offender had a low potential for future dangerous behavior.

At the other extreme, suppose a case which arouses little or no public moral outrage even though the offender has a high potential for future criminal behavior. Perhaps the best example of this would be the pathological shoplifter. Creative disposition is essential in this type of case. The absence of moral outrage obviates the necessity of a "cooling off" period, but a hypothetically poor prognosis seems to require incarceration nevertheless. However, some less severe mode of disposition is in order because of the relative moral innocuousness of the offense. Under the revised version it would be possible to subject the offender to outpatient treatment while protecting property owners by putting them on notice and providing a means for returning the shoplifted goods.

Moral criticism has been directed at theories similar to the revised version on the ground that as a consequence of its premises people would be unable to order their lives within the boundaries of the law in order to maximize the area of free choice.[17] This criticism implies that the revised version contributes to

15. Hart, *Varieties of Responsibility*, 83 L.Q. REV. 346 (1967) *reprinted and revised as Postscript: Responsibility and Retribution*, in H.L.A. Hart, PUNISHMENT AND RESPONSIBILITY 210 (1968) [hereinafter cited PUNISHMENT AND RESPONSIBILITY].

16. "However, in designating a criminal as acute or chronic, we must take into consideration the seriousness of the crime or crimes committed, as well as the frequency and time factor. Otherwise, an individual who commits one premeditated murder would be considered simply an acute criminal, while another individual who repeatedly commits harmless or nuisance thefts would be considered a chronic offender. Obviously, this is wrong because the first individual is more dangerous than the second, even though the latter in all probability has a personality defect. Of course, this might very well be true of the murderer, too, and although a man who commits murder may not necessarily be psychotic, he might display emotional or mental symptoms. His personality make-up is involved too much with his act to put him into the category of an acute offender." D. ABRAHAMSEN, THE PSYCHOLOGY OF CRIME 122 (1960).

17. *Punishment and the Elimination of Responsibility*, in PUNISHMENT AND RESPONSIBILITY 158, 180-81.

public insecurity in the sense that behavior which is the consequence of mistake or accident may give rise to criminal investigations and thereby increase the occasions of official interference.[18]

This line of criticism does not distinguish the revised version from the normal version. Under the latter an assault which is only "apparently" accidental would rationally give rise to further investigation where there is some doubt regarding the accidental quality of the assault. Under the revised version further investigation would be required for the same reasons and no others—under the assumption that a reasonable official would conclude that an accidental assault gives rise to no suspicion that the assailant is dangerous. Of course not all officials are reasonable. But the revised version in no way broadens the discretion of unreasonable officials.

Another, perhaps more crucial moral objection to the revised version is the claim that people ought to and do regard themselves and each other as people and not merely as manipulable bodies.[19] Because of this distinction moral judgments arise among men as a consequence of whether a given act is accidental or purposeful. Thus the victim of an assault reaches different conclusions about his future dealings with the assailant depending on whether the blow was purposeful or accidental. "Shall I be your friend or enemy? Offer soothing words? Or return the blow?"[20] I agree that the law ought to reflect these fundamental distinctions which "pervade the whole of our social life," and that "it would fail to do [so] if it treated men merely as alterable, predictable, curable or manipulable things."[21] I also agree that the victim's perception of the purposeful nature of the assault may play a significant role in ordering his future relations with the assailant. But certainly this would be true if the only concern of the victim were with the dangerousness of the assailant. One does not ordinarily become friends with a violently aggressive person. One may offer soothing words, under some circumstances, if the words are likely to be effective, or one might return the blow if that would appear to be most effective. The point here is that each of these responses corresponds to the perceived dangerousness of the assailant

18. *Changing Conceptions of Responsibility*, in PUNISHMENT AND RESPONSIBILITY 186, 206.

19. *Punishment and the Elimination of Responsibility*, in PUNISHMENT AND RESPONSIBILITY 182. This, I take it, is the Kantian moral imperative. For other expressions of the point *see* D. DAUBE, COLLABORATION WITH TYRANNY IN RABBINIC LAW (1965) and J. PIKE, YOU AND THE NEW MORALITY 70 (1967).

20. PUNISHMENT AND RESPONSIBILITY *supra* note 15 at 183.

21. *Id.* There is no better example of the employment of men as manipulable things than in the Model Penal Code. The Code allows a judge to withhold probation and refuse to suspend sentence *even if* "there is no undue risk that during the period . . . the defendant will commit another crime," and *even if* the defendant is not "in need of correctional treatment that can be provided most effectively by his commitment to an institution," so long as the judge believes that "a lesser sentence will depreciate the seriousness of the defendant's crime." Wechsler, *Codification of Criminal Law in the United States: The Model Penal Code*, 68 COLUM. L. REV. 1425, 1451 (1968), quoting § 7.01(1) of the Code. *See also* § 305.9(1) expressing a similar criteria with respect to parole. *Compare* the material in notes 22 and 44 *infra*.

and purports to have some effect on his future behavior. It may well be that these responses are morally determined; it is equally likely that they are practical repsonses to perceptions of relative dangerousness. The effort of the revised version is to make these responses more suitable for the occasion by knowing more about the assailant. This does not necessarily mean that man is being treated as a means rather than an end *in himself*. On the contrary, the revised version seeks to accommodate the needs of the individual with the pressures of his society by refusing to classify assailants according to faulty and often arbitrary categories. Surely it is not less moral to protect future victims by treating assailants in accordance with their needs and more moral to simply to return the blow.

Finally, there is the objection that dangerous but untreatable offenders cannot be imprisoned because society has no right to use an individual as an example unless it can show that he could have acted otherwise than he did.[22] This objection is practical as well as (or perhaps rather than) moral. Attempting to deter others by punishing one who could not have acted otherwise is irrational quite apart from being barbaric. Punishment in this case has the same general deterrent value as strict liability—none. However, the revised version is not less moral than the normal version by virtue of its efforts to secure the dangerous but untreatable. Under the normal version "insane" but untreatable persons who are dangerous are secured without regard for the deterrent value of the incarceration. Surely it would not be immoral to handle the sane but untreatable in the same way—so long as we do not indulge the fiction that such incarceration is in the service of general deterrence. The advance contained in the revised version is that it hopes to avoid calling all but a very few offenders sane but untreatable.

On a lower level of abstraction it has been claimed that insofar as the revised version eliminates the distinction between "guilt" and "innocence" it rejects the goal of general deterrence in favor of a system of imperfect predictions.[23] That is, since the revised version is not concerned with "condemnation and conviction" of offenders this "means of reinforcing habits and commitments of law abidingness" is being abandoned.[24] The revised version, it is said, because

22. *Changing Conceptions of Responsibility*, in PUNISHMENT AND RESPONSIBILITY 207. I have elsewhere suggested that the more carefully one examines the psycho-social history of criminal behavior the more difficult this becomes. Katz, Book Review, 117 U. PA. L. REV. 640 (1969). *Compare*: The "equilibrium of justice is upset by the desire" to deter others through punishment of the individual; "the judge is obliged to forget the particular individual he has in front of him. In such a case the penalty imposed is no longer designed to be just, for the offender merely comes to serve the presumed interest of the community. An exemplary penalty is an authoritarian proceeding quite unrelated to true justice." ANCEL, *Some Thoughts on the Problem of Deterrence*, in CRIME AND CULTURE 375, 385 (M. Wolfgang ed. 1968). Professor Wechsler and the Model Penal Code are to the contrary. *See* Wechsler, *Codification of Criminal Law in the United States: The Model Penal Code*, 68 COLUM. L. REV. 1425, 1434 (1968).

