Dangerousness: A Theoretical Reconstruction of the Criminal Law

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"All weakness tends to corrupt, and impotence corrupts absolutely."

Edgar Z. Friedenberg, *Coming of Age in America* 47-48 (paper ed. 1965)

In this Part my intention is to pick up some of the themes mentioned in Part I in an effort to deepen our understanding of the criminal law. In Part I the focus was mainly on the internal workings and justifications for the criminal law system. In Part II the focus shifts to the role played by the criminal law in social and individual life. Here it is necessary to use a variety of perspectives and approaches. In a sense the major theme remains: the normal version of the criminal law is guilty of both overreaching and underinclusion. I suggested in Part I that a criminal law grounded on a theory of danger would help correct these faults. Hopefully, Part II will lend additional force to this claim.

Initially, it is necessary to take up the two primary theoretical justifications for the normal version: The Theory of Community Condemnation and the Rule of Prudence. Both of these theories seek to justify the normal version and to place limits on the use of the criminal sanction. I will attempt to show that neither of these theories are adequate, particularly as limitations.

Since both of the theories just mentioned are essentially sociological, the sections following deal with the same general problem from a psychological point of view. These sections will draw upon some existing information from criminology, and offer a psychoanalytic critique of the present conception of the role criminal law plays in modern society. Here I will offer some ob-

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servations about authority, guilt and shame as they pertain to criminal law theory. The psycho-logic of this discussion necessitates following it with some observations about the distinction between criminal deviance and social rebellion.

In the final sections I will try to bring the discussion around to where it began in Part I with a more narrow focus on the legal problem of constructing criminal codes which are grounded on a theory of danger but retain regard for the principle of legality. Here I will suggest a paradigm drawn from existing law.

In Part II I ask for perhaps excessive attentiveness on the part of the reader. This is not entirely by choice. The phenomenon of criminal law for man in society does not, in my view, present itself in linear form, and it is beyond my capacity to represent it in such a form. The structure of Part II, and its relation to Part I, would graphically appear as a series of overlapping scales or levels which, if these observations are sound, would roughly complete a circle. With this in mind the following discussion may be somewhat clearer.

1. The two primary theories of justification for the use of the criminal law with which I shall deal here are the Theory of Community Condemnation and the Rule of Prudence. In the following two sections I will examine these theories and attempt to suggest that both rest on a concept of social solidarity which requires application of a principle of unanimity in the use of the criminal sanction. Further, I will argue that the principle of unanimity implies a criminal code confined to the proscription of behavior which is so threatening that insecurity with regard to such behavior tends to destroy all sense of community.

I do not include in this discussion the utilitarian theory of Marginal Social Benefit principally because I am concerned with the social value bases of criminal law theory, and the value concerns incidental to this view are covered by the two main formulations. The utilitarian notion of Marginal Social Benefit holds that where the total cost of criminalization exceeds social benefits the criminal sanction is being misused. This simplicity is

1. For applications of this notion, see E. Schur, Our Criminal Society (paper ed. 1969); Kadish, The Crisis of Overcriminalization, 374 Annals 157 (1967); State of California, Joint Legislative Committee for Revision of the Penal Code, Proposed Tentative Draft, Drugs, Part I (mimeo, 1968).
achieved by disregarding many of the serious "aims" of the normal version: "preservation of the moral fibre of society"; "social solidarity"; and "protection against social disintegration."

Furthermore, the general question of social resource allocation is not relevant to any theory of criminal law. Resource allocation is a question of priorities, and priorities can readily shift with a shift in perspective about the problem. The normal version now chooses to spend the bulk of the resources devoted to crime on enforcement personnel and hardware. The propriety of this allocation depends on one's conception of the purposes of the criminal law. Of course, this observation holds for the revised version as well. But it is not relevant to argue that the revised version would demand excessive expenditures of resources for new institutions or better (or differently) trained personnel unless one is also prepared to dispute the theoretical model.

Finally, in my view legal theory has suffered enormously as a consequence of its premature concern with resources. If one reflects for a moment on the cost of developing and articulating new theories in physical science, it is clear that an advance sensitivity to the cost problem would have totally immobilized scientific innovation. For this reason the suggestion that "we not spend another dollar on research into the cause of crime," coming from people presumably dedicated to research, is outrageous.2

2. The Theory of Community Condemnation is not helpful as a theory of limitation on the use of the criminal sanction. In Durkheim's version,3 the principle function of community condemnation is to preserve social solidarity. This function implies that if a particular use of the criminal sanction does not serve the end of social solidarity it is an inappropriate use of the criminal sanction. But misuse of the criminal sanction does not seem to be a real possibility in Durkheim's theory since he holds that the criminal law is always an expression of the common conscience; as an expression of the common conscience it must serve the end of social solidarity.4 In short, to the extent the theory holds that

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3. E. DURKHEIM, THE DIVISION OF LABOR IN SOCIETY (G. Simpson transl. 1933) [hereinafter cited as DURKHEIM].

4. How this operates in fact is not clear since Durkheim asserts that "where solidarity rests solely, or nearly so, upon resemblances" [penal law] forms of social break-up are more frequent and easier to bring about. Id. at 148.
as an expression of the common conscience penal law must always serve the end of social solidarity, it is not useful as a theory of limitation.

There are, however, added complexities to this theory. The form of solidarity preserved by penal law, which Durkheim called mechanical solidarity, is only one type. Mechanical solidarity, based on social likeness and expressed in penal law, is to be distinguished from organic solidarity based on social difference and expressed in restitutive law. Organic solidarity is of a higher order as a matter of social evolution, and predominates in proportion to the prevalence of the division of labor. Thus a decrease in the use of penal law is a sign of social evolution in the direction of organic solidarity. But Durkheim held to three propositions which, in their relation to each other, cast doubt on the role he ascribed to penal law in relation to social solidarity.

First, since mechanical solidarity is expressed in penal laws, "it becomes necessary that they persist in spite of their irrationality," and "that the acts which offend them be not tolerated." But Durkheim also believed that mechanical solidarity was the less stable form, so that where solidarity rests mainly on resemblances, as expressed in penal law, "breaks [with society] are more frequent and easier to bring about." Finally, since the relation between mechanical and organic solidarity is evolutionary, the prevalence of penal law diminishes and restitutive law dominates the "closer a social type approaches ours." Taking these propositions together raises serious difficulties. How can penal law contribute to social solidarity when, according to the second proposition, stable solidarity is inversely related to the prevalence of penal law as the expression of solidarity? Indeed, this is a particularly serious problem to the extent that penal law is said to retard social disintegration. Furthermore, if the relation between mechanical and organic solidarity is evolutionary, and the latter is the higher form, it is far from clear that penal laws—which express the more primitive form of solidarity—should "persist in spite of their irrationality."

One further observation is necessary at this point. Inherent

5. Id.
6. Id. at 107.
7. Id. at 148.
8. Id.
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in Durkheim’s theory is the possibility that the criminal law may be used as an expression of social nostalgia which may generate conflict rather than enhance solidarity. The possibility of conflict rests on what is, in my view, the essentially dialectical relationship between mechanical and organic solidarity. According to Durkheim, the division of labor brings with it mutual dependence, the necessity of cooperation and a decrease in the prevalence of penal law. However, the division of labor also underscores existential separation and the sense of individual isolation. This heightened awareness of separation may give rise to a desire to deny the reality of it, and this denial may take the form of a symbolic assertion of likeness. To the extent that likeness, in Durkheim’s terms, is expressed in penal law, criminalization is apparently useful as a social effort to deny separation, isolation and difference. In this circumstance criminalization appears reactionary and tends to produce conflict rather than reflect or enhance solidarity.

In sum, to the extent the Theory of Community Condemnation rests on some variant of Durkheim’s notion of social solidarity it is consistent with a constrained as well as a broad use of the criminal law. It does not seem possible, therefore, to develop principles of limitation on the use of the criminal law from its putative capacity to enhance social solidarity.

