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PUNISHMENT AND RESPONSIBILITY IN AQUARIUS

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INTRODUCTION

THE rhetoric of alienation and powerlessness, to the extent it embodies the reality of the world, poses a threat to the Rule of Law in a democratic society.[1] This is how it should be. A prime function of the law is to give substance to the ideals of the society it rules *and* to make those ideals real (put them at least in operation to the degree that the society feels the possibility of their future operation).

With these assumptions I intend to examine the institution of criminal law as it operates in our alienated society; I will focus on our justification of punishment and the role of psychiatry in the criminal process. Such role, I will argue, poses a potential and dangerous distortion of our rehabilitative ideal. The literature in the area is increasingly large, reflecting not mere scholarly fashion[2] but an anxiety that something is wrong with the operation of our criminal law institutions. It is peculiarly easy to immerse oneself in an examination of the minutiae of criminal practice, losing sight of the total institution, thereby lessening anxiety. This article will examine the practice of punishment philosophically, hopefully without losing sight of the ramifications of the particular actual or suggested practice.

For the purpose of this examination I intend to reflect upon two recently proffered conceptual models of the criminal law, one by Professor Packer[3] and the other by Professor

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1. I differentiate between alienation and powerlessness in that "alienation" as I am using it can refer to a group or groups who feel removed from, unrepresented by, and/or committed against the society. These groups are potentially powerful.

2. A. Kojeve suggests that the role of the intellectual as contrasted with that of the philosopher is to analyze both the real world (of everyday life) and philosophical world and is to provide a bridge between the two, suggesting the means whereby the ruler can operationalize the best of philosophy. We lawyers are allegedly particularly trained for this endeavor. A. KOJEVE, TYRANNY AND WISDOM, ON TYRANNY (1963).

3. H. PACKER, THE LIMITS OF THE CRIMINAL SANCTION (1968). The particular models were advanced previously in a seminal article, Packer, *Two Models of the Criminal Process*, 113 U. PA. L. REV. 1 (1964). I find that for the most part I am in agreement with Packer. Admitting agreement, I also admit real frustration concerning Packer's conclusions and an inability to proceed any further than did he. I think this is because of an error in focus. Modern lawyers are trained to think legal institutions can structure social consciousness; too often the reverse is the case.

Katz.[4] Next, I will examine the several philosophic justifications for punishment and consider the extent to which the practice of punishment and the criminal process in general can handle recent "cause" situations in this country: 1) The Chicago Democratic Convention, 2) The Chicago Conspiracy Trial, 3) The Chicago-based actions of the Weathermen. I intend to describe and speculate on the dynamics of these situations. I will assert that the institution of punishment cannot cope with these situations (nor can implicitly the criminal law as a whole). Yet, I do not stand for the abolition of punishment. Finally, I will examine our understanding of the doctrine of responsibility. This treatment will be made with an eye to developing in a follow-up article what modifications, if any, can be made to bridge the widening breach between the rule of law and the actions of the despondent and "anti-legal alienated."

I.

Professor Katz, following James Marshall[5] and Lady Barbara Wooton,[6] posits a "revised" version of the criminal process in lieu of the "normal version" (our present system). This revised version, as I understand it,[7] in contrast to the retrospective normal version, *i.e.*, where there is a concentration on the intent of the individual at the time of commission of the act as a necessary element of guilt, is "futuristic," presenting a bifurcated process. Its first inquiry would seek to establish the commission of the criminal act; its second, should such be necessary, would provide an assessment of the offender for purposes of sentencing—a sentencing, I take it, functionally different from punishment as we now call it. This sentencing will be a tailored treatment process definitely fitting into a rehabilitative ideal. In Katz' words:

> An explicitly futuristic system—what I shall call the revised version—would eliminate the notion of mens rea from the definition of criminality. Revised version criminality would include only an enumeration

4. Katz, *Dangerousness: A Theoretical Reconstruction of the Criminal Law*, 19 BUFFALO L. REV. 1 (1969) [hereinafter cited as Katz]. This article is one of two parts, the second of which I await. I was challenged by the first article although I disagree with its conclusions. A theoretical article can do little more than challenge on the academic level; it can on the real-world level prompt or indicate a move toward change; hence this reply.

5. J. MARSHALL, INTENTION IN LAW & SOCIETY (1968).

6. B. WOOTON, CRIME AND CRIMINAL LAW: REFLECTIONS OF A MAGISTRATE AND SOCIAL SCIENCE (1963).

7. Professor Katz' article is excellent and tightly written, in some respects so tightly that I am uncertain that I understand him. I apologize for any misinterpretation.

> 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 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.[8]

I found myself agreeing with Professor Katz as he urgently attacked and dismembered our "normal" process revealing its obvious inefficiency and, of more import, injustice to the particular offender.

Under the normal version, punishment is justified for a myriad of reasons.[9] But, indicates Katz, there exists no justification for rendering pain or suffering by way of the practice of punishment to an individual whose "behavior is not crucially affected by the potential infliction of pain in the future."[10] Nor, he further indicates, is such a justification attempted.[11] He attacks the modern explanation of punishment: "punishment for crime makes 'more vivid' the seriousness with which society regards the underlying norms. . . . Punishment is thus a tool of socialization."[12] Katz asserts that the justification is weakened through two errors, one of conception and the other of execution. One cannot make group values more vivid where the individual does not feel part of the group. Punishment to such individuals, the argument goes, can only further isolate the individual, not pull him into the common fold. On the execution (or operational) level the argument clearly shows "punishment almost exclusively takes the form of exclusion and isolation."[13]

8. *See* Katz at 10-11. I would suggest these "other purposes" functionally include or at least should include protection for the offender against errant, irresponsible or good faith, but wrong, hearsay.

9. The classic philosophical justifications rest on utilitarian or retributive grounds. *See* Rawls, *Two Concepts of Rules,* 1955 PHILOSOPHIC REV. 64.

10. *See* Katz at 17.

11. *Id.*

12. *Id.* at 18.

13. *Id.*

With appropriate citation,[14] Katz shows that our present mode of operationalizing punishment is not psychologically sound and is, if I read his position correctly, unjust. "One can hardly avoid concluding that on its own terms the normal version is immoral."[15]

Why is the normal version so patently immoral? The answer rests with the two underlying presuppositions of the normal version's justification of punishment: 1) men are not fungible but individuals in themselves, and 2) men who are not in control should not be punished and certainly not be used as examples to deter others.[16] The asserted immorality lies in the failure of the normal version "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."[17]

I heartily join Professor Katz in inveighing against a society which blames those it has conditioned to be anti-social for being

14. *E.g.*, E. ERICKSON, IDENTITY, YOUTH AND CRISIS (1968); J. PIAGET, THE MORAL JUDGMENT OF THE CHILD (1965); he could have added E. GOFFMAN, ASYLUMS (1961). The supportive list is potentially endless. Although I agree fully with the validity of Katz' psychological assertions, note that a sophist or modern psychiatrist, social worker, or penologist could dialectically manipulate Katz' argument by asserting that isolation is the one method whereby we can alter and restructure, *i.e.*, normalize, the personality of the offender. In popular parlance "brainwashing" is a most effective mode of personality alteration. But, hopefully, we experience means-ends problems. No matter how effective and "good" the end result, we think certain procedures *in and of themselves* are inhuman.

15. *See* Katz at 20. Can anything immoral be just? The reason for raising this issue of justice is obvious and not merely linguistic sophistry. As lawyers we are interested certainly in justice. On its own terms the modern system of punishment would aspire to be "just" as a practice *and* "just" on the individual level. It may occur that a practice is in itself "just," but in an individual case unjust. Certainly, in "normal" terms the punishment of the innocent (if this is possible logically) is manifestly unjust. *See, e.g.*, Quinton, *On Punishment*, 14 ANALYSIS 1933-1942, in FREEDOM AND RESPONSIBILITY: READINGS IN PHILOSOPHY AND LAW (H. Morris ed. 1961). (Quinton argues that the word punishment logically connotes that the offender is not innocent).

16. Our modern doctrine of mens rea, as well as our insanity defense, is conditioned on this second point. Perhaps this should be somewhat qualified. H.L.A. Hart, whose works on punishment and responsibility represent contemporary legal classics, indicates that same would claim that besides the elements of knowledge of circumstances and foresight of consequences, in terms of which many define mens rea, there is another "mental" or at least psychological element which is required for responsibility: the accused's "conduct" must be voluntary and not involuntary. This element in responsibility is more fundamental than mens rea in the sense of knowledge of circumstances or foresight of consequences; for even where mens rea in that sense is not required and responsibility is "strict" or "absolute" (as it is said to be, *e.g.*, in the case of dangerous driving), this element, according to some modern writers, is still required. H.L.A. HART, PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 90 (1968).

17. *See* Katz at 20.

anti-social. I also deny the efficacy and berate the injustice of our typical modes of punishment. "Enforced solidarity, outcast status as a punishment for crimes, and other forms of exile [stigmatization in and by the dominant society?], can do nothing but aggravate the problem."[18] But it does not require a change from the normal to the "revised," that is, the behavioristic version, to change our mode of operationalizing punishment.[19] We must ask if Katz is correct in emphasizing his attack on the deterrence rationale upon which he claims the normal version is based. It would seem to me that an individual, a man in himself, may have indeed been socialized, may accept the values of the dominant culture, may, indeed, know and understand the sanction for a particular proscribed act and, nonetheless, purposely breach the criminal law for "moral" reasons (civil disobedience), for "immoral" reasons (economic gain, namely, white collar crime or organized crime), or out of strong emotion (anger or fear, namely, homicide of wife's lover). Undoubtedly, a man may be socialized and *sometimes* breach; most of us do.

But Professor Katz is referring to another class, to those who truly are not socialized and who cannot control themselves. This class may encompass at least two classes of individuals. An individual may be unsocialized, in that he is committed to other than the legalized norms of the society but still is acquainted with these norms and capable of following them if he so desires.[20] The class

18. *Id.*

19. An eminent contemporary philosopher, Joel Feinberg, writes to this issue:

> I think that most humanitarian reformers who claim that punishment is obsolete (or immoral?) do not really mean what they say. They really mean that many of the usual accompaniments of punishment,—spite, cruelty, pointless moralizing, and so on—are obsolete, and in this I think they are right. Restriction of an offender's liberty is, generally speaking, an injury to him. Most modern penal reformers do not wish to eliminate this injury; they wish instead simply not to add insult to it. They recommend taking advantage of a prisoner's confinement by making every possible effort to rehabilitate him; but this would be a supplement to legal punishment, not a substitute for it.

Feinberg, *On Justifying Legal Punishment,* NOMOS III: RESPONSIBILITY 152, 164, 165 (C. J. Freidrich ed. 1960). Irrespective of Professor Katz' position, we can change our method of punishment without changing the normal version.

20. I would like here to avoid problems of freewill and determinism. I do not see them as necessary to this point of the discussion. One could argue as does Paul Edwards, that "you are right . . . in maintaining that some of our actions are caused by our desires and choices. But you do not pursue the subject far enough. You arbitrarily stop at the desires and solutions. We must not stop there. We must go on to ask *where* they came from; and if determinism is true there can be no doubt about the answer to this question. Ultimately our desires and our whole character are derived from our inherited equipment and the environmental influences to which we were subjected at the beginning of our lives

to whom Professor Katz refers, however, is composed of those who are both unsocialized and not deterrable by the threat of punishment (or by punishment itself, if they have already undergone this ritual). Professor Katz, I think, is quite right in asserting that some individuals "are not marginal with respect to pain,"[21] *i.e.*, they are not intimidated by the threat of the pain of punishment or they will not be deterred by the threat of future pain.[22] I agree with Professor Katz that if one accepts his formulation of justification for punishment, it is unfair[23] to punish this category of offenders. Very few, even classically, have contended that punishment is good in itself. It is certainly not a good intrinsic to the group Professor Katz has indicated. Punishment may, fortunately, turn out to work to their welfare. It will certainly provide an enforced opportunity for expiation, satisfying those who feel this is a necessity for reform.[24] But this is hardly a justification for punishment. Along with Professor Katz and so many commentators who have bothered to put their view in print, I wonder:

> He asked a very simple question: Why, and by what right do some people lock up, torment, exile, flog and kill others, while they are themselves just like those they torment, flog and kill? And in answer he got deliberations as to whether human beings had free-will or not; whether or not signs of criminality could be detected by measuring the skull; what part heredity played in crime; whether immorality could be inherited; and what madness is, what degeneration is, and what temperament is; how climate, food, ignorance, imitativeness,

It is clear that we had no hand in shaping either of these." Edwards, *Hard and Soft Determination,* in DETERMINISM AND FREEDOM IN THE AGE OF MODERN SCIENCE 104-13 (S. Hook ed. 1958). A hard determinist could quote a number of eminent supporters. "Our volitions and our desires," wrote Holback in *Good Sense* "are never in our power. You think yourself free, because you do what you will, but are you free to will or not to will; to desire or not to desire?" *Id.* 109. And Schopenhauer expressed the same thought in the following epigram: "A man can surely do what he wills to do, but he cannot determine what he will." *Id.*

21. *See* Katz at 17-18.

