THE AIMS OF THE CRIMINAL LAW*

HENRY M. HART, JR.†

I

INTRODUCTION

In trying to formulate the aims of the criminal law, it is important to be aware both of the reasons for making the effort and of the nature of the problem it poses.

The statement has been made, as if in complaint, that "there is hardly a penal code that can be said to have a single basic principle running through it."[1] But it needs to be clearly seen that this is simply a fact, and not a misfortune. A penal code that reflected only a single basic principle would be a very bad one. Social purposes can never be single or simple, or held unqualifiedly to the exclusion of all other social purposes; and an effort to make them so can result only in the sacrifice of other values which also are important. Thus, to take only one example, the purpose of preventing any particular kind of crime, or crimes generally, is qualified always by the purposes of avoiding the conviction of the innocent and of enhancing that sense of security throughout the society which is one of the prime functions of the manifold safeguards of American criminal procedure. And the same thing would be true even if the dominant purpose of the criminal law were thought to be the rehabilitation of offenders rather than the prevention of offenses.

Examination of the purposes commonly suggested for the criminal law will show that each of them is complex and that none may be thought of as wholly excluding the others. Suppose, for example, that the deterrence of offenses is taken to be the chief end. It will still be necessary to recognize that the rehabilitation of offenders, the disablement of offenders, the sharpening of the community's sense of right and wrong, and the satisfaction of the community's sense of just retribution may all serve this end by contributing to an ultimate reduction in the number of crimes. Even socialized vengeance may be accorded a marginal role, if it is understood as the provision of an orderly alternative to mob violence.

The problem, accordingly, is one of the priority and relationship of purposes as well as of their legitimacy—of multivalued rather than of single-valued thinking.[2]

* This paper is a revision of a mimeographed note originally prepared for first-year law students to serve as a supplement to other materials on the basic purposes of the criminal law. It will be seen that it still bears the marks of this origin both in the respect of being elementary and in the respect of not attempting a comprehensive examination of competing views of the criminal law.

† A.B. 1926, LL.B. 1930, S.J.D. 1931, Harvard University. Professor of Law, Harvard University. Co-author [with Herbert Wechsler], THE FEDERAL COURTS AND THE FEDERAL SYSTEM (1953).

[1] LIVINGSTON HALL AND SHELDON GLUECK, CASES ON THE CRIMINAL LAW AND ITS ENFORCEMENT 15 (3d ed. 1958).

[2] See Wechsler and Michael, *A Rationale of the Law of Homicide II*, 37 COLUM. L. REV. 1261, 1262 (1937).

There is still another range of complications which are ignored if an effort is made to formulate any single "theory" or set of "principles" of criminal law. The purpose of having principles and theories is to help in organizing thought. In the law, the ultimate purpose of thought is to help in deciding upon a course of action. In the criminal law, as in all law, questions about the action to be taken do not present themselves for decision in an institutional vacuum. They arise rather in the context of some established and specific procedure of decision: in a constitutional convention; in a legislature; in a prosecuting attorney's office; in a court charged with the determination of guilt or innocence; in a sentencing court; before a parole board; and so on. This means that each agency of decision must take account always of its own place in the institutional system and of what is necessary to maintain the integrity and workability of the system as a whole. A complex of institutional ends must be served, in other words, as well as a complex of substantive social ends.[3]

The principal levels of decision in the criminal law are numerous. The institutional considerations involved at the various levels differ so markedly that it seems worth while to discuss the question of aims separately, from the point of view of each of the major agencies of decision.

II

THE PERSPECTIVE OF CONSTITUTION MAKERS

We can get our broadest view of the aims of the criminal law if we look at them from the point of view of the makers of a constitution—of those who are seeking to establish sound foundations for a tolerable and durable social order. From this point of view, these aims can be most readily seen, as they need to be seen, in their relation to the aims of the good society generally.

In this setting, the basic question emerges: Why should the good society make use of the method of the criminal law at all?

A. What the Method of the Criminal Law Is

The question posed raises preliminarily an even more fundamental inquiry: What do we mean by "crime" and "criminal"? Or, put more accurately, what should we understand to be "the method of the criminal law," the use of which is in question? This latter way of formulating the preliminary inquiry is more accurate, because it pictures the criminal law as a process, a way of doing something, which is what it is. A great deal of intellectual energy has been misspent in an effort to develop a concept of crime as "a natural and social phenomenon"[4] abstracted from the functioning system of institutions which make use of the concept and give it

[3] See *Note on Organized Societies and the Principle of Institutional Settlement*, in HENRY M. HART, JR. AND ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 1 (mim. ed. 1957).

[4] See the discussion of the Italian positivists and their influence in American criminology in JEROME HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 539-51 (1947), especially at p. 549.

impact and meaning.[5] But the criminal law, like all law, is concerned with the pursuit of human purposes through the forms and modes of social organization, and it needs always to be thought about in that context as a method or process of doing something.

What then are the characteristics of this method?

1. The method operates by means of a series of directions, or commands, formulated in general terms, telling people what they must or must not do. Mostly, the commands of the criminal law are "must-nots," or prohibitions, which can be satisfied by inaction. "Do not murder, rape, or rob." But some of them are "musts," or affirmative requirements, which can be satisfied only by taking a specifically, or relatively specifically, described kind of action. "Support your wife and children," and "File your income tax return."[6]

2. The commands are taken as valid and binding upon all those who fall within their terms when the time comes for complying with them, whether or not they have been formulated in advance in a single authoritative set of words.[7] They speak to members of the community, in other words, in the community's behalf, with all the power and prestige of the community behind them.

3. The commands are subject to one or more sanctions for disobedience which the community is prepared to enforce.

Thus far, it will be noticed, nothing has been said about the criminal law which is not true also of a large part of the noncriminal, or civil, law. The law of torts, the law of contracts, and almost every other branch of private law that can be mentioned operate, too, with general directions prohibiting or requiring described types of conduct, and the community's tribunals enforce these commands.[8] What, then, is distinctive about the method of the criminal law?

Can crimes be distinguished from civil wrongs on the ground that they constitute injuries to society generally which society is interested in preventing? The difficulty is that society is interested also in the due fulfillment of contracts and the avoidance of traffic accidents and most of the other stuff of civil litigation. The civil law is framed and interpreted and enforced with a constant eye to these social

[5] *Cf.* Llewellyn, *Law and the Social Sciences—Especially Sociology,* 62 HARV. L. REV. 1286, 1287 (1949): "When I was younger I used to hear smuggish assertions among my sociological friends, such as: 'I take the sociological, *not* the legal, approach to crime'; and I suspect an inquiring reporter could still hear much of the same (perhaps with 'psychiatric' often substituted for 'sociological')—though it is surely somewhat obvious that when you take 'the legal' out, you also take out 'crime'."

[6] For a discussion of types of legal duties generally, see HART AND SACKS, *op. cit. supra* note 3, at 121-23. Account should also be taken of a peculiar type of criminal prohibition, baffling analysis, which purports to forbid not conduct, but certain kinds of personal condition. See Lacey, *Vagrancy and Crimes of Personal Condition,* 66 HARV. L. REV. 1203 (1953); Foote, *Vagrancy-Type Law and Its Administration,* 104 U. PA. L. REV. 603 (1956). To the extent that these crimes are valid and enforceable, however, it seems that they reduce themselves to prohibitions of the conduct bringing about the condition.

[7] See HART AND SACKS, *op. cit. supra,* note 3, at 114-17.

[8] Many of the duties of the civil law, of course, are open-ended, the specific nature of what is to be done being privately determined, as in contracts, and wills. In the criminal law, in contrast, officials bear the whole burden of prescribing the details of private conduct. But the same thing is true, for the most part, in the law of torts and other areas of civil law. See *id.* at 108-10, 129-31.

interests. Does the distinction lie in the fact that proceedings to enforce the criminal law are instituted by public officials rather than private complainants? The difficulty is that public officers may also bring many kinds of "civil" enforcement actions—for an injunction, for the recovery of a "civil" penalty, or even for the detention of the defendant by public authority.[9] Is the distinction, then, in the peculiar character of what is done to people who are adjudged to be criminals? The difficulty is that, with the possible exception of death, exactly the same kinds of unpleasant consequences, objectively considered, can be and are visited upon unsuccessful defendants in civil proceedings.[10]

If one were to judge from the notions apparently underlying many judicial opinions, and the overt language even of some of them, the solution of the puzzle is simply that a crime is anything which is *called* a crime,[11] and a criminal penalty is simply the penalty provided for doing anything which has been given that name. So vacant a concept is a betrayal of intellectual bankruptcy. Certainly, it poses no intelligible issue for a constitution-maker concerned to decide whether to make use of "the method of the criminal law." Moreover, it is false to popular understanding, and false also to the understanding embodied in existing constitutions. By implicit assumptions that are more impressive than any explicit assertions, these constitutions proclaim that a conviction for crime is a distinctive and serious matter—a something, and not a nothing.[12] What is that something?

4. What distinguishes a criminal from a civil sanction and all that distinguishes it, it is ventured, is the judgment of community condemnation which accompanies and justifies its imposition. As Professor Gardner wrote not long ago, in a distinct but cognate connection:[13]

[9] In many legal systems, moreover, private persons may institute criminal proceedings, as, of course, they could in the English common law and still can in contemporary England.

[10] Thus, debtors were once imprisoned. Insane persons, aliens held for deportation, and recalcitrant witnesses still are. Juvenile delinquents are put on probation. A judgment for the payment of money, which objectively considered is all that a fine is, is, of course, the characteristic civil judgment. And the amount of the civil judgment may be "punitive," and not merely compensatory or restorative.

[11] See, *e.g.*, State v. Dobry, 217 Iowa 858, 861-62, 250 N.W. 702, 704 (1933): "In finding what shall constitute a crime, the legislature has unlimited power. In other words, they can make it include certain elements or omit certain elements therefrom as in their judgment seems best." See, further, the discussion in part four *infra*.

[12] See, *e.g.*, in the Constitution of the United States, art. I, § 3, para. 7 (preserving safeguards of criminal trial in matters of impeachment); art. I, § 9, para. 2 (habeas corpus); art. I, § 9, para. 3 (forbidding passage of bills of attainder and ex post facto laws by Congress); art. I, § 10, para. 1, cl. 6 and 7 (forbidding passage of bills of attainder and ex post facto laws by any state); art. III, § 2, para. 3 (jury trial and venue in federal criminal cases); art. III, § 3 (definition and regulation of conviction and punishment for treason); art. IV, § 2, para. 2 (extradition); amendment IV (unreasonable searches and seizures and search warrants); amendment V (indictment by grand jury, double jeopardy, self-incrimination, and due process clauses); amendment VI (rights in criminal cases of speedy and public trial, jury trial, local venue, knowledge of accusation, confrontation of witnesses, compulsory process for obtaining witnesses, and assistance of counsel); amendment VIII (prohibition of excessive bail, excessive fines, and cruel and unusual punishments); amendment XIII (recognition of involuntary servitude as punishment for crime); and amendment XIV (due process and equal protection of the laws in state action).

[13] Gardner, *Bailey v. Richardson and the Constitution of the United States*, 33 B.U.L. REV. 176, 193 (1953). It is, of course, to be understood that Professor Gardner's statement and the statements in the

The essence of punishment for moral delinquency lies in the criminal conviction itself. One may lose more money on the stock market than in a court-room; a prisoner of war camp may well provide a harsher environment than a state prison; death on the field of battle has the same physical characteristics as death by sentence of law. It is the expression of the community's hatred, fear, or contempt for the convict which alone characterizes physical hardship as punishment.

If this is what a "criminal" penalty is, then we can say readily enough what a "crime" is. It is not simply anything which a legislature chooses to call a "crime." It is not simply antisocial conduct which public officers are given a responsibility to suppress. It is not simply any conduct to which a legislature chooses to attach a "criminal" penalty. It is conduct which, if duly shown to have taken place, will incur a formal and solemn pronouncement of the moral condemnation of the community.

5. The method of the criminal law, of course, involves something more than the threat (and, on due occasion, the expression) of community condemnation of antisocial conduct. It involves, in addition, the threat (and, on due occasion, the imposition) of unpleasant physical consequences, commonly called punishment. But if Professor Gardner is right, these added consequences take their character as punishment from the condemnation which precedes them and serves as the warrant for their infliction. Indeed, the condemnation plus the added consequences may well be considered, compendiously, as constituting the punishment. Otherwise, it would be necessary to think of a convicted criminal as going unpunished if the imposition or execution of his sentence is suspended.

In traditional thought and speech, the ideas of crime and punishment have been inseparable; the consequences of conviction for crime have been described as a matter of course as "punishment." The Constitution of the United States and its amendments, for example, use this word or its verb form in relation to criminal offenses no less than six times.[14] Today, "treatment" has become a fashionable euphemism for the older, ugly word. This bowdlerizing of the Constitution and of conventional speech may serve a useful purpose in discouraging unduly harsh sentences and emphasizing that punishment is not an end in itself. But to the extent that it dissociates the treatment of criminals from the social condemnation of their conduct which is implicit in their conviction, there is danger that it will confuse thought and do a disservice.

At least under existing law, there is a vital difference between the situation of a patient who has been committed to a mental hospital and the situation of an inmate

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text do not accurately describe the significance of a criminal conviction under many modern regulatory and other statutes which penalize people who have had no awareness nor reason for awareness of wrongdoing. The central thesis of this paper, to be developed below, is that a sanction which ineradicably imports blame, both traditionally and in most of its current applications, is misused when it is thus applied to conduct which is not blameworthy.

[14] Art. I, § 3, para. 7; art. I, § 8, cl. 6; art. I, § 8, cl. 10; art. III, § 3, para. 2; amendment VIII; and amendment XIII.

of a state penitentiary. The core of the difference is precisely that the patient has not incurred the moral condemnation of his community, whereas the convict has.[15]

B. The Utility of the Method

We are in a position now to restate the basic question confronting our hypothetical constitution-makers. The question is whether to make use, in the projected social order, of the method of discouraging undesired conduct and encouraging desired conduct by means of the threat—and, when necessary, the fulfillment of the threat—of the community's condemnation of an actor's violation of law and of punishment, or treatment, of the actor as blameworthy for having committed the violation.