3. The Theory of Community Condemnation does not allow for community sentiment of any sort to support penal law. The collective sentiments must be “strongly engraven” on all consciences. “It is not sufficient, then, that the sentiments be

9. Id. at 129-32.
10. Awareness of loneliness, of isolation, is one of the most characteristic experiences of the contemporary world. Marx’s chief condemnation of capitalism is that it alienates the individual. The phenomenon of individual isolation is the cornerstone of existential philosophy, and the fact of alienation in the contemporary world is one thing that gives existentialism its contemporary appeal. Freud regards separation and fear of separation as one of the main factors in anxiety. The situation of isolation is a central theme in Fromm’s Escape From Freedom, in Sullivan’s psychology of interpersonal relations, and in Durkheim’s and Merton’s analysis of anomie.
12. Durkheim, at 77.
strong; they must be precise." 13 The legal doctrine to which this notion corresponds is the doctrine of *mala in se*. If the collective sentiment must be "strongly engraven," and if, as Henry Hart argued, *mala in se* offenses reflect fundamental social norms—so fundamental that even if an individual offender pleaded *ignorantia legis* he could justifiably be punished for his ignorance of the law as for his specific infraction 14—then it is possible to consider the doctrine of *mala in se* as a principle of limitation on the use of the criminal law. The problem lies in avoiding tautology by preserving, or discovering, the empirical component of the doctrine. What are the criteria for distinguishing offenses *mala in se* from those which are not? 16 The answer in the literature and the cases is that the category is historical. Offenses of a sufficient vintage become *mala in se* as they become part of our collective conscience. But it is precisely in this historicity that difficulty with the *mala in se* doctrine arises. It is surely arguable that some *mala in se* offenses are anachronistic while some "regulatory" offenses are so important to a technological society that treating them as "lesser offenses" fails to reflect contemporary community needs. Indeed, one could readily argue that the elimination of mens rea from "regulatory" offenses indicates that the community regards these offenses as *more serious* than traditional harm producing offenses *mala in se*. 16

Nevertheless, the *mala in se* concept as a principle of limitation suggests something approaching a principle of unanimity in the legislative designation of deviance. The criminal law could help train for responsible citizenship where responsible citizenship means only adherence to a small, but basic set of norms of

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13. Id. at 79. See also P. DEVLIN, THE ENFORCEMENT OF MORALS 17 (1965).
14. H.M. Hart, The Aims of the Criminal Law, 23 LAW & CONTEMP. PROB. 401, 413 (1958): With respect to offenses *mala in se*, "knowledge of wrongfulness can fairly be assumed. For any member of the community who does these things without knowledge that they are criminal is blameworthy, as much for his lack of knowledge as for his actual conduct." Hart seems to contradict himself on the first point. Regarding strict liability offenses he says: "If it be said that most people will know of such commands and be able to comply with them, the answer, among others, is that nowhere else in the criminal law is the probable, or even the certain, guilt of nine men regarded as sufficient warrant for the conviction of a tenth. In the traditional Anglo-American law, guilt of crime is personal." Id. at 422-23. Furthermore, to the extent proof of guilt involves evidence the relevance of which depends upon probabilistic statements about human behavior in general, Hart's notion of "personal guilt" certainly overstates the matter.
15. H.L.A. Hart has attempted to deal with this question. See supra note 11.
mutuality in human interaction. The difficulty is that the assertion of the prime function of the criminal law as training for responsible citizenship does not account for a function of criminal law which sociologists argue is equally prime: the regulation of the rate of social change by criminalizing behavior "at the boundary." The *mala in se* concept as a limiting principle seems inconsistent with the boundary maintenance function to the extent it is concerned with the "core" of community identity. One can resolve this dilemma only by asserting that the proper function of the criminal law is to maintain this "core" of community identity, and that the nature of the core is discoverable in accordance with the principle of unanimity.

19. There is reason to doubt that the normal version takes seriously the Theory of Community Condemnation. If it were serious about this notion the plea of guilty would be abolished forthwith. One effective way to maintain a constant check on the extent to which the criminal law expresses community condemnation and conscience is to require trial by jury in all criminal cases. Here I shall only list the possible benefits from such a requirement.

1. Overcriminalization may disappear as a consequence of jury nullification;
2. Overcriminalization may disappear as a consequence either of public pressure generated by a new awareness of the range of existing prohibitions, or simple annoyance at being called up for jury duty to deal with trivial matters;
3. Plea bargaining would be reduced to bargaining over the charge, and even this might disappear since the prosecutor has little to gain by it;
4. With the reduction or disappearance of plea bargaining some of the existing police power to control the charging process will also disappear;
5. Since the police themselves will be required to testify in many cases, police abuse may become increasingly visible to the public;
6. Since the jury is a body with changing membership the problem of official control generated by the necessity of continuing cooperation between the controller and the controlled will diminish;
7. The legendary incompetence of the criminal bar will be more visible;
8. Community condemnation would be expressed/withheld by the jury in each case;
9. Since more people will be called for jury duty knowledge of law and legal process will be disseminated more widely and more accurately, with the possible consequences of
   (a) greater participation by minorities;
   (b) increased appreciation by the community of the nature of its crime problem;
   (c) increased probability that disposition will reflect community views;
   (d) increased compliance with criminal prohibitions.
10. It is also possible that if juries will not convict in certain kinds of cases the police may feel even more justified in imposing punishment sua sponte.


This should also become more visible, but perhaps not. There is, however, a related suggestion which might help. I see no convincing reason why police, lawyers and judges
The Rule of Prudence offers the principle that behavior regarded as either good or morally neutral by any significant social group should not be criminalized. The Rule of Prudence thus implies a society wherein diversity is valued, and which holds open the option of treating deviant behavior with tolerance, considering it innovative, or designating it as criminal.

The difficulty with the Rule of Prudence is not merely the obvious one of defining "significant social groups" or ascertaining the views of such groups. There is also the problem of whether minority dissent is to control in all cases where criminal designation is proposed. The affirmative here is not an impossible position, although one should recognize that pharmaceutical manufacturers may be "the significant social group" opposed to criminalizing misbranding of drugs, or that bad check writers may be opposed to criminal penalties for their behavior, and both groups may articulate their objection in terms of the doctrine of caveat emptor. The more important point is that if minority dissent controls in all cases, then the Rule of Prudence is nothing of the kind. Rather, it, too, proposes a principle of unanimity for application in the legislative designation of deviance. Thus the Rule of Prudence would have the same effect as mala in se taken as a limiting principle: the criminal law would be reduced to a small, basic set of norms of human interaction which is relatively static over time. If this is so, the Rule of Prudence by implication amends the Durkheim hypothesis by asserting that the interest in social solidarity is best served by a criminal code which polices only the "core" of community identity, and that more liberal use should be excused from jury duty. The need for bringing about real contact between the public and its bureaucrats seems to outweigh the speculative fears behind the present exclusion of these professionals.

21. For an excellent theoretical treatment of this question in terms of "simple systems" see Mills, Equilibrium and the Processes of Deviance and Control, 24 Am. Soc. Rev. 671 (1959).
23. On the principle of unanimity generally see Franklin, Concerning the Mission and Contemporary Force of Romanist (Intercessio) 2 Studi in Onore Di Vincenzo Arangio-Ruiz 269 (1952); Franklin, Concerning the Dialectic of Romanist Tribunitial "Intercessio" During a Period of Social Ambiguity and Social Irony, presented at the Telos conference, December, 1971, to be published shortly.
of the criminal sanction is dysfunctional from the perspective of social solidarity.

XII

The question of the role of the criminal law in promoting social solidarity is not sufficiently answered either by the Theory of Community Condemnation or the Rule of Prudence. To the extent that both theories point toward a Principle of Unanimity they are helpful, but the addition of the concept of danger is necessary. I will argue in the following sections that (1) to the extent the criminal law fosters individual helplessness, whether objectively or subjectively perceived, it creates the very danger it is meant to prevent; (2) from the perspective of social solidarity those forms of behavior which interfere with cooperative human interaction are dangerous and should be proscribed.

Helplessness is a theme that appears frequently in the literature dealing with the problem of crime and delinquency. It has often been observed that black Americans and the poor are not only without political power, they also are without the economic power that allows for market influence in a capitalist economy and that permits avoidance of serious injustices at the hands of the legal system and government bureaucracy. Furthermore, the self-perception of helplessness may account in part for the “choice” of crime as an adaptation to stress,24 and may provide some insight into the specific character of “differential association” as a “cause” of crime.25 The self-perception of helplessness may have much to do with orderly and disorderly prison behavior,26 not to mention student behavior in public schools.27 In combination with feelings of hope or a belief that injustice can be corrected, helplessness plays an important role in the “social disorders” called riots.28 In the young, it has been observed that the individual may even feel that a criminal act is necessary to preserve his identity: 29 a negative identity is better than none at all.30

27. E. Friedenberg, Coming of Age in America 47-48 (paper ed. 1965).
From the perspective of social solidarity criminalization may exacerbate both the fact of powerlessness and the perception of helplessness. Sociological criminology has addressed itself to the way in which criminalization sets social boundaries; "creates" a deviant group whose social task it is to periodically test those boundaries; 31 "coerces" minorities into the moral "virtues" of the dominant group 32 or simply symbolizes the moral dominance of the latter. 33 Criminalization may, therefore, increase the quality of social impotence. Indeed, this must be the result where criminalization consists in prohibiting behavior that has little to do with the necessary conditions of human interaction.