23. Kadish, *The Decline of Innocence*, 26 CAM. L.J. 273 (1968).

24. *Id.* at 287. The normal version defense here is further weakened by evidence pointing to the fact that in practice, the significance of the distinction between guilt and

of its futuristic orientation, rejects the goal of general deterrence as understood in the normal version.

This criticism is centrally inconsistent. On the one hand it is claimed that the revised version cannot eliminate the onus of punishment merely by being concerned with treatment.[25] On the other hand the claim is that the revised version can have no general deterrent value because it eliminates punishment.[26] But certainly it must be true that if the disposition meted out by the revised version will continue to be regarded as punishment, the revised version will have no lesser deterrent force than the normal version. However, even if it is true that the revised version eliminates punishment as the institutional response to dangerous behavior, it does not follow that revised version dispositions will be regarded by potential offenders as either pleasant or innocuous. Quite apart from the fact that the critical claim here assumes a rationality in human behavior which it is not prepared to substantiate,[27] it simply does not follow that because revised version dispositions bear directly on the potential for future dangerous behavior they are inherently noncoercive.

Perhaps the heart of this critical claim is that there is some powerful moral medicine (general deterrence) in the pronouncement of guilt which is eliminated by the revised version. This, of course, is not a moral claim but an empirical one which, again, the normal version is unable to defend. I might just as readily assert that the adjudication of dangerousness has an equal moral impact which functions in the service of general deterrence.

It may be true that "the decline of guilt . . . also means, and necessarily, the decline of innocence,"[28] but only in the philosophical sense that if none of us are guilty then none of us are innocent:[29] guilt is a relative matter. This does

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innocence has almost disappeared. "The attention given by trial and appellate courts to questions of sufficiency of evidence and due process, however, should not divert attention from the fact that the great bulk of cases are disposed of at early stages where the primary question frequently is, 'What ought to be done with this individual who is probably guilty of a crime?'" McIntyre, *Judicial Dominance of the Charging Process*, 59 J. CRIM. L.C. & P.S. 463, 466 (1969).

25. Kadish, *supra* note 23, at 286.

26. *Id.* at 288. *Compare:* "It is, therefore, inaccurate or at any rate, a gross oversimplification, to claim, as is sometimes done, that when punishment in the traditional sense is replaced by a form of treatment, this might result in reducing the deterrent effect of the penalty. . . . [I]t is evident that methods of treatment, rationally applied in conformity with modern penological ideas, do not in any way diminish the deterrent effect of appearance before the court or the sentence imposed. This is so because the treatment envisaged is planned and carried out in the post-trial phase." Ancel, *Some Thoughts on the Problem of Deterrence*, in CRIME AND CULTURE 375, 383 (M. Wolfgang ed. 1968).

27. *See* Chambliss, *Types of Deviance and the Effectiveness of Legal Sanctions*, 1967 WIS. L. REV. 703.

28. Kadish, *supra* note 23, at 285.

29. "As for the law of retaliation, it must be admitted that even in its primitive form it is legitimate only between two individuals of whom one is absolutely innocent and the other absolutely guilty. Certainly the victim is innocent. But can society, which is supposed to represent the victim, claim a comparable innocence? Is it not responsible at least in part, for the crime which it represses with such severity? This theme has been frequently developed elsewhere, and I need not continue a line of argument which the most varied minds have elaborated since the eighteenth century. Its principal features can be summed up, in any

not mean, however, that without guilt as a verbal handle we have no reliable method for distinguishing dangerous individuals from the general population, nor does it mean that banishing the function of moral condemnation from the criminal law will generate wholesale anxiety.[30] Anxiety is generated only when it is unclear what modes of behavior are acceptable and what modes are unacceptable. Anxiety will be allayed by a process which generates reasonable confidence in its ability to make fair and reliable distinctions. The normal version can claim no special competence in this task.

VIII

The psycho-social assumptions of normal version theory connect the political arguments offered to justify its theory and the moral and "empirical" arguments offered to justify punishment in a particular case. This psycho-social tie seriously questions the morality of normal version punishment. In summary, the normal version argument is that the legality of politically imposed norms depends on general loyalty to the interests of the social whole. If the social whole commands the loyalty of the masses generally it can feel justified in demanding individual conformity to group legality. Where the demand itself is not sufficient to effect compliance, the social whole may provide a system of pains and penalties which will exact the necessary obedience.

The notion of loyalty is of great political significance. When general loyalty to the interests of the social whole weakens, the security of the political order and the effective strength of its dogma is in jeopardy. Insofar as legality is a specific means of social ordering, it too depends on general loyalty for its effectiveness. However, less than universal compliance with specific legal norms can be tolerated so long as the demand for universal compliance with legality is justified by general loyalty to the interests of the social whole. Put another way, *the justness of demanding compliance with legality largely depends on general loyalty.*

Though general loyalty may be a necessary condition for legality, it is never practically sufficient to command universal compliance with specific legal norms. Since the need for compliance cannot rest on general loyalty, a system of pains and penalties is imposed which, it is hoped, will exact the necessary compli-

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case, by observing that every society has the criminals it deserves." Camus, *Reflections on the Guillotine* (Richard Howard tr.), *reprinted from* 1 EVERGREEN REVIEW No. 3 (1957) *in* THE LAW AS LITERATURE 512, 533 (E. London ed. 1960). *Compare* Sarbin: "The dangerous offender is an outcome in large measure of the institutions we have created to manage and mould him." *The Dangerous Individual: An Outcome of Social Identity Transformations*, 7 BRITISH JOURNAL OF CRIMINOLOGY, 285, 294 (1967). "We commit the crime of damning some of our fellow citizens with the label 'criminal.' And having done this, we force them through an experience that is soul-searching and dehumanizing. In this way we exculpate ourselves from the guilt *we* feel and tell ourselves that we do it to 'correct' the 'criminal' and make us all safer from crime. We commit this crime every day that we retain our present stupid, futile, abominable practices against detected offenders." K. MENNINGER, THE CRIME OF PUNISHMENT 9 (1968).

30. Kadish, *supra* note 23, at 288.

ance.[31] But the relation between the individual's sense of loyalty and the failure of specific compliance is unclear.[32] Is the failure of specific compliance related to a failure in the development of the individual's sense of loyalty, or can the individual maintain basic loyalty to the interest of the social whole while not complying with specific legal norms? This question is particularly important because if, in a particular case, noncompliance is related to the individual's lack of basic loyalty, any system of punishment designed to exact compliance will necessarily fail to the extent it does not promote the individual's sense of basic loyalty. On the other hand, if individual deviance is not inconsistent with a basic sense of loyalty, punishment may be effective whether or not it promotes the individual's sense of basic loyalty.