22. *Id.* Katz continues, "these responses to the classical defense of punishment are well known, and I am more particularly interested in the modern explanation." *Id.* I take it Professor Katz does not buy the so-called classic defenses, otherwise, he would indicate his points here against the "normal" system are well countered. I will outline such defenses which, are indeed, well known, but which are as applicable to the revised as to the normal version.

23. *See* Rawls, *Justice as Fairness,* 67 PHILOSOPHIC REV. 164 (1958).

24. This is not an outlandish position. In fact, it was the underlying psychological insight of the Roman Catholic confessional according to a noted psychologist, O. H. Mowrer. *See* this theme developed in O. MOWRER, THE CRISIS IN PSYCHIATRY AND RELIGION (1961), and O. MOWRER, THE NEW GROUP THERAPY (1964).

hypnotism, or passion affect crime; what society is, what its duties are and so on . . . , but there was no answer on the chief point: 'By what right do some people punish others?'[25]

II.

What is wrong with the Katz revised version of the criminal process?[26] I can only speculate on its effects. Yet I can speculate consistently with certain values which our criminal process, as a function of our mythical democratic ideals, posits. For this purpose I turn to Professor Packer's heuristic Crime Control and Due Process Models.[27]

Packer's models are intellectual constructs designed to show the direction a criminal process can take and the tension radiated by the values inhering in either direction. Packer's models are designed to show the structures and pressures in our normal process and to allow evaluation. Katz' model is designed to be put in operation and would, once in operation, lean toward one or the other of Packer's descriptive, dynamic model directions.

Since Packer's formulations are well-known, I will briefly indicate that the Crime Control Model is geared to yield efficiency in a system of wide application and limited resources. It presumes, encourages, and is designed to structure a guilty plea in a swift functional manner. This would necessitate the exclusion of all "obstructionist" procedure. The Due Process Model is primarily

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25. L. TOLSTOY, RESURRECTION (V. Traill transl. 1961). In his excellent book THE RATIONALE OF LEGAL PUNISHMENT (1966), Professor Pincoffs has used this excerpt from Tolstoy as a preface. Pincoffs' final answer to this question is a frustrated one and this after long and diligent thought. "The short answer to Tolstoy's question: 'By what right do some people punish others?' is that, needing a practice, we do not know any better one than legal punishment." *Id.* at 136.

26. The effectiveness of this revised scheme is contingent upon coping with the problem of delineating in a viable, *i.e.*, non-arbitrary way, "dangerousness." One can hardly fault Katz for his attempt in this area or for his method in giving operation to that attempt. One must, however, analyze whether, and how, it will work. The Katz paper is an excellent delineation and development of the behavioral position. Also it provides easy and concise access to all who would analyze this position. But I remain unconvinced by Katz' differentiation between anxiety and fear, as a basis for determining societal dangerousness. In "common useage" the two seem very close; on the conceptual level there is much dispute about causes and feelings of anxiety. *See generally* R. MAY, THE MEANING OF ANXIETY (1950).

27. Packer, *supra* note 3. *See also* Blumberg, Book Review, 117 U. PA. L. REV. 790 (1969). Blumberg suggests that Packer's prediction of a shift toward the Due Process Model is in error and that the Crime Control Model will take the upper hand. Both Packer and Blumberg prefer the due process version. Professor Katz himself has reviewed the Packer book, 117 U. PA. L. REV. 640 (1969).

concerned with the rights of the individual thereby involving sometimes (its critics would maintain) involuted procedural niceties. The essence of the Due Process Model is its concern with "the primacy of the individual and the complementary concept of limitation on official power."[28] To this end, advocates of crime control indicate, criminal procedure is often unnecessarily cumbersome.

The limitation of official power inhering in the Due Process formulation is a point of our ideology that is worth developing. Increasing numbers of commentators and a significant number of our liberal and academic communities have seemed to reflect an animus against official power. It may be apocryphal but I have heard attributed to the humanistic psychiatrist Victor Frankl that "America is based on a paranoid's dream: life, liberty and the pursuit of happiness." I think it axiomatic that as a society our orientation has been wherever possible a circumscription of official intervention at the potential cost of personal physical security.

It is my belief that the Katz proposal would prove in derogation of the Due Process direction.[29] The rationale for substituting the revised version is to guarantee or at least structure toward an individuated justice. The process will purportedly have both eyes on the defendant at bar; it will not be motivated theoretically by any unarticulated desire or need to deter the conduct of others.

But the revised system must necessarily work at the enforcement level through the same procedures extant for the normal version. The defendant will be processed in the same manner as he is now. Except in the very limited number of cases where a defendant is found to have committed the proscribed act and also is found not to be dangerous, he will be subject to a dispositional sanction or treatment.

If we grant it to be unfair to penalize an individual who had no control of his action or has been conditioned by some combination of personal and societal determinants toward the act in ques-

28. H. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 165 (1968).

29. I see the Katz scheme as another step in what could turn into a therapeutic state. The Due Process Model stands for both substance and procedure. *See* Kaplan, *Civil Commitment or As You Like It,* 49 B.U.L. REV. 14 (1968). *See generally* T. SZASZ, THE MYTH OF MENTAL ILLNESS (1961); T. SZASZ, LAW, LIBERTY AND PSYCHIATRY (1963); T. SZASZ, PSYCHIATRIC JUSTICE (1965); R. LEIFER, IN THE NAME OF MENTAL HEALTH: THE SOCIAL FUNCTION OF PSYCHIATRY (1969); Beaver, *The "Mentally Ill" and the Law: Sisyphus and Zeus,* 1968 UTAH L. REV. 1; Beaver, Book Review, 14 McGILL L.J. 756 (1968). *See also* Kaplan, Book Review, 43 TUL. L. REV. 923 (1969).

tion, is it not as unfair to force treat him as it is to punish him? In fact, we are operating on him through coercive process through no fault of his own (by definition).[30]

The advantage of the revised system in terms of individuated justice is nugatory if one feels, as I do, that a forced treatment is as much punishment and, for some, more, compared to a typical penal sanction. Moreover, the revised system structures toward a potential indeterminancy of treatment which may prove more harsh to the defendant than a straight, normal sanction. To be sure Professor Katz would limit such abuse. My point is that once posited and in actual operation it will be highly tempting to hold a defendant until he is cured, Professor Katz' theory notwithstanding. Cure and dangerousness, I feel, will be quickly equated by institutional psychiatric experts, particularly where they feel potential pressure from public opinion for any injury inflicted by a "too-quickly-released" defendant.

Factually, the very treatment based upon the same psychiatric evaluation can be proffered through the normal system. This direction is, in fact, readily seen in the operation of our present process. I have no protest if Professor Katz or others can persuade legislatures to provide a dispositional phase of process where the problem of dangerousness can be clearly defined and determined, but only if a defendant can opt out of such a process by choice. But I would not agree to the dropping of the mens rea requirement as related to the incorporation of such a second phase. I see mens rea despite its obscurity as an additional safeguard against *any* societal intervention against an accused.

Professor Katz has focused upon mens rea as a key conceptual culprit responsible for the normal system operating against a blameless, control-less defendant. Ironically mens rea is one of the very concepts which demands a personalized trial for an accused. Did *he* intend to perform the proscribed act? Did *he* act voluntarily? Did *he* have any excuses or defenses? I am suggesting that a defendant can indicate states of consciousness, excuses and

30. Notice that we have assumed that such individuals have little or no control. We have not attempted, nor has Katz, to determine where or when the individual's control of self was vitiated or to what extent he was passive in such loss of control. What is the justification for opting for a psychiatrist over a lawyer or philosopher for such evaluation? Will the revised version's psychiatric expert determine this? Why not have such questions phrased by a lawyer and allow a psychiatrist to attempt to answer them *after he has revealed the philosophic substratum of his particular school of theory.*

defenses through a mens rea concept or analogue which are designed to guarantee the very individuation Professor Katz is seeking. If the normal version fails to individuate, the fault is not a function of mens rea nor will it be corrected by a revised version which may not even formulate concepts to shield a defendant. Such process could easily yield to ad hoc determinations contingent upon the fortuity of a psychiatric board dedicated to one view of man as opposed to another or who may not have any theory at all, *e.g.* behaviorists who are anti-theoretical and who do get results through methodological interventions.[31]

III.

Professor Katz, it seems to me, has not worked out the dispositional phase of his process. This is most probably forthcoming. I certainly hope so for I am assuming that his analysis and obvious acute sense of individuated justice will allay some of my fear, namely, the abdication of criminal disposition to psychiatric experts which I see as a further erosion of principles of personal responsibility to a psychiatric bureaucracy. The dispositional phase of the revised process, with or probably without a judge (what, if any, would be his function?), will perhaps be constituted by some sort of medical (psychiatric) or psychological board which will scientifically assess the defendant's "being." I am not sure to what extent the diagnosis of this capacity must be related to the specific breach. For example, if an individual comes into the dispositional step of the revised process on a simple assault[32] and the diagnosis indicates a high degree of potential dangerousness for future physical altercations of this type, do we hold him until cured? How do we determine how dangerous he must appear to be? Do we want psychiatrists, psychologists, and/or social workers making these judgments? What social (not medical) guidelines do we give them?

But one may protest: this problem does not render the revised version nugatory; criteria can be developed. Maybe. What, to continue my cases, if a bad-check writer turns out to be potentially physically dangerous. Do we hold him until cured? Katz sug-

31. *See generally* T. AYLLON & N. AZRIN, THE TOKEN ECONOMY: A MOTIVATIONAL SYSTEM FOR THERAPY AND REHABILITATION (1968).

32. H.L.A. Hart uses this particular example in *Changing Conceptions of Responsibility,* PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 186, 206 (1968).

gests that an offender may be found not dangerous and released immediately or as soon as public clamor allows. If public clamor is important then this process also treats the individual to the extent public clamor restricts his release. Again I am concerned with the direction the revised model can take; academic limitation, I predict, would yield quickly to popular clamor once a dangerousness standard was established as conceptually determinative. My basis for this feeling is tied to the change of focus from mens rea to dangerousness—a change from volition to result, a change from an individual ideal to one more protective of community security.

But this may be too cryptic. Mens rea focuses particularly on the intent of the action; its orientation is to ascertain what the defendant consciously wanted to effect by his act. Dangerousness would function in the same way, but it connotes a focus to protect others from individual harmful action.

The very attempt to reconstruct intent serves an important function. It forces a judge and/or jury to attempt to put themselves in defendant's position and to feel what he was feeling and to see how or why he could have intended (been motivated) to act as he did. A "dangerousness" focus even by psychiatrists reflects more concern with "what happened" and "will it happen again" than to how it happened.

Returning to my hypothetical checkwriter, one can argue he had notice of the risks inhering in a revised process, that is, he knew that if he were caught he could potentially be held for his position on a dangerousness continuum and not for the particular bad-check writing act. So if we assume a rational bad check writer, he assumed a risk based on notice and lost. Moreover, since he is determined to be dangerous, why not keep him until rendered harmless?

The classical answer lay in our tariff system of sanction. No matter how bad a man's intent we demand a nexus between that intent and his act and hold him according to our determination of the seriousness of the damage caused by his act. Hence attempts, for example, are sanctioned to a much lesser degree than the accomplished act. There has been a societally-held value that the mere attempt even if unsuccessful for fortuitous reasons (as opposed to psychically determined failure mechanism) still should pay less than for harm done. This may be based on a policy to pro-

tect the individual, even, the bad offender, from severe societal sanction. This common law policy is unarticulated and without logical derivation—it reflects lay morality.

Professor Katz' revised version marks and may be marked by a change in society's position on this question. I am suggesting that the behaviorial scheme as posited by Katz is itself a product of a reading of social problems and an attempt at a rational answer to perceived societal demands.

The direction of the "reform" may prove subject to greater abuse of our currently held value preference for individual autonomy, than the version it seeks to replace.

The law is a powerful force in contributing to the structuring of popular morality. To the extent that legal institutions focus on dangerousness and not the results of an act, society may demand even a greater excision of the dangerous from the societal corpus. In other words, the change in the law as it percolates to the society (without attempting to analyze that process) may create greater demands upon its process to repress dangerousness. At a certain point one can discern demand for the suppression of the dangerous without waiting for the legally proscribed act. And the revised machinery facilitates the operationalization of such a tendency.

IV.

The traditional *raison d'être* for our mens rea requirements are recognized by Professor Katz. Under the mens rea rationale, the argument goes, the individual is put on notice of the type of conduct proscribed and can gauge his actions accordingly. Further, to punish (or treat, I may add) an individual who did not *intentionally* breach such a proscription is unfair. "Anxiety levels" will rise when individuals know that mistaken behavior can result in the invocation of the criminal process against them. Hart gives an excellent account of this so-called "pricing system."[33] Feinberg phrases the argument thus:

> Because the criminal law recognizes certain excusing conditions, I can make my plans in perfect confidence that I will not by accident, blunder my way into prison [or into a hospital] and have my plans ruined. In short, the law maximizes the effectiveness of my choices and

33. H.L.A. Hart, *Legal Responsibility and Excuses*, in DETERMINISM AND FREEDOM IN THE AGE OF MODERN SCIENCE 117 (S. Howe ed. 1961).