The damage to social solidarity which may be the product of the criminalization of conduct which does not interfere with autonomy and cooperation is clearer if seen in this context. Criminalization creates a deviant population. The ancillary status effects of this social designation make it increasingly difficult for the population so designated to engage fully in cooperative interaction with the general public. If this process fosters social solidarity it does so only by redefining society to exclude those who are unable to engage fully in cooperative interaction. Social solidarity may be promoted by a criminal law confined to safeguarding the essential methods of human cooperation, but criminalization not so confined promotes nothing but dangerousness.

Implicit in any principled limitation on the use of the criminal law is the belief that chronic social conflict over the appropriateness of behavior is not inconsistent with social solidarity; that there are uses of disorder. "Overcriminalization" may be an index of the social drive for certainty, normative purification and stylistic orthodoxy. The tragedy to be avoided is the self-fulfilling prophecy. In periods of rapid change social boundaries come to appear vague and uncertain due to divisions within society. There is a great temptation to criminalize one or another form of behavior as a symbolic affirmation of normative stability, but criminalization may rigidify and exacerbate the division. "Crime rates" go up and the sense of security declines; social conflict may not

only increase but take more serious, violent, forms as well as raise more fundamental political issues. It is far from clear that, given this scenario, criminalization serves the interests of social solidarity. "Symbolic" criminalization not only indicates the moral or political ascendency of one group over another; it also provides an alternative point of cathexis for individual loyalty. Thus it may well be that the change in labels affixed to criminal deviants—from defective to defector—is due as much to the misuses of the criminal sanction as to the progress of criminology.

XIII

There are two strains of thought in contemporary criminology which appear to "explain" crime in terms which are quite different if not mutually exclusive. There is what might be called the psycho-social strain which understands the available research data as supporting a theory of defective personal development. In this view the family is most important, and disturbances within the family configuration have an impact upon the child which may move him in the direction of crime as a way of adapting to the real world. On the other hand, there is what might be called the socio-political strain which understands its research data as supporting a theory of value defection. In this view the relevant social context is beyond the family but narrower than the public at large—variously described as peer group, neighborhood, subculture, community and so on. In this view, the particular political and social situation of the group tends to socialize the individual to a set of norms which are opposed to, or at least differ from, the norms of the larger society. Furthermore, because the group is usually relatively deprived in some way or other, the context presents the individual with a particular set of stresses which are conducive to crime. In short, crime indicates the normative defection of the group and/or the political defection of the individual.

In what follows I would like to show that neither of these two strains are sufficient as a foundation for criminal law theory, that they are not really different anyway, and that terms like "de-

"defective" and "defector" may be used by society or the individual for tendentious purposes.

The failure of the psycho-social strain needs to be traced to its intellectual foundation in psychoanalytic theory. Since Freud it has been believed that the dominant socializing agent in the family was the father, at least insofar as the major norms of social behavior are concerned. Father and Authority have come to be interchangeable terms and concepts. This tradition holds that as the child grows the authority of the father becomes the authority of society in general and the authority of government as reflected in the criminal law and the policeman in particular. Thus the absence of a father in early childhood or the presence of a "bad" father may generate fundamental authority problems in the individual. Since criminal law is, in this view, the social equivalent of paternal authority one can expect individuals with "father problems" to be involved in crime.

The difficulties with this conception go back as far as Freud's postulated "primal crime," but neither logic nor evidence necessarily support it. While there is no doubt that the father's role in the family configuration is important, the connection between paternal authority and social-political authority is arbitrary. It is argued that while maternal authority and influence is predominant and even exclusive during the first year or two of life, this is later superseded by paternal authority. Assuming this is true, it does not follow that earlier maternal dominance loses its influence on the child in favor of later paternal dominance. It would be just as logical to view the father as enforcer or executive of norms established primarily by the mother. The identification series Father-Society-Government-Criminal Law is at best a symbolic formulation and at worst a dangerous obfuscation.

36. Bienenfeld, Prolegomena to a Psychoanalysis of Law and Justice Part II Analysis, 53 Calif. L. Rev. 1254, 1261-75 (1965). Bienenfeld's analysis is based, essentially, on three psychoanalytic concepts: (1) Oedipal conflict, as opposed to Oedipal union; (2) Introjection of the paternal superego; and (3) A distinction between "depressive" and "persecutory" guilt. The latter seems to be little more than a verbal substitution for the concepts ego-ideal and superego. Furthermore, it is indistinguishable from Durkheim's mechanical-organic solidarity dichotomy. The core difficulty with both formulations lies in the concept of identification. See Lichtenstein, Identity and Sexuality, 9 J. Am. Psyc. Ass’n. 179, 196 (1961). In jurisprudence, the desire for rule certainty, predictability and finality has been traced to a longing to be governed by paternal authority. See J. Frank, Law and the Modern Mind 35, 44-45 (paper ed. 1969).

The psycho-social strain is also insufficient to the extent it chooses to ignore two theoretical formulations which seem to lead in an opposite direction. Erikson's theory would suggest that the establishment of a sense of "basic trust" takes place in the first year of life and requires that the mother herself have a "basic trust" in the world.38 A mother who is poor, who has been subjected to discrimination, humiliation and injustice may very well communicate her disaffection with the world to her offspring—thus laying the foundation for the child's later defection from the prevailing social norms. In this way Erikson's theory denies a distinction between "defective" and "defector."

The psycho-social strain also ignores the theoretical significance of Piaget's work. According to Piaget the full development of norms of human interaction based on mutual consent must take place during the latency period and requires association with peers. True appreciation for the significance of the norms which protect the methods of peer interaction, norms which resemble criminal laws, take place in this context and at this time.39 Piaget's theory, therefore, suggests that the identification of paternal authority with the criminal law is socially regressive rather than socially protective. Piaget also moves us closer to the socio-political strain in modern criminology.

The fundamental difficulty with the socio-political strain is that it fails to account for the importance of norms and values in early family life. Sub-cultural or oppositional norms may be inherent in the life view of the family in general or the mother in particular. To the extent this is so, later "differential association" decreases in significance as an "explanation" for crime, as does the notion of defection.40

Thus there is little essential difference between the psycho-

40. Shoham & Nehari, Crime and Madness, 9 ANNALES INTERNATIONALES DE CRIMINOLOGIE 1 (1970). The contrary conclusion in this paper seems to depend on a nonsequitur. The authors identify a type of family conflict situation "which would result in an ambiguity of social roles and expectations [which] induce the youngster to look for clear-cut normative substitutes outside the family." The normative certainty provided by peer groups "would be the causal link between an adolescent's predisposition to delinquency and deviance and his actual association with deviant and delinquent groups." Since in this situation "the oral fixations are too remote" the "sociological approach to crime causation can be fully upheld, insofar as early personality developments are not relevant for the subsequent delinquent solutions." Id. at 125.
social and socio-political strains. Values and norms play a role in the life of the individual from the beginning. It is arbitrary to generate causal explanations from developmental events arising at a particular point in time. The social manifestations of early character formation are not "settled" in the earliest years of life. Values play a role in early family life, and character continues to develop in the larger community or sub-cultural context. The two strains in contemporary criminology insist on a distinction where there is only a dynamic.

Terms like "defector" and "defective" have a utility independent of their explanatory significance, for they can serve as self-justifying labels either for society or the individual. As Matza has pointed out, the notion of "defective" can be used by young offenders to deny their own moral responsibility. The same notion is equally useful to support prison reform and the substitution of therapy for punishment. "Defective" allows the user of the term to assume the validity of the legal norms in general, and their application in the particular case, because the focus is on the individual rather than the infraction. This focus can be changed, or is automatically changed, by switching to the language of defection.

The language and idea of "defection" is commonly used by those who see crime as a primitive form of social rebellion and by those who wish to stress the extent to which "the melting pot" never melted. The "defector" approach allows a focus on the

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41. The term is borrowed from E. HOBBSPAWM, PRIMITIVE REBELS 1065 (paper ed. 1959); E. HOBBSPAWM, BANDITS (1969).
42. E. SCHUR, supra note 1. Curiously, Schur applies the motive of value defection to "ghetto" crime but not to "white collar" crime. The result is that to the former his tone is one of understanding and compassion, while he harshly blames the latter for setting a bad example. See particularly id. at 188-90.

The vacuity of the discussion of political crime in M. CLINARD & R. QUINNEY, CRIMINAL BEHAVIOR SYSTEMS ch. 5 (1967) is best illustrated by the following passage:

It is apparent that an understanding of the political criminal requires a conception of man that is not unusually used in the study of the criminal. The view that the criminal is produced by a variety of impersonal forces beyond his control is not adequate for the study of the political criminal. The introspective nature of man, man as a reflective being, may be seen in the political criminal. Man alone is capable of considering alternative actions, of breaking from the established social order. Once the individual has an awareness of self, acquired as a member of society, he is able to choose his actions. A purposive, voluntaristic conception of man and his behavior is thus essential to the study of human behavior in general and political crime in particular. The ability of the individual to break with the established order is nowhere better illustrated than in some forms of political behavior.
norms of the criminal law (or the social ideology behind those norms) while assuming the developmental health and personal integrity of the individual.