My hypothesis is that the serious deviant behavior with which society is principally concerned is engaged in by individuals who lack a developed sense of basic loyalty. If this hypothesis is correct, the normal version attempt to exact compliance will necessarily fail because normal version punishment bears no relation to the development of a sense of basic loyalty. A brief examination of the "empirical" rationalizations for normal version punishment will bear this out.

The classic rationalization for normal version punishment is that it imposes the consequence of pain which most people will seek to avoid by compliance with the substantive norms.[33] Similarly, pain will intimidate the individual on whom it is inflicted so that, to avoid further pain, he will not repeat his criminal behavior. This defense of punishment is entered with the usual assumption of "all other things being equal." That is, the model is free market economics. Punishment prevents criminal behavior by all those who are "at the margin." Individuals who would violate the substantive norm *but for* the painful consequences provided by punishment are thereby deterred. It is notable that this defense of normal version punishment never attempts to justify punishment when all other things are not equal. The normal version never attempts to explain the function of punishment with regard to those individuals who are not marginal with respect to pain, and it ignores the possibility that in many instances individual behavior is not crucially affected by the potential infliction of pain in the future.[34] But these responses to the classical defense of punishment

31. H. KELSEN, WHAT IS JUSTICE 235 (1957).

32. "It should perhaps be stressed that they [the nonpsychotic, non-mental defective criminal patients] deviate so clearly in interhuman relations that they have no reason to feel solidarity with society at large. They consider themselves outcasts and find it easier to develop relationships with people who are also outcasts." G. STÜRUP, TREATING THE "UNTREATABLE" 7 (1968).

33. It is interesting to observe that both Bentham and Freud recognized that any sort of behavior or motivation could provide pleasure to the individual; Freud went so far as to identify motivation with pleasure. The difference between these two men lies in their ethical notions of freedom. *See* P. RIEFF, FREUD: THE MIND OF THE MORALIST 324ff. (1959).

34. One way of looking at legislative grading is as an assumption that everybody is marginal with respect to pain, and in the same way. In other words, marginality has more to do with categories of acts than it does with individual personality.

are well known, and I am more particularly interested in the modern explanation.

The psychology of the modern defense of punishment is more sophisticated. Now it is said that punishment for crime makes "more vivid" the seriousness with which society regards the underlying norms. Vividness is significant because it is a condition of obedience that the importance of the norm to the group be conveyed. Punishment is thus a tool of socialization.[35] There are two difficulties in this defense of punishment, one of conception and one of execution, and both difficulties converge at the notion of loyalty.

The difficulty of conception is that the "views" of the group can only play a positive role in the life of an individual who is in reality, and who feels himself to be, part of the group. There is no point in making group values more vivid by punishment if the individual has not developed a sense of solidarity with the relevant group.[36] This point is more complex than the rhetoric of alienation would have it. Solidarity with the group is, in the developmental sense, the *sine qua non* of respect for group created legality. This is the importance of recognizing the "common root" in the terms loyal and legal.[37] Without solidarity there is only the experience of the solitary. The solitary individual can only experience frustration and helplessness—not cooperation. It is no surprise, then, to find that helplessness is a predominant characteristic of criminal offenders.[38] Nor is it surprising to find a high incidence of arbitrary and frequent physical punishment in the early life of offenders, as well as a high incidence of fragmenting tension in the family.[39] It is not unreasonable to suppose (though it is somewhat speculative) that these features of frequent unreasonable punishment and dysfunctional families adversely affect the development of a sense of solidarity in the individual. This adverse effect may be particularly serious where the society at large appears to reinforce feelings of rejection, pain and helplessness.

The second difficulty with the modern defense of punishment, one of execution, is related to the developmental characteristics already mentioned. In modern times punishment almost exclusively takes the form of exclusion and isolation. That is, the normal version means prison when it speaks of punishment. For the offenders to whom the above noted characteristics apply, prison

35. H. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 42-43 (1968). *But see* Katz, Book Review, 117 U. PA. L. REV. 640 (1969).

36. Because the sense of isolation is so significant, in treating deviants with "character disorders" group therapy stresses the fact that "crime is an interpersonal problem" and attempts to build a "feeling of solidarity" among inmates. G. STÜRUP, TREATING THE "UNTREATABLE" 70, 72 (1968).

37. " 'Loyal' and 'legal' have the same root, linguistically and psychologically, for legal commitment is an unsafe burden unless shouldered with a sense of sovereign choice and experienced as loyalty. To develop that sense is a joint task of the consistency of individual life history and the ethical potency of the historical process." E. ERIKSON, IDENTITY, YOUTH AND CRISIS 236 (1968).

38. S. HALLECK, PSYCHIATRY AND THE DILEMMAS OF CRIME 76, 79, 80-82 (1967).

39. D. ABRAHAMSEN, THE PSYCHOLOGY OF CRIME ch. III (1960).

as punishment is singularly absurd. The negative identity of a prisoner, one of outcast, is certainly not foreign to the offender's life history. Thus prison only reinforces his sense of isolation, rejection and helplessness; only confirms his negative self-image.[40] Furthermore, the lack of rational relation between prison as punishment and the specific harm done to society is precisely the sort of punishment "expected" by an individual whose history was inconsistent with the development of group solidarity. This point requires further elaboration.

Prior to the age when children begin to respond to, and take part in, the regulative experience of group interaction, they are "egocentric" and experience only the "morality of constraint."[41] That is, the regularities of behavior imposed by adults are regarded as implicitly valid and binding, and punishment by adults for violations of these externally imposed rules is regarded as just and necessary. If punishment does not follow violation there is a breach in nature, so to speak. At this stage punishment need not be related to practical ends, but will be regarded as just if it is imposed authoritatively.[42]

From this one can easily see the effect of punishment on an individual who does not fully develop from the "egocentric stage" characterized by adult constraint to the "cooperative stage" characterized by the development of group participation and a sense of solidarity. Punishment continues to be experienced as in the nature of things, and as following necessarily from the breach of a legal norm. The reasons why punishment of this sort is no longer effective, as one supposes it would be for a very young child, are two-fold. First, in reality the substantive regularities (norms) are no longer imposed by an all-powerful adult figure. Instead, they are imposed by a group toward which the individual may feel no sense of loyalty. Second, and in a seemingly paradoxical way, to the extent the individual has a personal life history of frequent and excessive punishment at the hands of an adult, he responds to group imposed norms with mixed feelings of guilt and hostility because the group becomes identified with the old adult figures. The apparent paradox between this second point and the first noted reason why prison as punishment is ineffective disappears with an appreciation of the complex interactions being over-simplified here. It is entirely possible for a given individual to resent the imposition of norms by a group to which he does not "belong," to violate those norms in a simultaneous bid for recognition and defiance of adult authority, and to resent punishment while accepting it as a necessary atonement for his guilt and a confirmation of his outcast status.