The question, like most legal questions, is one of alternatives. Perhaps the leading alternative, to judge from contemporary criticism of the penal law, would be to provide that people who behave badly should simply be treated as sick people to be cured, rather than as bad people to be condemned and punished. A constitutional guarantee to accomplish this could be readily drafted: "No person shall be subjected to condemnation or punishment for violation of law, but only to curative-rehabilitative treatment." Would the establishment of this new constitutional liberty be well-advised?

Paradoxically, this suggested guarantee, put forward here as an abandonment of the method of the criminal law, is not far removed from a point of view that has been widely urged in recent years as a proper rationale of existing law. Professors Hall and Glueck express this point of view in their recent casebook, more moderately than some of its other exponents. They recognize that "no general formula respecting the relative proportions of the various ingredients of the general punitive-corrective aim can be worked out." But they then go on to say:[16]

> It is the opinion of many of those who have studied both the causes of crime and the results of its treatment by means of the death penalty and the usual forms of incarceration, that for the vast majority of the general rule of delinquents and criminals, the corrective theory, based upon a conception of multiple causation and curative-rehabilitative treatment, should clearly predominate in legislation and in judicial and administrative practices. No other single theory is as closely related to the actual conditions and mechanisms of crime causation; no other gives as much promise of returning the offender to society not with the negative vacuum of punishment-induced fear but with the affirmative and constructive equipment—physical, mental and moral—for law-abidingness. Thus, in the long run, no other theory and practice gives greater promise of protecting society.

This suggests the possibility of a modified version of the constitutional guarantee in question, directing that "The corrective theory of crime and criminal justice,

[15] For a convincing statement that the difference does not lie in the necessarily greater gentleness of the treatment administered in the hospital, see de Grazia, *The Distinction of Being Mad*, 22 U. CHI. L. REV. 339, 348-55 (1955). Of course, there are also differences in the legal provisions governing the possibility of release, but these are mostly corollaries of the basic difference in the nature of the judgment directing detention.

[16] HALL AND GLUECK, *op. cit. supra* note 1, at 19.

based upon a conception of multiple causation and curative-rehabilitative treatment, shall predominate in legislation and in judicial and administrative practices." Would such a provision be workable? Would it be wise?

Any theory of criminal justice which emphasizes the criminal rather than the crime encounters an initial and crucial difficulty when it is sought to be applied at the stage of legislative enactment, where the problem in the first instance is to define and grade the crime. How *can* a conception of multiple causation and curative-rehabilitative treatment predominate in the definition and grading of crimes, let alone serve as the sole guide?[17] But even if it were possible to gauge in advance the types of conduct to be forbidden by the expected need for reformation of those who will thereafter engage in them, would it be sensible to try to do so? Can the content of the law's commands be rationally determined with an eye singly or chiefly to the expected deficiencies of character of those who will violate them? Obviously not. The interests of society in having certain things not done or done are also involved.[18]

Precisely because of the difficulties of relating the content of the law's commands to the need for reformation of those who violate them, a curative-rehabilitative theory of criminal justice tends always to depreciate, if not to deny, the significance of these general formulations and to focus attention instead on the individual defendant at the time of his apprehension, trial, and sentence. This has in it always a double danger—to the individual and to society. The danger to the individual is that he will be punished, or treated, for what he is or is believed to be, rather than for what he has done. If his offense is minor but the possibility of his reformation is thought to be slight, the other side of the coin of mercy can become cruelty.[19] The danger

[17] Is the correlation between describable types of conduct (acts or omissions), on the one hand, and the need for cure and rehabilitation of those who engage in them, on the other hand, so close that the need can be taken as a reliable index of the types of conduct to be forbidden and the differentiation among offenses to be made? These determinations must be made in advance and in general terms. In making them, the extent of the depravity of character characteristically manifested by particular types of behavior ought, of course, to be taken into account so far as it can be. But this is a factor which is peculiarly difficult to appraise ahead of time by a generalized judgment. Depravity of character and the need of the individual for cure and rehabilitation are essentially personal matters, as the whole modern theory of the individualization of correctional treatment bears witness. A fortiori, the susceptibility of the individual to rehabilitation is personal.

[18] For the conclusion that the reformative principle has little that is distinctive to contribute in the substantive differentiation between criminal and noncriminal behavior, see Michael and Wechsler, *A Rationale of the Law of Homicide I*, 37 COLUM. L. REV. 701, 757-61 (1937). For a detailed and judicious appraisal of the respective roles of the deterrent and reformative principles in the *treatment* of criminals, including the legislative grading of offenses, see part two of the same article. *Id.* at 1261.

[19] So, two contemporary advocates of "a rational approach to crime repression" who urge reformation as the central objective in the treatment of criminals are led to follow out the apparent logic of their position by saying that "those who cannot be reformed . . . must be segregated for life—but not necessarily punished—*irrespective of the crimes they have committed.*" (Emphasis added.) HARRY E. BARNES AND NEGLEY K. TEETERS, NEW HORIZONS IN CRIMINOLOGY: THE AMERICAN CRIME PROBLEM 953 (rev. ed. 1945).

Speaking of the school of positivism which has dominated American criminology in recent years, Professor Jerome Hall says: "Its dogmas biased not only theories concerning prevention but also, combined with its determinism, stigmatized punishment as vengeance—at the same time opening the door to unmitigated cruelty in the name of 'measures of safety'." HALL, *op. cit. supra* note 4, at 551.

The rash of so-called "sexual psychopath" laws which disgrace the statute books of many states

to society is that the effectiveness of the general commands of the criminal law as instruments for influencing behavior so as to avoid the necessity for enforcement proceedings will be weakened.

This brings us to the crux of the issue confronting our supposed constitution-makers. The commands of the criminal law are commands which the public interest requires people to comply with. This being so, will the public interest be adequately protected if the legislature is allowed only to say to people, "If you do not comply with any of these commands, you will merely be considered to be sick and subjected to officially-imposed rehabiltative treatment in an effort to cure you"? Can it be adequately protected if the legislature is required to say, "If you do not comply, your own personal need for cure and rehabilitation will be the predominating factor in determining what happens to you"? Or should the legislature be enabled to say, "If you violate any of these laws and the violation is culpable, your conduct will receive the formal and solemn condemnation of the community as morally blameworthy, and you will be subjected to whatever punishment, or treatment, is appropriate to vindicate the law and to further its various purposes"?

On the sheerly pragmatic ground of the need for equipping the proposed social order with adequate tools to discourage undesired conduct, a responsible constitution-maker assuredly would hesitate long before rejecting the third of these possibilities in favor of either of the first two. To be sure, the efficacy of criminal punishment as a deterrent has often been doubted. But it is to be observed that the doubts are usually expressed by those who are thinking from the restrospective, sanction-imposing point of view.[20] From this point of view, it is natural to be impressed by the undoubted fact that many people do become criminals, and will continue to do so, in spite of all the threats of condemnation and of treatment-in-

illustrate the possibilities to which this streak of cruelty may lead. See Hacker and Frym, *The Sexual Psychopath Act in Practice: A Critical Discussion,* 43 CALIF. L. REV. 766 (1955); Guttmacher and Weihofen, *Sex Offenses,* 43 J. CRIM. L., C. & P.S. 153 (1952). For the shock of a concrete example of what may happen in the administration of such laws, until the courts correct it, read *In re Maddox,* 88 N.W.2d 470 (Mich. 1958), where the state hospital psychiatrist insisted on assuming the truth of unproved police charges in his treatment of one who had been civilly committed as a "sexual psychopath" and, when his victim kept protesting his innocence, had him transferred to state prison on the ground that this refusal to admit guilt made him "an adamant patient" lacking "the desire to get well" which was necessary to make him amenable to hospital care. Consider also the possibilities implicit in the Maryland Defective Delinquent Law, MD. ANN. CODE art. 31B (1951).

[20] See, *e.g.,* ADVISORY COUNCIL OF JUDGES, NPPA GUIDES FOR SENTENCING (1957). Almost the whole of what this handbook says about deterrence as a factor in sentencing is contained in the following paragraph:

"In some situations, knowledge of a penalty may deter an individual tempted to violate a law; on the whole, however, the deterrent force of severe penalty alone for major crimes has been highly overrated and belief in its value is unrealistic. A stubborn reliance on deterrence results in making sentences increasingly severe, and excessively severe sentences produce deteriorating effects on prisoners, without corresponding benefits to society." *Id.* at 2.

It will be observed that this confuses the question of the efficacy of the threat of criminal condemnation and punishment as a factor in controlling the conduct of the bulk of mankind with the question of the efficacy of severe punishments, a confusion which is not uncommon. Few people will deny that excessively severe sentences are undesirable, and many will agree that a large proportion of the sentences currently meted out *are* excessively severe.

consequence-of-condemnation that society can offer. But the people who do *not* commit crimes need to be taken into account, too. A constitution-maker, thinking from the prospective point of view of the primary, as distinguished from the remedial, law has especially to think of them, if he is to see his problem whole. So doing, he will be likely to regard the desire of the ordinary man to avoid the moral condemnation of his community, as well as the physical pains and inconveniences of punishment, as a powerful factor in influencing human behavior which can scarcely with safety be dispensed with.[21] Whether he is right or wrong in this conclusion, he will align himself, in reaching it, with the all but universal judgment, past and present, of mankind.

Moreover, there are other and larger considerations to be weighed in the balance. The case against a primarily rehabilitative theory of criminal justice is understated if it is rested solely on the need for the threat of criminal conviction as an instrument of deterrence of antisocial conduct. Deterrence, it is ventured, ought not to be thought of as the overriding and ultimate purpose of the criminal law, important though it is. For deterrence is negative, whereas the purposes of law are positive. And the practical fact must be faced that many crimes, as just recognized, are undeterrable. The grim negativism and the frequent seeming futility of the criminal law when it is considered simply as a means of preventing undesired behavior no doubt help to explain why sensitive people, working at close hand with criminals, tend so often to embrace the more hopeful and positive tenets of a curative-rehabilitative philosophy.

However, a different view is possible if an effort is made to fit the theory of criminal justice into a theory of social justice—to see the purposes of the criminal law in their relation to the purposes of law as a whole. Man is a social animal, and the function of law is to enable him to realize his potentialities as a human being through the forms and modes of social organization. It is important to consider how the criminal law serves this ultimate end.

Human beings, of course, realize their potentialities in part through enjoyment of the various satisfactions of human life, both tangible and intangible, which existing social resources and their own individual capacities make available to them. Yet, the social resources of the moment are always limited, and human capacities for enjoyment are limited also. Social resources for providing the satisfactions of life and

[21] *Cf.* RANYARD WEST, CONSCIENCE AND SOCIETY 165 (1945): "It is upon the fact of the potential criminal in every man that I would give to law its psychological grounding."

Compare the valuable analysis by a Norwegian scholar, Johs Andenaes, in *General Prevention—Illusion or Reality?*, 43 J. CRIM. L., C. & P.S. 176, 179-80 (1952). Professor Andenaes distinguishes between individual prevention ("the effect of punishment on the punished") and general prevention ("the ability of the criminal law and its enforcement to make citizens law-abiding"). He further distinguishes "three sorts of general-preventive effects": first, a "deterrent" effect (used in the narrow sense of "the mere frightening . . . effect of punishment—the risk of discovery outweighing the temptation to commit the crime"); second, a "moralizing" effect (punishment helping "to form and to strengthen the public's moral code" and so to create "conscious or unconscious inhibitions against committing crime"; and, third, a habit-forming effect (arousing "unconscious inhibitions against committing forbidden acts . . . without appealing to the individual's concepts of morality").

human capacities for enjoying them, however, are always susceptible of enlargement, so far as we know, without eventual limit.[22] Man realizes his potentialities most significantly in the very process of developing these resources and capacities—by making himself a functioning and participating member of his community, contributing to it as well as drawing from it.

What is crucial in this process is the enlargement of each individual's capacity for effectual and responsible decision. For it is only through personal, self-reliant participation, by trial and error, in the problems of existence, both personal and social, that the capacity to participate effectively can grow. Man learns wisdom in choosing by being confronted with choices and by being made aware that he must abide the consequences of his choice. In the training of a child in the small circle of the family, this principle is familiar enough. It has the same validity in the training of an adult in the larger circle of the community.

Seen in this light, the criminal law has an obviously significant and, indeed, a fundamental role to play in the effort to create the good society. For it is the criminal law which defines the minimum conditions of man's responsibility to his fellows and holds him to that responsibility. The assertion of social responsibility has value in the treatment even of those who have become criminals.[23] It has far greater value as a stimulus to the great bulk of mankind to abide by the law and to take pride in so abiding.

This, then, is the critical weakness of the two alternative constitutional provisions that have been discussed—more serious by far than losing or damaging a useful, even if imperfect, instrument of deterrence. The provisions would undermine the foundation of a free society's effort to build up each individual's sense of responsibility as a guide and a stimulus to the constructive development of his capacity for effectual and fruitful decision.[24]

If the argument which has been made is accepted and it is concluded that

[22] See HART AND SACKS, *op. cit. supra* note 3, at 10-16.

[23] WALTON HAMILTON MOBERLY, RESPONSIBILITY: THE CONCEPT IN PSYCHOLOGY, IN THE LAW, AND IN THE CHRISTIAN FAITH 23 (1956): "Recite a delinquent's disabilities and handicaps in front of him in open court and you are doing something to confirm them; you are impairing that self-respect and sense of responsibility which is the chief incentive to effort. Treat him as sane and responsible and as a whole man and you give him the best chance of rising to this level. In many circumstances to expect and to exact a high standard is the most likely way to get it."

See also the discussion of the problem of growth in responsibility in Katz, *Law, Psychiatry, and Free Will,* 22 U. CHI. L. REV. 397 (1955).

[24] See generally MOBERLY, *op. cit. supra* note 23, and especially the opening lecture on "The Concept [Of Responsibility] in Psychology and Law."

There are other agencies of social discipline, of course, than the criminal law. But the criminal law is the only one which speaks to the individual formally and solemnly in behalf of the whole society.