> decision, helps me anticipate the future and plan accordingly, diminishes anxiety, and insecurity, and deters by threat private individuals who might otherwise cause me great damage. Furthermore, I think a case could easily be made that the law could not yield these benefits for me nearly so effectively without the system of punishment. Finally, and most importantly, the advantages I have cited are advantages shared alike, by all.[34]

But the truth of the matter may be otherwise. This offered rationale for mens rea requirements is based on an "economic" model. Economic models assume rationality. The thieves, rapists, murderers, and the Thoreaus, Spocks, and Hoffmans who have become ensnared or ensnare themselves in the criminal process may be in no way affected by the notice implications of our mens rea requirements. *May* not be. Llewellyn suggests that the average citizen does not know the rule of law[35] (and probably does not feel a lack thereby). This citizen abides by the "folkways" of society which are predicated on his peer group membership. He follows the law because the law reflects the societal norms, not necessarily vice versa. But Llewellyn admonishes:

> Modern means of communication and of force-application have made possible terrifically effective government which, over a couple of generations, can prove efficient to almost wholly remodel folkways and even mores, on a mass scale. Indeed before Hitler and Soviet Russia, and without modern technology, sociologists should not have overlooked the work of the Zulu Chaka and, to a somewhat comparable extent, of the Mongol Genghis.[36]

Also, and obviously, there exists a dialectical tension between the societal norms and modes of conduct and the authoritative legal mandates. The mens rea requirement reflects the fact that society finds it unfair to label a criminal and to intervene, even therapeutically, with one who has not intentionally and purposely

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34. *See* Feinberg, *supra* note 19, at 162. Professor Katz in reading a prior draft of this article rightly commented that "those who think this way, if they exist, never commit crimes (or are marginal)." He asks "what about those who do not test reality in a rational way?" My answer goes to the basic if erroneous assumption the law makes: men are rational and can be controlled by reason. As a policy assumption it seems to me valid to assume such potential for rationality as opposed to the converse. Moreover, the criminal process is directed to all of us, not to an offender after he acts. Even under the Katz proposal the man who has acted illegally will be subject to coercive disposition. This being the case I prefer our present formula.

35. K. LLEWELLYN, JURISPRUDENCE: REALISM IN THEORY AND PRACTICE (1962).

36. *Id.* at 411 n.d.

breached a criminal ukase. Excuses and intent requirements in the law partially maintain, I would conjecture, individual assessments on extra-legal everyday matters.

The criminal mens rea legal practice acts as a very real morality giving center, evaluating the proffered excuses of offenders to see whether and to what degree they measure up to acceptable standards. This is a fairly sophisticated and slowly developing process. It is arguable, however, that case development in the "excuse/mens rea" area is dead. Perhaps it should be resurrected and aired to the populace. To the disinterested populace? How? The normal version faces the same issue: how does it become a vital institution? By vital I mean more than functioning; I mean value generating and justice actualizing. Vitalization of our institutions is needed. Killing mens rea does not create life, does not create moral debate (even in esoteric places like law reviews); it forecloses debate. Of course, as Norval Morris commented, concerning the abolition of the insanity defense, such foreclosure may save time, effort, and effectuate a canalizing of our resources to more fruitful issues.[37]

Substitution of the revised version for the normal version will create debate at the rehabilitative level: a significant area worthy of analysis rather than pedestalized obedience. If individual responsibility on the psychiatric level is important, the abolition of mens rea is not going to further this end. Instead of an attempt to elucidate responsibility categories, we will attempt to clarify psychiatric nosological categories which, though heuristic for treatment purposes, are not relevant to a justification for holding an offender. Of course we can operationalize the revised version by introducing lawyers, philosophers, sociologists, anthropologists as well as psychiatrists, psychologists and social workers at this phase of the process. Instead of the backward looking "normal" process with its mens rea requirements, we can have a forward looking assessment of, of, . . . of what? Well, of what the particular offender is all about and of why he did what he did. We will then have to ascertain if he knew what he was doing, and if so, why he still did it. The question of his intent in doing the act may be necessary to determine for therapeutic purposes. What if we find that the offender knew what he was doing, knew it was legally

37. Morris, *Psychiatry and the Dangerous Criminal*, 41 S. CAL. L. REV. 514 (1968). Morris, to my understanding, is a firm advocate of the mens rea practice.

proscribed, and still *felt justified* in doing what he did; what if our team (of whatever composition) agrees that in the particular case he was in their opinion justified, but that he is dangerous?[38] By treating such an offender may we not discourage this type of future conduct even though we find it morally justified in the particular case?[39]

Specifically, I am concerned here with the "political offender" who will probably fill an increasing caseload in our criminal process. He could be a Dr. Spock or a Thoreau. Under the normal version such an individual can reason: I think this law (or governmental action) is unjust; by breaching this law (or governmental action) I will highlight my dissent (serve witness); my breach will be further highlighted by the punishment I receive; I have a right to this action and an obligation to endure the concomitant punishment. Our hero, as often he is, under the revised version, if I understand it correctly, will be found to have committed the act; this will constitute guilt. He will then move to phase two where he will be somehow "assessed" for dangerousness. Maybe he really is dangerous: a true revolutionary in the footsteps of a Washington or a Jefferson. I take it, then we cure him of this deviance. This is the way to individuate justice? This is the way to treat an individual with dignity? Enough rhetoric. Intuitively, I think *the equation of capacity responsibility with a psychiatric label set in terms of dangerousness is a denial of the dignity of a man. I think it both an immoral and unjust practice and immoral and unjust in the individual case.*[40]

The revised version, to the extent it relies on psychiatric nosology as opposed to legal categories of responsibility, can undermine an individual's opportunity to justify his action. He may well

38. *E.g.*, an offender may be found to have acted in self-defense but to have a potential for physical violence generally.

39. To be fair the normal version yields a similar result. However, its structure is more conducive to the explanation of conduct than would be the revised version, which seemingly automatically imports psychiatric expertise and therefore psychiatric nomenclature.

40. *See* Katz at 22. Professor Katz indicates that our present operation of justice undermines this demand. This is often and perhaps generally the case. I do not see the revised version remedying the present defect but rather buttressing an already invidious tendency. *See* Berlin, *Equality as an Ideal*, 56 PROCEEDINGS OF THE ARISTOTELIAN SOCIETY (1955-1956), in F. OLAFSON, JUSTICE AND SOCIAL POLICY 128, 130 (1961), where Professor Berlin states, "Equality is one of the oldest and deepest elements in liberal thought and is neither more nor less 'natural' or 'rational' than any other constituent in them. Like all human ends it cannot be defended or justified, for it is itself that which justifies other acts-means taken toward its realization." *Id.* at 130.

feel inhibited by psychiatric experts who he knows to be assessing his statements *not* philosophically but toward potential treatment. This focuses process on rehabilitation even before a finding that an offender should be held. Psychiatrists are specifically trained to treat, not to answer, philosophic questions. If an offender for example contends that he acted in self-defense, in the normal process he may or may not be believed by a jury. But he has had an opportunity to have his position judged on its merits. Indeed, an offender should have a right to know why he is being dealt with; he should have the right to explain, attack, excuse, or mitigate any of the "hearsay" information going into the judicial computer assessing his fate. A psychiatric expert in a revised version may judge any argument in excuse or mitigation, not in terms of justification but as indicative of the presence or absence of a disease entity which may or may not be a part of the expert's theoretical understanding of dangerousness. To the extent he is acting as a psychiatrist, the expert is acting in terms of medical intervention. He may see a paranoid schizophrenic where a jury sees an individual who has acted in self-defense.

My protest is that psychiatrists have not proven their worth as philosophers; they often fail to see the philosophic underpinnings of their own theoretical position. By substituting psychiatric labels for legal categories we establish the psychiatrist as philosopher king. We endow him with an understanding of societal dynamics of which he is often unaware when compared for example to a sociologist, cultural anthropologist, philosopher and even lawyer. Moreover, the law still has the function of structuring toward certain ideals. Psychiatric practice is often geared to structure man's conformity to existing standards. Psychiatric theory and practice can be a powerful socializing force—but this force may lead in the direction of other-directed conformity. The more the law institutionalizes psychiatrists as decision-makers, the more the tendency toward conceiving man in terms of disease entities. And once a man is so labeled we have dynamically structured his abdication of responsibility. After all a sick man cannot be blamed; he is sick, not evil, because our psychiatric priests so said. Men tend to believe their doctors.[41]

41. In another article I posited a model man, *i.e.*, a post-Freudian man and placed him in a technological, alienated society. I then attempted to use this description as explanatory of and as a polemic against the practice of civil commitment. I still stand behind that article and find that the commitment process is a denigration of human

V.

We are in the process of forming an extensive literature concerning this phase and perhaps the abolition of the mens rea requirements.[42] A significant literature concerned with the abolition of the insanity defense has already been developed.[43] I think it indicative of a disaffection with a prime traditional symbol in our normal process. Abolition would affect relatively few cases as has been often indicated. In fact, given the wide practice of guilty pleas predicated on plea bargaining, the abolition of mens rea may not affect large numbers of cases. But its effect in terms of reflecting and forming public opinion is more difficult to assess. At the very least the mens rea requirement provides an important buffer between the individual and the state where the individual offender chooses to invoke the full process. I favor the maintenance of such a buffer institution.

The debate over the abolition of the insanity defense highlights one particular issue key to either the normal or revised process: the use of psychiatric expertise in the criminal process. One assertion against the insanity defense is the spectre it presents of two adversary scientists (psychiatrists) validating diametrically opposed views. Psychiatric testimony at the trial level is often predicated on a Procrustean bed to advance the particular adver-

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dignity—a move toward a therapeutic welfare state where the concept of individual autonomy and responsibility will be anthropological vestiges of an older unenlightened culture. Real issues exist. What do we do with the societally deviant: punish them? Treat them? What difference in the various models? Indeed is not individual responsibility a myth promulgated by the "establishment," *i.e.*, an economic oligarchy, the church, or the state? If the individual responsibility was at one time viable what does it mean now? How do we go about finding a responsible man? And if he were wise (as I suggest he would be) would he not hide from us to keep the taper flickering for another age, for a critical period where he could assert personal impact?

What distinguishes a responsible man? Are there positive indicia? Can a criminal be responsible? If he is, do we punish him and if he is not, do we commit him? What are our justifications for any or all of our limited models in confronting the societal outlaw, or deviant threat? A precipitous move toward a revised system obscures but does not start to answer these questions.

42. *See, e.g.*, Kadish, *The Decline of Innocence*, 26 CAMB. L.J. 273 (1968). I am happy to join Kadish. I particularly join in his conclusion and exhortation:

> One would hope that the direction of creative reform would not be to remake the criminal law after the model of these special and largely unsuccessful exceptions to the fundamental criminal law principles, but rather to devise legal principles and mechanisms for subjecting the process of treatment and social prevention to the restraints of law.

Id. at 290.

43. *See* Morris, *supra* note 37. Morris, in an appendix to his excellent article, outlines the key position taken by the advocates of abolition.

sary position. Keeping the insanity defense maintains, for lawyers at least, a high level visibility of psychiatric incompetence and sometimes bad faith—all of which can be easily masked in the revised version. Experts become institutionalized as quickly as mere mortals. Would there not be a tendency to err against the individual by an institutionalized psychiatric (or whatever) panel at phase two of the revised process? The revision of the model involves a theoretical revision of our ideal: to protect the individual against official intervention. The threat, if not the actuality, looms large.

Returning to the competing normal and revised versions, I think it accurate to distill rehabilitation as a central concept. The rehabilitative ideal is implicit in both versions. In practice, both will often sacrifice the individual to utility while purportedly reducing the community fear or anxiety generated by crime at the particular moment. The move *should be* a tightening up of such law, a move toward due process machinery.[44]

The Wootton position's escalation among commentators (*e.g.*, Katz is an articulate advocate) is a product of its intellectual attractiveness first, because it is the natural outcome of the rehabilitative ideal,[45] and, second, because community pressures are increasingly generating disaffection with the present process. The general community discontent with the normal process is a function of a general societal alienation and demand for the law to provide answers to problems of human living. As such societal demands are not directed against particular procedures but focus on a demand for results. A popular and academic theme goes to this issue of social alienation. I would like to briefly describe this alienation and show its relation to criminal process: normal or revised. Neither version resolves alienation, but the revised version indicates a focus on psychiatric expertise for solution of societal ills. This focus undercuts an emphasis on what man can do for himself in the every day world. A psychiatric focus distorts and obfuscates economic and social problems which must be con-

44. But my prediction would be a behaviorist victory. And the forces which would engender such a victory ironically come from different ideological positions. A. Szasz, for example, is joined with a Lady Wootton on the abolition of the insanity defense. Szasz feels that mental illness is a myth. Lady Wootton, like Katz, wants social scientists to get into the process more quickly and efficiently.

45. *See* F. ALLEN, BORDERLAND OF CRIMINAL JUSTICE (1919), for an elucidation of this concept.

fronted before we indulge in psychiatric labeling. The present state of our society suggests the ease with which we can opt out of individual action by allowing state authorized psychiatrists to provide answers for us.