The principal point is that the modern defense of punishment contains crucial faults of conception and execution. It is absurd to justify punishment as an aid to socialization of the substantive norms in question when socialization depends on the development of a sense of solidarity defeated (in part) by pun-

40. E. ERIKSON, IDENTITY, YOUTH AND CRISIS 88 (1968).
41. J. PIAGET, THE MORAL JUDGMENT OF THE CHILD 54, 88, 228 *passim* (1965).
42. *Id.* at 205, 256 *passim.*

ishment itself. Punishment is even more absurd when those we punish are, generally, the very individuals who "escaped" socialization to norms "made vivid" by punishment.[43] Thus the modern defense of punishment is vacuous: it adds nothing to the classic claims based on the economic model. The normal version still punishes one group of individuals in order to affect the behavior of a hypothetical group of "marginal" men.[44]

It is interesting to note here the relevance of two previously discussed moral claims of the normal version: men must be treated as ends in themselves and not merely manipulable bodies,[45] and individuals cannot be used as examples for others unless one can show they could have acted otherwise than they did.[46] The irony here is that the normal version's "economic" defense of punishment requires specific violation of these moral imperatives. Those individuals for whom punishment did not "make vivid" the underlying substantive norms are punished, are used, in order to deter the hypothetical marginal man. The normal version fails to see that if punishment is necessary for the socialization of specific norms, where socialization to these norms has nevertheless failed one can hardly impose blame. Yet the normal version inflicts punishment on such individuals to aid the socialization of others. One can hardly avoid concluding that on its own terms the normal version is immoral.

The importance of these points must be clear. The specific structure of the criminal law is irrelevant so long as the end product is social isolation. All the available evidence points to a configuration of helplessness, social and psychic isolation and long experience with corporal punishment and other deprivations and frustrations. To the extent crime is an infraction of the basic requirements of social solidarity, a violation of the norms of cooperative existence, crime is evidence of a breakdown in socialization. Enforced solidarity, outcast status as a punishment for crime, and other forms of exile, can do nothing but aggravate the problem.

> Justice does not need to destroy the future life of an offender. Justice in our time must be based both on traditional principles and on the requirements of each individual case. A sentenced criminal is still a citizen, and he will usually, often after a very short time, become a free citizen again. When we limit his freedom, we have an obligation

43. "It may even be asked whether the most dangerous offenders or the authors of the most serious crimes . . . are not precisely those upon whom the threat of punishment has the least effect." ANCEL, *Some Thoughts on the Problem of Deterrence*, in CRIME AND CULTURE 375, 378 (M. Wolfgang ed. 1968). "Is it not painfully obvious that such 'training' by the criminal law does not work effectively?" Diamond, Book Review, 56 CALIF. L. REV. 920, 922 (1968).

44. "I simply refuse to buy the theme . . . that a proper function of the criminal law is to provide sacrificial victims to support the mythologies of morality, responsibility, and justice. It is just such cynical disregard of the individual which has so frequently permitted the official institutions of the administration of criminal justice to become more immoral, more irresponsible, and more unjust than any single criminal would dare to be." Diamond, Book Review, 56 CALIF. L. REV. 920, 922 (1968).

45. *See* note 21 *supra*, and accompanying text.

46. *See* note 22 *supra*, and accompanying text.

> to try to motivate him to live a life acceptable to himself and to others.[47]

IX

In the construction of a revised version of the criminal law there is a temptation to seek "final solutions" to the question of goals. To the extent that both crime and illness are endemic to human social life the questions are not whether crime, but how much; not whether progress can be made, but what kind.[48] In this section I will try to build the theoretical framework within which the kinds of conduct to be prevented by the revised version can be defined. The question "What Conduct is Dangerous" should not, however, be read to imply that the answer can be found in nature. The answer, on the contrary, takes the form of value proposals for the reconstruction of the criminal law.

At the outset I would like to make clear the manner in which I think the problem of goals ought to be considered.

> Goals literally conceived have the logical property that their location and other characteristics as well, can be described independently of of describing the condition of anyone traveling toward them. . . . The contrast with [the goals of] liberty and equality coud hardly be sharper. The only way we have of telling whether the public interest has been served is by observing the condition of society. . . .[49]

To this must be added the observation that the desirability of proposed goals cannot be determined without considering the conditions necessary for their attainment. The values underlying the revised version presuppose, for example, that society is willing to forego institutionalizing the passion for revenge in favor of utilizing its crime prevention resources in the most rational way.[50] Applied to the question "What Conduct is Dangerous," the principle of rational resource utilization means that not all types of objectionable conduct may be designated as dangerous.

I should make it clear that neither the principle of rational resource utilization, the arguments to support it, nor my answer to the question "What Conduct is Dangerous," are fresh. In this section I will argue that only conduct which presents a direct threat to the person or property of others should be considered dangerous. This view, first articulated fully by J. S. Mill,[51] has been expressed by generations of legal thinkers and social scientists who have either argued the same proposition on other grounds or have introduced new evidence tending to support it. Most recently those writing in the tradition of Mill include

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47. G. STÜRUP, TREATING THE "UNTREATABLE" 245 (1968).
48. Essentially, this is the formulation of the question Freud accepted in dealing with the difference between normality and neurosis. *See* P. RIEFF, FREUD, THE MIND OF THE MORALIST 354-55 (1959).
49. Braybrooke, *The Present and Future of the Concept* in V Nomos, THE PUBLIC INTEREST 143-44 (C. Friedrich, ed. 1964).
50. H. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 259 (1968).
51. J. S. MILL, ON LIBERTY ch. 1 (1859).

Schur, Becker, Skolnick and Gusfield among the social scientists,[52] and H. L. A. Hart, Kadish, Allen, Packer and Williams among the lawyers.[53] It is interesting to note that Mill's idea has finally reached the pinnacle of legal respectability. In a recent address the President of the American Bar Association is reported to have said that the criminal law has come to concern itself with too many kinds of conduct not directly related to protection of life and property, and has extended itself too far into the area of victimless crimes.[54]

The revised version is, therefore, an attempt to clarify and synthesize the propositions of this tradition. It is in the nature of this attempt that all the arguments and evidence cannot be repeated. Instead, I will try to defend Mill's proposition from both a subjective and an objective perspective. The subjective perspective will approach the question of dangerous conduct from the point of view of the individual in society. The objective perspective will approach the question of dangerous conduct from the point of view of society as a whole. The subjective view is from the inside out, the objective view is from the outside in. I hope to show that from both perspectives the same result is possible: dangerous conduct should be limited to that which presents a direct threat to the person or property of others.

A.