In what the criminal law says to the individual, moreover, much more is involved than training simply in the observance of the specific and mostly elementary standards of conduct which the law seeks directly to enforce. Limits of some kind upon the scope of permissible choice perform an indispensable psychological role in the development of personal capacity for successful social adjustment. By fixing even minimal limits, the law thus develops capacities which are transferable to the more complex problems of social existence. This is especially so to the extent that the individual is made conscious of the moral basis and social rationale of the law's commands, for the principles of social living underlying them have far wider relevance than the commands themselves.

explicit abandonment of the concept of moral condemnation of criminal conduct would be unsound, what then is to be said of the soundness of an interpretation of existing law which tries to achieve a similar result by indirection—treating the purpose of cure and rehabilitation as predominating, while sweeping under the rug the hard facts of the social need and the moral rightness of condemnation and of treatment which does not dilute the fact of condemnation?

C. Constitutional Limitations on the Use of the Method

It is evident that the view which the constitution-maker takes of the function of criminal law will be important in shaping his attitude on inclusion in the document of many of the traditional guarantees of fair procedure in criminal trials. Most of these, such, for example, as indictment by a grand jury or even trial by a petit jury, are largely or wholly irrelevant to the offender's need for, or his susceptibility to, curative-rehabilitative treatment.[25] Indeed, as already suggested,[26] even the basic concept that criminality must rest upon criminal conduct, duly proved to have taken place, would come into question under a purely rehabilitative theory. Present laws for the confinement and care of mentally-ill persons do not insist upon this requirement, and, if criminality were to be equated with sickness of personality generally, its rationale would not be readily apparent. But if what is in issue is the community's solemn condemnation of the accused as a defaulter in his obligations to the community, then the default to be condemned ought plainly to consist of overt conduct, and not simply of a condition of mind; and the fact of default should be proved with scrupulous care. The safeguards which now surround the procedure of proof of criminality or the essentials of them, in other words, will appear to be appropriate.

Should the constitution-makers go further and prescribe not only procedural safeguards, but substantive limitations on the kinds of conduct that can be declared criminal? For the most part, American constitution-makers have not done this.[27] They have relied, instead, primarily on the legislature's sense of justice. Secondarily, they have relied on the courts to understand what a crime is and, so, by appropriate invocation of the broad constitutional injunction of due process, to prevent an arbitrary application of the criminal sanction when the legislature's sense of justice has failed. Whether they have been wise in so doing is a question which can best be left to the reader's judgment, in the light of the examination which follows of the actual handling of the problems by legislatures and courts.

[25] Laws for the confinement of mentally-ill persons commonly dispense with these requirements, and with many others as well. See Note, *Analysis of Legal and Medical Considerations in Commitment of the Mentally Ill*, 56 YALE L. J. 1178, 1190-96 (1947). So also do the "sexual psychopath" laws referred to in note 19 *supra*.

[26] See note 19 *supra*.

[27] Ex post facto clauses are the only important express substantive limitation usually found in American constitutions. It should be noticed, however, that the principles of just punishment implicit in such clauses have relevance in other situations than that only of condemnation under an after-the-fact enactment—a wider relevance than courts have yet recognized.

III

THE PERSPECTIVE OF THE LEGISLATURE

A legislature deals with crimes always in advance of their commission (assuming the existence of constitutional prohibitions or practices excluding ex post facto laws and bills of attainder). It deals with them not by condemnation and punishment, but only by threat of condemnation and punishment, *to be imposed always by other agencies.* It deals with them always by directions formulated in *general terms.* The primary parts of the directions have always to be interpreted and applied by the private persons—the potential offenders—to whom they are initially addressed. In the event of a breach or claim of breach, both the primary and the remedial parts must be interpreted and applied by the various officials—police, prosecuting attorneys, trial judges and jurors, appellate judges, and probation, prison, and parole authorities —responsible for their enforcement. The attitudes, capacities, and practical conditions of work of these officials often put severe limits upon the ability of the legislature to accomplish what it sets out to accomplish.

If the primary parts of a general direction are to work successfully in any particular instance, otherwise than by fortunate accident, four conditions have always to be satisfied: (1) the primary addressee who is supposed to conform his conduct to the direction must know (a) of its existence, and (b) of its content in relevant respects; (2) he must know about the circumstances of fact which make the abstract terms of the direction applicable in the particular instance; (3) he must be able to comply with it; and (4) he must be willing to do so.

The difficulties of satisfying these conditions vitally affect the fairness and often even the feasibility of the effort to control the behavior of large numbers of people by means of general directions, subject only to an after-the-event sanction. This is so even when the sanction is civil, such as a judgment for compensatory damages or restoration of benefits. But the difficulties are especially acute when the sanction is criminal. For then, something more is involved than the simple necessity of getting the direction complied with in a sufficient proportion of instances to keep it in good working order—that is, to maintain respect for it and to avoid arbitrary discrimination in singling out individual violators as subjects of enforcement proceedings. If what was said in part two is correct, it is necessary to be able to say in good conscience in *each* instance in which a criminal sanction is imposed for a violation of law that the violation was blameworthy and, hence, deserving of the moral condemnation of the community.

This raises two closely related questions which lie at the heart of the problems of the criminal law: *First,* what *are* the ingredients of moral blameworthiness which warrant a judgment of community condemnation? *Second,* retracing the ground of part two, can the position be maintained that guilt in the sense of the criminal law is an individual matter and cannot justly be pronounced by the community if the individual's conduct affords no basis for a judgment of moral condemnation?

These questions present themselves in different guises in different types of criminal statutes. They can best be examined separately in relation to the various major types of purposes for which a legislature may seek to employ a criminal sanction.

A. The Statement of the Minimum Obligations of Responsible Citizenship: The Control of Purposeful Conduct

The core of a sound penal code in any view of the function of the criminal law is the statement of those minimum obligations of conduct which the conditions of community life impose upon every participating member if community life is to be maintained and to prosper—that is, of those obligations which result not from a discretionary and disputable judgment of the legislature, but from the objective facts of the interdependencies of the people who are living together in the community and of their awareness of the interdependencies.

In the mind of any legislator who recognizes this central and basic job as a distinct one and who is trying to do it faithfully and intelligently, a variety of aims will coalesce, to the point of becoming virtually indistinguishable. The inculcation of a sense of social responsibility throughout the society will be the dominant aim. But the stated obligations will, at the same time, represent desired standards of conduct and so will necessarily involve the aim of deterrence of undesired conduct. Since violators are to be condemned as defaulters in their duty to the community and treated accordingly, the aim can also be described as punitive. And if the conduct declared to be criminal does, indeed, evince a blameworthy lack of social responsibility, the declaration will also constitute an essential first step in identifying those members of the community whose behavior shows them to be in need of cure and rehabilitation, and this aim will likewise be included. So also, subordinately, will be the aim of temporary or permanent disablement of certain of the more serious offenders.

Returning now to the four conditions earlier stated for the successful operation of a general direction and to the problem of deciding when a failure of compliance due to a failure to satisfy one of the conditions is blameworthy, it will be seen that in this area of the criminal law, the difficulties are minimal, so long at least as the legislature is denouncing purposeful or knowing, as distinguished from reckless or merely negligent, conduct.[28]

If the legislature does a sound job of reflecting community attitudes and needs, actual knowledge of the wrongfulness of the prohibited conduct will usually exist. Thus, almost everyone is aware that murder and forcible rape and the obvious forms of theft are wrong. But in any event, knowledge of wrongfulness can fairly be assumed. For any member of the community who does these things without knowing that they are criminal is blameworthy, as much for his lack of knowledge as for his actual conduct. This seems to be the essential rationale of the maxim, *Ignorantia legis neminem excusat,* which has been so much misunderstood and abused in rela-

[28] On the special problems of control of reckless and negligent conduct, see subsection B of this part *infra.*

tion to regulatory crimes, involving conduct which is not intrinsically wrongful.[29]

Similarly, knowledge of the circumstances of fact which make the law's directions applicable will ordinarily exist when harms are inflicted or risks created of the elementary and obvious types sought to be prevented by these intrinsically wrongful crimes. But suppose that knowledge does not exist? The traditional criminal law, concerned almost exclusively with crimes of this kind, has ready to hand a solution in the traditional maxim that ignorance of fact excuses, as well as in cognate doctrines such as that of claim-of-right in the law of theft.[30] If the legislature can depend upon the courts to read these doctrines into its enactments, the requisite of blameworthiness as an element of criminality will be respected.

Obligations of conduct fixed by a fair appraisal of the minimum requirements for the maintenance and fostering of community life will, by hypothesis, be obligations which normal members of the community will be *able* to comply with, given the necessary awareness of the circumstances of fact calling for compliance. But suppose that in a particular case, this ability does not exist? Again, the traditional law provides materials for solution of the problem when inability negatives blameworthiness; and the only question is whether the legislature can count upon the courts to make use of the materials. The materials include doctrines with respect to duress, as well as doctrines providing for the exculpation of those individuals who because of mental disease or defect are to be deemed incapable of acting as responsible, participating members of society.[31]

There remains only the question of willingness to comply. In relation to direc-

[29] Compare the illuminating and much more subtle analysis of Jerome Hall in *Ignorance and Mistake in Criminal Law*, 33 IND. L. J. 1 (1957). Professor Hall points out the consideration here stressed: ". . . namely, that the criminal law represents certain moral principles; to recognize ignorance or mistake of the law as a defense would contradict those values." *Id.* at 20. But he is concerned to defend the application of the maxim not only in relation to crimes involving intrinsically wrongful conduct, but in relation to purely regulatory crimes which, if the views hereafter presented are correct, involve no other moral value than that of respect for constituted authority. This leads him into refinements which this paper passes by.

[30] See Hall, *Ignorance and Mistake in Criminal Law*, 33 IND. L. J. 1, 27-34 (1957). *Cf.* Morissette v. United States, 342 U.S. 246 (1952), where the Court invoked the whole broad tradition of criminal intent as a reason for giving a statute a restricted reading, although a reference to the specific doctrine of claim-of-right in theft would have been enough to do the trick.

[31] It is important to notice the extent to which the whole doctrine of irresponsibility by reason of mental disease or defect confirms the main thesis of this paper. The doctrine, to be sure, can be understood as a corollary of a coldly utilitarian deterrent theory which simply exculpates nondeterrables. And the *M'Naghten* test, on a narrow and literal reading, may be thought to bear out this view. But if nondeterrability were the sole basis of the doctrine, it would seem to follow that all doubts on that score should be resolved in favor of society. This is not the way in which the test is administered, even by courts which adhere to it most strictly. What the courts actually do, and even more plainly what the critics of the courts say, is eloquent testimony to the general understanding that something more is involved than a cold-blooded estimate of deterrability. The "something more" surely is not the defendant's personal need for cure and rehabilitation, for the greater the insanity, the greater the need. Nor can susceptibility to cure and rehabilitation be taken as the touchstone consistently with general principle, or else the more hardened the criminal, the better would be his claim to irresponsibility. What seems to be involved in general understanding, and certainly in any adequate analysis of the problem, is a reaching for criteria which will avoid attaching moral blame where blame cannot justly be attached, while, at the same time, avoiding a denial of moral responsibility where the denial would be personally and socially debilitating.

tions which make a reasonably grounded appeal to the citizen's sense of responsibility as a citizen, this willingness is likely to be at a maximum. Individuals who are able but unwilling to comply with such directions are precisely the ones who ought to be condemned as criminals.

In the sphere of conduct which is intrinsically wrongful, the legislature's task is further simplified by its ability (or the ability which it is entitled to suppose it has) to rely upon the courts for the elaboration of detail and the solution of unanticipated or peripheral problems. Indeed, this was a body of law which was largely built up by English judges without benefit of acts of Parliament and which in this country required the intervention of the legislature, on its primary side, only to satisfy the theoretical and emotional appeal of the maxim, *Nullum crimen sine lege*. Despite the maxim, most American legislatures have been content to make use of familiar words and phrases of the common law, relying upon the courts to fill in their meaning, and even leaving whole areas of doctrine, such as criminal intent and various phases of justification, entirely to the courts. So long as the courts are faithful in their reflection of the community's understanding of what is morally blameworthy, judgments of conviction are not subject to the reproach of being, even in spirit, ex post facto.

B. The Statement of the Minimum Obligations of Responsible Citizenship: The Control of Reckless and Negligent Conduct

Special difficulties are presented when the criminal law undertakes to state an obligation of conduct in a way which requires an addressee, if he is to comply with it, to have a certain kind of general knowledge or experience, or to exercise a certain degree of skill and attention, or to make an appraisal of the probable consequences of what he does or omits to do with a certain degree of accuracy. When can a criminal sanction be properly authorized in cases in which the addressee fails in one or another of these respects and harm results or a risk is created because of his failure?[32]

For example, one who undertakes to practice as a physician does not know that flannels saturated with kerosene will tend to produce severe burns if applied directly to the flesh of a patient.[33] A foreman of a railroad section gang misreads a timetable and orders railroad tracks to be taken up for replacement just before a train is due.[34] The owner of a night club fails to realize that the means of egress would be inadequate if a fire were to break out when the club was crowded.[35] Upon pre-

[32] Through use of the doctrine of conspiracy, attempt, and solicitation, and in other ways, the criminal law often condemns the deliberate planning of a blameworthy harm, even though no harm actually results. But even where it punishes the inadvertent creation of a risk which actually causes harm, Anglo-American law, wisely or unwisely, has developed no general principle condemning the same kind of risk-creating conduct in cases in which, by good fortune, no ultimate harm eventuates. Of course, however, there are a good many *ad hoc* statutes declaring specific forms of such conduct, such as speeding, to be criminal, regardless of their consequences.

[33] See Commonwealth v. Pierce, 138 Mass. 165 (1884).

[34] See Regina v. Benge, 4 F. & F. 504 (Kent Summer Assizes 1865).

[35] See Commonwealth v. Welansky, 316 Mass. 383, 55 N.E.2d 902 (1944).

cisely what kind of showing can a legislature justly provide that such people are to be condemned and punished as criminals?

If the legislature requires that an awareness of the risk be brought home to the actor and that the risk be one which, by the general standards of the community, is plainly excessive, a direction for criminal punishment creates no difficulty of principle, however trying may be the problems of application. For judgment about whether a given risk can justifiably be taken to promote a given end depends upon the evaluations implicit in community standards of right and wrong to which each member of the community can justly be expected to conform his conduct. If an individual knowingly takes a risk of a kind which the community condemns as plainly unjustifiable, then he is morally blameworthy and can properly be adjudged a criminal. He is criminally reckless in the traditional sense articulated with precision by the draftsmen of the American Law Institute's Model Penal Code.[36]

This concept of criminal recklessness may well embrace not only situations in which the actor adverts directly to the possibility of the ultimate harm, but those in which he adverts only to his own deficiencies in appraising the possibility of harm or preventing it from coming to pass and to the possible consequences of *those* deficiencies. Thus, the doctor who swathes his patient with kerosene-soaked rags, without even suspecting what is going to happen, may, nevertheless, know that special knowledge and training is generally needed in order to treat patients safely and successfully and that he does not have that knowledge and training. In any such situation, if the actor knows of his deficiency and of the risk which such a deficiency creates, and if *that* risk is one which in community understanding is plainly unjustifiable, there is a basis for legislative condemnation of the conduct as criminally reckless.