Following is intended to be a brief description of at least one view of our society. The phenomenological level is as important as the analytic because we must know what is in the world out there before we can analyze it.

The future seems to many to offer little hope for a continuation of stable patterns passed from generation to generation in a timebinding nexus.[46] Parents do not know what to tell their sons or daughters to do or to be; parents are increasingly pushed to the wall in an attempt to justify their own existence. As a highly generalized abstraction it can be said that we do not have or are rapidly losing faith in the future. Our institutions seem to be caught in a cybernetic program, self sustaining but impermeable to human intervention. Citizens are told that they are the Silent Majority and are structured to reflect that psychological necrophilic position. They are told that their values are being destroyed, and that they are being ignored. They are not encouraged to create or keep alive norms; just hate the haters.

When a group feels meaninglessness or anxiety, or both, it is almost a healthy expectation that it will search for the cause of this aimlessness. A common enemy mobilizes the group to act in unity. Nietzsche clearly saw the power of "resentment."[47] So did Scheler and Mannheim.

In this society, the "freaks," "hippies," Yippies, and criminals are among the groups who are obvious butts of society's resentment. Society observes: "they" are destroying; but "we" are civilized; we do not want to punish; we want to help; we know that we are somehow implicated in the process that entails such deviants. What to do? To treat: a happy solution. But is this a viable one? Does it not present dangers in itself?

This does not mean that there is something inherently bad about the rehabilitative ideal implicit in the revised version. The danger is the discernible tendency to evaluate self, in all phases of

46. *See generally* K. KENNISTON, THE UNCOMMITTED: ALIENATED YOUTH IN AMERICAN SOCIETY (1965).

47. *See* BEYOND GOOD AND EVIL at 110-11 (Gateway ed. 1955).

our daily life, in mental health terms. Ronald Leifer,[48] a practicing psychiatrist, writes concerning the growth of the community psychiatry movement (the rehabilitative ideal and the revised version are part of the same process):

> Community psychiatry must be considered as a full-fledged member of the modern quest for community undertaken with the instrument of state power. The modern state is, of course, the most powerful instrument ever in man's hands for accomplishing good. However, as history had taught us, the quest for community undertaken by the state is the greatest enemy of the open society. There are indications that it leads, in varying degrees, to collectivization rather than to community, to homogenization rather than to individuation, and to obedience rather than to freedom and responsibility. *As the modern method par excellence for controlling thought and behavior, psychiatry may well become the chief instrument of the state to bend the individual to its needs.*[49]

I do not think that it is "the state" *at this point* which is subsuming the individual to its needs. Rather the pressure is from the society on formal institutions to solve problems that are not being solved, to provide happiness. Our ideology was one of procedural opportunity for all, for each man to have a right to make his own life and to pursue his own happiness. Whatever the theoretical causes imputed by Neo-Marxists, sociologists, Neo-Freudians etc., man in this society does not seem to feel a powerlessness to feed his needs into institutional workings. Most often, the "average" citizen seems incapable of articulating his disaffection, his anxiety, his desires. (Psychotherapists know the importance for the patient of overcoming general "free floating" anxiety, *i.e.*, anxiety without a discernible object.)

In some ways, ironically, a society which pretends to want a cultural pluralism encourages fragmented groups with disparate loyalties. Erik Erikson, along with ego psychology in general, has stressed the strength of the individual ego over individual ego weakness. I think that a balanced picture of this society and its symbols still reflects the old due process norms. These norms *are becoming* vacuous. Statements attributed to our "new breed" of young reflect the fact that they have internalized the ideals of due

48. R. LEIFER, IN THE NAME OF MENTAL HEALTH: THE SOCIAL FUNCTIONS OF PSYCHIATRY (1969).

49. *Id.* at 241-42 (emphasis added).

process both procedurally and substantively. They want the distribution of societal goods to all; they are not contented with a procedurally fair process. Procedure does not put food into peoples' mouths or alter the physical environment of ghettos, or provide job training and opportunities. These require substantive legislation.

A criminal process to work in a free society must yield as high and as visible a quality of justice as possible. It also must protect the society from the dangerous. Our system is failing but not because it has ignored the revised version's objective, the rehabilitative ideal; it is moving more and more toward it and will get increasingly effective at it without need of any behavioral substituted process.[50] The changes we need are substantive. We do not need a negation of our due process ideals which the abolition of mens rea may entail.[51] Nor will we gain any visibility for justice or, indeed, effectively reduce corroding alienation by switching to a behavioral model. Such process will operate in much the same vacuum in which the normal version now operates unless we make further inroads into a criminal law theory and remove the dangerous before they commit dangerous acts. The enforcement phase of the normal version receives more publicity and permeates deeper into group feelings than the trial phase of the normal version. Likewise, this will be true of the behavioral phase of the revised version. At least at the beginning the behavioral assessment process will have very low visibility.

In the next few years we can move into the schools and other institutions with batteries of sophisticated tests sensitive to the issue of dangerousness. A recent and exhaustive analysis of the question of the violent person suggests this very option.[52]

> At present, neither reliable identification nor successful treatment for most types of potentially violent individuals can adequately be assured. There is evidence that part of the problem lies with the current shortage of facilities and trained personnel to work specifically with the potentially violent individual. The solution to this problem is more

50. I am not arguing that treatment under present knowledge cannot be effective. I do think, however, that it is on the road to being more effective. This presents a hope and a danger. *See* P. LONDON, BEHAVIOR CONTROL (1969).

51. *See generally* Ellul, *Law as Representation of Value,* 10 NATURAL L. FORUM 54 (1965).

52. Comment, *Contemporary Studies Project: Detection Treatment and Control of the Potentially Violent Person,* 55 IOWA L. REV. 118 (1969).

complex, however, than a mere reallocation or increase in funds for an expansion of these services. The successful prevention of violent behavior initially requires the advancement of techniques for identifying potentially violent individuals and for diagnosing the degree of their propensities for violence.[53]

A key factor in the increasing concern with the rehabilitative ideal (in either a normal or revised process) is that rehabilitation is increasingly becoming viable. But I do not know what rehabilitation connotes. It calls for some mode of approved socialization of the offender. It calls for treatment so as to permit the offender to become a meaningful member of society. It calls for altering his attitude concerning his criminal activity so he can see the "light." All this is part of the psychological implication of rehabilitation, yet there is certainly an economic perspective—to enable the offender to acquire skills to compete effectively for society's goods, including prestige.

The time has come to examine the various modes of therapy within our rehabilitative system and its goals and expected results.[54] For example, if an offender has become emeshed in the process because of homosexuality, does the society have the right and/or obligation to "cure him" of his homosexuality *or* to attempt to socialize him so he will not get caught in homosexual activity in the future? But even asking these questions changes our focus, and such change is most important. We have already determined that there is something sick about homosexuality if we decide to treat it. The same point must be made with perhaps

53. *Id.* at 226. The comment continues:

It is recommended that research for the improvement of these techniques be conducted on school children and prison inmates, two groups readily accessible for testing purposes. Random samples from these populations would be selected and thoroughly evaluated. A prediction would then be made regarding each subject's propensity for violence. Periodically, follow-up studies would be conducted to determine the accuracy of the predictions and to locate significant correlations between specific test indicia and subsequent violent or nonviolent behavior. These results could then be used to refine identification procedures.

Cf. Yarvis, *Potentials for Psychiatric Research into Criminal Behavior and Correctives: Its Implications for the Prison and the Court,* 3 TOL. L. REV. 599 (1969), wherein the author, formerly Chief of Psychiatric Services, Federal Bureau of Prisons, 1967-1969, suggests "that given more data based on etiological studies, psychiatrists can furnish courts with more complete and specific explanations to account for the Commission of Criminal Acts. *What philosophic, moral, or legal conclusions they wish to draw from such explanations must remain their concern." Id.* at 631 (emphasis added).

54. The following reflection has been attributed to the noted psychologist David Bakan: "[T]he reason why psychologists have not heretofore been effective is that they really do not want to predict and control human behavior."

greater force vis-à-vis political types. A Bobby Seale may be dangerous. Should the "treating team" find out why, find out if he is justified in being "a dangerous threat" or should we socialize him if possible. If therapy does not work, should we use shock, drugs? We must clarify our rehabilitative ideal.

Much of my case has been predicated on an assumption of the alienation of society. It may be that only certain radical youth and ivory towered academics feel despair, anger, or resolve against "the system." The rhetoric is loose, the feelings uncertain, hurt, baffled. But when an articulate "alienated" group, given high level publicity, expresses its discontent, its action *in itself* can provoke a reaction of the "unalienated" majority who fear the inflamed rhetoric. When a whole system is challenged, it is a natural reaction for the satisfied (particularly if they are not psychologically secure) to want to remove the threatening group.

The ideology of due process, of which mens rea is an important substantive part, serves as a buffer to the effective operation of quickly and badly conceived law. The mens rea requirement can provide an opportunity for the application of principles of justice which are not part of our positive law but are integral to our system of justice.[55] The very existence of the mens rea requirement permits the court (and jury) an opportunity to "interpret" the legislative proscription. The jurist maintains the dynamic tension between positive law and natural right.[56] The abolition of mens rea will permit a greater likelihood of application of untempered legislative enactments corrupting a final buffer to individual freedom. A wise judge with proper tools can often frustrate bad law.

VI.

Would the revised version make a difference in the following cases: 1) the 1968 Chicago Democratic Convention, 2) the Chicago Conspiracy Trial and 3) the Chicago-based activity of the Weathermen?

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55. *See* Dworkin, *The Model of Rules,* 35 U. CHI. L. REV. 14 (1967) wherein Professor Dworkin persuasively indicates that we do have principles of justice which are not part of our positive law, and that analytical positivism as conceived through Austin by H.L.A. Hart inadequately accounts for such principles.

56. *See* Kaufman, *The Ontology of Natural Law,* 8 NATURAL L. FORUM 79 (1963). Kaufman indicates that the actualization of justice requires natural law principles to operate, confront and push positive law perceptions.

It is worthwhile to examine these cases in themselves as well as in relation to a revised version because they reflect paradigms which society demands the law to handle in some way. These situations provide a real context on which any criminal procedure may have to act.

The three "episodes" are in the continuing flow of our societal time-space continuum. They cannot be removed and examined in a vacuum. They are "caused" by societal pressures, and precondition certain societal responses. It is impossible to do more than impute etiological theories to their cause; it is impossible to construct more than heuristic models of explanation. But it is beneficial to understand that these situations are social, not individually manifested "abhorrent" activities.

Schur,[57] commenting on the more general problem of "most criminal offenders," states:

> *The belief that most criminal offenders are 'basically different' has constituted a dangerous form of self-deception.* By virtue of it, those fortunate enough to live relatively law-abiding lives have washed their hands of all responsibility for crime problems. And the moral self-righteousness bred through this device frequently strengthens the grounds of resistance to rational and humane crime policies. Certainly it is true that some crime reflects the personal problems of the offender individual, yet . . . the applicability of strictly psychiatric explanations of criminal acts—in terms of the total range of types of 'treatment' and 'rehabilitation'—admittedly commendable ones—must not serve as comfortable evasions of responsibility for the social nature of crime. *One consequence of the eager resort to this rhetoric has been the attempt to pass on to psychiatrists and other treatment personnel responsibility for 'solving' social problems that reach beyond their professional competence. Another result has been a tendency to ignore the substantive and procedural rights of the individual; as we proceed to take whatever action is deemed necessary to protect 'his own interests.'*[58]

The point I want to make concerning all three situations goes to the fact that all were predictable "happenings"; that they are part of what is termed our increasing "political polarity." Vietnam, poverty, race—all gave thrust to these situations; these factors

57. E. SHUR, OUR CRIMINAL SOCIETY: THE SOCIAL AND LEGAL SOURCES OF CRIME IN AMERICA (1969).

58. *Id.* at 231 (emphasis added).

seeded the ground of hollowness that the participants, at least, personally perceived.

The 1968 Convention was well within our tradition with citizens assembling in large numbers in Chicago to voice protest. The City geared itself for invasion. Response, counter response; inevitable confrontation.

How was the criminal process to deal with the protesters? Arrest fortuitously? Arrest the leaders? Were there leaders? Arrest no one?

The normal version of the criminal process was not instrumented to handle this type of situation.[59] The process is designed to handle single offenders not masses of citizens who are confronting what they see to be arbitrary governmental or quasi-governmental action. The 1968 Convention defied a just application of the normal process. The high visibility of events during the convention put the country on notice of the broad spectrum of citizens participating. So one would arrest, find guilty and fine.

Another response, of course, could be to indict the "leaders" of the protesters at the Convention; to deflect attention from the large number of participants to a handful of acknowledged troublemakers. How does one go about picking leaders in a happening like the 1968 Convention? Why have a trial at all? Is there a choice or is such a trial "inevitable"?