The defective-defector difference implies a significant split on the question of determinism and free will. The language of "defective" stresses determinism while the language of "defection" stresses choice. But I think there is utility in not dealing with this problem at the level of the question of free will. One can readily agree with Professor Hart\footnote{H.L.A. Hart, Legal Responsibility and Excuses, in Determinism and Freedom in the Age of Modern Science 95, 115-16 (S. Hook ed., paper ed. 1961).} that there is something to be gained from a criminal law that recognizes excusing conditions in principle, without conceding that the question of principle is the most important one. Since no one is prepared to support a criminal law theory that fails to recognize any excusing conditions, the important issue is the content of the list of excusing conditions: whether poverty should be considered a form of duress; whether a character disorder "manifested only by repeated criminal or otherwise anti-social conduct"\footnote{Model Penal Code § 4.01 (2) (Tent. Draft No. 4, 1955).} should be considered a form of insanity; or whether adherence to subcultural norms should be considered a form of mistake. These are the questions raised by the "defective" and the "defector" language; these are the questions which cannot be answered by discussion of excusing conditions in principle; these are the questions which are intractable under normal version theory.\footnote{But cf. Goldstein, supra note 28; Morris, Psychiatry and the Dangerous Criminal. 41 S. Cal. L. Rev. 514 (1968).}

The consequence of identifying the Father image with Society, Government and, ultimately, criminal law is that the criminal law comes to be regarded as the Word emanating from Authority. Whether or not the criminal law is enacted in a politically legitimate or even democratic way is quite beside the point. Both the rulers and the ruled see the criminal law as the instrument of Authority. On the rulers' part this leads to a willingness to engage the criminal law to prevent people from "doing bad things" or control people "for their own good"—both standard
goals of paternalism—without feeling obliged to justify their engagement of the criminal law in terms of the necessities of human interaction.

On the part of the ruled, the perception of the criminal law as the instrument of authority results in both blind obedience and a kind of scapegoat disobedience. By the latter I mean to suggest that the identification of the criminal law with authority makes it a prime target for symbolic destruction. According to the Freudian myth, when the Father-Chief ceased to be effective he was killed by a conspiracy of the Sons. To extend the myth: when criminal law is identified with authority, disaffection with any aspect of society or government leads to this sort of "ritual crime." It has been observed that historically American violence has rarely been directed at the government itself. It may be that the myth of paternal authority has insulated the government from direct attack, and that crime is one form of channeled expression of disaffection with government and society. This is not to say that all crime is treason, although there is a sense in which the paternalistic-authoritarian conception makes it so, but that ritual crime is a consequence of criminal law conceived as an instrument of authority.

The vicious circle of arrogant criminalization by the rulers and ritual crime by the ruled can only be broken by thorough detachment of the criminal law from the myth of paternal authority, and acceptance of criminal law as a means of establishing the ground rules for human interaction and social cooperation.

46. The rule of law: that is our scapegoat; into this image we gather all the impersonal forces of society which keep us in our place. The conditions of civilized living do much to sap our lives of adventure and risk. We take our revenge by equating spirit with lawlessness, and adventure with the criminal. The violence of the lawbreaker becomes the symbol of manly action in a world of machines. J. Bronowski, The Face of Violence 64-65 (1967). I believe Raskin misses the point when he says "Bronowski believes that the society's attack on leaders is a hatred for the rule of law." M. Raskin, Being and Doing 28 (1971) (emphasis added). See also K. Keniston, The Uncommitted 333 (paper ed. 1965).


48. The following is an excellent articulation of the kind of position I mean to contradict. It should be noted that the authors do not necessarily subscribe to it.

A criminal code has symbolic offices to fill. The unequivocality of the criminal prohibition and of the threat of punishment for those who transgress contribute something . . . to the deterrent and moralizing force of the criminal law. Relying on police interposition avoids proclaiming on the face of the prohibition that it is
XIV

The ascription of guilt is a technique of social control which a community need only use sparingly and which it may use only sparingly. The level of use of this technique is an index of the relative absence of social solidarity. To understand why this is so, consider the data of the Willcock’s study.

Since young males in the second half of their teens and early twenties are the age-group with the highest rates of serious crime, the Home Office asked the Government Social Survey to interview a sample of youths whose ages ranged from fifteen to twenty-two. This was done in 1963, and the sample obtained was 808. Sixteen percent had been in court, accused of an offense of some kind, serious or trivial; three out of four had met someone to whom this had happened. Whether or not they had been brought to court for it, 17 percent admitted at least one theft; 20 percent admitted having taken part in at least one vandalism or gang fighting, and 84 percent admitted traffic offenses. Although these percentages are no doubt smaller than they would have been if every member of the sample had been completely frank, it is clear that these males at a delinquency-prone age were a mixture of the deterred and the undeterred.49

The men in the sample were asked to consider the possibility of committing the offense of shop-breaking, and their reasons for not committing this offense were elicited. According to Walker’s report of this study, 43% responded that they would not do it because of one or another form of “internal restraint” such as conscience or self-image. The subjects were also given eight cards describing possible effects of being caught and were asked to rank these in terms of “Which of these things would worry you most about being found out by the police?” Only about 15% of the responses indicate predominant concern with the institutional consequences of crime. The rest were concerned with the reaction of friends, relatives and work associates. Taking out “The chances of losing my job” response leaves 64% of the sample indicating their sensitivity to what others will think of them if they

not meant to be taken literally. Furthermore, it avoids affronting the rule-of-law ideology by overt recognition of the extent to which important matters, even those directly affecting the liberty of citizens, are left to the official’s discretion.


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commit a crime. Walker misses the significance of these results when he says:

We cannot, of course, conclude that the operative deterrent for about half of the sample was the thought of their families' reaction. For we must remember that almost as many (43 percent) had said that they would have been held back from law-breaking, or at least worried, by 'conscience' or some other form of internal restraint. And since the sort of family which reacts strongly against law-breaking is also the sort of family which is likely to have sons with strong internal restraints, many of the youths who put their families' reactions at the top of their lists of deterrents must have been youths who would in fact have been held back by internal restraints.

The point is not the possible overlap of responses, but the fact that "internal restraints" and "the opinions of others" are the same; for more than two-thirds of the subjects shopbreaking means a failure to live up to expectations, and whether these are self-expectations or the expectations of important others is not significant. These young men suggest that shame, not the institutional ascription of guilt is the emotional experience most productive of compliance. This sense of shame helps to explain why the social control technique of guilt-punishment is one which need only be, and may only be used sparingly, and why the proliferation of the technique is an index of social disorganization.

The sense of shame is the primary, most effective mechanism for social control in a community. If guilt is attached to a mode

50. *Id.* at 66.

51. I believe that Kai Erikson fails to take account of this shame factor when he observes that for the community to single out a criminal act as an especially solid indicator of character is irrational to the extent that such acts are time bound in the history of the community and at best episodic in the life of the individual. K. ERIKSON, supra note 18, at 6-7; cf. Andenaes, *The General Preventive Effects of Punishment*, 114 U. PA. L. REV. 949, 961 (1966):

At least three conditions combine to prevent an individual from perpetrating a punishable act he is tempted to perform: his moral inhibitions, his fear of censure of his associates and his fear of punishment. The latter two elements are interwoven in many ways. A law violation may become known to the criminal's family, friends and neighbors even if there is no arrest or prosecution. However, it is frequently the process of arrest, prosecution and trial which brings the affair into the open and exposes the criminal to the censure of his associates. If the criminal can be sure that there will be no police action, he can generally rest assured that there will be no social reprobation. The legal machinery, therefore, is in itself the most effective means of mobilizing that kind of social control which emanates from community condemnation.

of conduct which the community does not find shameful, the pro-
scription will largely fail to produce compliance. Where infrac-
tion does not contradict self-expectations, or the expectations of
important others, institutional prohibitions will be ineffective.