Moreover, as considered more fully under the next subheading, if the actor knowingly goes counter to a valid legislative determination that the risk he is taking is excessive, even though he himself does not believe it to be, there is an independent basis for moral condemnation in this deliberate defiance of law.

The question remains whether simple unawareness of risk, without awareness of any deficiency preventing appreciation or avoidance of it and without any element

[36] See MODEL PENAL CODE § 2.02(2)(c) and (d) (Tent. Draft No. 4, 1955):

"(c) Recklessly.

"A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves culpability of high degree. [Alternative: its disregard involves a gross deviation from proper standards of conduct.]

"(d) Negligently.

"A person acts negligently with respect to a material element of an offense when he should be aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that the actor's failure to perceive it, considering the nature and purpose of his conduct, the circumstances known to him and the care that would be exercised by a reasonable person in his situation, involves substantial culpability. [Alternative: considering the nature and purpose of his conduct and the circumstances known to him, involves a substantial deviation from the standard of care that would be exercised by a reasonable man in his situation.]"

of knowing disregard of a relevant legislative decision, can justly be declared to be culpable. The answer would seem clearly to be no, at least in those situations in which the actor lacks the ability either to refrain from the conduct which creates the risk or to correct the deficiency which makes engaging in the conduct dangerous, for otherwise, the third of the requisites above stated[37] for the successful operation of a general direction is impossible to satisfy. But suppose the actor has this ability? Guilt would, then, seem to depend upon whether he has been put upon notice of his duty to use his ability to a degree which makes his unawareness of the duty, in the understanding of the community, genuinely blameworthy. In exceptional situations of elementary and obvious danger, the circumstances of fact of which the actor is conscious may be sufficient in themselves to give this notice. But this can be true only when the significance of the circumstances of fact would be apparent to one who shares the community's general sense of right and wrong. If this is not so—if appreciation of the significance of the facts depends upon knowledge of what happens to be written in the statute books—then, the problem becomes one of the nature and extent of the moral obligation to know what is so written, which is discussed under the next subheading.

Criminal punishment of merely negligent behavior is commonly justified not on the ground that violators can be said to be individually blameworthy, but on the ground that the threat of such punishment will help to teach people generally to be more careful. This proposes, as legitimate, an aim for the legislature which is drastically different from that of inculcating minimum standards of personal responsibility to society. The issues it raises are examined under the subheading after the next.[38]

C. The Regulation of Conduct Which Is Not Intrinsically Wrongful: Bases of Blameworthiness

The statute books of the forty-nine states and the United States are filled with enactments carrying a criminal sanction which are obviously motivated by other ends, primarily, than that of training for responsible citizenship. The legislature simply wants certain things done and certain other things not done because it believes that the doing or the not doing of them will secure some ultimate social advantage, and not at all because it thinks the immediate conduct involved is either rightful or wrongful in itself. It employs the threat of criminal condemnation and punishment as an especially forceful way of saying that it really wants to be obeyed, or else simply from lack of enough imagination to think of a more appropriate sanction. Such enactments present problems which neither the courts nor the legislature of this country have yet succeeded in thinking through.[39]

[37] See p. 413 *supra*.

[38] For a valuable general discussion of problems of criminal negligence, see JEROME HALL, GENERAL PRINCIPLES OF CRIMINAL LAW c. 9 (1947).

[39] See generally Mr. Justice Jackson's review of the development in Morissette v. United States, 342 U.S. 246 (1952); Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55 (1933); JEROME HALL, GENERAL PRINCIPLES OF CRIMINAL LAW c. 10 (1947).

When a legislature undertakes to prohibit or require conduct theretofore untouched by the criminal law, what considerations *ought* to guide it in deciding whether to declare that noncompliance with its direction shall be a crime?

1. If the legislature can, in good conscience, conclude that the new direction embodies standards of behavior which have to be observed, under existing social conditions, if social life is to be maintained, then the use of a criminal sanction raises no difficulty. Obviously, there is room for growth, as conditions and attitudes in society change, in the central body of law earlier discussed which undertakes to state the minimum obligations of responsible citizenship. Obviously also, the legislature is an appropriate agency to settle debatable questions about the appropriate extent of growth, whether or not it is desirable for courts to have a share in the process.[40]

Statutes which make well-considered additions to the list of the citizen's basic obligations are not open to the objection of undue multiplication of crimes. Normal principles of culpability, moreover, can properly apply to such offenses, and should apply. Absent exceptional circumstances, in other words, ignorance of the criminality of the conduct (act or omission) which is forbidden ought not to be a defense. *Per contra,* ignorance of the facts ought to be. And, of course, the usual defenses based on inability to comply should be available.

2. If the legislature cannot, in good conscience, regard conduct which it wishes to forbid as wrongful in itself, then it has always the option of declaring the conduct to be criminal only when the actor knows of its criminality or recklessly disregards the possibility that it is criminal. For knowing or reckless disregard of legal obligation affords an independent basis of blameworthiness justifying the actor's condemnation as a criminal, even when his conduct was not intrinsically antisocial. It is convenient to use the word "wilful" to describe this mode of culpability, although the term is by no means regularly so limited in conventional usage.[41]

The inclusion in a new regulatory crime of the requirement of "wilfulness" avoids any difficulty of principle in the use of the criminal sanction—assuming that the requirement comprehends not only a culpable awareness (knowing or reckless) of the law, but a culpable awareness also of the facts making the law applicable, together with a sufficient ability to comply. The requirement, moreover, mitigates any objection on the score of undue multiplication of regulatory crimes, although it can hardly eliminate it entirely.[42]

3. Under what, if any, circumstances may a legislature properly direct the con-

[40] Obviously, the courts must have a share, whether it is desirable or not, in the interpretation of such enactments. See pp. 435-36 *infra.*

[41] See United States v. Murdock, 290 U.S. 389 (1933); Spies v. United States, 317 U.S. 492, 497-98 (1943); Wechsler, *The American Law Institute: Some Observations on Its Model Penal Code,* 42 A.B.A.J. 321, 324 (1956).

[42] The dominant objective of public education in the obligations of responsible citizenship is prejudiced if the public mind is confused by assertion of too many obligations. The force of the threat of criminal condemnation and punishment, moreover, is weakened if serious enforcement is impracticable, and there are, and seemingly must inevitably be, severe limitations upon the load which the machinery of criminal law enforcement can carry. See part four *infra.* Finally, the criminal law always loses face if things are declared to be crimes which people believe they ought to be free to do, even wilfully.

viction as a criminal of a person whose conduct is not wrongful in itself and who neither knows nor recklessly disregards the possibility that he is violating the law?

To engage knowingly or recklessly in conduct which is wrongful in itself and which has, in fact, been condemned as a crime is either to fail to comprehend the community's accepted moral values or else squarely to challenge them. The maxim, *Ignorantia legis neminem excusat,* expresses the wholly defensible and, indeed, essential principle that the action, in either event, is blameworthy.[43] If, however, the criminal law adheres to this maxim when it moves from the condemnation of those things which are *mala in se* to the condemnation of those things which are merely *mala prohibita,* it necessarily shifts its ground from a demand that every responsible member of the community understand and respect the community's moral values to a demand that everyone know and understand what is written in the statute books. Such a demand is *toto coelo* different. In no respect is contemporary law subject to greater reproach than for its obtuseness to this fact.

Granting that blame may, in some circumstances, attach to an actor's antecedent failure to determine the legality of his conduct, it is, in any event, blame of a very distinctive kind.

a. The blame in such a case is largely unrelated, in gravity or any other respect, to the external conduct itself, or its consequences, for which the actor is purportedly convicted. Indeed, all such instances of conduct in ignorance of laws enjoining *mala prohibita* might well be thought of as constituting a single type of crime, if they constitute any kind of crime at all—the crime of ignorance of the statutes or of their interpretation. Knowledge of the facts and ability to comply may be formal requisites of criminality, but in the absence of knowledge of the law, they are irrelevant, and willingness to comply remains untested. The whole weight of the law's effort to achieve its purpose has to be carried, in the first instance, by the effort to get people to know and understand its requirements.[44]

b. In such cases, the essential crime, if that is what it is, is always a crime of omission. If the purported crime is itself one of omission, as in the failure to take out a license, then the offense is doubly negative. As Professor Graham Hughes has recently abundantly demonstrated,[45]

> . . . a penal policy of omissions and a criminal jurisprudence of offenses of omission are overdue. . . . [W]here inaction is evidently socially harmful, no good reason appears for shrinking from penal prohibition. Any penal policy, however, must be linked with a consciousness of the need to promulgate and publicize offenses of omission and a recognition by the judiciary that conventional attitudes to *mens rea,* particularly with respect to ignorance of the law, are not adequate tools to achieve justice for those accused of inaction.

[43] See note 29 *supra.*

[44] *Cf.* Hughes, *Criminal Omissions,* 67 YALE L. J. 590, 603 (1958): "The conventional analyses of *mens rea* in omissions suffer either from a complete neglect of the aspect of ignorance of the law or a tendency to confuse the two separate issues of ignorance of the duty and ignorance of the circumstances which triggered the duty."

[45] Hughes, *supra* note 44, at 636.

Even when the nominal crime is one of commission rather than omission, the problem of promulgating and publicizing the offense, which Professor Hughes mentions, is likely to be serious if the nature of the affirmative conduct gives no warning of the possibility of an applicable criminal prohibition. But it is especally likely to be serious when the nominal crime is itself one of omisson, for mere inaction often gives no such warning whatever.[46]

c. The gist of a crime of statutory ignorance may lie not in the failure to inform oneself of the existence of an applicable statute, which is always in some sense a do-able thing if the statutes are published and there is a decent index to them, but in the failure to divine their meaning, which may be altogether non-do-able. All statutes are, of necessity, indeterminate in some of their applications. When a criminal enactment proscribes conduct which is *malum in se,* such as murder or manslaughter, however, the moral standards of the community are available always as a guide in the resolution of its indeterminacies, and there is a minimum of unfairness when doubt is resolved against a particular defendant. This guidance is missing when the proscribed conduct is merely *malum prohibitum.* The resolution of doubts must, thus, depend not upon a good human sense of moral values, but upon a sound grasp of technical doctrines and policies of statutory interpretation. Dean Pound has justly observed of American lawyers and judges that "we have no well-developed technique of developing legislative texts."[47] To condemn a layman as blameworthy for a default of technical judgment in a matter which causes trouble even for professional judges is, in many cases, so manifestly beyond reason that courts have developed various makeshift devices to avoid condemnation in particular situations.[48] And the draftsmen of the Model Penal Code have devised for such cases a generalized defense of limited scope.[49] Until the nature and dimensions of the

[46] See the discussion of the Supreme Court's recent decision in Lambert v. California, 355 U.S. 225 (1957), at pp. 433-34 *infra.*

[47] Pound, *Sources and Forms of Law,* 22 NOTRE DAME LAWYER 1, 76 (1946).

[48] The devices have generally dealt only with the extreme situation in which the defendant was misled by some form of official advice that his conduct was lawful. See, *e.g.,* State v. Jones, 44 N.M. 623, 107 P.2d 324 (1940), overruling a prior judicial interpretation of a statute now regarded as erroneous "with prospective effect only." See HART AND SACKS, *op. cit. supra* note 3, at 661-64. *Cf.* Long v. State, 44 Del. (5 Ter.) 462, 65 A.2d 489 (1949), allowing a defendant in a bigamy prosecution to show that he had acted in reliance on an attorney's advice that a prior divorce was valid.

[49] MODEL PENAL CODE § 2.04(3) and (4) (Tent. Draft. No. 4, 1955):

"(3) A reasonable belief that conduct does not legally constitute an offense is a defense to a prosecution for that offense based upon such conduct, when:

(a) the statute or other enactment defining the offense is not known to the actor and has not been published or otherwise reasonably made available to him prior to the conduct alleged; or

(b) he acts in reasonable reliance upon an official statement of the law, afterward determined to be invalid or erroneous, contained in (i) a statute or other enactment; (ii) a judicial decision, opinion or judgment; (iii) an administrative order or grant of permission; or (iv) an official interpretation of the public officer or body charged by law with responsibility for the interpretation, administration or enforcement of the law defining the offense.

"(4) A defense arising under paragraph (3) of this section constitutes an affirmative defense which the defendant is required to prove by a preponderance of evidence. The reasonableness of the belief claimed to constitute the defense shall be determined as a question of law by the Court."

problem have been more fully perceived, however, no genuinely satisfactory solution can be reached.

d. No doubt there are situations in which one who engages in a particular course of conduct assumes an obligation, in general community understanding, to know about the law applicable to that kind of conduct. Sometimes, this may be true in areas of statutory law affecting people generally, such as motor vehicle laws. It is most likely to be true of laws applicable to particular occupations. One cannot say categorically, therefore, that ignorance of a law creating a merely statutory crime never affords a basic for moral condemnation. What can be said, in general terms, is that (1) the criminal law as a device for getting people to know about statutes and interpret them correctly is a device of dubious and largely unproved effectiveness; (2) the indiscriminate use of the device dilutes the force of the threat of community condemnation as a means of influencing conduct in other situations where the basis for moral condemnation is clear; (3) the loss to society from this dilution is always unnecessary, since the legislature has always the alternatives of either permitting a good faith belief in the legality of one's conduct to be pleaded and proved as a defense,[50] or of providing a civil rather than a criminal sanction for nonwilful violations.

e. Under what, if any, circumstances may a legislature properly direct the conviction as a criminal of one who knows about the applicable law but who has been negligent, although not reckless, in ascertaining the facts which make the law applicable to his conduct—where the kind of conduct involved is morally neutral, both from the point of view of the actor and in actuality?