We have been treated to the spectacle of Hoffman against Hoffman. This is our normal version at work at its worst. A bad law, arbitrary selection of defendants (partially due to the bad law) and a trial which is making a mockery of the dignity of the American courtroom. Counsel arrested. For what? Contempt of what? A defendant bound and gagged. We know all this. So what. Well, at least for those who still care, we do have visibility to this mockery; we can assess it and comment on it and hopefully change this type of denigration of process.

The revised version would not alter this situation; the trial would have to determine if the defendants did enter into a conspiracy, but I fear that the trial would be somewhat truncated without mens rea requirements. In a revised version it would

59. *See* Fuller, *The Law's Precarious Hold on Life*, 3 GA. L. REV. 530 (1969). "Events that take place beyond the reach of ordinary human powers of observation and judgment are equally beyond the reach of any legal rule that requires us to decide just who was to blame for what happened." *Id.* at 536.

seem to prove that defendants did what they did and did it together. Would the intention of each defendant to enter a conspiracy be relevant in the revised version? Since the statute requires it, the revised version would have to inquire into intent pending a reworking of statutory language.[60]

The Weathermen incident in Chicago is a prime example of the escalation of rhetoric to symbolic violent action. This is in one sense the age of McLuhan.[61] Form (presentation) becomes more important than content. A group like the Weathermen which wants to make an impact on society has to find a way to get publicity for its view. Rhetoric is cheap. All groups have competing "eloquent" spokesmen. Key words are used, catchingly coined: for example, "pig" for policeman. But even here with the proliferation of groups, one may co-opt the vocabulary of another. It becomes necessary to maintain individual and group integrity (often more important than issue analysis or ideology in general). Psychologically, the acting out of violence becomes a natural step to show a group's disdain for mere talk and its commitment to action. This serves at least two purposes: to attract any who are tired of talk and want to join with true activists and to shock society from the trance previously induced by repeated violent rhetoric. At some point someone must put up or shut up!

Ironically, the groups who are deriding the establishment are the groups who demand the full complement of the Packer Due Process Model. The ideology and action of the Weathermen posits that the greater the injustice it can show exists, the more support it will receive from the new generation to whom it is directing its communications. If in the process Due Process is foreclosed to a greater degree, the Weathermen expect greater support. If total repression is the outcome, this only will prove that the seeds of such repression were already planted. And the liberals will have to join or be forever silenced. The revolution will be necessary to protect freedom.

We will not, however, provide more respect for the criminal process, greater deterrence, or loyalty to the system by obfuscating or delimiting our Due Process Model vis-à-vis the potential of-

60. *See* Kadish, *supra* note 42.
61. *See* M. MCLUHAN, THE MEDIUM IS THE MESSAGE (1967).

fender.[62] I do think that a swifter more deadly law enforcement system could satisfy the fear of the greater part of the society regarding the so-called dangerous. This would entail a conscious alteration of our ideology to a Control State which euphemistically *and* actually we would and may well make therapeutic.

It bears repeating: labeling the Weathermen, a Convention Rioter, or a Conspirator sick and in need of treatment which I think Katz' revised version would do, undercuts their respective philosophic position and denies to them the opportunity to give effective voice to their dissent. Who will listen to a madman? We will all pity him. This does not make it fairer to punish him when we feel we have engendered or not reacted to the causes of his behavior. I think it the better of the competing evils. If treat him we must, let us safeguard his opportunity to excuse himself at the very outset.

The revised model, in short, can readily lend itself to a perversion of a fair hearing of issues on the merits and substitute swift Crime Control procedures augmented by psychiatric labels.

VII.

I intend in this and the following section to develop the two positions justifying punishment as an institution: retribution and deterrence. These positions are outlined to show their relevance as justifying the normal system's use of punishment and to show that the revised system must likewise account for its justification on the same arguments. Both retributivists and utilitarians are aware of and attempt to answer the arguments against the normal version of punishment.

If we cannot justify our normal version's system of sanction, it does not follow that we can more readily defend a behavioral model. Justification, however, exists both in the philosophical sense and on the existential level. We must show that we can gain societal acceptance of any system no matter how theoretically ideal it may be. We acknowledge the validity of Professor Ellul's words:

> [We are concerned with] the man [who] expresses his failure to adhere to this [any] law and thereby testifies to this degree of inapplica-

62. D. MATZA, DELINQUENCY AND DRIFT (1964) has pointed out that the denial of due process to juvenile offenders in favor of a therapeutic process causes a greater animus by the "delinquents" against the system than the adversary process. Juvenile offenders apparently have sufficiently internalized our conception of fair play to the point that rehabilitation demands that they get fair play. "I'll pay for what I do but not for what I did not do."

> bility in the law. If his sentiment becomes general, if men have this representation of their law, that it is unjust, oppressive, unworthy of confidence, then the law ceases to be really applicable, even if formally and for a time it is applied. A society where the applicability of law no longer holds is a society in danger. There is a kind of socio-moral hemorrhage in a group of this order which cannot be indefinitely maintained on the basis of . . . a purely formal order.[63]

Punishment is, and is conceived to be, a form of suffering imposed on an individual offender for the breach of a legal ukase.[64] H.L.A. Hart drawing on the work of Baier,[65] Flew,[66] and Benn[67] defines punishment thus:[68]

(i) It must involve pain or other consequence normally considered unpleasant.

(ii) It must be for an offense against legal rule.

(iii) It must be of an actual or supposed offender for his offense.

(iv) It must be intentionally administered by human beings other than the offender.

(v) It must be imposed and administered by an authority constituted by a legal system against which the offense is committed.

Definition is important so we know what we are trying to justify, since as conditions change former justifications become irrelevant or off-mark. However, arbitrary classification of a societal intervention as being or not being punishment is illegitimate. Moreover, we have the Wittgensteinian insight that we can only

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63. Ellul, *supra* note 51, at 59.

64. *See generally* J. MICHAEL & H. WECHSLER, CRIMINAL LAW AND ITS ADMINISTRATION 4-17 (1940).

65. K. BAIER, IS PUNISHMENT RETRIBUTIVE ANALYSIS? (1955).

66. A. FLEW, THE JUSTIFICATION OF PUNISHMENT PHILOSOPHY (1954).

67. Benn, *An Approach to the Problems of Punishment,* 33 PHILOSOPHY 325 (1958) in FREEDOM AND RESPONSIBILITY: READINGS IN PHILOSOPHY AND LAW 517 (H. Morris ed. 1961).

68. *See* H.L.A. HART, *supra* note 16, *Prolegomenon to the Principles of Punishment and Responsibility* at 4-5. Hart adds secondary definitions:

(a) Punishments for breaches of legal rules injured or administered otherwise than by officials (decentralized sanctions).

(b) Punishments for breaches of non-legal rules or orders (punishment in a family or school).

(c) Vicarious or collective punishment of some member of a social group for actions done by others without the former's authorization, encouragement, control or permission.

(d) Punishment of persons (otherwise than under (c)) who neither are in fact nor supposed to be offenders.

make sense of terms in the context in which they are used.[69] (We must know our game and its rules.) Punishment as far as society is concerned may be play to the moral masochist. Treatment to society may be punishment to the patient-victim. We must bear in mind the subjective-objective perspectives in both punishment and responsibility.[70] Both are necessary to the justification of any practice which a society institutionalizes. It is allowable to play with Alice's friends, but we must have some understanding of a word's referent whatever our Wonderland.

The essence of the retributive position may perhaps be distilled from Kant: "Whoever commits a crime must be punished in accordance with his desert."[71] To Kant:

> Juridical punishment can never be administered merely as a means for promoting another good either with regard to the criminal himself or to the civil society, but must in all cases be imposed only because the individual on whom it is inflicted *has committed a crime.* For one man ought never to be dealt with merely as a means subservient to the purpose of another, not mixed up with the subject of real right. Against such treatment his inborn personality has a right to protect him even though he may be condemned and punishable before there can be any thought of drawing from his punishment any benefit for himself or his fellow-citizens. The penal law is a categorical imperative; and woe to him who creeps through the serpent windings of utilitarianism to discover some advantage that may discharge him from the justice of punishment, or even from due measure of it, according to the Parisaic maxim: 'It is better that *one* man should die than the whole people should perish . . .' For if justice and righteousness perish, human life would no longer have any value in the world. . . . But what is the mode and measure of punishment which public justice takes as its principle and standard? It is just the principle of equality by which the pointer of the scale of justice is made to incline no more to

69. L. WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS (1958). *See generally* J. HARTNACK, WITTGENSTEIN AND MODERN PHILOSOPHY (1965) which puts the work of H.L.A. Hart and others in perspective in regard to the Wittgenstein influence.

70. *See* A. SCHUTZ, THE PHENOMENOLOGY OF THE SOCIAL WORLD (1967).

71. E. PINCOFFS, THE RATIONALE OF LEGAL PUNISHMENT 4 (1966). *See also* H. PACKER, THE LIMITS OF THE CRIMINAL SANCTION (1969); and the work of the philosophers John Rawls, Joel Feinberg, A.M. Quinton, S.I. Benn, C.W.K. Mandle, J.D. Mabbott, and H.L.A. Hart. One should particularly acknowledge the work of Professor Jerome Hall whom I have not cited but whose work has a pervasive influence among modern legal commentators in the field of jurisprudence, and particularly criminal jurisprudence. I have also previously cited Herbert Morris's extraordinary collection FREEDOM AND RESPONSIBILITY. The Morris text also contains a lengthy bibliography of relevant material. I have also been constantly stimulated by the work of C.S. LEWIS, THE ABOLITION OF MAN (1947).

> the one side than the other. It may be rendered by saying that the undeserved evil which anyone commits on another is to be regarded as perpetrated on himself. Hence it may be said: 'If you slander another, you slander yourself; if you steal from another, you steal from yourself; if you strike another, you strike yourself; if you kill another, you kill yourself.' This is the Right of Retaliation (*jus talionis*); and properly understood, it is the only principle which in regulating a public court as distinguished from mere private judgment, can definitely assign both the quality and the quantity of a just penalty. All other standards are wavering and uncertain; and on account of other considerations involved in them, they contain no principle conformable to the sentence of pure and strict justice.[72]

There has been a renewed modern vitality given to the retributive cause.[73] Pincoffs has distilled the retributive classical position to these three points:

1. The only acceptable reason for punishing a man is that he has committed a crime.
2. The only acceptable reason for punishing a man in a given manner and degree is that the punishment is 'equal' to the crime.
3. Whoever commits a crime must be punished in accordance with his desert.[74]

Pincoffs indicates that the position rests on two assumptions: an assumption about the direction of justification to the criminal; and an assumption concerning the nature of justification to show the criminal that it is he who has willed what he now suffers. It is important to note the *a priori* nature of the argument: to direct punishment at an individual offender, him and him alone. The retributive argument is not primarily concerned with deterrence, although certainly modern exponents would concede this to be an element of punishment in practice. Without further exploration, punishment administered as *deserved* by an offender seems to lawyers to be a natural law system.[75] Pragmatically, this justi-

72. RECHTSLEKRE, Part 2, 49 (E. Hastie transl. 1950); *reprinted in* E. PINCOFFS, *supra* note 71, at 2, 3.

73. *See* Mabbott, *Punishment*, 49 MIND 152 (1939) in JUSTICE AND SOCIAL POLICY 39 F. Olafron ed. (1961); Lewis, *The Humanitarian Theory of Punishment*, 20TH CENTURY (1949); Mundle, *Punishment and Desert*, IV THE PHILOSOPHICAL Q. 216 (1954) in ETHICS 430 (J. Thompson and G. Dworkin eds. 1968); A. S. KAUFMAN, ANTHONY QUINTON ON PUNISHMENT ANALYSIS (1959).

74. *See* E. PINCOFFS, *supra* note 71, at 15.

75. *Id.*

fication delimits and thereby safeguards an offender from anything more than his "just desert."

But the question of deciding "just desert" is a difficult if not impossible one. Enemies of the retributive model reduce the principle to an absurdity. "You can take a life for a life, but beyond that there is practically no room for the principle of equation to operate. You can't impose a rape for a rape, a forgery for a forgery. An eye for an eye is not impossible, but does . . . anyone . . . today seriously suggest putting out the eye of a man guilty of hitting another in the eye in a felonious assault?"[76] We can, as Professor Weihofen has indicated, rank offenses but this proves rather difficult on application. What is a crime intrinsically worth on a "suffering scale"? Any matching of severity of offense and strictness of sanction would not lie in the logical sphere but would be an intuitive assessment by decision makers conceiving what they thought the rank order of serverity to be.[77] Yet such a principle does provide notice to the offender as to what he can expect; it treats the offender as an equal and it attempts to guarantee that he will not get a greater sanction than he deserves.[78]

That the retributive model is concerned principally with the offender and not with the deterrent effect on the society is highlighted by the following example offered by Mabbott.[79] If an individual breached a law or rule of an organization and no one but the sanctioning authority knew of such breach, and if publicity of such breach could be proscribed, should punishment not be rendered? What if the sanctioning authority thought the breach justified? What if the sanctioning authority thought the offender not dangerous? The principles of utility would allow the possibility of no punishment for the breach as long as it remained secret in the outside community. The retributive would not.