Increased reliance on guilt-punishment indicates that shame
constraint is not working with respect to particular modes of be-
behavior because there are groups of important others for whom
infraction of these norms bespeaks no significant violation of ex-
pectations. Furthermore, ambivalence in regard to the matter of
propriety can be managed or compromised by the institutional
ascription of guilt. That is, the behavior may be guilty, but not
shameful, for either the individual or his important others: nei-
ther approve of it, but neither really condemn it. There is, there-
fore, a tension both within groups of important others, and
between such groups and those who have the power to control
the institutional ascription of guilt. In the ordinary course of the
criminal process only the top of this iceberg is seen in the form of
the criminal defendant who confesses (or passively accepts) guilt
while exhibiting none of the remorse affect which officials (and
juries) think should accompany the confession or acceptance of
guilt. The foregoing should help explain why, in general, this
affect is absent.\(^5\)

Matza has observed that a young person may commit a crime
as an act of personal salvation: when his feeling of helplessness
and passivity (experiencing himself as effect rather than cause)
come dangerously close to the point of denying his very exis-
tence.\(^6\) This is the sense of doubt which is developmentally re-
lated to the sense of shame.\(^7\) The experience of shame questions

\(^5\) Although the normal version ascribes or “finds” guilt, the existing practice of
prison as punishment unconsciously attempts to use shame as the major sanctioning device.
Guilt attaches to an act and may involve no greater part of the personality. Shame ques-
tions the identity, the existence, the being of the individual. See H. Lynd, On Shame and
The Search for Identity 49 (1958). Since prison administrators apparently regard crime as
a failure to live up to their expectations of what a person should be—whatever the indi-
vidual’s self-expectations or the expectations of his important others—the treatment of
prisoners reflects the belief that infraction works a “forfeiture” of the right to personality.
See G. Sykes, Society of Captives 131 (paper ed. 1958). For this reason I regard any use
of the notion of “forfeiture” as quite dangerous. For example: “With the idea of forfeiture
in the foreground, culpability functions as the touchstone of the question whether by virtue
of his illegal conduct, the violator has lost his moral standing to complain of being sub-
jected to sanctions.” Fletcher, The Theory of Criminal Negligence: A Comparative Analysis,

\(^6\) D. Matza, Delinquency and Drift 189 (paper ed. 1964).

\(^7\) E. Erikson, Childhood and Society 251-54 (paper ed. 1963).
the identity of the individual and his relatedness to others. Likewise, a pervasive sense of doubt generates anxiety over whether one is meeting expectations. The psychological function of criminal guilt may be a defense against this sense of shame and doubt. Crime means one may be guilty, but at least one has had, as Matza puts it, some effect on the world. This defensive action is only possible, however, where the infraction itself does not violate the expectations of important others—which it does not where the immediate group is ambivalent about crime, and the individual believes the society at large more or less expects it of him. Again, there is a way in which a negative identity is better than none at all.

The societal analogue to this phenomenon is social doubt about social identity, and this social doubt interacts with individual doubt in a way which tends toward social decay. Americans are preoccupied with questions of national goals and purposes, with the boundary between healthy diversity and pathological division, with "understanding" those who are different. Modern sociology has made us so aware of the degree to which sub-cultural groups are different, that it has helped generate real doubt about whether we share a common belief system. The individual who engages in the "guilty" behavior which functions as a defense to his own doubt and potential shame reflects the same theme. Society and its criminals share a similar sense of doubt. Furthermore, American society employs a technique for managing its doubt which is similar to that used by individuals: the ascription of guilt functions as a defense against an overwhelming sense of doubt. The legal form this takes is the drive toward normative purification; the life-style form it takes is the effort to purify experience.

Normative purification means removing doubt about the appropriateness of forms of behavior by designating normative deviance as guilty. The extent to which this defensive technique is used indicates the extent to which society no longer has a firm grasp on what it expects of itself. Contrary to Lord Devlin's assertion, criminalization does not protect against so-

56. E. Erikson, supra note 30.
57. Skolnick, supra note 32.
cial disintegration; rather, it indicates the degree of social disintegration which already exists.

The picture I have drawn is one in which crime and criminalization feed on each other with no apparent possibility for resolution. The process is one of decay, which means a return to the more simple laws governing the behavior of units. Organisms decay when they no longer maintain their "identity." It would seem that what a return to the more simple laws governing the behavior of units may mean in this context is two-fold: either a "simple" criminal code, or the "simple" code of violence and self-help. In either event the immediate precondition is likely to be a steady high level of crime which will increasingly come to be regarded as "political."

XV

Loyalty is the commitment aspect of social solidarity. It is the way in which the shared life is expressed as an idea. It is in this sense that loyalty and legality serve the same purpose. Though the distinction between disloyalty and criminality is less sharp than usually supposed, there is a difference which needs to be appreciated in order to understand the phenomenon of the patriotic thief and the meaning of political crime.

The professional thief does not steal state secrets and probably would not even if he could. One characteristic that distinguishes him from the episodic adult offender and the sub-cultural juvenile offender is his particular style of value inversion and distortion. The professional thief seems to accept the major norms defining the goals of social life. He merely distorts and inverts the social articulation of permissible means. His acceptance of these goal-defining norms necessarily precludes allegiance to any group or ideology which rejects them. The professional thief understands and accepts the normative system which defines his guilt. Guilt, like crime, is part of his way of life.

60. "As the group separates itself from the larger society, so society reacts adversely; thus new justifications for even greater deviance are found by the group, and, in turn, new acts of repression by society are warranted." M. Grodzins, The Loyal and the Disloyal 151 (1956).

61. Quincy Wright has expressed a similar reservation about a clear distinction between war and revolution. See 2 Q. Wright, Study of War 1110 (1943).

Acceptance of the social ascription of guilt is the key to understanding the relationship of loyalty to legality. Guilt is properly ascribed, and generally accepted, where the offender and the system share a belief in the fundamental norms of the society. Guilt only makes sense where at least the remnants of social solidarity remain. The normal version fails to recognize this when its mode of disposition does little or nothing to affirm or strengthen the individual's sense of social relatedness or demonstrate society's continued interest in maintaining that relatedness.

The social ascription of guilt has no meaning where there is no mutual acceptance of the fundamental norms of the society. Without this mutual acceptance crime assumes a political quality regardless of the legal definition of the particular act. What makes this phenomenon so difficult to see is that social perceptions and individual allegiances shift over time. For example, Eldridge Cleaver was an ordinary rapist at the time of his acts; the ascription of guilt made perfect sense to him and to the system. When he came to reject some of the values of his society he also rejected the definition of his former behavior as "ordinary crime" and came to see his offenses as political acts. The consequence of his conversion was that he no longer accepted the ascription of guilt, and he rejected rape as a political act.63

It seems possible for the system to understand the meaning of a particular offense as a rejection of, or hostility toward, its underlying values even where the individual has no such understanding. I have elsewhere examined this process as it appears in obscenity trials,64 but that is only a special case of the general phenomenon. In principle, this sort of disparate perception seems possible, but I suspect it is rare that the system's perception of the "meaning" of a particular offense has no relation to the offender's perception of its meaning. In any event, disloyalty and illegality merge where the meaning of an offense is mutually perceived as a rejection of fundamental social values. Loyalty and


legality merge where there is mutual acceptance of such values; the ascription of guilt in this circumstance affirms social solidarity. Nevertheless, invocation of the connection between loyalty and legality to enforce compliance with law is the most dangerous strategy a system can employ. It is the strategy of authoritarian paternalism, which indicates why it is a dangerous strategy. To make the connection is to invite an individual to consider whether his behavior does not have a greater meaning than otherwise supposed. Of course, the individual may refrain from criminal infraction as a consequence of his reflection, but it is also possible for him to become aware of the extent of his disagreement with fundamental social norms. The "If you love me you will do as I say" strategy can readily backfire. For example, if refraining from homosexual activity is a necessary condition of social loyalty perhaps the society is not worth preserving. When the strategy does backfire, crime may become "banditry" or some other primitive form of revolutionary action. "Steal This Book."

By far the most serious consequences of authoritarian paternalism, a consequence for which the normal version must take its share of responsibility, is that the Rule of Law has become an empty form of words. It has been reduced from a principle of general official accountability to a principle of judicial management. The normal version has concentrated on precision in the drafting of criminal provisions to the exclusion of precision in the formulation of the policy to be served by the criminal sanction, and to the exclusion of precision in the articulation of sentencing and parole policies. By and large the normal version has used the myth of the Rule of Law to mask authoritarian paternalism.

XVI

In the normal version certainty and predictability are sought almost entirely through attention to precision in drafting, with considerably less attention paid to the development of policy based limitations on the criminal law corpus. Whatever certainty may be achieved through precision in drafting is offset by uncertainty regarding the potential content of the list of prohibitions.

65. See text at supra notes 45-47.
66. E. HOBSBAWM, supra note 41.
However, the uncertainty which results from imprecise drafting is qualitatively different from the uncertainty produced by a criminal law unchecked by limiting principles. In the former situation the behavior of enforcement officials is not sufficiently controlled; the ability of individuals to conform their conduct to law is, therefore, circumscribed. In the latter situation the behavior of legislative officials is not sufficiently controlled; the ability of individuals, in association with others, to change, modify and experiment with behavior styles is, therefore, circumscribed.

The concept of certainty, central to the normal version, is said to be ignored or diluted by the revised version. In this section I would like to explore the relation between these two aspects of certainty, and argue that rejection of the revised version on the ground that it fails to provide certainty is untenable, and reflects serious illusions about the real character of the normal version.