From the subjective point of view, people may want a given mode of conduct designated as criminal because it is annoying, or immoral, or because it is dangerous. Some types of conduct clearly fall into one or another of these categories, but many others do not. For example, while the noise created by unmuffled automobiles may certainly be an annoyance, a claim that the raucous noise is immoral does not readily arise out of the event, and the sense in which the noise is dangerous is unclear. On the other hand, many types of private conduct may be considered immoral in themselves and proscribable on this basis alone. However, if the claim of immorality is not regarded as sufficient to justify proscription, the claim of dangerousness may be introduced. The claim of dangerousness is brought in by generalizing the connection between the im-

52. E. SCHUR, CRIMES WITHOUT VICTIMS (1965); H. BECKER, OUTSIDERS (1963); Gusfield, *Moral Passage: The Symbolic Process in Public Designations of Deviance*, 15 SOC. PROBS. 175 (1967); Skolnick, *Coercion to Virtue*, 41 S.C. L. REV. 588 (1968).

53. H.L.A. HART, LAW, LIBERTY AND MORALITY (1963); F. ALLEN, THE BORDERLAND OF CRIMINAL JUSTICE (1964); KADISH, *Substantive Law Reform and the Limits of Effective Law Enforcement*, U.S. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS 97-107 (1967), *expanded in* Kadish, *The Crisis of Overcriminalization*, 374 ANNALS 157 (1967); H. PACKER, THE LIMITS OF THE CRIMINAL SANCTION (1968); *Williams, Authoritarian Morals and the Criminal Law*, 1966 CRIM. L. REV. 132. *Cf.* MODEL PENAL CODE § 102(1)(a) (Proposed Official Draft 1962).

Of course, there are contemporary defenders of the position taken in opposition to Mill by James Fitzjames Stephens in LIBERTY, EQUALITY, FRATERNITY (1874). P. DEVLIN, THE ENFORCEMENT OF MORALS (1959); *Cohen, Moral Aspects of the Criminal Law*, 49 YALE L.J. 987 (1940); E. ROSTOW, THE SOVEREIGN PREROGATIVE 45-80 (1962).

54. Remarks of William T. Gossett, President, American Bar Association, February 4, 1969 (A.B.A. News Release).

moral conduct and the needs of public order. Finally, some types of conduct, such as the bearing of concealed deadly weapons, are regarded as dangerous in themselves and proscribable for that reason. Claims of annoyance or immorality play virtually no role in the demand for criminal designation in such cases.

The difficulty with arguments based on these reasons of annoyance, immorality and dangerousness, lies in determining appropriate terms of discourse. Whatever the mode of conduct in question may be, it is always *possible* to formulate claims which will fit into any of the three categories. It is possible to argue, for example, that loud and raucous noises frighten pedestrians, disturb sleep, and interfere with the peaceful enjoyment of leisure hours in the home. It may be true that unmuffled automobile noise can cause immediate mental or physical harm only to particularly sensitive individuals,[55] but the noise may also—in the long run—damage the emotional well being of the population at large and cause a drop in population growth and economic production. In short, in the absence of appropriate terms of discourse it is possible to argue that the failure to secure an adequate automobile muffler is dangerous conduct.

There are, however, terms which facilitate distinguishing modes of conduct in terms of dangerousness. From the subjective point of view, conduct should be considered dangerous only if it is feared. Conduct which only generates anxiety should not be considered dangerous. The concept of fear denotes an individual response to a threat which is proximate in time and space. Threats which are proximate in this sense are objectified by the perceiving individual, and fear is, in general, the response. On the other hand, threats which are remote in time or space remain diffuse and conceptual; the threat gives rise only to anxiety.

The following examples may help to clarify this distinction between fear and anxiety.

1. Suppose that no law prohibits solicitation to engage in homosexual relations. It would then be possible (legal) for men and women to solicit their sexual counterparts in any public place at any time. Heterosexual individuals may regard the prospect of being solicited for homosexual relations as a direct temporal and spatial threat to their sexual integrity. This is the sort of threat which may generate fear.

2. Suppose, on the other hand, that no law prohibits homosexual relations as such, but solicitation is prohibited. The response to this situation may be quite different because there is no longer a proximate threat from an objective source. The threat which is now perceived arises from the fact that homosexuality is a "permitted" form of conduct. Since the conduct is officially "permitted" the individual may engage in homosexual relations or not as he chooses; the matter is one of free choice. This sort of freedom, even where the conduct in question is condemned by prevailing moral norms, generates anxiety

55. Rogers v. Elliot, 146 Mass. 349, 15 N.E. 768 (1888).

because it opens to the individual possibilities not discounted by authoritative pronouncements. However, the threat to sexual integrity in this case, because it is removed, conceptual and non-objective, generates only anxiety.

3. Arson is quite distinct from homosexuality in the quality of its threat. The threat presented by arson cannot be separated into constituent aspects. The idea or concept of arson presents no threat distinguishable from the threat presented by the practice of arson. The threat only arises out of the potential harm caused by the destruction of a structure by fire. It is certainly true that in the absence of legal prohibition individuals would be free to choose whether they will or will not engage in arson. But the moral objections to such conduct cannot be distinguished from the immediate harmful consequences to others. There is no removed, diffuse threat arising from the idea of arson; only the proximate, objective threat of property destruction is present. The individual response is fear, not anxiety.

4. The problem of conspiracy is more difficult than either arson or homosexuality. The normal version rationale for making conspiracy a crime provides a good place to begin. In general, the rationale for proscribing conspiracy to commit a substantive crime is linked to the assumed probability that a planned enterprise involving more than one person is more likely to be carried out and has greater chance of succeeding. These normal version justifications for proscribing conspiracy attempt to identify the proximate, objective character of the conduct. The defenders of the normal version have never suggested that conspiracies are proscribable because they are annoying or immoral apart from the completed offense. Nor has it ever been suggested that were conspiracies not prohibited by law the conduct would be impliedly permitted so that individuals would be free to choose whether to conspire or not. Of course were conspiracies not proscribed one could not be punished for conspiring, but the moral quality of conspiring is entirely determined by the proximity of the conspiracy to actual criminal conduct. This, I submit, is what the normal version means by "intent" or "criminal purpose." Planning a crime is morally innocuous provided it is far removed from actual criminal conduct. Law professors plan crimes as a regular part of the process of examining students, and mystery story writers are even more adept and prolific. Undoubtedly, in some circles, the planning of crimes takes on the character of a parlor game. The point is that defining proscribed conspiracies as "agreements with the intent to commit a crime" is an attempt to identify the proximate, objective quality of the threat presented by the conduct.[56] In short, the argument for proscribing conspiracies

56. The criteria of proximity and objectivity are similar to the tests of proximity (to the completed actus reus) and equivocality (res ipsa loquitur) applied in determining whether behavior has 'gone far enough' to constitute an attempt. *See* The King v. Barker, [1924] N.Z.L.R. 865 (1924). Essentially, the problem discussed here is the same as that dealt with earlier in connection with normal version criminality. *See* note 6 *supra*, and accompanying text. In both instances the problem is one of inference from relatively ambiguous data. In this connection consider the possible meanings of the following statement. "They [those who sought to discover ways of "dispensing with mental states"] floundered on the

is that they are dangerous. Absent the proximate, objective character of the threat presented by conspiracies one would be left with the fatuous claim that they are either annoying or immoral. Conspiracies are dangerous because they are feared.