In the usual situation of assertedly criminal negligence earlier discussed,[51] the harm caused or threatened by failure of advertence is one which it would be morally wrongful to cause advertently. The assertion of a duty of attention is, thus, strengthened by the gravity of the risks actually involved. In the situation now under discussion, the facts are morally neutral, even to one who knows about them, save for the existence of an applicable statute. Thus, the basis of blame, if any, is inattention to one's duty as a citizen to see that the law gets complied with in all the situations to which it is supposed to apply. For example, manufactured food becomes adulterated or misbranded within the meaning of a statute, but in a way which involves no danger to health.

Condemning a person for lack of ordinary care in ascertaining facts at least does not involve the offense to justice sometimes involved in the ignorance-of-interpretation-of-statute cases of condemning him for failure to do the impossible. But otherwise, most of the points just made about ignorance of regulatory law apply: (1) the basis of moral blame will usually be thin and may be virtually nonexistent; (2) the likelihood of substantial social gain in stimulating greater care is dubious; (3) the social cost is a weakening of the moral force and, hence, the effectiveness of the

[50] See paragraph (4) of the Model Penal Code provision in note 49 *supra*.
[51] See subheading B of this part *supra*.

threat of criminal conviction; and (4) the cost is unnecessary, since the legislature has always the alternative of a civil sanction.

D. Strict Liability

A large body of modern law goes far beyond an insistence upon a duty of ordinary care in ascertaining facts, at the peril of being called a criminal. To an absolute duty to know about the existence of a regulatory statute and interpret it correctly, it adds an absolute duty to know about the facts. Thus, the porter who innocently carries the bag of a hotel guest not knowing that it contains a bottle of whisky is punished as a criminal for having transported intoxicating liquor.[52] The corporation president who signs a registration statement for a proposed securities issue not knowing that his accountants have made a mistake is guilty of the crime of making a "false" representation to the state blue-sky commissioner.[53] The president of a corporation whose employee introduces into interstate commerce a shipment of technically but harmlessly adulterated food is branded as a criminal solely because he was the president when the shipment was made.[54] And so on, *ad* almost *infinitum*.

In all such cases, it is possible, of course, that a basis of blameworthiness might have been found in the particular facts. Perhaps the company presidents actually *were* culpably careless in their supervision. Conceivably, even, the porter was culpably remiss in failing to ask the traveler about the contents of his bag, or at least in failing to shake it to see if he could hear a gurgle. But these possibilities are irrelevant. For the statutes in question, as interpreted, do not require any such defaults to be proved against a defendant, nor even permit him to show the absence of such a default in defense. The offenses fall within "the numerous class in which diligence, actual knowledge and bad motives are immaterial. . . ."[55] Thus, they squarely pose the question whether there can be any justification for condemning and punishing a human being as a criminal when he has done nothing which is blameworthy.

It is submitted that there can be no moral justification for this, and that there is not, indeed, even a rational, amoral justification.

1. People who do not know and cannot find out that they are supposed to comply with an applicable command are, by hypothesis, nondeterrable. So far as personal amenability to legal control is concerned, they stand in the same posture as the plainest lunatic under the *M'Naghten* test who "does not know the nature and quality of his act or, if he does know it, does not know that the act is wrong."

2. 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

[52] *Cf.* Commonwealth v. Mixer, 207 Mass. 141, 93 N.E. 249 (1910).
[53] State v. Dobry, 217 Iowa 858, 250 N.W. 702 (1933).
[54] United States v. Dotterweich, 320 U.S. 277 (1943).
[55] See City of Hays v. Schueler, 107 Kan. 635, 193 Pac. 311 (1920).

warrant for the conviction of a tenth. In the tradition of Anglo-American law, guilt of crime is personal. The main body of the criminal law, from the Constitution on down, makes sense on no other assumption.

3. If it be asserted that strict criminal liability is necessary in order to stimulate people to be diligent in learning the law and finding out when it applies, the answer, among others, is that this is wholly unproved and prima facie improbable. Studies to test the relative effectiveness of strict criminal liability and well-designed civil penalties are lacking and badly needed. Until such studies are forthcoming, however, judgment can only take into account (a) the inherent unlikelihood that people's behavior will be significantly affected by commands that are not brought definitely to their attention; (b) the long-understood tendency of disproportionate penalties to promote disrespect rather than respect for law, unless they are rigorously and uniformly enforced; (c) the inherent difficulties of rigorous and uniform enforcement of strict criminal liability and the impressive evidence that it is, in fact, spottily and unevenly enforced;[56] (d) the greater possibilities or flexible and imaginative adaptation of civil penalties to fit particular regulatory problems, the greater reasonableness of such penalties, and their more ready enforceability; and (e) most important of all, the shocking damage that is done to social morale by open and official admission that crime can be respectable and criminality a matter of ill chance, rather than blameworthy choice.[57]

4. If it be urged that strict criminal liability is necessary in order to simplify the investigation and prosecution of violations of statutes designed to control mass conduct, the answer, among others, is that (a) maximizing compliance with law, rather than successful prosecution of violators, is the primary aim of any regulatory statute; (b) the convenience of investigators and prosecutors is not, in any event, the prime consideration in determining what conduct is criminal; (c) a prosecutor, as a matter of common knowledge, always assumes a heavier burden in trying to secure a crim-

[56] There are more strict liability and other criminal statutes on the books than investigators and prosecutors, with their existing staffs, can hope to enforce. See part four *infra*. Nor is there any pretense that most of them are seriously enforced. Even with statutes which a genuine effort is made to enforce, only a relatively few cases of violation are selected for prosecution, and these are commonly chosen in accordance with standards quite different from the strict liability standards laid down by the legislature or judicially attributed to it. See, *e.g.*, Schwartz, *Federal Criminal Jurisdiction and Prosecutors' Discretion*, 13 LAW & CONTEMP. PROB. 64, 83-84 (1948); Developments in the Law, *The Federal Food, Drug, and Cosmetic Act*, 67 HARV. L. REV. 632, 694-97 (1954).

[57] Think, for example, about the implications of the language of an English court in rejecting as preposterous the suggestion that the defense of ignorance and good faith should be allowed in a prosecution for criminal conspiracy: "We demur to the notion that there is anything particularly wicked attached to the word 'conspiracy.' No doubt in common speech 'conspiracy' has a melodramatic and sinister implication, but it has been pointed out that it carries no such implications in law. . . . It does not matter how prosaic the unlawful act may be or how ignorant the conspirators may be of the fact that the act is prohibited by the statutory provision." Rex v. Clayton (Ct. Cr. App. 1943, unreported), reported in footnote to Rex v. Percy Dalton, 33 Cr. App. Rep. 102, 119 (1949). "There, there," says the court to the once sturdy-minded yeomen of old England, "no matter what your mothers and fathers may have told you, there is really nothing particularly wrong about being a criminal." The same overtones, though usually less baldly expressed, run through countless American opinions. See, *e.g.*, Mr. Justice Frankfurter, in United States v. Dotterweich, 320 U.S. 277, 280-81 (1943); and in Lambert v. California, 355 U.S. 225, 230-31 (1957).

inal conviction than a civil judgment; (d) in most situations of attempted control of mass conduct, the technique of a first warning, followed by criminal prosecution only of knowing violators, has not only obvious, but proved superiority; and (e) the common-sense advantages of using the criminal sanction only against deliberate violators is confirmed by the policies which prosecutors themselves tend always to follow when they are free to make their own selection of cases to prosecute.[58]

5. Moral, rather than crassly utilitarian, considerations re-enter the picture when the claim is made, as it sometimes is, that strict liability operates, in fact, only against people who are really blameworthy, because prosecutors only pick out the really guilty ones for criminal prosecution.[59] This argument reasserts the traditional position that a criminal conviction imports moral condemnation. To this, it adds the arrogant assertion that it is proper to visit the moral condemnation of the community upon one of its members on the basis solely of the private judgment of his prosecutors. Such a circumvention of the safeguards with which the law surrounds other determinations of criminality seems not only irrational, but immoral as well.

6. But moral considerations in a still larger dimension are the ultimately controlling ones. In its conventional and traditional applications, a criminal conviction carries with it an ineradicable connotation of moral condemnation and personal guilt. Society makes an essentially parasitic, and hence illegitimate, use of this instrument when it uses it as a means of deterrence (or compulsion) of conduct which is morally neutral. This would be true even if a statute were to be enacted proclaiming that no criminal conviction hereafter should ever be understood as casting any reflection on anybody. For statutes cannot change the meaning of words and make people stop thinking what they do think when they hear the words spoken. But it is doubly true—it is ten-fold, a hundred-fold, a thousand-fold true—when society continues to insist that some crimes *are* morally blameworthy and then tries to use the same epithet to describe conduct which is not.

7. To be sure, the traditional law recognizes gradations in the gravity of offenses, and so does the Constitution of the United States. But strict liability offenses have not been limited to the interpretively-developed constitutional category of "petty offenses," for which trial by jury is not required.[60] They include even some

[58] See note 56 *supra*.

[59] See, *e.g.*, the unconscionable proposal sanctioned by a commission of the American Bar Association, the leading association of lawyers in the United States, that in a Model Anti-Gambling Act, all forms of gambling, even purely social gambling, should be declared to be criminal, even while recognizing "that it is unrealistic to promulgate a law literally aimed at making a criminal offense of the friendly election bet, the private, social card game among friends, etc." The commission's reason for being thus "unrealistic" was that "it is imperative to confront the professional gambler with a statutory façade that is wholly devoid of loopholes." Its report indicated that pressure from prosecutors accounted for the proposal and that it was relying on prosecutors' discretion to avoid abuses. Approval of the proposition was mitigated by the fact that the commission, evidently uneasy about what it was doing, also reported an "optional" provision giving the social gambler a limited statutory protection. But the report gave no hint of awareness that basic issues of public morality were involved. 2 ABA COMM'N ON ORGANIZED CRIME, ORGANIZED CRIME AND LAW ENFORCEMENT 74-78 (1953).

[60] See Frankfurter and Corcoran, *Petty Federal Offenses and the Constitutional Guarantee of Trial by Jury*, 39 HARV. L. REV. 917 (1926); Callan v. Wilson, 127 U.S. 540 (1888); Schick v. United States,

crimes which the Constitution expressly recognizes as "infamous."[61] Thus, the excuse of the Scotch servant girl for her illegitimate baby, that "It was only such a leetle one," is not open to modern legislatures. And since a crime remains a crime, just as a baby is unalterably a baby, it would not be a good excuse if it were. Especially is this so since the legislature could avoid the taint of illegitimacy, much more surely than the servant girl, by simply saying that the "crime" is not a crime, but only a civil violation.[62]

E. The Problem of Providing for Treatment

In determining that described conduct shall constitute a crime, a legislature makes necessarily the first and the major decision about the appropriate sanction for a violation of its direction. For it decides then that community condemnation shall be visited upon adjudged violators. But there remain hosts of questions about the degree of the condemnation and the nature of the authorized punishment, or treatment-in-consequence-of-violation.

Entangled with the problems of the appropriate aims to be pursued which are involved in these questions are problems of the appropriate assignment of powers to

195 U.S. 65 (1904); District of Columbia v. Clawans, 300 U.S. 617 (1937). By the standards laid down in these cases, it will be seen, hosts of strict liability offenses are plainly not "petty."

[61] See *Ex parte* Wilson, 114 U.S. 417 (1885); *In re* Claasen, 140 U.S. 200 (1891); United States v. Moreland, 258 U.S. 433 (1922); Oppenheimer, *Infamous Crimes and the Moreland Case*, 36 HARV. L. REV. 299 (1923). By the standards of these cases, it will be seen, many a conviction for a strict liability offense carries infamy.

[62] The Model Penal Code, as tentatively drafted, recognizes, in large part, the moral indefensibility of strict liability and the lack of any real public necessity for it. See MODEL PENAL CODE § 2.05 (Tent. Draft No. 4, 1955). The draftsman's "comment" on this section, *id.* at 140, explains it as follows:

"1. This section makes a frontal attack on absolute or strict liability in penal law, whenever the offense carries a possibility of sentence of imprisonment. The method used is not to abrogate such liability but to provide that when conviction rests upon that basis the grade of the offense is reduced to a violation, which is not a "crime" and under Sections 1.04(5) and 6.02 may result in no other sentence than a fine or fine and forfeiture or other civil penalty. If, on the other hand, the culpable commission of the offense has been established, the reduction in grade does not occur. Negligence is, however, treated as sufficient culpability in cases of this kind.

"This position is affirmed not only with respect to offenses defined by the Penal Code; it is superimposed on the entire corpus of the law, so far as penal sanctions are involved. Since most strict liability offenses are involved in special, regulatory legislation, this superimposition is essential if the problem is to be attacked. We have no doubt that the attempt is one that should be made. The liabilities involved are indefensible in principle, unless reduced to terms that insulate conviction from the type of moral condemnation that is and ought to be implicit when a sentence of imprisonment may be imposed. In the absence of minimal culpability, the law has neither a deterrent nor corrective nor an incapacitative function to perform.

"It has been argued, and the argument undoubtedly will be repeated, that absolute liability is necessary for enforcement in a number of the areas where it obtains. But if practical enforcement cannot undertake to litigate the culpability of alleged deviation from legal requirements, we do not see how the enforcers rightly can demand the use of penal sanctions for the purpose. Crime does and should mean condemnation and no court should have to pass that judgment unless it can declare that the defendant's act was wrong. This is too fundamental to be compromised. The law goes far enough if it permits the imposition of a monetary penalty in cases where strict liability has been imposed."

The only shortcoming of the draft is that strict liability so far as concerns ignorance or mistake with respect to the existence or meaning of the applicable law is retained, subject only to the narrowly limited exceptions set forth in note 49 *supra*. In view of the magnitude of the reform actually urged by the Code, however, the decision to restrict the proposal reflects an understandable counsel of prudence.

make decisions in carrying out the aims. To what extent should the legislature undertake to give binding directions about treatment which will foreclose the exercise of any later discretion? To what extent should it depend, instead, upon the judgment and discretion either of the sentencing court or of the correctional authorities who will become responsible for defendants after they are sentenced?

It is axiomatic that each agency of decision ought to make those decisions which its position in the institutional structure best fits it to make. But this, as will be seen, depends in part upon the criteria which are to guide decision.