The first sense in which the normal version claims to achieve certainty is through the clear dissemination of knowledge of criminal prohibitions. My colleague Gifford, who has treated this claim in some detail, makes the following observation.

Knowledge of ‘primary rules’ of obligation in their official versions is not widely shared by the lay public, but is confined for the most part to the judges, lawyers, and officials who possess knowledge of the secondary rules. Moreover, the popular formulations of those ‘primary rules’ that are obeyed may vary considerably. Although Hart’s suggestion that ‘in a healthy society [private citizens] will in fact often accept these [primary] rules as common standards of behaviour and acknowledge an obligation to obey them, or even trace this obligation to a more general obligation to respect the constitution,’ is true, it should be qualified. In a healthy society private citizens will often accept rules of morality whose observance is consistent with observance of officially-formulated ‘primary rules’ of obligation. A legal system that functions as a primary motivational force imposes a greater strain upon the methods and procedures available for disseminating information about legal commands than is imposed by a system in which private citizens observe (nonlegal) moral codes or practices and thereby avoid actions violative of legal prohibitions.

67. See 19 BUFFALO L. REV. 1 (Part I) § VII.
68. Although it is somewhat unfair in a theoretical dispute to cite the practice under a theory as evidence of theoretical fault, I do so here because the practice may show that either the normal version does not really mean what it says, or is seeking a false goal.
In all fairness, the normal version has never claimed widespread dissemination of the *details* of criminal prohibitions—and it could hardly do so—but it has claimed a positive value for precision in drafting. The normal version seems not to have noticed the sense in which precise statutes may not coincide with those accepted rules of morality which generally determine conforming behavior. It may be true, as Gifford has observed, that

> Observance of the command ‘thou shalt not steal’ would produce compliance with the legal prohibitions against larceny, larceny by trick, embezzlement, burglary, and armed robbery, and knowledge of the details of these legal prohibitions would be unnecessary.\(^7\)

But this does not clearly hold for other examples. Observance of the command “thou shalt not kill” will not *necessarily* produce compliance with the following definition of murder:

> Under circumstances evincing a depraved indifference to human life, he recklessly engages in conduct which creates a grave risk of death to another person, and thereby causes the death of another person . . . .\(^7\)

The potential disparity between the moral command and the articulated legal norm is even greater when one considers the legal definition of causation which could be applied to the above quoted statute.\(^7\)

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\(^7\) Id. at 413.
\(^7\) N.Y. PENAL LAW § 125.25 (2) (McKinney 1967).
\(^7\) MODEL PENAL CODE (Proposed Official Draft, 1962):
Section 2.03. Causal Relationship Between Conduct and Result; Divergence Between Result Designed or Contemplated and Actual Result or Between Probable and Actual Result.

(1) Conduct is the cause of a result when:
(a) It is an antecedent but for which the result in question would not have occurred; and
(b) the relationship between the conduct and result satisfies any additional causal requirements imposed by the Code or by the law defining the offense.

(2) When purposely or knowingly causing a particular result is an element of an offense, the element is not established if the actual result is not within the purpose or the contemplation of the actor unless:
(a) the actual result differs from that designed or contemplated, as the case may be, only in the respect that a different person or different property is injured or affected or that the injury or harm designed or contemplated would have been more serious or more extensive than that caused; or
(b) the actual result involves the same kind of injury or harm as that designed or contemplated and is not too remote or accidental in its occurrence to have a [just] bearing on the actor's liability or on the gravity of his offense.

(3) When recklessly or negligently causing a particular result is an element of an offense, the element is not established if the actual result is not within the risk of
There are, in addition, criminal prohibitions which meet the conceptual strictures of the normal version but are even less clearly related to any readily articulated moral command. Note, for example, the New York provision on coercion.\textsuperscript{73}

Examples could be multiplied, but the narrow point to be made is that, with a few notable exceptions, the normal version's criminal code does not constitute a body of "primary rules" in the sense that they are directions to people about how to behave. The normal version's criminal code is mainly a set of directions to officials about how to proceed with "criminal" cases.\textsuperscript{74} If there which the actor is aware or, in the case of negligence, of which he should be aware unless:

(a) the actual result differs from the probable result only in the respect that a different person or different property is injured or affected or that the probable injury or harm would have been more serious or more extensive than that caused; or

(b) the actual result involves the same kind of injury or harm as the probable result and is not too remote or accidental in its occurrence to have a [just] bearing on the actor's liability or on the gravity of his offense.

(4) When causing a particular result is a material element of an offense for which absolute liability is imposed by law, the element is not established unless the actual result is a probable consequence of the actor's conduct.

\textsuperscript{73} § 135.60 Coercion in the second degree.

A person is guilty of coercion in the second degree when he compels or induces a person to engage in conduct which the latter has a legal right to abstain from engaging in, or to abstain from engaging in conduct in which he has a legal right to engage, by means of instilling in him a fear that, if the demand is not complied with, the actor or another will:

1. Cause physical injury to a person; or
2. Cause damage to property; or
3. Engage in other conduct constituting a crime; or
4. Accuse some person of a crime or cause criminal charges to be instituted against him; or
5. Expose a secret or publicize an asserted fact, whether true or false, tending to subject some person to hatred, contempt or ridicule; or
6. Cause a strike, boycott or other collective labor group action injurious to some person's business; except that such a threat shall not be deemed coercive when the act or omission compelled is for the benefit of the group in whose interest the actor purports to act; or
7. Testify or provide information or withhold testimony or information with respect to another's legal claim or defense; or
8. Use or abuse his position as a public servant by performing some act within or related to his official duties, or by failing or refusing to perform an official duty, in such manner as to affect some person adversely; or
9. Perform any other act which would not in itself materially benefit the actor but which is calculated to harm another person materially with respect to his health, safety, business, calling, career, financial condition, reputation or personal relationships.

Coercion in the second degree is a class A misdemeanor.

N.Y. PENAL LAW § 135.60 (McKinney 1967).

DANGEROUSNESS—PART II

is any substantial communication of information to the public about the specific content of criminal prohibitions it takes place by a process of induction from hearsay. People may

have a fairly clear idea of the line separating theft from more legitimate forms of commerce, but few of them have ever seen a published statute describing these differences. More likely than not, our information on the subject has been drawn from publicized instances in which the relevant laws were applied—and for that matter, the law itself is largely a collection of past cases and decisions, a synthesis of the various confrontations which have occurred in the life of the legal order.\textsuperscript{75}

The sense in which the normal version produces certainty thus depends on the ability of the public to induce general formulations from what it knows about the law in action. In turn, this ability depends on the capacity of the law to constrain official behavior to an extent sufficient to enable this sort of public induction. It is, therefore, necessary to consider the capacity of the normal version to constrain official discretion.

The point has been made over and again that the differences between precise legal rules and statements of legal policies, principles or even standards lies in the amount of "discretion" allowed to officials whose function it is to apply the legal norm in concrete cases.\textsuperscript{76} At this point in jurisprudential history no one claims that precise rules avoid official discretion entirely, only that they narrow the range or freedom to exercise discretion in application of the norm. Thus the revised version is faulted because it seems impossible to draft a criminal statute in revised version terms that will not leave officials free to apply it as they will.\textsuperscript{77} But this is not a serious criticism once two points are made. First, if one confronts the notion that criminal codes are not primarily directions to the public at large but to officials, then the form criminal codes take in the normal version need not be retained. I willingly concede that it is, indeed, impossible to draft a statute using revised version \textit{concepts} and normal version \textit{forms}. Second, the alleged precision of normal version codes is largely a myth which the normal version has abandoned in practice if not in theory. These points require some elaboration.

\textsuperscript{75} K. ERIKSON, \textit{supra} note 18, at 11-12.
\textsuperscript{76} See generally K. DAVIS, \textit{DISCRETIONARY JUSTICE} (1969).
\textsuperscript{77} Kadish, \textit{The Decline of Innocence}, 26 CAMB. L.J. 273, 288 (1968).
Drafting normal version codes has always been a problem because of the dual constraints of generality and specificity. The style of proliferation of almost synonymous terms in a code indicates problems foreseen or experienced with the construction of a single term.\(^7\) But this is only one way to solve the problem.\(^7\)

In this century we have become familiar with the phenomenon of regulations which are by and large a technique for solving the same problem. One can imagine normal version arguments for holding that regulations, as a technique for clarifying the meaning of criminal codes, are inappropriate. First, criminal codes enact rules rather than establish policies or standards under which specific rules are to be formulated by an agency charged with the task of doing so. But this would seem to be a less than satisfying argument to any lawyer who researches the cases under a particular criminal statute in order to discover its "real" meaning. The existence of a multitude of such cases seems to adequately refute the assertion that criminal rules do not, and \textit{may not}, require policy-premised articulation by an official body.\(^8\)

Second, it may be that the gravity of criminal prohibitions precludes delegation of the articulating function to an official organ less dignified (or less responsible) than a judiciary. This sort of objection can have, at best, relative significance depending on the nature of the offense. Surely treason and disorderly conduct are not offenses of the same order, and the case for using regulations as a technique of articulation is correspondingly different.