Certainly proximity and objectivity are relative matters, questions of degree, but the question of degree becomes increasingly important as one moves from threats to individual security and approaches threats to collective security: those threats which are generally called "political" crimes. Threats to collective security are relevant here because the doctrine of conspiracy is a common legal weapon used in dealing with them.

The criteria of proximity and objectivity is similar to the doctrine of "clear and present danger" formulated by the Supreme Court in an effort to distinguish threats which normal version criminality may reach from those which it may not touch. The relevance at this point of the clear and present danger test is that it purports to limit the reach of the criminal sanction. Speech which is colorably protected by the first amendment may be prohibited (punished) only if it threatens to "turn into" overt conduct which is itself proscribable. The Supreme Court never denied that "pure speech" may threaten the general security insofar as it expresses ideas completely at odds with the precepts of the community. Instead the Court took the position that this sort of threat is not sufficient to justify invoking the criminal sanction. As a matter of political dogma "pure speech" is not to be feared. Only when the threat presents a "clear and present danger" of harm to the collective security may the community resort to repressive measures.

The theoretical import of this formulation is significant, for while the explicit purpose of the dogma is a resolution of the conflict between freedom of expression and collective security, implicit in it is the realization that a sensitive community may regard almost anything as threatening to its collective security; within the notion of "threat" there are no principled limitations. The Supreme Court supplied a dogma to fill the gap in principle: a threat to collective security may only be suppressed when it is feared, and it may only be feared when it presents a "clear and present danger" of overt conduct which is itself proscribable.

There is another way of looking at the "clear and present danger" test which brings it closer to this discussion of conspiracy. The distinction between

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rocks of the criminal law and other branches of law which are *intelligible only if mental states are considered.* The external behavior of an intentional killer, a negligent one, and a mistaken one might be identical. The significant differences are ascertainable only by discovery of the respectively different states of mind, for example, whether putting a spoonful of sugar into another person's cup of tea was an innocent act or an *attempt* to kill. Of course, an inference regarding another's state of mind must be based on observable actions or on talk, including confession; but *the actor can immediately disclose his state of mind.* It is also true that one makes many decisions that are never carried out; only he has knowledge of those mental states. Thus dependence on external actions in fact-finding and the existence of internal states are *very different matters.*" Hall, *Analytic Philosophy and Jurisprudence*, 77 ETHICS 14, 24 (1966) (emphases added).

threats which the community may not suppress with the criminal sanction ("pure speech") and those which it may ("clear and present danger") can be read as an effort to distinguish real threats from mere symptoms. Speech or advocacy of ideas do not pose *real* threats but action does. The community effort to interfere before the point of action is simply a device to effectively guard itself from the effects of the action. (As I pointed out earlier, invoking the criminal sanction against nonpolitical conspiracies is only an efficient means for protecting against the real threat: commission of the substantive offense.) This is well recognized in the literature, but I have mentioned it here in order to make the point that conspiracies are not necessarily dangerous in themselves. They may only be a symptom of some other threat which is feared. To regard conspiracies as *per se* dangerous is a perilous step to the extent it moves the criminal law away from that area within which it functions best and most securely: the prevention of dangerous conduct.

The four examples discussed in this section should clarify the way in which the notion of fear and anxiety help designate the kinds of conduct which are properly called dangerous. In one sense there is more to this than merely a word game, but in another sense all that is involved is a choice of terms. If we use words to designate classes of conduct there should be something about the character of the class that justifies the inclusion of any particular member. This means that the designation of dangerousness should include modes of behavior which have something in common apart from the fact that they are all called dangerous. On the other hand, it is always necessary to decide whether a particular term is to be applied to a class that exhibits at least one common characteristic. Whether all modes of conduct which evoke a fear response should be designated as dangerous is a question of value, and should remain so. The verbal aspect of the problem becomes particularly serious when the question is whether individuals who present some sort of threat to themselves should be considered dangerous for public law purposes. Because conceptual clarity often breaks down on this question it is worth dealing with separately.

There are innumerable ways in which an individual may be a threat to his own physical safety or his own life. These sources of danger range from suicidal tendencies to mere ignorance, poor judgment or carelessness, with conditions like senility, epilepsy, amnesia, inebriation, chemically induced hallucination, and proneness to coronary arrest lying somewhere in between. The normal version draws an unarticulated distinction between threats from sources which produce risks regarded as inherent in ordinary social life, and risks regarded as extraordinary. On the other hand, this social distinction may be framed in terms of the individual characteristic of rationality. In some instances the individual may be able to "rationally make choices" which endanger his life, while in other instances the individual may be unable to make the "choices" necessary to avoid situations of personal threat. As a practical matter, the

question of when, and in what way, the social order should interfere to protect individuals from themselves may be answered in terms of the capacity of the individual for rational choice.

The justifiability of social interference to prevent self-harm is not adequately explained either by the notion of "ordinary risk" or by the criterion of rationality. The unarticulated distinction between threats which are inherent in ordinary social life and those which are extraordinary begs the question: Why are threats from some sources a matter of "let the chips fall where they may" while threats from other sources call for positive social action? Nor does the allegedly individual characteristic of rationality help to explain the distinction for the purpose of classification. Whether an individual is rational enough to avoid a particular threat is a question of particular "fact" and not a question which can be answered by reference to the nature of the threat. Some people may be rational with regard to certain threats and quite irrational with regard to others. The matter is finally confounded by the elusive quality of reason and the difficulty of determining where rationality ends and fantasy begins.

Professor Dershowitz has recently compared two cases which nicely illustrate the problem.[57] In one case Justice Robert H. Jackson, at the age of 62, was warned by his physicians that if he continued to work he ran the risk of a fatal heart attack. Justice Jackson chose to run that risk and died shortly thereafter. In the second case, Mrs. Lake was committed to a mental hospital because she was found wandering the streets in a state of confusion. Mrs. Lake suffered from arteriosclerosis which brought on periods of confusion interrupting periods of rationality. On petition for release, Mrs. Lake testified that she realized her problem but would prefer to risk her life rather than live out her days in a mental hospital. Her petition was denied.

The distinction between these two cases, in terms of the principles I have been discussing, is that either the threat of coronary arrest is an ordinary risk of social life, or Justice Jackson was rational while Mrs. Lake was not. But these principles do not explain why heart attack is an ordinary risk of social life while the mental effect of arteriosclerosis is not, or in what sense Justice Jackson is more rational than Mrs. Lake.

In my view, the real distinction between these two cases in terms of social response can be found in the premises of the normal version, in the notion of moral responsibility. Earlier, I tried to show that moral responsibility was the key concept in the normal version. In its criminal aspect, the fact of a provable crime leads to an inference of dangerous mental condition (moral responsibility). In its civil aspect, dangerous mental condition leads to an inference of potential dangerous conduct (non-responsibility). In terms of self-harm, this means the normal version will interfere whenever there is serious doubt that the individual

57. Dershowitz, *The Psychiatrist's Power in the Legal Process: A Knife That Cuts Both Ways*, 2 PSYCHOLOGY TODAY No. 9, 43, 47 (1969) *also printed in* 57 JUDICATURE 370, 375 (1968).

can be held morally responsible for what he may do to himself. The primary social interest lies in protecting the validity of the assumption that all autonomous citizens are morally responsible for what they do. The two cases presented by Professor Dershowitz can be explained in terms of this interest: Justice Jackson is regarded as morally responsible for his choice, but there is serious question whether Mrs. Lake is morally responsible for hers.