1. The traditional criminal law recognizes different grades of offenses, such as felony and misdemeanor, and modern statutes recognize different degrees within the grades. If the criminal law were concerned centrally with reforming criminals, this would scarcely be appropriate: a confirmed petty thief may have much greater need of reformation than a once-in-a-lifetime manslaughterer. If the thesis of this paper is accepted, however, it follows that grading is not only proper, but essential; that the legislature is the appropriate institution to do the grading; that the grading should be done with primary regard for the relative blameworthiness of offenses (a factor which, of course, will take into account the relative extent of the harm characteristically done or threatened to individuals and, thus, to the social order by each type of offense); and that the grading should be determinative of the relative severity of the treatment authorized for each offense.

2. Given such a ranking of offenses, the question remains: how far up or down the scale of possible severity or lenity of treatment should the whole array be moved? Are comparatively severe punishments to be favored or comparatively lenient ones? Here is a question of public policy which is pre-eminently for the legislature. On this question, its cardinal aims should be its cardinal guide. Punishments should be severe enough to impress not only upon the defendant's mind, but upon the public mind, the gravity of society's condemnation of irresponsible behavior. But the ultimate aim of condemning irresponsibility is training for responsibility. The treatment of criminals, therefore, should encourage, rather than foreclose, the development of their sense of responsibility. Allowance for the possibility of reformation, or formation, of character in the generality of cases becomes at this point, in other words, an overriding consideration. This consideration will point inexorably in the direction of eliminating capital punishment and minimizing both the occasions and the length of incarceration.

3. Should the legislature prescribe a single definite and unvarying form of treatment for each type of offense? The almost universal judgment of modern legal systems is that, ordinarily at least, it should not.[63] Two types of considerations seem to underlie this judgment. The first is the need of making the treatment fit the

[63] Notable exceptions, of course, are the mandatory death sentence and the mandatory life term for recidivists, both of which, however, have fallen into widespread disrepute and, one may hope, are on the way to complete abandonment.

crime. Statutory definitions of offenses are, of necessity, highly general categories covering a host of variant circumstances which are relevant to the blameworthiness of particular crimes. All the circumstances which are relevant in a particular case cannot be known until the case has been tried. The second type of consideration is the need of making the treatment fit the criminal, so as to take into account not only the kind of thing he did, but the kind of person he is. Only in this way can room be allowed for the effective play, on the basis of individualized judgment, of the criminal law's subordinate aims of reforming offenders or of disabling them where a special period of disablement seems to be needed. Both types of considerations indicate that discretion should be left to trial courts or correctional authorities, with respect both to the type of treatment—fine, imprisonment, probation, or the like—and to its extent or duration.

4. Should the legislature fix the maximum punishment, or the maximum severity of the treatment authorized, for particular types of crimes? Basic considerations of liberty as well as the logic of the aims of the criminal law dictate that it should. Men should not be put to death or imprisoned for a crime unless the legislature has sanctioned the penalty of death or imprisonment for that crime. Even with respect to penalties of an authorized type, the maximum of the permitted fine or term of imprisonment should be fixed by law. Only in this way can the integrity of the legislature's scheme of gradation of offenses and of the underlying principle that penalties should correspond in some fashion to the degree of blameworthiness of defendants' conduct be maintained. Only in this way can room be allowed for the beneficent operation of theories of reformation, while shutting the door to their tendencies toward cruelty.[64]

5. Should the legislature prescribe the *minimum* punishment, or the minimum severity of the treatment to be meted out, for particular types of crimes? The problem here is to make sure that society does not depreciate the gravity of its own judgments of condemnation through the imposition by sentencing judges of disproportionately trivial penalties. Yet, the virtues of individualization have their claims, too. Perhaps a suspended prison sentence, with probation, may be the best form of treatment even for a convicted murderer, as it certainly may be for a convicted manslaughterer. A society which entrusts its juries with power to bring in a verdict of acquittal in cases of undoubted guilt ought to be able to trust its judges to exercise the lesser discretion of leniency in sentencing.

6. In cases in which convicted persons are to be sentenced to a term of imprisonment, how should power be divided between the sentencing judge (or jury) and prison and parole authorities in determining the actual duration of the incarceration? This question can best be left to be considered when the problems of the criminal law are examined from the point of view of those agencies.

[64] See note 19 *supra*.

IV

THE PERSPECTIVE OF POLICE AND PROSECUTING ATTORNEYS

To shift from the perspective of the legislature to that of police and prosecuting attorneys is to shift from the point of view of formulation of general directions to that of their application. These law enforcement officers, moreover, have power only to determine how their own functions shall be carried out. Unlike the antecedent determinations of the legislature and the subsequent determinations of courts, their decisions carry no authority as general directions to others for the future. They have a lesser role to play, accordingly, in the conscious shaping of the aims of the criminal law.

Nevertheless, what enforcement officials do is obviously of crucial importance in determining how the criminal law actually works. Their problems and the policies they pursue in trying to solve them need to be studied for the purpose not only of learning how better to control their activities—familiar enough questions—but for the purpose also of a better understanding, which legislatures sadly need, of what responsibilities ought to be given them and of the consequences of unwise imposition of responsibility.

This is not the place to pursue these questions in detail. A few suggestions only will be ventured.

1. The breadth of discretion we entrust to the police and prosecuting attorneys in dealing with individuals is far greater than that entrusted to any other kinds of officials and less subject to effective control. This discretion presents obvious difficulties in securing the lawful and equal administration of law. It presents also less obvious, or less noticed, difficulties of transferring from the legislature to enforcement officials the *de facto* power of determining what the criminal law in action shall be.

2. To the extent that the activities of enforcement officials are confined to securing compliance with what have been described as the basic obligations of responsible citizenship, their discretion will tend to be reduced to the minimum which the necessities of the administration of law admit. If social morale is good, there will be community demand for enforcement of these obligations and community support of it, and it will be feasible to provide an enforcement staff reasonably adequate to its task. Under these circumstances, reliance upon enforcement only on private complaint or newspaper insistence will be minimized. The exercise of discretion by police and prosecutors will consist largely of making specifically professional, and inescapable, judgments concerning the sufficiency of the evidence to warrant further investigation or formal accusation, what charges to make, what pleas to accept, what penalties to ask for, and the like.

3. The stupidity and injustice of the thoughtless multiplication of minor crimes receives its most impressive demonstration in police stations and prosecutors' offices. Invariably, staffs are inadequate for enforcement of all the criminal statutes which

the legislature in its unwisdom chooses to enact. Accordingly, many of the statutes go largely unenforced. To this extent, their enactment is rendered futile. But it proves also to be worse than futile. For statutes usually do not become a complete dead letter. What happens is that they are enforced sporadically, either as a matter of deliberate policy to proceed only on private complaint, or as a matter of the accident of what comes to official attention or is forced upon it. Sporadic enforcement is an instrument of tyranny when enforcement officers are dishonest. It has an inescapable residuum of injustice in the hands even of the best-intentioned officers. A selection for prosecution among equally guilty violators entails not only inequality, but the exercise, necessarily, of an unguided and, hence, unprincipled discretion.

4. While the evils just described are common in the enforcement of most minor crimes, they are at their most acute in the sphere of regulation of conduct which is not intrinsically wrongful, and there a special phenomenon is likely to develop. Even though he ought not to seek the power in advance,[65] a conscientious prosecutor, faced with the fact of more violators than he can prosecute, is likely to single out for prosecution those whom he regards as morally blameworthy, in default of any better basis of selection.[66] Thus, he will negate the legislative judgment that all violators should be prosecuted, regardless of moral blame. But at the same time, he will create a *de facto* crime, the main element of which is withdrawn from proof or disproof by due process of law.

5. In the area of traditional crimes, enforcement officials have an opportunity to put the dominant aim of the criminal law to inculcate understanding of the obligations of responsible citizenship, and to secure compliance with them, into a meaningful relationship with its subsidiary aim of rehabilitating people who have proved themselves to be irresponsible. In the area of regulatory crimes, this is possible only if "wilfulness," as earlier defined,[67] is an ingredient of criminality. The whole concept of curative-rehabilitative treatment has otherwise no relevance in this area.

V

THE PERSPECTIVE OF COURTS IN THE ASCERTAINMENT OF GUILT

Courts look both backward and forward in the application of law. They look backward to the relevant general directions of the Constitution and the statutes, as interpreted and applied in prior judicial decisions. They look backward to the historical facts of the litigation. But when the facts raise issues with respect to which the existing general directions are indeterminate, they are bound to look forward to the ends which the law seeks to serve and to resolve the issues as best they can in a way which will serve them. This, of course, is the strength of the judicial process—that it permits principles to be worked pure and the details of implementing rules

[65] See note 59 *supra* and accompanying text.
[66] See note 56 *supra*.
[67] See note 41 *supra* and accompanying text.

and standards to be developed in the light of intensive examination of the interaction of the general with the particular. But it is a strength existing sometimes in the potentiality rather than in the realization. Notably has this been true in this country in the development of the substantive law of crimes.

The inherited criminal law was rich with principles and with potentialities for their reasoned and intelligible development. But the multiplication of statutory crimes and the inadequacy of judicial techniques of interpreting statutes, coupled with unimaginative and unintelligent use even of familiar common-law techniques, have shaken much of the law loose from these moorings.

It is possible to see the beginnings of this development in some unfortunate decisions in the area of customary crimes touching sensitive matters of sex and family law.

A well-known example is that of statutory rape and kindred offenses against immature girls. Here, the courts came widely to hold that when the legislature had specified a fixed age of consent, the man's belief in the girl's age, and even his utmost good faith and reasonableness in holding the belief, were irrelevant.[68] They pictured the legislature, in other words, as saying to mankind: "If you choose to have intercourse with a willing female who may be over or under the age of consent, you will be playing a game with the law as well as with her. If she is of age, you win the law's game. If she is under age, you lose it and will be condemned as a felon, regardless of what she may have told you and regardless of the good reasons you may have had for believing her." When account is taken of the long tradition that ignorance of the fact excuses, it is evident that this interpretation was not a necessary one, if, indeed, it was even plausible. But it seems to have had important influence in encouraging the modern trend toward strict liability.

Similarly, in prosecutions for bigamy, and particularly when the bigamy statute was coupled with a presumption of the death of a missing spouse after a fixed period of unexplained absence, the courts tended to hold that a man or woman who remarried within the statutory period did so at the peril of criminal conviction if the spouse were actually alive.[69] In effect, such courts said: "Good faith and reasonable inquiry have nothing to do with this. We read the legislature's presumption as not merely avoiding the necessity of specific proof of good faith when the presumption is applicable, but as barring such proof when it is inapplicable. We attribute to the legislature a purpose to discourage the remarriage of abandoned spouses as socially impolitic, by requiring those who attempt it to take a gambler's chance of becoming a criminal." Once again, obviously, the interpretation was not a necessary one. And once again, currency was given to the notion that people can commit crimes without really doing anything wrong at all.

Closely and vitally related to the failure of American courts to develop adequate

[68] The bellwether case is Regina v. Prince, L.R. 2 Cr. Cas. Res. 154 (1875).

[69] On this issue, Massachusetts led the way in Commonwealth v. Mash, 48 Mass. (7 Metc.) 472 (1844). A majority of the English judges, recoiling from Regina v. Prince, *supra* note 68, went the other way. Regina v. Tolson, 23 Q.B.D. 168 (1889).

principles of criminal liability and an adequate theory of the aims of the criminal law as guides in the interpretation of statutes has been their failure to come to grips with the underlying constitutional issues involved. This failure is the more surprising because of the obvious concern of the Constitution to safeguard the use of the method of the criminal law—especially, but not exclusively, on the procedural side—and the concern of the courts themselves, particularly in recent times, to give vitality to the procedural guarantees. What sense does it make to insist upon procedural safeguards in criminal prosecutions if anything whatever can be made a crime in the first place? What sense does it make to prohibit ex post facto laws (to take the one explicit guarantee of the Federal Constitution on the substantive side) if a man can, in any event, be convicted of an infamous crime for inadvertent violation of a prior law of the existence of which he had no reason to know and which he had no reason to believe he was violating, even if he had known of its existence?

Despite the unmistakable indications that the Constitution means something definite and something serious when it speaks of "crime," the Supreme Court of the United States has hardly got to first base in working out what that something is. From beginning to end, there is scarcely a single opinion by any member of the Court which confronts the question in a fashion which deserves intellectual respect.[70]

[70] A possible exception is Mr. Justice Jackson's spread-eagle dissertation in Morissette v. United States, 342 U.S. 246 (1952), involving the question whether a defendant charged with having "knowingly converted" government property consisting of rusty bomb casings dumped on a remote Air Force practice bombing range (which the defendant had openly appropriated and sold for junk) should have been allowed the defense that he believed in good faith that the casings had been abandoned. However, the opinion, which held the defense available, seems open to the objections indicated in the following imaginary concurring opinion, which is here reproduced to illustrate the main theme of the text of the importance of interpretative presumptions.

"Mr. Justice TENTHJUDGE, concurring in result.

"While I have an emotional sympathy with most of what is said in my brother Jackson's engaging opinion in this case, I should not wish to be understood as expressing judicial agreement with any part of it, except the very limited part which is necessary for decision of the narrow issue before us.

"We ought to refrain from writing discursive essays on the law, if only to spare law students the burden of reading them and law professors the pain of deciding whether to reproduce them in their casebooks. But there is a still more compelling reason for restraint. We cannot possibly apply our minds to all the considerations which are relevant to all the propositions which the Court's opinion advances. We cannot possibly be sure, therefore, that each proposition will stand up when it is tested in the crucible of a litigation squarely involving it. Thus, to the peccadillo of announcing too much law in this case, we add the cardinal sin of announcing law of dubious reliability.

"We have to deal here with a typical modern statute consolidating—with typical looseness of draftsmanship—the various forms of theft, so far as these crimes are of concern to the United States as a governmental entity. With respect to all these forms of theft—not only those which are of judicial origin, like trespassory larceny and larceny by trick, but those which have their origin in statutes, like obtaining property by false pretences and embezzlement—a 'claim of right' has traditionally been a defense. Morissette's claim falls comfortably within the types of claims which have traditionally been recognized as affording this defense. *E.g.*, People v. Shaunding, 268 Mich. 218, 255 N.W. 770 (1934); People v. Lapique, 120 Cal. 25, 52 Pac. 40 (1898); *cf.* Commonwealth v. Althause, 207 Mass. 32, 51, 93 N.E. 202 (1910). See generally ROLLIN M. PERKINS, CRIMINAL LAW 223 (1957).