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76. Aquinas and Grotius can be added to the historical list supporting a form of retributive justification; further supporting its "natural law" heritage, *see* Newman, *Punishment and the Breakdown of the Legal Order: The Experience in East Pakistan,* NOMOS III: RESPONSIBILITY 128 (C.J. Frederich ed. 1960).

77. Weihofen, *Retribution is Obsolete,* NOMOS III: RESPONSIBILITY (C.J. Frederich ed. 1960).

78. Macartney says "To punish a man is to treat him as an equal. To be punished *for an offense against rules* is a sane man's right." *See* Mabbott, *supra* note 73, at 46. The word that behaviorists will key on is "sane." We should remember this as yet to be a legal term of art, presumed until put in issue on trial, (or if we broaden the concept, part of the competence to stand tried issue).

79. The strength of the argument runs through Mabbott's article; *see supra* note 73.

Here Mabbott parts company with the classical retributivists. To Mabbott, punishment is a "purely legal matter."[80] There is no equation between punishment and the morality of the offender.

> A 'criminal' means a man who has broken a law, not a bad man; an 'innocent' man is a man who has not broken the law in connection with which he is being punished, though he may be a bad man and have broken other laws.[81]

This position separates law and morality.[82] Under this formulation marijuana possession, for example, will not be treated but punished. (If the law is unjust, punishment of offenders is more likely to create change in the law than a behavioristic revised process which designates the offender sick. Once we have decided that conduct is sick, we will dampen motivation to change such laws. After all, we must treat sickness.)

The key charge leveled at the retributivist model, one against which most students of my generation have been directed, is that retributive punishment is nothing more than vengeance. Some commentators have argued that one justification for maintaining punishment, including the capital sanction, is the need to appease the vengeance desires of the community which demands its pound of flesh. More subtly the argument continues: punishment in addition to satisfying vengeance needs, allays any envy the community may have concerning the possible success of offenders.[83]

The retributivist answer to this charge is that retribution is not seeking vengeance. Society is doing nothing more than paying the offender his due. He has *purchased his punishment.* The law seeks to maintain compliance; it does not structure toward breach. The community does not want to punish; it does not need to, but when the offender has acted against its legal machinery it must. At this juncture the argument takes on a tone of pure legal science (a Kelsonian positivism): action-reaction; inexorability.

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80. *See supra* note 73, at 41.

81. *Id.*

82. *See* H.L.A. Hart's excellent formulation, drawing on Durkheim, of issues as to how much and of what order society can separate moral questions from legal proscriptions. *Social Solidarity and the Enforcement of Morality,* 35 U. CHI. L. REV. 1 (1967).

83. *See generally* Bodenheimer, *Is Punishment Obsolete* in NOMOS III: RESPONSIBILITY 87 (C. J. Frederich ed. 1960). *See also* Ehrenshweig, *A Psychoanalysis of the Insanity Plea—Clues to the Problem of Criminal Responsibility and Insanity in the Death Cell,* 73 YALE L.J. 425 (1964), for a sophisticated psychoanalytic analysis of the function of the capital sanction.

To be a human institution, a practice must reflect human values such as mercy; it cannot pretend to be the necessary half of a physical law or mathematical equation. Granted that the individual offender has "purchased his punishment," it does not follow that we have a right in our sanctioning practice to meet his wrong with one of our own. Institutional responsibility is necessarily higher if we are to preserve respect toward ideals of justice. Opponents of retribution certainly have a case against a rigid pronunciation of a tariff sanctioning scale. Justice to be real must be individualized.[84] But this can be done without undermining the very real concern of the retributivists position on justice. Vengeance does not seem an inevitable corollary to the retributive justification of punishment. To the extent it is, attack against it and modification of its theory is necessary.

VIII.

The other philosophical position justifying punishment as an institution is utilitarianism. The simplistic version of its calculus is well known: the greatest happiness to the greatest number. Is this the heart of the utilitarian justification of punishment? Does it then ignore individuated justice?

William Paley's classic utilitarian position on punishment indicates the direction of justification to the community rather than the individual. "The proper end of human punishment" according to Paley, "is not the satisfaction of justice but the prevention of crimes."[85] Pincoffs posits the following three Paley propositions posed to Kantian retribution:

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84. *See, e.g.,* Rawls, *Two Concepts of Rules,* 64 PHILOSOPHICAL REV. 3 (1955), ETHICS 104 (J. Thompson & G. Dworkin eds. 1968).

85. Quoted in E. PINCOFFS, *supra* note 71, at 18. Pincoffs further quotes Paley:

> [W]hen the care of the public safety is intrusted to men, whose authority over their fellow creatures is limited by defects of power and knowledge from whose utmost vigilance and sagacity the greatest offenders often lie hid; whose wisest precautions and speediest pursuit may be eluded by artifice or concealment; a different necessity, a new rule of proceeding results from the very imperfection of their faculties. In their hands the uncertainty of punishment must be compensated by the severity. The ease with which crimes are committed or concealed, must be counteracted by additional penalties and increased terrors. The very end for which human government is established, requires that its regulations be adapted to the suppression of crimes. This end, whatever it may do in the plans of infinite wisdom, does not in the designation of temporal penalties, always coincide with the proportionate punishment of guilt.

Id. at 18, 19.

1) The only acceptable reason for punishing a man is that punishing him will serve the end of the prevention of crimes.

2) The only acceptable reason for punishing a man in a given manner and degree is that this is the manner and degree of punishment most likely to prevent crime.

3) Whether or not a man should be punished depends upon the possibility of preventing the crime in question by non-punitive means.[86]

Bentham's version of utilitarianism while a more complete theory, does not have the pervasive influence in our policy formulation and elucidation that Paley's does. Punishment to Bentham, as to Paley, is an evil.[87] But, to Bentham, punishment is only one of the possible modes whereby we can deal with crime.[88] To Bentham, punishment should be inflicted only where it serves to exclude a greater evil. It should not be invoked where it is groundless, inefficacious, unprofitable or needless.[89]

While it is not possible here to give a real analysis to the richness of the Benthamite elucidation of the punishment problem, I think it at least necessary to mention the following major policy principles. Crime should be viewed in its social context, not on a crime by crime, act by act basis. This significantly reduces for Bentham the harshness of the Paley formulation. Bentham was particularly concerned with the use of the legislature for framing broad policy approaches. As to punishment, his legislative directive would be to gear the sanction to the rational offender with a view to minimizing the dangerousness of the offense. Bentham thought that by differentiating significantly, in the range of sanctions, a would-be offender would be induced to commit the act which had a lesser penalty. (The same reasoning, of course, is involved in providing a greater penalty to crimes where a firearm has been used.) Though Benthem was concerned with the individuation of

86. *See* E. PINCOFFS, *supra* note 71, at 19.

87. *Id.*

88. *See generally* J. BENTHAM, INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION: THE THEORY OF LEGISLATION; AND THE RATIONALE OF PUNISHMENT (1823).

89. Bentham's alternative modes of dealing with crime include: 1) the Preventative, 2) the Suppressive, 3) the Satisfactory and finally, 4) the Punishment. The first category would include police presence and warning (a potential offender will not generally breach when a policeman is on the scene, the argument would go). The suppressive remedy apparently differs only at the time of intervention from the preventive. The "satisfactory" category involves reparations and/or indemnities. *See* E. PINCOFFS, *supra* note 71, at 20, 21.

justice, the utilitarian position of balance would still seem (from the retribution vantage point) slanted to use the individual offender as a deterrent to others. In sanctioning the individual offender, the utilitarian perspective would be in accord with the revised version's futuristic approach. In fact, the retributivist cry against the utilitarian position on punishment would permit, if not indicate, the sanctioning of an innocent man. For example, given a public scare concerning a series of sexual attacks on women or children, a utilitarian might countenance (at least his theory would justify) the sanctioning of an innocent victim so as to allay the community anxiety.

The utilitarian can answer this charge somewhat by asserting that the activity would become known, thereby creating a loss of respect for legal institutions; such a loss would prove negative on the calculus and thereby proscribe such a practice. The retributive rejoinder would be that the utilitarian theory still would permit single acts of punishment of innocent men. (On these terms, this argument seems irresolvable.) Two contemporary philosophical papers on the confrontation between the retributive and utilitarian views claim to, and may, resolve this clash.[90]

John Rawls[91] insists on and underlines the distinction "between justifying a practice and justifying a particular action falling under it."[92] Rawls seeks to explain the distinction by having a son ask his father, "Why was I put in jail yesterday?" The father answers, "Because he robbed the bank at B. He was duly tried and found guilty. That's why [he] was put in jail yesterday."[93] But continues Rawls, the question could have been "Why do people put other people in jail?" To which the answer could be "To protect good people from bad people: or to stop people from doing things that would make it uneasy for all of us; for otherwise we wouldn't be able to go to bed at night and sleep in peace."[94]

The first question evidently is directed to an individual case; the other is directed toward the institutionalized practice. The

90. I will use Rawls, *supra* note 84, since both he and Quinton, *supra* note 15, have indentical positions.

91. *See* Rawls, *supra* note 84.

92. *Id.* at 104. Rawls indicates peripherally that most commentators have accepted the practice of punishment; few have rejected the practice entirely. It would seem, however, that if the behavioral (revised) model does eliminate punishment then the number of advocates entirely against the practice is on the increase.

93. *See* Rawls, *supra* note 84, at 106, 107.

94. *Id.* at 107.

legislature in the utilitarian scheme is charged with propounding futuristic policy for the community (the utilitarian perspective). The judiciary, on the other hand, must apply the prescribed policy to the individual case, at least partially looking backward (the retributive perspective). This distinction safeguards the retributivist objection that the utilitarian practice could allow the punishment of an innocent man, that is, the retributivist is concerned not with the establishment of an institution to provide a correspondence between crime and punishment, but with the particular application. The retributivist is not against maximizing the greatest benefit to the society as long as the individual is not sacrificed.

But may not the practice of punishment as promulgated by the legislature allow for the punishment of the innocent? Pragmatically, this is errant nonsense in that the high visibility of such a practice would create anxiety in the citizens who could not be safe merely because they have not acted in a criminal manner. Moreover, justice as it is still interpreted, would not allow, as a broad policy, the purposeful sanctioning of the innocent. With such visibility what would be gained by punishing the innocent?

Rawls and Quinton[95] agree that punishment *as defined* proscribes punishment of the innocent. A system of law which allows the infliction of punishment on an innocent individual *as a practice,* Rawls indicates, would not be punishment; it would be something else which he chooses to call telishment.[96] Quinton makes the same point:

> Punishment cannot be inflicted on the innocent; the suffering associated with punishment may not be inflicted on them, firstly, as brutal and secondly, if it is represented as punishment, as involving a lie. 'Punishment implies guilt' is the same sort of assertion as 'ought implies can.' It is not pointless to punish or blame the innocent, as some have argued for it is often very useful. Rather the very conditions of punishment and blame do not obtain in these circumstances.[97]

If we are satisfied with the Rawls-Quinton theoretical solution of the retribution-utilitarian debate, its effect in practice must still be considered. To be sure, the legislature posits a practice of punishment. (We can speculate to what extent it analyzes the

95. *See* Quinton, *supra* note 15.
96. *See* Rawls, *supra* note 84, at 113.
97. *See* Quinton, *supra* note 15, at 515.

practice on any grounds let alone sophisticated utilitarian ones.) The legislative act is necessarily futuristic. Our judiciary, however, does not have a set practice. Herein lies the Katz objection. Theoretically, all courts should individuate according to the Rawls position. But a lack of adequate role definition of jurists, not the normal system itself, results in a failure to individuate. Our judicial practice presupposes a finding of guilt. At the dispositional stage, a jurist generally has a great discretion to be forward looking.[98] He can often (within maxima and minima) individuate to a significant extent. It would seem that Rawls is correct in asserting that on the legislative level we can justify a policy only by trying to determine whether it will benefit the society without creating an evil we particularly wish to proscribe.

The behavioral model, or revised version, seems to be challenging punishment, to some extent ironically, on retributive grounds, that is, an individual offender may not be responsible and therefore should not be subject to punishment. The revised system is here, assuming, on the basis of social science data, that offenders should be presumed to have rational control. If offenders have not acted voluntarily, they should not be held accountable; they should be held for breach (social utility) if dangerous and then treated.

On the practice level, the revised model would justify itself on utilitarian grounds—just like punishment. It would hold offenders for the social good on the practice level. It would take away their "excuse" opportunity on the dispositional level. Here we have no suffering as earned. We have an object to be treated: Professor Wasserstrom suggests that if it is wrong to punish another man when he is not "responsible" for his action but merely to deter others, then "this very objection may apply to a greater extent to a behavioral model."[99] Do we have a right to treat a man if he

98. We know, for example, that many jurists assess an offender who has pleaded guilty with a lesser sanction, than an offender who has made the process "prove" his guilt.