Where there is reason to question the moral responsibility of an individual, the normal version claims the right to interfere, but it pretends its motive is altruistic. Statutory formulations such as "in need of care or treatment," "unable to care for himself," or "presents a danger to himself,"[58] whether or not honored in practice,[59] certainly reflect this apparent altruistic motivation. Altruism is not, however, the social interest justifying these statutes. The social whole is, I believe, primarily concerned with protecting itself against individuals who are irresponsible in the moral sense. A society which regards itself as individualistic must presuppose that its members are morally responsible for what they do.[60] In practice this must be more than a supposition, it must be a presumption. Consequently, when there is reason to believe that a particular individual could not be held morally responsible if he were to do something harmful to himself, society feels it must take action. If it does not take action it creates, in effect, two classes of citizens: those presumed to be responsible and those to whom the presumption does not apply.

There is an additional reason why society feels it must take action with regard to an individual whom it suspects may not be morally responsible for actions harmful to himself. If an individual does violence to himself there are only two alternative responses: "He did wrong, it's his own fault," or, "poor fellow, he didn't know what he was doing." The normal version, for reasons having more to do with tradition than anything else, feels competent to deal with the former and uneasy with respect to the latter. This uneasiness is compounded by the realization that the line between "it's his own fault" and "he didn't know what he was doing" often seems to be drawn in lemon juice.

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58. F. LINDMAN & D. MCINTYRE, THE MENTALLY DISABLED AND THE LAW 17-18 (1961).

59. *See generally*, R. ROCK, HOSPITALIZATION AND DISCHARGE OF THE MENTALLY ILL (1968).

60. "We tend to hold ourselves, and others, responsible for every act. From childhood, each of us is subjected to a system of rewards and punishments designed to make us feel obligations of responsibility to ourselves, our families, community and nation. We are taught to believe that the obligation of developing responsibility is ours, individually. Whenever a man loses his self-control, gives way to his aggressive impulses, commits a heinous crime and then asserts that he is not responsible for it, each of us is endangered to the extent that we look upon ourselves as a person capable of committing the same act. A man's plea of irresponsibility in such a situation threatens to weaken our personal controls over our aggressive impulses. In this situation we find ourselves in conflict between our feelings of self-blame and a desire to blame others. In addition, there is the necessity of deciding whether the offender should be condemned as a criminal or regarded generously and compassionately as mentally ill." Morris, *The Insanity Defense and a "Jury" Experiment*, 43 WASH. L. REV. 623, 631-32 (1968).

Thus the interest in protecting society against individuals who are morally irresponsible becomes significant because of the problem of the presumption, and because of the reactive dilemma. Altruism plays no part in the social motivation here. The altruism rhetoric is only important to the extent society is unsure of the validity of its real concern. This unsureness can be remedied by presenting the individual interest and the social interest as congruent, and the rhetoric or altruism performs this function. If it is in society's interest to protect itself against individuals suspected of being irresponsible in the moral sense, then surely it is in the interests of the individual to be prevented from engaging in conduct for which he may not be responsible. The individual is held to be just as interested in morally responsible action as the social whole. In this way social interference with individual autonomy is readily justified.

Putting altruism aside, it is necessary to deal with the real social interest, as I have presented it, within the context of this section. Our original question was whether individuals who presented some sort of threat to themselves should be considered dangerous for public law purposes. The next step is to ask whether moral irresponsibility, insofar as it may be manifested in self harm, should be considered dangerous from the subjective perspective of the individual in society.

From the subjective point of view, the individual who may be morally irresponsible for acts harmful to himself presents a threat which can only generate anxiety. By definition, self-harm presents no direct, objective threat to anyone else. Only the characteristic of moral irresponsibility can have some kind of general significance. The nature of this general significance is identified by the problem of the presumption and the reactive dilemma. From the subjective point of view, if the individual cannot presume that all men with whom he has contact are morally responsible for their actions he is thrown into uncertainty; he must determine the responsibility of others for himself and on an *ad hoc* basis. This uncertainty, this inability to presume the moral responsibility of others, tends to generate anxiety. The same conclusion follows from the reactive dilemma. Absent the presumption of moral responsibility, the individual in society is more likely to impute fault in an inappropriate case. He is more likely to say "it's his own fault" where he should say "poor fellow, he didn't know what he was doing." The possibility that one will pass inappropriate judgments may generate anxiety as well as guilt. The potential for guilt in this situation has an additional aspect relevant to the generation of anxiety. Morally irresponsible people are often regarded as children; they require care and supervision for their own protection. Insofar as they are regarded as children a moral duty to act is imposed upon everybody. The effect of this duty is the realization that one may fail to act when one is under a moral duty to do so. This realization may generate apprehension and guilt.

The nature of the threat presented by morally irresponsible people is, from the subjective point of view, a moral threat. The threat is not from an objective

source, and it is neither direct nor immediate. This means that individuals who present some sort of threat to themselves, who may not be morally responsible for their acts of self-harm, should not be considered dangerous.

I am not proposing that society take no action with regard to individuals who may harm themselves. This analysis proposes only that such people should not be considered dangerous in the sense that term is being used here. From the public law point of view activities which are annoying or immoral should be treated differently from those which are dangerous in order to allocate scarce resources in a rational way, and to avoid social conflicts wherever possible. The criminal law should be concerned with dangerousness only, and that means threats which generate fear, not merely anxiety.

B.

From the objective point of view, from the point of view of society as a whole, dangerous conduct should be limited to that which presents a direct threat to the person or property of others. The reasoning here is similar to that used in the preceding section dealing with the subjective point of view. The designation of dangerousness should be limited to threats which generate fear rather than anxiety. However, the relevance of this distinction is somewhat different when one looks at the problem from the objective perspective. From the point of view of the social whole, the relevance of the distinction lies in the difference between the way individuals are likely to adapt to threats which generate fear, on the one hand, and their adaptation to threats which generate anxiety on the other. The question of adaptation is crucial for public law purposes.

In general, threats which generate fear will evoke affirmative, often violent, action. An individual who fears a certain threat does so because his integrity, in the broad sense, is at stake. When the integrity of the individual is at stake formal norms are, at best, only marginally effective in controlling the character of the response. The maintenance or protection of individual integrity is of primary importance in the presence of acute stress. For this reason mature societies have long recognized that individual self-help generally tends to reproduce violence and antagonism. If the legal order does nothing else it must be concerned with eliminating the *need* for self-help as a response to threats which generate fear.