"Hence the simple question before us is whether the vague and general language of the 'knowingly converts' clause of 62 STAT. 725 (1948), 18 U.S.C. § 641 (1952) should be read as incorporating this established element of the crime of theft or as eliminating it.

"There are a plethora of good reasons for the narrower reading.

The Court began with a few dicta suggesting that a crime is anything which the legislature chooses to say it is.[71] These were followed by a pair of narcotics cases,

"Statutes, generally, should be read in the light of the common law, save where they make plain a purpose to depart from it.

"This is doubly true of statutes defining crimes, which ancient learning tells us should be strictly construed, if a strict construction is sensible. McBoyle v. United States, 283 U.S. 25 (1931); United States v. Wiltberger, 18 U.S. (5 Wheat.) 76, 95-96 (1820).

"It is trebly true of statutes defining federal crimes, which are not readily to be given an expansive interpretation overlapping the criminal prohibitions of the states.

"It is quadruply true of a section which the statutory revisers tell us simply 'consolidates' previous provisions of the code, which provisions, as we know, had never been held to dispense with the common law defense.

"It is quintuply true when the section in question is contained in a recodification which, as the Court's opinion tells us (note 28), was generally 'not intended to create new crimes, but to recodify those then in existence.'

"It is sextuply true when the recodification in question—why not come right out and say it?—is one for which the spadework was done by the hired hands of three commercial law-book publishers, on delegation from a congressional committee desirous of escaping the responsibility of hiring and supervising its own staff.

"In these circumstances, the case against finding a major change of public policy in the interstices of this slovenly enactment is overwhelming.

"If the Court's opinion had chosen merely to add as a seventh reason that it is a general principle of our law that criminal condemnation imports moral blameworthiness and that the legislature ought not lightly to be taken as wishing to weaken this principle, I should have had no objection; indeed, I should have applauded.

"But I see no occasion for examination and labored distinction of the notorious instances in which Congress and this Court have sanctioned blatant defiance of this principle. In particular, whether United States v. Balint, 258 U.S. 250 (1922), United States v. Behrman, 258 U.S. 280 (1922), and United States v. Dotterweich, 320 U.S. 277 (1943), were soundly decided on their facts, and what, if any, the ramifications of their reasoning may be are questions which, I think, we ought to leave to the riper wisdom of another day.

"As an example of the need for such wisdom, it may not be inappropriate to call attention to the paradox in which my brother Jackson's ratiocinations have involved him.

"In relation to offenses of a traditional type, the Court's opinion seems to be saying, we must be much slower to dispense with a basis for genuine blameworthiness in criminal intent than in relation to modern regulatory offenses. But it is precisely in the area of traditional crimes that the nature of the act itself commonly gives some warning that there may be a problem about its propriety and so affords, without more, at least some slight basis of condemnation for doing it. Thus, Morissette knew perfectly well that he was taking property which, at least up to the moment of caption, did not belong to him.

"In the area of regulatory crimes, on the other hand, the moral quality of the act is often neutral; and on occasion, the offense may consist not of any act at all, but simply of an intrinsically innocent omission, so that there is no basis for moral condemnation whatever. Thus, in *Dotterweich,* the Court upheld a conviction of the president and general manager of a corporation doing a reputable business merely because the corporation had happened to ship an adulterated and misbranded drug in interstate commerce and Dotterweich happened to be its responsible executive.

"I think the Court is right in holding that Morissette should have been allowed to go to the jury on the question of his consciousness of wrongdoing. But it will take something more than the lucubrations of the present opinion to convince me that Morissette had a better title to do so than Dotterweich."

[71] The earliest discussion seems to be the elaborate and much cited dictum in Shevlin-Carpenter Co. v. Minnesota, 218 U.S. 57, 67-69 (1910). The case was a *civil* action for damages against a lumber company for trespass in cutting timber on state land after a permit to do so had expired. The state court had entered judgment for double damages against the company on the ground that the trespass was "wilful." Among the grounds of the company's appeal was the claim that the statute also made a "casual and involuntary trespasser" liable to the state in double damages, and that it included also a severe criminal penalty, " 'and that declaring his act a felony violates the Fourteenth Amendment,' because those provisions 'eliminate altogether the question of intent,' and that the 'elimination of intent as an element of an offense is contrary to the requirements of due process of law.' " The Court's opinion made the obvious rejoinders that the company was in no position to advance this complaint, first, because

patently concerned with the evils of drugs rather than with the evil of disloyalty to a millennium of legal tradition.[72] Then came, only a few years ago, one of the most drastic of the Court's decisions, treating the whole matter as a *fait accompli*.[73] Not until the last term, in *Lambert v. California*,[74] did the Court discover that the due process clauses had anything to say about branding innocent people as criminals. But neither the majority nor the dissenting opinion in that case is persuasive of any need to qualify the second sentence in this paragraph.

The *Lambert* case involved a Los Angeles ordinance making it a criminal offense for any "convicted person," as defined, to be and remain in the city for more than five days without registering. The Court held that the application of

its action had been found to be "wilful" and, second, because in any event, the provisions for a criminal penalty were separable. But then, with impatience, and corresponding lack of hard thinking, it went on to say broadly that the argument with respect to the necessity of criminal intent was not any good anyway. It cited no authority whatever. Manifestly, the company had no claim of surprised innocence sufficiently plausible to draw the Court's real attention to the question.

Mr. Justice McKenna's *Shevlin-Carpenter* dictum was followed the next year by a dictum of Mr. Justice Holmes in United States v. Johnson, 221 U.S. 488, 497-98 (1911)—again, wholly nude of supporting authority. The case held that false claims of being a cure for cancer on the labels of plaintiff's patent medicine bottles did not make the bottles "misbranded" within the meaning of the Food and Drugs Act of 1906, because they constituted simply innocent puffing, rather than misstatements about the identity of the contents. For this shockingly narrow and distorting interpretation, the opinion gave the ironical reason that "the article may be misbranded without any conscious fraud at all," and that while "it was natural enough to throw this risk on shippers with regard to the identity of their wares," it was "a very different and unlikely step to make them answerable for mistaken praise." Morality and rationality alike, it is submitted, could hardly be more completely inverted.

[72] United States v. Balint, 258 U.S. 250 (1922); United States v. Behrman, 258 U.S. 280 (1922), both decided on the same black Monday. Both cases involved facts which, one may surmise, would have permitted conviction on orthodox principles. But Mr. Justice Holmes, dissenting in the *Behrman* case (although not in *Balint*), said that the indictment there had been framed "for the very purpose of raising the issue that divides the Court"; and the same thing seems to have been true of the *Balint* indictment. The *Balint* case held that a physician could be convicted of selling a certain opium derivative without the use of a required form, under a statute carrying a maximum penalty of five years imprisonment and a fine of $2,000, even though he had been without knowledge of the contents of the drug. The *Behrman* case made a similar holding with reference to the prescription of drugs.

Chief Justice Taft's *Balint* opinion said that the objection "that punishment of a person for an act in violation of law when ignorant of the facts making it so" had been "considered and overruled" in Shevlin-Carpenter Co. v. Minnesota, 218 U.S. 57 (1910), *supra* note 71, a manifestly cavalier use of dictum as controlling authority. For further authority, the opinion cited only some state court cases, some lower federal court cases, and two English cases. Mr. Justice Day's *Behrman* opinion cited only *Balint* and some lower federal court cases.

Chief Justice Taft said that the statute had the "manifest purpose" of requiring "every person dealing in drugs to ascertain, at his peril, whether that which he sells comes within the inhibition of the statute." It expressed its reasons for approving this in two sentences: "Congress weighed the possible injustice of subjecting an innocent seller to a penalty against the evil of exposing innocent purchasers to danger from the drug, and concluded that the latter was the result preferably to be avoided. Doubtless considerations as to the opportunity of the seller to find out the fact and the difficulty of proof of knowledge contributed to this conclusion." Exactly how the desired end of protecting innocent purchasers was served by convicting innocent sellers the opinion did not explain. Nor did it explore any of the other relevant considerations.

[73] United States v. Dotterweich, 320 U.S. 277 (1943). See the discussion of the case in note 70 *supra*. Mr. Justice Frankfurter's opinion disposes of the problem in a curt half paragraph, citing only the *Balint* case, *supra* note 72, and Holmes' dictum in United States v. Johnson, 221 U.S. 48 (1911), *supra* note 71. It pays no attention to the differences between the possibilities of protecting themselves which sellers of drugs have and those which corporation presidents have.

[74] 355 U.S. 225 (1957).

this ordinance to one who had no actual or "probable" knowledge of it violated the due process clause of the fourteenth amendment. Yet, four members of the Court dissented. They were led by so sensitive a judge as Mr. Justice Frankfurter, who, pointing to the large body of legislation which he believed to be put in question by the majority's reasoning, expressed his confidence "that the present decision will turn out to be an isolated deviation from the strong current of precedents—a derelict on the waters of the law."

The opinion of the Court by Mr. Justice Douglas pinned its holding upon the fact that the conduct condemned by the ordinance was "wholly passive" and "unlike the commission of acts, or the failure to act under circumstances that should alert the doer to the consequences of his deed." Yet, it made no effort to analyze the nature of crimes of omission, as distinguished from those of commission.[75] It spoke vaguely of "the requirement of notice" as "engrained in our concept of Due Process." But it cited only inapposite cases,[76] left the unexplained suggestion that notice making for "probable" personal knowledge would be enough, and wholly ignored the fact that the theretofore unqualified doctrine of Anglo-American law has been that notice by due promulgation and publication of a statute is all that is required.[77] On the issue of criminal intent, the opinion said that "we do not go with Blackstone in saying that 'a vicious will' is necessary to constitute a crime." More atrocious even than the rhetoric of this statement is its moral insensitivity and the intellectual inadequacy of the reasoning offered to support it. Why the views of Blackstone should be thus cavalierly overridden in interpreting a Constitution written by men who accepted his pronouncements as something approaching gospel was left unexplained. What the essential distinction is between those states of innocence which permit conviction of crime and those which do not was left to guesswork.

The dissenting opinion did not have the virtue even of the majority's muddy recognition that being a "criminal" must mean something. It contented itself with flat assertion that human beings may be convicted of crime under the Constitution of the United States even though they "may have had no awareness of what the law required or that what they did was wrongdoing." To this, one can say only, "Why? why? why?" The opinion gives only one answer, "So it has been decided. So it has been decided. So it has been decided." The replication has to be, "But this is wrong, wrong, wrong. And it will continue to be wrong so long as words have meaning and human beings have the capacity to recognize and the courage to resent bitter and unwarranted insult."[78]

[75] For the possibilities of such an analysis, see Hughes, *supra* note 44.

[76] The cases, as the Court said "involved only property interests in civil litigation."

[77] The analysis by Hughes, *supra* note 44, recognizes how crucial the question of the bearing of this doctrine is and comes to intellectual grips with it.

[78] It is true that the problem in *Lambert* was one of constitutionality under the fourteenth amendment and, so, of a kind which raises for Mr. Justice Frankfurter the ultimate problem of judicial self-restraint in the interpretation of the Constitution. That this is so, however, serves only to emphasize the casual way in which in United States v. Dotterweich, 320 U.S. 277 (1943), *supra* note 70, he disposed of an issue which was simply one of the just interpretation of a federal statute.

The importance of constitutional doctrine is not to be measured by the number of statutes formally invalidated pursuant to it or formally sustained against direct attack. Thinking in constitutional terms provides the points of reference which are necessary in building up a body of thought which is adequate to the task of statutory interpretation.[79] Correspondingly, the absence of such basic thinking is likely to result in a hiatus of thought when interpretive problems present themselves. Thus, the small handful of pre-*Lambert* decisions upholding the constitutionality of strict criminal liability helped to breed a multitude of other decisions blandly assuming, with no effort at ratiocination, that it was a matter of indifference whether ambiguous statutory language were to be read as importing a requirement of "criminal" intent or dispensing with it, and permitting slight evidence to tilt the scales in favor of dispensation. Correspondingly, what will be chiefly important to watch about the *Lambert* case will be the strength of the push it gives to interpretations insisting upon the necessity of a genuinely criminal intent. One may guess that the push would have been stronger if the majority opinion had been more muscularly written.

What are likely to be crucial in the development of any body of statutory law are the presumptions with which courts approach debatable issues of interpretation. For it is these presumptions which control decision when a legislature has failed to address itself to an issue and to express itself unmistakably about it. If the interpretive presumptions of the courts are founded on principles and policies rationally related to the ultimate purposes of the social order, then statutory law will tend to develop the coherence and intelligibility, and the susceptibility to being reasoned about, which a body of unwritten law tends always to have. Otherwise, it will tend to become a wasteland of arbitrary distinctions and meaningless detail.

Legislatures in our tradition have depended heavily upon the assistance of courts in giving statutory law this kind of in-built rationality. The articulation and use of interpretive presumptions by the courts is an essential means of providing this assistance. It involves no impairment of legislative prerogative, but, on the contrary, facilitates the legislature's work rather than hinders it. It serves to focus issues, to sharpen responsibilities, and to discourage buck-passing. It gives assurance that a legislature's departure from generally prevailing principles and policies will be a considered one. This, in turn, requires the courts to confront the resulting constitutional questions, if any, with recognition of the deliberateness of the legislature's determination and of the need for taking full account of the reasons for the determination before overturning it.

The need of some improvement in the shoddy and little-minded thinking of American legislatures about the problems of the criminal law is great. But adequate improvement cannot come from that source alone. Only if the courts acknowledge their obligation to collaborate with the legislature in discerning and expressing the

[79] See Book Review, 67 HARV. L. REV. 1456, 1485-86 (1954). See also the opinion in note 70 *supra*.

unifying principles and aims of the criminal law is it likely that a coherent and worthy body of penal law will ever be developed in this country. For the most part, American courts have, thus far, failed not only in the fulfillment, but even in the recognition of this obligation.

VI

THE PERSPECTIVE OF COURTS IN MAKING DECISIONS ABOUT TREATMENT

When an offender has been found guilty, the court's responsibility for the generalized statement of substantive legal doctrine is at an end. What ordinarily remains is only an individualized determination with respect to this particular defendant. This focus upon the defendant as an individual provides opportunities to be exploited. But it also points up tendencies to be resisted. For the defendant is a character in a much larger drama, and questions about his needs must not be allowed to push out of view questions about the effect of his treatment on other persons and on the well-being of society generally.