I think it most likely, however, that the technique of regulation is foul to the normal version primarily because it belies the immutability of the criminal law, and would tend to expose the degree to which the alleged specificity of criminal codes is mythical. Under the normal version, articulation takes place explicitly in concrete cases on judicial review. Save for celebrated cases, and perhaps not even then, this articulation is accessible only to lawyers and judges. Continuity is maintained because the code itself


\(^8\) See McGautha v. California, 91 S. Ct. at 1489 (dissenting opinion).

is rarely changed to comport with the articulation—even in extreme instances. The normal version thus provides certainty by presenting to the public relatively fixed and immutable definitions of prohibited conduct while the changes through articulation are performed by the legal priests. The technique of articulation through regulations would tend to explode the myth of immutability thus created.

The revised version would recognize that the details of criminal prohibitions are, in many respects, directions to officials rather than the public. It is vital that the general articulation of prohibited harms be actually communicated to the public, and for this purpose the code form is perhaps sufficient. But the dangerousness which becomes relevant at the dispositional stage cannot, as I argued in Part I, be guided by a set of arbitrary language categories like purpose, knowledge, and so forth, without obfuscating the qualitative difference between defendants. The bounding of official discretion here requires sound and intelligent articulation of those factors which are relevant for the modes of disposition available. The cumulation of experience through application of these articulated factors should be expressed in approving or disapproving regulations which should, of course, be made as public as possible even though they are, and must be, essentially directions to officials.\(^8\)

The alleged precision of normal version language is a myth, and by this I do not simply mean that the normal version has failed the impossible task of eliminating the problem of the "penumbra." I mean to claim that precision in drafting is a function of consensus among a relevant public as to the referent of a particular term. When a court holds, for example, that a statute prohibiting verbal or pictorial accounts of "bloodshed . . . lust" or crime means to prohibit materials "so massed as to become vehicles for inciting violent and depraved crimes against the person" it is articulating what the court believes is the common understanding of at least the legislature and the courts as to the real-world referent of the statutory language. Its inter-

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81. 19 Buffalo L. Rev. 1, §§ I-IV.
82. K. Davis, supra note 76, at ch. 3.
When, in the same case, a higher court holds that the statute, as construed, is "too uncertain and indefinite to justify conviction" because it is impossible for the actor to "know where this standard of guilt would draw the line between the allowable and the forbidden" the court is articulating what it sees as a potential disparity of understanding between the courts and legislature, on the one hand, and the relevant public on the other hand. It is important to recognize the sense in which judicial judgments recognizing either a common understanding or a disparity of understanding between two or more relevant groups depends on empirical data which the court does not have and which it makes little effort to get. The judicial assessment of vagueness or uncertainty must then be a function of the judge's imaginative capacity to articulate possible meanings. The meaning of statutory language will be unclear both to the very ignorant and the very imaginative.

The major policy problem at the heart of the certainty question is to what extent community judgment plays a role in criminal adjudication. In the case I have been discussing the Supreme Court expresses concern that lack of precision leaves the trier of fact too much latitude in applying statutory formulations to concrete cases. What too much means in this context is unclear, but more importantly the refusal to allow the meaning of the statutory language to be developed in concrete cases over time is oddly inconsistent with the assertion that the meaning of crimes described by other terms, like "obscenity" have become "well understood through long use in the criminal law . . . ." Community judgment must play a role, but the Rule of Law demands real notice of what is prohibited. Apparently, in some cases the community may participate directly in developing the boundary between the permissible and the prohibited, while in other cases community participation is limited to the indirect form of legislation.

In my view, the myth of certainty or precision in the normal version arises out of those normal version crimes about which

85. Id. at 514.
86. Id. at 519.
87. Id. at 518.
there is little dispute or doubt—the prohibition of those forms of behavior which are inconsistent with mutuality in human interaction. In these instances precision is relatively easy to achieve even with normal version concepts. But the proliferation of criminal prohibitions has generated both the demand for certainty in all criminal statutes and the mythical belief that such certainty is as achievable with one type of prohibition as it is with another. Furthermore, as I have attempted to show above, the existing theories of limitation on the use of the criminal law employ some variant on the theme of shared understanding, a theme which should have exposed the normal version myth of certainty: if one insists on real agreement as to particular uses of the criminal law the problem of certainty should be almost entirely academic.

XVIII

Earlier I suggested certain social principles which should limit criminalization. These principles can be effectuated by more rational use of concepts drawn from existing law. More specifically, I believe that a conceptual approach arising out of judicial review of first amendment problems should be applied to all criminal legislation.

I begin with the premise that the criminal sanction is, ultimately, a rule of force, a form of institutional violence in the exercise of social power. As Hannah Arendt puts it, power requires only legitimacy; violence requires not legitimacy but justification. Unless one is prepared to hold that any exercise of institutional violence by legitimate power is justified, some standard is essential. Power is legitimized by looking back in time to the underlying political consensus; violence is justified by looking forward to the ends for which it serves as a means. Since the relation between violence as a means and any particular social goal must always be relatively speculative, violence "loses in plausibility the farther away its intended end recedes into the future. No one will question the use of violence in self-defense because the danger is not only clear but present, and the end to justify the means is immediate." 89

This observation would indicate that the usual standard of

88. See text supra §§ X-XII.
justification applied to federal legislation, articulated by Justice Marshall in *McCulloch v. Maryland* 90 is insufficient—particularly as applied to penal legislation. The *McCulloch* standard contains three elements: (1) a constitutionally legitimate end and (2) constitutionally permitted means (3) which are plainly adapted to that end. This formulation is plainly unrealistic in one respect and circular in another.

Legitimacy of governmental objectives or ends is unrealistic as a standard because the government can always articulate its objectives in terms that are clearly legitimate. No one is prepared to say that the government's articulation is phoney or even fascile: it must be accepted at face value.91 Thus the government would never argue that its arrest of pamphleteers is justified because the writings are un-American, but because the writings seriously interfere with the war effort.92 Or again: Congress has the power to raise an army; conscription is a legitimate means for achieving this end; draft cards are administratively necessary for this purpose; therefore, the wilful destruction of the draft cards may be prohibited as a permissible means to a legitimate end—raising an army.93 Of course, the analysis would be quite different if the government were to concede that its objective in preventing draft card destruction was that the propaganda value of the "speech" might damage political support for its policies. In short, because the relation of means to objectives is continuous rather than polar the legislature need not justify its choice of means by articulating its "real" or ultimate objective.

The *McCulloch* "test" is circular because the question of constitutionally permitted means is the question for final judgment: it can in no way be a "factor," "element" or "test" of legislation without assuming the answer to the question presented.

Given these two difficulties, the issue in most cases questioning the legality of federal legislation must be whether the means chosen are adapted to the articulated objectives. The courts should deal with this issue on the basis of a probability statement which says: the justifiability of the means varies directly with the

91. For example, the "wagering tax" in *Marchetti v. United States*, 390 U.S. 39, 42-44 (1968) and the Marihuana "dealers tax" ($3 per year for "unclassified dealers") in *Leary v. United States*, 395 U.S. 6, 14-16 (1969).
probability that they will effectuate the ends in the service of which they are proposed. The utility of this sort of probability statement is manifest. It allows the judiciary to pass upon the validity of legislation without overtly substituting its values for the legislature's, and it permits variable rigor of review by manipulation of the degree of probability required.

First amendment cases are the prime instance where a higher degree of probability is required. Whether the applicable "test" is clear and present danger, imminent danger of serious harm, ad hoc balancing, definitional balancing, less onerous alternative, nexus, or overbreadth the principle is the same: there must be a relatively high probability that the legislative means will effectuate the articulated objectives. For example, where the means chosen sweep too broadly there is real question whether they will effectuate the articulated objectives rather than some other, unarticulated (and perhaps unconstitutional) objectives. For similar reasons, the effort to make this judgment of probability will be hampered by statutory formulations which are indifferent to, or are imprecise about, the character of the harm sought to be avoided: where statutes do not proscribe behavior which itself interferes with government operations or which constitutes revolutionary activity.94

The justification for the requirement that a significant probability of danger be shown before speech can be proscribed lies in the socio-political value placed in speech. The extent to which freedom of speech is "preferred" over behavioral freedom is graphically demonstrated by comparison of the constraints on the legislative capacity to proscribe speech with those placed on the capacity to proscribe behavior. It would be ludicrous to suggest that Social Solidarity, Community Condemnation or Popular Revulsion are sufficient justifications for restraints on speech, or that freedom of speech is safeguarded by a Rule of Prudence. It would be equally ludicrous to suggest that a constraint on legislative capacity to proscribe behavior take the form of an "absolute" prohibition. But there is nothing unseemly in the suggestion that criminal proscriptions be justified by a showing of danger—which means a clear statement of legislative objective and a showing of

the way in which proscribing a particular mode of behavior will effectuate that objective. At present it seems that we have so fully concentrated our attention on freedom of speech that freedom to act has become almost a contradiction in terms.