Threats which generate anxiety, however, do not generally evoke adaptive responses of an affirmative, violent character. Primarily, the adaptive mode employed here is the formulation of norms of morality, or drawing upon custom or tradition, in an effort to narrow the range of choices open to individuals and eliminate the "freedom" to engage in behavior which generates anxiety.[61] This

61. Erikson has observed that moral rules of conduct are based on a fear of threats to be forestalled. E. ERIKSON, *The Golden Rule in the Light of New Insight*, in INSIGHT AND RESPONSIBILITY 219, 222 (1964). In this regard it would seem that James Marshall's

mode of adaptation to threats which generate anxiety is possible only because the integrity of the individual is not at stake. In terms of the examples used earlier, unmuffled automobile noise, the "existence" of homosexual behavior, and morally irresponsible individuals, do not present a threat to the integrity of the individual: these threats are not feared. Consequently, affirmative, violent self-help is an unlikely mode of adaptation.

There is an additional reason why, from the objective point of view, the designation of dangerousness should be limited to threats which generate fear. Law shares with morality, custom and tradition the characteristic of being a mechanism of social ordering.[62] But it does not follow from this common characteristic that these mechanisms of social ordering are fungible: While it may not be possible to clearly proscribe or even describe the ideal functions of each it is certainly possible and necessary to propose that law should be limited in its functions, and to describe the sources of such limitations.

Both law and morality function, in the psychological sense, as defenses against internal and external threats.[63] Essentially I have thus far proposed that the defensive function of the criminal law should be limited to defending against those threats which generate fear. By implication, then, I am proposing that the criminal law play no part in defending against anxiety-producing threats, but that this function be left to moral and customary norms. What follows is an attempt to defend this proposal.

There are no "natural" limitations on the uses of the criminal law. At best there are a few constitutional limitations, but beyond that the criminal law is bounded only by political possibilities. Of course there may exist within the inherited morality of the culture a certain sense of limitation, but it is hard to believe that this sense is either sufficiently strong or articulate to counteract intellectual knowledge of the absence of limits. In theory, then, any mode of behavior may be designated as criminal if such designation is backed by a sufficient political force. It is this political character of all criminal codes that allows for development and change as well as repression and rigidity.

The theoretical flexibility of the criminal law tends to breed the assurance that at least in some sense political society is still in control of itself. On the other hand, the absence of inherent limits on the uses of the criminal law tends to breed the feeling that someday anyone's ordinary modes of behavior may be designated as criminal. The point here is that in the absence of some external

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inference is somewhat loaded. "However, observance of social norms is a defense against personal instability which occurs when one is socially dissident." J. MARSHALL, INTENTION—IN LAW AND SOCIETY 180 (1968).

62. H. KELSEN, WHAT IS JUSTICE 231 ff. (1957).

63. "Much of what we ascribe to neurotic *anxiety* and much of what we ascribe to existential *dread* is really only man's distinctive form of *fear*: for as an animal, for the sake of survival, scans near and far with specialized senses fit for a special environment, man must scan both his inner and his outer environment for indications of permissible activity and for promises of identity." E. ERIKSON, *Identity and Uprootedness in Our Times*, in INSIGHT AND RESPONSIBILITY 103 (Norton, 1964).

"test" the criminal law may itself generate anxiety. This is particularly true to the extent the criminal law is a relatively simple and putatively effective weapon against disapproved behavior. In times of stress it is too often the first choice of those seeking simple solutions to complex social problems. To the extent any mode of behavior may, in theory, be designated as criminal, the criminal law becomes an all-purpose defense mechanism, an event which, according to the law of parsimony, weakens its defensive power. Society cannot be too aware that the content of the criminal law depends on the fickle sway of political forces.

It has rightly been observed that the defensive force of any criminal statute depends on a broad consensus respecting the validity of its objective.[64] This need for consensus has generally been explained on the basis of the needs of law enforcement, but I think there is a more fundamental reason. The absence of broad consensus respecting the validity of the objective of any criminal statute brings about consciousness of the political character of criminal designations, and consequently generates anxiety through the realization that any mode of behavior may be designated as criminal.

These observations support the proposal that the function of the criminal law be limited to a defense against threats which are feared. Modes of behavior which generate anxiety because they threaten the stability of the moral order, or because they question the moral "necessity" of any contrary mode of behavior, should be dealt with by the non-legal mechanisms of social ordering. A rational[65] determination of the extent to which a particular mode of behavior presents a threat which is feared, therefore, serves both the pragmatic and theoretical needs of the legal system. It designates as criminal those modes of behavior which are likely to provoke violence in defense of personal integrity, and it conserves the seriousness and moral effectiveness of the community's designations.

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In Part II, I will discuss the notion of fear as it relates to more traditional theories about the province of the criminal law. That is, it has been argued that there are limits to what the criminal law can and should do. Some of these theories have taken the position that the criminal law, because it does or ought to reflect those values which are essential to the maintenance of order, ought to be concerned with a "heartland" of protectable social interests. Other commentators have taken a more pragmatic approach and suggested that the limits can be found in procedural necessity and the consequences of moral pluralism. Here I will argue that in any event the result is the same; fear is the characteristic which distinguishes the proper from the improper concern of the criminal law.

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64. H. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 261-64 (1968).

65. Fear is the premise. Reason operates to "score" the enterprise. Fried, *Reason and Action*, 11 NAT. L.F. 13, 23 (1966). *See also* Kaplan, *Some Limits on Rationality* in VII Nomos, RATIONAL DECISION 55, 57 (C. Friedrich, ed. 1964); S. FREUD, FUTURE OF AN ILLUSION 86 (1928); P. RIEFF, FREUD: THE MIND OF THE MORALIST 325 (1959).

The final sections of Part II will deal with some more removed yet essential questions. First, I will deal with the relation between abstract criminality and behavior in terms of the dichotomy between chaos and certainty. The dichotomy between chaos and certainty is reflected in the legal notions of "clear and present danger" and "strict liability." I will argue that the difference between the concept of "clear and present danger" and that of "strict liability" is not in the *quantity* of chaos or certainty, but in the *quality* of the certainty or chaos implied by the distinction. In concrete terms, a system employing "strict liability" for acts implies a kind of chaos in that the notion of innocence largely disappears: everyone may be criminal at any moment since even mere accident is not a defense. On the other hand, "clear and present danger" implies a kind of chaos resulting from lack of clarity as to where the danger point lies in any particular instance.

The dichotomy between chaos and certainty, in turn, raises serious questions about The Rule of Law, particularly with regard to the relation between crime and revolution. With respect to this question I will point out that the social response to an act of crime is always ambivalent because one is never certain whether the act is merely the result of meanness, or whether it implies a total rejection of social authority or the particular social system. Crime is a subspecies of revolution, the revolution may be a type of crime. To the extent one recognizes this relationship, the moral vigor in the assertion of the pre-eminence of The Rule of Law is substantially weakened. The relative strength of the moral claim to the pre-eminence of The Rule of Law, I will argue, always depends on the relative strength of the sense of social solidarity pertaining at the time.

Finally, I will try to point out that because the pre-eminence of The Rule of Law depends on the relative strength of the sense of social solidarity, the disposition of dangerous (criminal) offenders only makes sense to the extent that it attempts to strengthen the individual's sense of solidarity with the group, and loyalty to it.