A. The Judgment of Conviction

If criminality is to be equated with antisocial conduct warranting the moral condemnation of society, then plainly the first and foremost function of the trial judge in every case, when a finding of guilt has been made, is to express to the defendant with all possible solemnity a judgment of condemnation of his conduct in society's behalf.

The trial judge, of course, can do this under existing law, as many do, when the defendant's offense is one which the community recognizes as blameworthy. But here we meet another of the hidden costs of the sacrifice of principle. For a conscientious judge who is called upon constantly to convict and to sentence defendants who have been guilty of bad luck more than anything else is forced to differentiate. Since he cannot, in honesty, tell such a defendant that his conduct is morally blameworthy, he is forced to draw a line among criminal defendants. This is not like drawing a line between genuinely criminal offenses of varying degrees of gravity. For this differentiation puts in question the very integrity and meaning of the concept of crime. The result may be that even the judge himself stops believing in the equation between criminality and blameworthiness.

A distinguished federal district judge said recently in private conversation that in entering judgments of conviction and passing sentence, he was careful always to refrain from expressing any view about the defendant's character or the morality of his conduct. One can respect the spirit of personal humility that lies behind this restraint. One can discern the main outlines of the supporting rationalization which the positivistic strain in American legal thought provides. One can understand why it is particularly easy for a federal judge, dealing with a considerably larger proportion of regulatory crimes than most state judges, to take such a view. Yet, it has still to be said that the practice described epitomizes the moral and intellectual

debility of American criminal law. An able and sensitive judge does not consider that there is any difference between a criminal conviction and a civil judgment which it is worth while to try to communicate to the defendant. If this is so, what attention can ordinary people be expected to pay to the threat of a criminal as distinguished from a civil sanction?

The result, considered simply from the point of view of efficient social engineering, is a grievous waste. For all except the most hardened criminals, a judgment of community condemnation, solemnly and impersonally expressed, can be made a shaking and unforgettable experience. If legislatures had kept clean the concept of crime and sentencing judges were then enabled to tell a convicted criminal, in good conscience, that his conduct had been wrongful and deserved the condemnation of his fellow men, the very pronouncement of such a judgment would go far to serve the purposes of the criminal law by vindicating its threats and so to lessen the need for resort to other commonly less effective and invariably more expensive and oppressive forms of treatment.

B. The Sentence: Herein Also of the Perspective of Prison and Parole Authorities

A judgment of conviction having been entered, the trial judge must next face the harsh realities of imposition of sentence.

If what has been said is correct, the judge, in doing this, should be guided by two main, and interrelated, objectives. First, is the overriding necessity of a sentence which, taken together with the judgment of conviction itself, adequately expresses the community's view of the gravity of the defendant's misconduct. Second, is the necessity of a sentence which will be as favorable as possible, consistently with the first objective, to the defendant's rehabilitation as a responsible and functioning member of his community. The first objective stresses the interests of the community; but it does not ignore the interests of the defendant as an individual, since his rehabilitation requires his recognition of communty interests and of the obligations of community life. The second stresses the interests of the defendant as an individual; but it does not ignore those of the community, since the community is interested in the defendant's realization of his potentialities as a human being and in the contributions he can make to community life.[80]

The community's condemnation of the defendant's conduct can be expressed in four main ways: *first,* by the legislature's prior grading and characterization, in general terms, of the offense of which he has been found guilty; *second,* by the trial judge's formal expression of condemnation of the particular conduct, taking into

[80] The protection of society by disabling offenders who are likely to offend again is conventionally said to be one of the functions of the criminal law, and the statement in the text may be thought to be mistaken in ignoring this purpose. It is suggested, however, that there is serious danger in admitting so speculative a factor as a criterion in the exercise of general sentencing discretion. The existence of a special need for disablement of particularly dangerous individuals seems better taken into account either (1) by parole authorities, in the light of prison experience, in deciding whether to release a prisoner before his maximum term has expired; or (2) through statutory provisions for extended terms laying down carefully-stated criteria to be applied by the judge on the basis of special findings of fact. See MODEL PENAL CODE § 7.03 and accompanying comment (Tent. Draft No. 2, 1955).

account all the special circumstances of it; *third,* by a determination that the defendant shall be vulnerable to unpleasant consequences *in the future* if his behavior thereafter fails to conform to prescribed conditions; and, *fourth,* by a determination that the defendant shall *presently* and forthwith undergo unpleasant consequences, such as fine or imprisonment. Under modern statutes, the judge's exercise of discretion in sentencing will consist largely of choices about the use to be made of the third and fourth forms of condemnation.[81] This paper will not attempt a detailed analysis of the judge's problems in making these choices, but a few broad suggestions in line with the general thesis of the paper may be appropriately made.

1. It is first to be observed that the best possibilities of an imaginative and effective reconciliation of the community's interests and the individual's in fixing sentences will lie ordinarily in the use of the third of the forms of condemnation just described. To declare that the defendant is to be vulnerable to future punishment can be, in itself, an impressive expression of the community's moral disapproval. At the same time, the conditional suspension of the punishment, whether it be a fine or term of imprisonment, can provide an environment favorable to rehabilitation, both by conveying to the defendant a sense of the community's confidence in his ability to live responsibly and by giving him a special incentive to do so. It would seem to follow that a suspended sentence with probation should be the preferred form of treatment, to be chosen always unless the circumstances plainly call for greater severity.

2. Of all the forms of treatment of criminals, prison sentences are the most costly to the community not only because of the out-of-pocket expenses of prison care, but because of the danger that the effect on the defendant's character will be debilitating rather than rehabilitating. It would seem to follow that if some form of present punishment is called for, a fine should always be the preferred form of the penalty, unless the circumstances plainly call for a prison sentence.

3. Once it is decided that a defendant should be sent to prison, a problem arises about the division of authority and responsibility between the sentencing court and the parole authorities in deciding the time of the prisoner's release—assuming, that is, that the view earlier advanced is accepted that prison sentences ought not to be for a fixed term, neither more nor less.[82] The first aspect of this problem relates to the minimum length of the term. It was earlier urged that the legislature ought not to specify a fixed minimum term in such a way as to deprive the sentencing judge of power to give a suspended sentence.[83] But this was for the reason that the judge ought to have an opportunity to appraise the blameworthiness of the crime in

[81] As just suggested in subdivision A of this part, the judge has an important discretion also in deciding just what kind of ceremony he will make of the formal pronouncement of the judgment of conviction. In addition, the Model Penal Code, as presently drafted, proposes that he should have a discretion to reduce the grade of the offense for which the defendant is convicted in order to deal justly with those cases in which there are special ameliorating circumstances not taken into account in the general statutory definition of the crime. See *id.* § 6.11.

[82] See pp. 426-27 *supra.*

[83] See p. 427 *supra.*

the light of the particular circumstances of it. Should the judge, having made this appraisal, be empowered to fix a minimum prison term in such a way as to deprive the parole authorities of discretion to order an earlier release? Obviously, the judge is better qualified than the parole authorities to interpret the community's views of the blameworthiness of the defendant's conduct. Prima facie, therefore, it would seem that he ought to have the power to fix a minimum term, although the power should be used with caution, since its exercise will deprive the prisoner of an opportunity by his behavior in prison to justify an earlier parole.[84]

4. Should the sentencing judge also have power to fix a maximum term shorter than the statutory maximum so as to deprive the parole authorities of discretion to keep the prisoner in confinement for the full statutory term? Undoubtedly there will be cases in which extenuating circumstances make the conduct of a guilty defendant less blameworthy than that of the general run of those who commit the same type of crime. This suggests that the judge, as the community's representative, should have the power to recognize these special circumstances in some fashion, either in his judgment of conviction or in his sentence.[85] Yet, it will be observed that whereas the minimum term has the sole function of seeing that the community's condemnation of the defendant's conduct is adequately expressed, different, or at least additional, considerations enter into the fixing of the maximum term. The statutory maximum has as its prime function the fixing of a limit upon the period during which the prisoner may be subjected to administrative control.[86] Judicial power to lower this maximum may be less essential than judicial power to see to the adequate expression of community disapproval.

5. In relation to both of the two points last made, a further and vitally important aspect of the problem of sentencing needs to be taken into account—namely, the necessity of avoiding anarchical inequality in the sentences handed down by different sentencing judges. The achievement of the purposes of the criminal law can never be satisfactorily approximated until this intractable problem is in some fashion reduced to minor, instead of major, proportions. The very ideal of justice is offended by seriously unequal penalties for substantially similar crimes, and the most immediate of its practical purposes are obstructed. Grievous inequalities in sentences are ruinous to prison discipline. And they destroy the prisoner's sense of having been justly dealt with, which is the first prerequisite of his personal reformation. Experience seems to show that large numbers of sentencing judges with power to fix both individualized minimum terms and individualized maximum terms will inevitably produce an indefensible heterogeneity of result. How can a reasonable degree of order be brought into this chaos?

6. Legal experience gives a relatively precise answer to the question just put.

[84] The Model Penal Code proposes that the trial judge should be given the authority to fix a minimum prison term of not less than one year—the theory of the one-year minimum for the judicially-fixed minimum term being that it is "an institutional necessity" for effective treatment. See MODEL PENAL CODE § 6.06 and accompanying comment (Tent. Draft No. 3, 1955).

[85] For an alternative form of power to give this recognition, see note 81 *supra*.

[86] See p. 427 *supra*.

Consistency of result in similar cases can be secured either by the laying down of quite precise rules of decision (which here seems impossible), or by subjecting heterogeneous discretionary decisions to review and revision by a single tribunal, or in both ways. Appellate courts seem ill-adapted to the function of reviewing and revising the sentences of trial judges, besides being too preoccupied with other functions. The creation of a new authority, with the single responsibility of equalizing sentences initially imposed, to the end of assuring that they reflect uniform concepts of degrees of blameworthiness, is a tempting possibility. Short of this expedient, the only institutional machinery presently available in most American legal systems is the parole board.

7. In an ideal system, perhaps, prison and parole authorities would receive prisoners from trial courts with sentences for predetermined, individualized maximum and, when appropriate, minimum terms. The correctional authorities would then have the sole responsibility of custody and treatment of each prisoner, with an eye single to determining, within those limits, first, what kind of custodial treatment would best promote the individual prisoner's growth in responsibility; and, second, when, after the minimum sentence, if any, had been served, growth had progressed to a point which made it proper to permit the prisoner to resume, on parole, the effort at responsible living. But if such a regime is to work effectively, prisoners must have some sense of reasonable equality, and hence justice, in the terms under which they are asked to work out their salvation. In the existing institutional structure, and in any alternative structure which seems feasible, parole boards seem to be the agency best qualified to take responsibility for bringing about this sense of equality. Occasional minimum sentences, which have the special justification already indicated, would not seriously interfere with the discharge of this responsibility. But regular, judicially-tailored maximum sentences would.[87]

VII

CONCLUSION

The views expressed in this paper are somewhat, but not widely, at variance with the statement of purposes and principles of construction contained in the present tentative draft of the American Law Institute's Model Penal Code. That statement would approximate these views more closely if it were revised to read as follows (new matter being in italics):

Section 1.02. PURPOSES: PRINCIPLES OF CONSTRUCTION.

(1) The general purposes of the provisions governing the definition of offenses are:

(a) *To foster the development of personal capacity for responsible decision to the end that every individual may realize his potentialities as a participating and contributing member of his community:*

(b) *To declare the obligation of every competent person to comply with* (1)

[87] The Model Penal Code denies the judge the power to fix an individualized maximum term which is less than the statutory term, except in the special case where sentence for an extended term is imposed. See MODEL PENAL CODE § 6.06 and accompanying comment (Tent. Draft. No. 2, 1955).

those standards of behavior which a responsible individual should know are imposed by the conditions of community life if the benefits of community living are to be realized, and (2) *those further obligations of conduct, specially declared by the legislature, which the individual either in fact knows or has good reason to know he is supposed to comply with, and to prevent violations of these basic obligations of good citizenship by providing for public condemnation of the violations and appropriate treatment of the violators;*[88]

(c) To safeguard conduct that is *not blameworthy*[89] from condemnation as criminal;

(d) To give fair warning of the nature of the conduct declared to constitute an offense; *and*

(e) To differentiate on reasonable grounds between serious crimes and minor offenses.

(2) The general purposes of the provisions governing the conviction, sentencing, and treatment of offenders are:

(a) *To further the purposes of the provisions governing the definition of offenses;*[90]

(b) To promote the correction and rehabilitation of offenders;

(c) *To subject to a special public control those persons whose conduct indicates that they are disposed to commit crimes;*[91]

(d) To safeguard offenders against excessive, disproportionate, or arbitrary punishment;

(e) To give fair warning of the nature of the sentences that may be imposed on conviction of an offense;

(f) To differentiate among offenders with a view to a just individualization in their treatment;

(g) To define, co-ordinate, and harmonize the powers, duties, and functions of the courts and administrative officers and agencies responsible for dealing with offenders;

(h) To advance the use of generally accepted methods and knowledge in the sentencing and treatment of offenders; and

(i) To integrate responsibility for the administration of the correctional system in a State Department of Correction (or other single department or agency).

(3) The provisions of the Code shall be construed according to the fair import of their terms but when the language is susceptible of differing constructions it shall be interpreted particular provision involved. The discretionary powers conferred by the Code shall be to further the general purposes stated in this section and the special purposes of the exercised in accordance with the criteria stated in the Code and, in so far as they are not decisive, to further the general purposes stated in this section.

[88] The provisions of the MODEL PENAL CODE (Tent. Draft No. 2, 1954) which the italicized paragraphs (a) and (b) replace are as follows:

"(a) To forbid and prevent conduct that unjustifiably and inexcusably inflicts or threatens substantial harm to individual and public interests;

"(b) To subject to public control persons whose conduct indicates that they are disposed to commit crimes";

In the suggested revision, the latter paragraph is transferred to subsection (2) of the section dealing with sentencing and treatment.

[89] The words "not blameworthy" are substituted for "without fault."

[90] The language is substituted for the clause, "To prevent the commission of offenses."

[91] See note 88 *supra.*