The effect of this relative depreciation of behavioral freedom can best be seen in those cases which dispense with mens rea as a necessary element of criminality. Rather than apply a standard of probability to evaluate the relation between the means chosen and the objectives sought to be achieved in these cases, the courts focus mainly on the social importance of the articulated objectives. They almost suggest that if the articulated objective is sufficiently important any means the legislature selects will be regarded as valid. Application of the probability standard suggested above would require a response to two distinct questions: (1) to what extent is any type of criminalization likely to achieve the objectives articulated by the government; (2) to what extent is criminalization which requires only minimal historical involvement in the criminal enterprise likely to achieve the objectives articulated by the government. Confusing these questions, or ignoring them entirely, is to engage in scapegoating rather than to make an effort toward social protection.

The fact that the Constitution places no clear restrictions on the shape of substantive criminal law accounts (in part) for the following anomaly. The justifications for dispensing with mens rea as an element of an offense are essentially the same as the justifications for presuming the existence of the element until the defendant establishes the contrary to the satisfaction of the trier of fact. The procedural device is much less harsh than the substantive technique of considering such proof irrelevant to either party's case in chief. Nevertheless, the Supreme Court has consist-

95. I am here taking the position Justice Brennan dismissed out of hand in Roth v. United States, 354 U.S. 476, 486-87 (1957): "Certainly no one would contend that obscene speech, for example, may be punished only upon a showing of such [clear and present danger] circumstances."

96. In Balint the court was dealing with drugs, in Freed with hand grenades, in this case with sulfuric and other dangerous acids. Pencils, dental floss, paper clips may also be regulated. But they may be the type of products which might raise substantial due process questions if Congress did not require, as in Murdock, "mens rea" as to each ingredient of the offense.

ently required some showing of a probabilistic relationship between the presumed fact and the real world situation before upholding the procedural technique.\textsuperscript{97} Perhaps the Court does not recognize the relatedness of the procedural and substantive techniques.\textsuperscript{98} If it does, the absence of specific constitutional restrictions on substantive criminal law cannot justify the disparity of the outcome in, for example, \textit{United States v. Balint} \textsuperscript{99} and \textit{Leary v. United States}.\textsuperscript{100} The Court would not be guilty of serious distortion were it to consider \textit{mens rea} as a procedural device which aids in the determination of whether coercive disposition is required in a particular case. Given the normal version procedural sequence, dispensing with \textit{mens rea} generally means the defendant has little or no opportunity for showing that his case does not warrant coercive disposition. Statutes containing presumptions shifting the burden of going forward or the burden of proof at least provide some opportunity for the defendant to make such a showing. I see no difficulty with a constitutional decision holding that if \textit{mens rea} is eliminated from the definition of the offense the state must provide a procedural device wherein the issue of whether coercive disposition is justified can be fully contested.

An example may help to clarify the point. Section 220.25 of the New York Penal Code provides that the presence of a "dangerous drug" in an automobile "is presumptive evidence of knowing possession thereof by each and every person in the automobile at the time such drug was found . . . ." Given the \textit{Leary} line of cases, a full analysis of the "rationality" of this presumption is required to meet constitutional standards. Were the statute to be re-written to provide that 'being in a car where dangerous drugs are found is a felony' no proof of knowledge would be required and, according to \textit{Balint}, no analysis of the "rationality" of this technique would be necessary. But it is clear that in this instance

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\item \textsuperscript{98} Mr. Justice Frankfurter wrote the opinion for the majority in United States v. Dotterweich, 320 U.S. 277 (1943), but dissented from the decision in Leland v. Oregon, 343 U.S. 790 (1952) holding that a state may place the burden of proving insanity on the defendant.
\item \textsuperscript{99} United States v. Balint, 258 U.S. 250 (1922).
\item \textsuperscript{100} 395 U.S. 6 (1969).
\end{itemize}
dispensing with mens rea is a procedural device facilitating convictions. I see no reason why a court could not hold that this technique violates procedural due process, and that if the state wants to use this technique it must provide some opportunity for the defendant to contest the justifiability of coercive disposition. In short, if the state wishes to eliminate mens rea from the definition of the offense it must provide something like the two stage process suggested by the revised version.

The probability standard noted above also provides an insight into the difficulty with conspiracy cases wherein the courts are concerned mainly with the sufficiency of the evidence of agreement and with criminal purpose. The relationship between the crime of conspiracy and an articulated governmental objective is, by definition, one of probability. Proof of an agreement is held to be sufficient evidence of danger on the basis of the probability statement that people who enter unlawful agreements will probably carry out its purposes. In my view this is not a sufficient justification for criminalization.

I argued earlier, in connection with the first amendment problem, that where the legislatively selected means sweep too broadly there is a real question whether the means are calculated to effectuate the articulated objective rather than some other secret, perhaps unlawful objective. General conspiracy statutes raise the same problem. They have some tendency to effectuate the articulated objective, but they also leave considerable room for application to questionable cases as well as cases which should be clearly excluded by the articulated objective. Another way of putting the problem is, to repeat the common observation, that general conspiracy statutes fail to sufficiently control official discretion. For example, in every case in which a minor offense is attempted by the concerted action of two or more persons a conspiracy could be charged. That it rarely is indicates an insufficient articulation of the objectives the government seeks to effectuate. Insufficient articulation of objectives raises doubt whether the means chosen will probably effectuate those objectives. Where criminal statutes raise this sort of doubt there is always a problem of control of official discretion; whenever there is a problem of control over official discretion there is a diminished probability that the legislatively selected means will effectuate articulated objectives. For these reasons courts faced with
cases involving conspiracy and speech elements attempt to inject additional safeguards.\textsuperscript{101}

The foregoing analysis leads to the conclusion that overcriminalization and the principle of legality involve almost identical considerations. The more difficult the task of clear articulation of criminal prohibitions, the more likely it is that the prohibitions will bear a dubious relation to legitimate social objectives and will raise serious problems of control of official discretion. Were the criminal law system to focus on dangerousness these problems would be much less serious and the viability of the Rule of Law greatly enhanced.

\textbf{XIX}

Ambiguity and doubt is the price we pay for being human. The Rule of Law is a shorthand expression for the attempt by human society to minimize ambiguity and doubt.\textsuperscript{102} A criminal code that attempts to do more than proscribe dangerous behavior, that attempts to do more than prohibit behavior which is feared, that attempts to do more than protect the essential conditions of human interaction takes the risk of generating more ambiguity and doubt than it eliminates. The Rule of Law is more than a judicial technique for solving problems of legislative drafting; it is a principle of social solidarity which must be taken into account when political decisions are made. It is not a matter of making extravagant claims for the Rule of Law;\textsuperscript{103} it is a matter of recognizing the social cost of failing to ask the questions raised by the concept of dangerousness.

A place to begin making real the Rule of Law as a principle of social solidarity is with a reconstructed criminal law wherein no proscription is permitted absent a full articulation of the sense

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  \item \textsuperscript{101} United States v. Spock, 416 F.2d 165 (1st Cir. 1969) holding that evidence of specific intent to achieve the illegal objectives of a multi-objective agreement is necessary to convict on a charge of conspiracy to counsel evasion of the Selective Service Law. But the quality of historical involvement which “must be sufficiently substantial to satisfy the concept of personal guilt in order to withstand attack under the Due Process Clause” (Scales v. United States, 367 U.S. 203, 225 (1961)) is apparently met by the finding of an agreement. The agreement furthermore may be inferred from a set of discrete activities when it is “beyond the range of probability that [these activities were] the result of mere chance.” Interstate Circuit v. United States, 306 U.S. 208, 223 (1939).
  \item \textsuperscript{102} Fuller’s elements of the “inner Morality” of law are all variants on the theme of notice, which is one major technique for managing ambiguity and doubt. L. FULLER, \textit{The Morality of Law} (1964).
  \item \textsuperscript{103} K. Davis, \textit{supra} note 76, at 28.
\end{itemize}
in which the proscribed behavior is dangerous, and absent substantial public unanimity on the question of dangerousness. In addition, a reconstructed criminal law must recognize that the goal of coercive disposition is social solidarity. The boundary defining function of the criminal law is not irrational, but it is irrational to take the term literally and make it physically, spiritually, philosophically or psychologically impossible for the offender to rejoin the community.