99. Wasserstrom, *H.L.A. Hart and the Doctrines of Mens Rea and Criminal Responsibility*, 35 U. CHI. L. REV. 92, 120 (1967); Wasserstrom makes many of the same points I make here, antedating my objectives. He traces Hart's developing views in this area and contrasts them to Lady Barbara Wootton. He shows, as Hart's writings explicitly indicate, Hart's partial defection to the behavioral camp. Wasserstrom concludes:

> The elimination of responsibility may render unintelligible much that we now properly seek to proscribe and it may render impotent much that we now use to prevent the occurrence of crime. But more important, surely, is Hart's insistence

does not want to be treated? Only if we assume his lack of capacity. We have traditionally "excused" infants while holding them as "delinquents"; now we will "excuse" all (if we adopt the revised model); we will hold and treat the majority of them. Maybe we should at least give the offender an option to "spontaneously remit" on his own without outside medical intervention while he serves his term.

Yet, even if we are determined, we still may be the true author of our acts. A pre-determined act can be intentional and volitional. Determinism implies causes for our actions. This does not negate our ability to determine and deliberate on these causes.

Feinberg summarizes his argument against a behavioral model:

> I conclude then that the justification of legal punishment as a general practice is to be found in the benefits it yields directly or indirectly not just for a specially privileged group, but by and large, for all of us equally; and that the theory of determinism is no real threat to it. Determinism is not incompatible with self-righteous anger, hatred, and cruelty toward the criminal. But then, self-righteousness, hatred, and cruelty are equally incompatible with indeterminism or any other theory. In a state of civilized society, I think it safe to say, those attributes and emotions are obsolete.[100]

This is not to say that confluence of societal forces cannot victimize more than others. It does say that institutionalized practice which threatens to infringe on an individual's liberty should treat him as an equal with all others in the society *as they conceive themselves to be,* that is, with *intentions* and *volitions.* Even with the mens rea requirements, the psychiatric experts will get the offender under our present practice soon enough.

IX.

Responsibility is the conceptual product of a society wrestling with normlessness.[101]

One could easily develop a lengthy epistemological delineation of the concept of responsibility. I intend here only a

upon our being made aware of the fact *that a society which insisted upon treating all of its offenders would run the very great risk of being stiflingly and insensitively manipulative.*

Id. at 126 (emphasis added).

100. *See* Feinberg, *supra* note 19, at 166, 167.

101. WEBSTER'S NEW TWENTIETH CENTURY DICTIONARY UNABRIDGED 1543 (2d ed. 1969).

brief outline drawing primarily on Richard McKeon's valuable work.[102] According to McKeon, John Stuart Mill equated the concept of responsibility with punishment. Both Bradley and Levy-Bruhl demurred; the former indicating that Mill's formulation was "vulgar," that is, common usage; the latter insisting that punishment was not the fundamental import of the doctrine. McKeon was unable to find a philosophical treatment of responsibility prior to 1859. Moreover, such treatment presumed controversies in which the term "responsibility" did not appear:[103] rather "accountability" was used for which Mill substituted "responsibility."

The Greeks did discourse on imputation and the problems of accountability in terms of justice. For the Greeks, Aristotle makes clear, justice had a moral quality pertaining to actions and men:

> In moral applications to actions, 'justice' is an ambiguous term; it means the 'lawful' and then it is complete virtue in relation to our neighbor, and it means the 'fair,' and then it is a particular virtue which takes two forms: distributive justice, which operates by imputation through honors, money, and other rewards, and rectificatory or commutative justice, which judges accountability for voluntary and involuntary damages and injuries.[104]

Justice for the Greeks related ethics to politics. "Imputation" and "accountability" are subsumed under "justice"; imputation circumscribes the range of actions open to moral and political sanction; accountability or guilt served the same function for legal penalty.[105] This distinction is contingent on a "natural" concept of justice which can be identified by reason.[106] Where justice is conventional, it is marked by consensus, contract, and power; by

102. McKeon, *The Development and the Significance of the Concept of Responsibility*, 11 REV. INTERNATIONALE DE PHILOSOPHIE 3 (1957).

103. *Id.* at 5. The word appeared earlier in non-philosophic treatment antedating philosophic usage by about seventy years. *Id.* at 6.

104. *Id.* at 11.

> There is therefore [McKeon goes on] a scale of wrong-doing in accountability for injuries: (1) when the injury occurs contrary to reasonable expectations it is a misadventure; (2) when it is not contrary to reasonable expectation, but results from external accident rather than a vice of the agent, it is a mistake; (3) when the agent acts with knowledge, but not after deliberation, as when he acts in anger, it is an act of injustice; (4) when he acts from choice he is an unjust and a vicious man.

Id.

105. *Id.* at 10-11.

106. *See generally* L. STRAUSS, NATURAL RIGHT AND HISTORY (1953), for an elucidation and particularly close analysis of the concept of national right.

praise and blame on its positive side; by punishment and other sanctions on the negative.[107]

The concept of duty as opposed to responsibility more readily fits into the classical mode. Duty signified "that for which, when done, a reasonable defense can be adduced." Duty presupposes a discernible cosmic harmony. By the seventeenth century there was a diversified effort to posit a science of law and morals analogous to the physical sciences. The theory, predicated on physical laws, defined "moral good and evil by . . . [the terms] reward and punishment and identified by praise and blame."[108] The other mode of explanation posited "free" human actions dependent on will and intellect; here then "the external accountability imposed by power or judged by pragmatic utility must be judged by an internal law recognized by conscience and reason."[109]

Mill first used the term responsibility to break the deadlock concerning freedom and necessity, intentions, motives, etc., all of which were aimed at finding ethical criteria in terms of reason or duty. Responsibility in this context is tied to the concept of punishment, to the fact that we deserve the infliction of punishment.[110] Mill's position is predicated upon the psychological and sociological assumption that society does posit rights and wrongs; that society will disapprove of anyone who pursues the wrong and will stop such pursuit when it becomes sufficiently serious (dangerous?).

> He [the offender] not only forfeits the pleasure of their [society's] good will, and the benefit of their good offices, except when compassion for the human being is stronger than distaste towards the wrongdoer; but he also renders himself liable to whatever they may think necessary to do in order to protect themselves against him; which may probably include punishment, as such, and will certainly involve much that is equivalent in its operation on himself. In this way he is certain to be made accountable, at least to his fellow-creatures, through the normal action of their natural sentiments. And it is well worth consideration, whether the practical expection of being thus called to account, has not a great deal to do with the internal feeling of being

107. *See* McKeon, *supra* note 102, at 12.

108. *Id.* at 14.

109. *Id.* at 15.

110. *Id.* at 19-21.

> accountable; a feeling, assuredly, which is seldom found existing in no great strength in the absence of that practical expectation.[111]

Mill's appeal, as would be expected, fits within the classic utilitarian defense of punishment; society decides (in some way) right and wrong; the individual internalizes these norms, (positively) respecting them; the individual is supported in compliance by the threat of punishment, a seeming corollary to the breach of a proscription (retribution). Responsibility here assumes merely that society has decided to hold offenders accountable; it assumes volitions on the practice level. All citizens can internalize societal norms.

Levy-Bruhl indicated the subjective content of the concept of responsibility as another and additional implication to the objective "legal" position of Mill.[112] Moral responsibility to Levy-Bruhl is subjective and "empty of concrete content."[113] Responsibility for both Mill and Levy-Bruhl centers in the social context. The development of the concept did not solve the issues of freedom, intentionality, rationality, right, and wrong. But the concept does indicate the social origin of these issues.

But the idea of "responsibility" was applied to governments before its pronunciation of individual ethical levels. McKeon suggests the following interrelationship:

> The original elements of the idea of responsibility depended on a reciprocal relation of individual and state, but they were negative and external: a man is responsible under law if he is accountable for the consequences of his action, and he can be responsible only if the law is not subject to arbitrary change or enforcement; officials are responsible to rulers or to citizens, and a citizen is responsible if he possesses the political means of influencing the policies of government.[114]

Certain assumptions keep a check on the injustices of laws and the perversity of the constituency: the people shall judge; justice will flourish in an atmosphere of free moral choice as a product of rational dialogue. This second assumption attempts to guarantee an open system, a continued process as opposed to authorative prior directives. But "political responsibility" is contin-

111. J.S. MILL, AN EXAMINATION OF SIR WILLIAM HAMILTON'S PHILOSOPHY 289 (1884), *as quoted in* McKeon, *supra* note 102, at 21.

112. *See generally* L. LEVY-BRUHL, L'IDÉE DE RESPONSABILITÉ (1884).

113. *See* McKeon, *supra* note 102, at 21.

114. *Id.* at 24.

gent in turn on cultural or social responsibility, which requires the recognition of accountability for projects undertaken and imputability for actions.

Responsibility on the political-cultural level connotes reflexivity of relationship.[115] This was (and at least verbally still is) a significant aspect of our democratic ideology. It seems, however, that the social interaction of contemporary American society has, on the one hand, conditioned what Riesman calls the "other-directed" man.[116] On the other hand, it has created the alienated groups who find little vitality on the individual level in societal institutions, to sustain a richness and meaningfulness of life.[117] McKeon seems to suggest that "responsibility" provides a significant conceptual approach to the problems of alienation and repression (repressions at least on the psychological level).[118]

Legal responsibility has focused on the individual thereby emphasizing such issues as intent, and volition, compulsion and control. Aristotle posits a "defeasible" definition of volition which Hart[119] has used in delineating a modern approach to responsibility.[120] In this view it is impossible to indicate all the factors which must be included to define the responsible act. Rather, the approach is negative. Voluntary and involuntary are words of art designating classes of action: if certain excuses exist which are recognized by society then the individual is not responsible, or here, if certain "happenings" have occured, the individual has not acted voluntarily. Such "excuses" and "happenings" seem to be

115. *Id.* at 26.

116. *See* D. RIESMAN, THE LONELY CROWD (1952).

117. *See* H. MARCUSE, THE ONE DIMENSIONAL MAN (1964), for a powerful description of the plight of the alienated in this society. One need not buy his under-lying "casual" explanation to grant him his effective portrait of American life for so many.

118. *See* McKeon, *supra* note 102, at 31. McKeon concludes:

> The dilemna of right and good, of custom and duty, grows out of the need for criteria of values, which is expressed in antagonistic terms borrowed from the authority which they should possess and the rationality which they should embody; can the analysis of responsibility increase the reliance on reason that would re-establish the relation between actual preferences and ideal values? The concept of responsibility leads away from the ancient logomachies of freedom versus necessity and of consequences and utilities versus intentions and intuitions to such problems as these found in the circumstances and history in which the concept itself was formed.

Id. at 29, 30.

119. H.L.A. HART, *The Ascription of Responsibility and Rights,* XLIX PROCEEDINGS OF THE ARISTOTELIAN SOCIETY (1948-49).

120. *See generally* H. VEATCH, RATIONAL MAN; A MODERN INTERPRETATION OF ARISTOTELIAN ETHICS (1962); B. GARDNER, MORAL RESPONSIBILITY: A MODERN ARISTOTELIAN ANALYSIS (1965).

predicated on the social, normative expectations. For Aristotle volition and deliberation were necessary to lead the virtuous life. The aim was to find and learn from the good man (whose characteristics were to be learned): no formula for becoming the good man seems indicated. Standards, we reflect at this historical state, were "naturally" posited and apparently accepted on broad based levels. Man could perform good acts; could deliberate (use reason) to make appropriate (good) choices.

The modern concept of responsibility dealing in an age of cultural relativism and competing ideology reflects a concern for the exercise of personal judgment and a conscious value analysis. We have not to this extent surpassed Aristotle: the emphasis on the individual level must still be on reflection and deliberation.[121]

The modern formulation of legal accountability has focused on the voluntary character of actions. The formula is simple: we cannot punish a man unless he acted in a voluntary manner. In fact, however, we often hold a man for his status. Human behavior falls on a continuum of consciousness. Many of us find ourselves driving our automobiles in an unconscious, habituated fashion. If we were involved in an accident while so "automatically" acting would we claim that our action was "involuntary ?"[122] We certainly were driving and "intended to drive, and we were willingly carrying out our intent." We did not, of course, mean to have an accident and we plead negligence but not intentional smash-up. However, we would be held accountable, that is, responsible under present tort law. Likewise, in the criminal process were an individual to plan to kill his brother by poisoning his food and if he took his mother and put her on a train but she came back and ate this food, would we say that he was accountable?[123] Certainly our protagonist deliberated, did not intend to kill his mother; in fact he did everything he could to avoid doing so. Yet, we would hold this individual criminally accountable for the killing. Given the behaviorist attack on mens rea, I press the point that volition is not one psychological or static set, but encompasses, in normal version criminal jurisprudence, a broad range of consciousness. It

121. Pennock, *The Problem of Responsibility,* NOMOS III: RESPONSIBILITY 3, 27 (C.J. Frederich ed. 1960).

122. *See* J. SILBER, BEING AND DOING: A STUDY OF STATUS RESPONSIBILITY.

123. *Id.* at 76.

is the rare case where an individual has totally and thoroughly deliberated on his mode of activity.

To adequately analyze responsibility we would have to follow the McKeon lead: we would have to posit or describe the workings of an individual's mind, the operation of self, intention and volition, and we would have to explore the dynamic interchange between the self and the society in which it is interacting. Such an analysis is an essential framework for considering responsibility, one which I will undertake on another occasion.

It is vital to note the "social" influence on self.[124] In fact, modern social science's interpretation of disparate data suggests that modern man is conditioned by his societal environment. "Self actualization" theorists, like Carl Rogers, posit the influence of inadequate personal environment as determining the "natural" development of the self toward its unique potentiality.[125] Even "existentialism," perhaps the most radical formulation (description) of freedom and responsibility, assumes the social contingency of the self.[126] But it does not follow that societal pressures absolve an individual from personal responsibility. Rather, we see the doctrine of responsibility predicated upon our "culture relativist" state.

The Freudian ethic, for example, does not vitiate responsibility, but demands a personal commitment to an analysis of even

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124. *See, e.g.,* G.H. MEAD, MIND, SELF AND SOCIETY FROM THE STANDPOINT OF A SOCIAL BEHAVIORIST (1934).

125. *See* Rogers, *Actualizing Tendency in Relation to Motives and to Consciousness,* in NEBRASKA SYMPOSIUM ON MOTIVATION (M. R. Jones ed. 1963). *See also* K. GOLDSTEIN, HUMAN NATURE IN THE LIGHT OF PSYCHOPATHOLOGY (1940) *and* A. MASLOW, TOWARD A PSYCHOLOGY OF BEING (1962) for two other significant modern dilineations of self-actualizing. *See generally* S. MADDI, PERSONALITY THEORIES: A COMPARATIVE ANALYSIS (1968).

126. *See particularly* J.-P. SARTRE, CRITIQUE DE LA RAISON DIALECTIQUE (1960); W. LUIJPIN, PHENOMENOLOGY OF NATURAL LAW (1967), puts this Sartrian analysis into a jurisprudential framework. Sartre, in this critique, has modified his position on the inexorable conflict between man and man. The Sartre of BEING AND NOTHINGNESS (1943), in his analysis of the "stare," indicated the only option in human inter-relationship is an objectifying of the other before he "refies" you. In the Critique, Sartre allows for the possibility in some future without the necessity of violence and human reification. The key to this analysis rests with the issue of scarcity; to Sartre human violence is the inevitable result of a scarcity of societal goods. However, as Professor McBride indicates, scarcity is always a relative concept and Sartre does not give us an index to determine when we are approaching a non-scarce state, if this is indeed possible. McBride, *Sartre and the Phenomenology of Social Violence* in NEW ESSAYS IN PHENOMENOLOGY 298 (J. Edie ed. 1969).

"unconscious" motivation.[127] Psychoanalysis does not remove guilt *until it removes the wishes and actions which have engendered such guilt.*[128] The psychoanalytic rubric where "id is ego shall be" is a mandate to "know yourself"; psychoanalytic theory and therapy indicates this possibility. But the ethic is a hard one. It involves not freedom but an inevitable compromise with societal norms which are necessary to delimit the dangerous id impulses. Moreover, the ethic demands an internal perspective, which, although sound on both therapeutic and philosophic grounds, often undermines attacks against inhuman societal institutions. Man, according to Freud, is responsible for all the hidden, foul urges in society.

This responsibility is harsh and necessary if man is to function with individual dignity. Mannheim asserts:

> [T]he world of social relations is no longer inscrutable or in the lap of fate but, on the contrary, some social interrelations are potentially predictable. At this point the ethical principle of responsibility begins to dawn. Its chief imperatives are, first, that action should not only be in accord with the dictates of conscience, but should take into consideration the possible consequences of the action in so far as they are calculable and second, 'that conscience itself should be subjected to critical self-examination in order to eliminate all the blindly and compulsively operating factors.'[129]

The concept calls for man to be self reliant; to understand that he cannot know the right or any right answers; that, in fact, he must depend upon self for legitimating his own action. To the extent that we convince ourselves as a society that we are diseased, we may undermine the power and will for meaningful action. I see the revised system suggestion as another indication of the diminution of personal responsibility buttresses to "knowing" behavioral scientists.

X.

The revised version does correspond with one philosophically held position on responsibility. As Sartre points out, an individual

127. *See* P. RIEFF, FREUD: THE MIND OF THE MORALIST (1959). I have indicated that the sociological implication of Freud's teaching has "caused" him greater feelings of powerlessness than the pre-Freudian sociology. *See also* Kaplan, *Civil Commitment "As You Like It"*, 49 B.U.L. REV. 14 (1969).

128. *See* H. FINGERETTE, THE SELF IN TRANSFORMATION (1963).

129. K. MANNHEIM, IDEOLOGY AND UTOPIA: AN INTRODUCTION TO THE SOCIOLOGY OF KNOWLEDGE *passim* (1936).

is necessarily responsible for all his actions. He cannot avoid that which pervades his consciousness. He may repress it, but psychoanalytic case studies reveal the types of personal pain which flow from such repression. Sartre's procedure follows the phenomenological school of philosophy. Accordingly, he refuses to reduce human experience to universal causes or instincts. Rather, he attempts to explore existence in its individual and personal richness. Here, responsibility implies a description of the nature of individual being; it is an ontologically founded perspective.[130] In Sartre's words:

> We are taking the word 'responsibility' in its ordinary sense as 'consciousness (of) being the incontestable author of an event or an object.' In this sense the responsibility of the for-itself is overwhelming since he is the one by whom it happens that there is a world; since he is also the one who makes himself be, then whatever may be the situation in which he finds himself, the for-itself must wholly assume this situation with its peculiar coefficient of adversity, even though it be insupportable. . . . It is . . . senseless to think of complaining since nothing foreign has decided what we feel, what we live, or what we are.[131]

To Sartre then, a war which impinges on my consciousness is my war and I *must* respond to it. One could desert or commit suicide but the choice always lies with the individual; he cannot avoid it. This may seem unfair, but unfairness is irrelevant. Man is born into a world not of his choice, but everything he perceives in it he must react to live *authentically,* that is, he must live as a man with the dignity of a man.[132] Non-action itself is a choice which implicates a man's being.

Abolition of mens rea could be held to strengthen our notions of moral responsibility. We will brook no excuses. Commit a breach of a legal directive and you are responsible. We are play-

130. *See generally* J. WILD, THE CHALLENGE OF EXISTENTIALISM (1966).

131. *See* J.-P. SARTRE, BEING AND NOTHINGNESS: AN ESSAY ON PHENOMENOLOGICAL ONTOLOGY 529-30 (1956).

132. For an evaluation of the relevance of existential philosophy to law, *see* Blackshield, *The Importance of Being: Some Reflections on Existentialism in Relation to Law,* 10 J. OF NAT. L. 67 (1965), wherein the author particularly analyzes the difficult concept of authenticity, which he shows varies according to existential thinkers. This would follow because authenticity is a necessary product of the personal choice wherein self continues to constitute self. The concept is subject to errant subjectivism. To this end it is often pointed out that Heidegger, from whom Sartre took so much, cooperated fully with the Nazis during World War II.

ing no excuse games here. No labels of sickness or incompetency. But there *are* differences between legal practices and moral demands. Responsibility is a legal-type term and its moral use is an analogue to legal-type practice.[133] When we say we blame, in the non-legal context, we mean we censure, or we mean we are advising someone concerning someone else's being; a suggestion to act accordingly. "He is not responsible" means "do not deal or depend on him."

The ontological analysis is suggestive of ethical formulations, but ethical formulations do not flow full-bodied from an analysis such as Sartre's. Indicating that a war is my war tells me that I will respond to it somehow; it does not tell me how to respond. Moreover, Sartre would suggest that this direction can only come from my being. *I* make my values and only *I* can act on them.

Criminal institutions cannot demand ontological perfection posited in a philosophic paradigm. Legal practices must provide some certainty and must allow some human fallibility before charging accountability. Philosophies from Aristotle to Jaspers have recognized that the individual will often find himself in an untenable choice situation.[134] The pressure of legally mandated absolute responsibility for all acts despite protestations, for example of mistake, or duress, could provide an unfair psychological burden on the average citizen who does comply with, and intends to comply with, social and legal norms.

A good case can be further delineated calling on psychoanalysis, existentialism, and social psychology since we are responsible for our actions (connoting the making of meaning as opposed to physiological reflex). The therapeutic idea of the revised version is at its heart a most demanding ethical stance. But sociologically, the labeling process which we have incorporated in its operation serves to sap responsibility values. Instead of indicating that the individual suffers pain or feels constrained or compelled to act in a certain mode as a function of his interpersonal relations, we choose to posit a medical model. Here we claim that we can excise a cause and make the individual well just as we can give him a super drug and cure an organically induced disease. Insight therapies seek to make him find his responsibility, and emotionally un-

133. Feinberg, *On Being "Morally Speaking a Murderer"*, 61 J. OF PHILOS. 158 (1964):

134. *See* Austin, *A Plea for Excuses,* LVIII ARISTOTELIAN SOC. PROC. 1 (1956).

derstand his responses. Insight therapies implicitly posit the "freedom of the individual to change," "constitute" or "discover" his own best mode of, and for, being.[135] As such they posit interpersonal interaction and societal contigency.

We may have the kind of freedom claimed by phenomenological philosophy: we perhaps can wrench ourselves out of one social context by a self reflexive act and opt for a different life style, a more "authentic" mode of being (open, honest, feeling). But we will probably exist in the styles we have already chosen.[136] In the words of Professor Gendlin, an existential philosopher-psychologist:

> It is time to emphasize that freedom for me cannot be anything I please. I have tried it; it does not work. I am not able to be anything I please, I cannot live in another culture. I cannot have another past. I cannot be a different person than the one I am. I can only start with me, with what I am, with what I feel. I must attempt to live that 'forward' and, with all that, seek a step of felt truth. Then I must be pleased if my next step is not completely the same as always, if I succeed, even a little, in obtaining a new, fresh and different way that actually works for me. To work for me, it must be continuous with my feelings and it must carry them further. When it occurs it is a felt continuity, a moving continuity, it means that what I am feeling is resolved in the actions I devise and choose or in the words I say.[137]

Mens rea allows for human fallibility and theoretically structures a developing social sense of what legal responsibility should be. The revised version undermines this structuring process not because of its denial of responsibility (we have seen that it is ontologically justified and more radical than our present ethical-legal accountability practice), but because it does not allow an individual to explain his actions. By holding him strictly liable, the revised version thwarts the feeling of responsiblity which we seek to engender on the part of the offender. Moreover, the revised version may contribute to a structuring against excuses, thus encouraging strict moral accountability (impossible in daily human action). Responsibility rather should reflect a dialectical interchange and a flexibility of response and censure.

135. *See* Gendlin, *A Theory of Personality Change,* PERSONALITY CHANGE 102 (P. Worchel & D. Byrne eds. 1964).

136. *See* M. MERLEAU-PONTY, PHENOMENOLOGY OF PERCEPTION (1962).

137. Gendlin, *Neurosis and Human Nature in the Experimental Method of Thought and Therapy,* 3 HUMANITAS INSTITUTE OF MAN 139 (1967).

CONCLUSION

My attack is not against a therapeutic ideal but against a therapeutic state.

The revised version, even if it incorporates a full but informal system of excuses at the second stage of process, moves us further in the hands of our therapeutic decision-makers who are as societally conditioned as are we; who have the same value ranges as do we; who have no peculiar claim to posit a hierarchy of value directions for the society at large.

The move toward a therapeutic state is a move toward a social solidarity predicted by Hegel as the apotheosis of historical human consciousness. The state shall be universal; all citizens shall be loyal to and content in it, and history will so end. We need tension to develop human forms to improve or actualize human potential and human institutions.

In a democracy we have opted to allow the individual to change only because he is persuaded he should change, that change is in his self interest. The rhetoric of the new left berates our middle-class consciousness as incapable of furthering more human, more feeling ideals, institutions, interactions. Our criminal process as it moves to protect our silent majority for these rumblings and from its frustrated violence should not permit that the rectitude in its dissent should be mashed in therapeutic nosological categories.

Sartre posits the ethical justifications for violence to effectuate individual freedom and to alter human consciousness. His, as well as Marcuse's position, is a cogently reasoned analysis and vindication of violent tactics. Ironically, to maintain a community after a successful revolution, Sartre calls for the giving up of authority to the community to guarantee the maintenance of group loyalty and solidarity. To the extent we undercut the already weakened norms encompassed in mens rea formulation, to the extent we permit ourselves to help others as patients and not treat others on the issue level, we will move most certainly to a homogeneous society.

> From the Universal Tyrant, however, there is no escape. Thanks to the conquest of nature and to the completely unabashed substitution of suspicion and terror for law, the Universal and Final Tyrant has at his disposal practically unlimited means for ferreting out, and for extinguishing, the most modest efforts in the direction of thought . . .

[the coming of the universal and homogeneous state will be the end of philosophy on earth.][138]

Those who are committed to law as a necessary evil, or a good, cannot allow our legal due process to corrode because our substantive justice is failing. Better individual anarchy and terror than soporific drug induced or therapeutically induced vegetative existence. Our sense of justice runs deeply; our due process can stand much societal shock before it has to succumb to therapeutic democracy. Let's keep lawyers (and philosophers) in the process as long as possible.

138. L. STRAUSS, ON TYRANNY 226 (1963).