There Ought to Be a Law: But Why?

Isidor Chein

New York University

In an examination of the role of law in regulating human behavior it is argued that punishment does not work as a deterrent to crime because the nature of our society and its values makes it impossible to satisfy the conditions necessary for it to work. The theory of quarantine as a means to reduce the amount of crime is also found wanting, in statistical as well as moral respects. It is posited that the essential role of law is to make norms of conduct explicit so that they can become self-regulatory subsystems within autonomous members of the social group. In this framework a new set of criteria for the evaluation of law and its implementation is derived and examined.

It may be a *hutzpah* for me to address myself to the question of the role of law in regulating human behavior. I have no

---

It is said that the atmosphere of Jerusalem makes one wise. In any case, I find in it a serenity of spirit that makes it easier for me to order my thoughts. I am grateful, therefore, to my brother-in-law and sister, Samuel and Eva Schooler, for sharing with my wife and me the tranquility of their Jerusalem apartment and to my wife's and their forbearance in permitting me to withdraw into the privacy of writing this paper. I am no less grateful for their detailed criticism of the first draft. The faults that remain are entirely my own, not to be blamed on either them or the Jerusalem atmosphere.

Correspondence regarding this article may be addressed to I. Chein, Department of Psychology, New York University, New York, New York 10003.

1. I include rulings of administrative bodies and judicial decisions within the scope of the term, in addition to legislative enactments. I am also aware that in concentrating on the role of law in relation to the regulation of good and bad behavior I have not exhausted the functions of law—principally, the function of superposing a map on a terrain with no obvious landmarks or intrinsically superior pathways from one point to another. Many regulations or sets of regulations probably cannot be said to be better than their possible alternatives from any normative-ideal point of view. Their function is to provide structure for otherwise unstructured behavior settings in order to make possible the coordination of one individual's actions to those of another.
legal training and I make no claims to profound scholarship in either the history or philosophy of law. Perhaps, however, it is not a complete vanity for me to think that I do have some perspective to contribute to the issue from the vantage point of a behavioral scientist who has worked in several arenas in which social, legal, and scientific concerns overlap.

My interest in the subject dates back to the time when I became personally associated with Kurt Lewin, as a research associate of the Commission on Community Interrelations of the American Jewish Congress. One of Lewin's arguments for the importance of research in the civil rights field was that the legislative effort in this arena entailed the risk that the coerciveness of law might make this approach self-defeating by raising the tension levels in our society if legal advances were not backed up by other scientifically based social action approaches. Although we shared Lewin's faith in the importance of scientific research in the area of civil rights, some of us were rather skeptical about the explosive friction-producing possibilities of legal change. A difference of opinion with Lewin could not, however, be taken lightly, and this generated a need to clarify for myself the role of law. Lewin's subsequent vindication and my own involvement in other behavioral science areas bordering on the law intensified this need and have led me to devote more and more thought to the issue.

Lewin's caveat was far more sophisticated than the then common counterargument to the legal approach, viz., that one could not legislate against prejudice without first changing attitudes through education. To the latter argument my colleagues and I had a number of answers.

1. We pointed out that attitudes are as much a product of patterns of behavior as they are a cause, and that dilatoriness with respect to positive action teaches its own attitudinal lessons. The increasing acceptance of the normality of black, Caribbean, and Oriental newscasters and commentators on television illustrates the impact of changing behavior patterns on attitudes. The effect of delay with respect to action, once the issue of principle becomes clear, may be illustrated in the history of the school desegregation decision of 1954. The unanimous and courageous ruling by the U.S. Supreme Court was debased and tainted by a concurrent postponement for a year of the implementation part of the decision and the subsequent issuance of a "with-all-deliberate-speed" rather than a "forthwith" decree. Since, to
borrow William Ewart Gladstone's famous dictum, "justice delayed, is justice denied" and since one would not expect our highest court to deny justice lightly, the Court's manifest reluctance to act in accordance with its verbally enunciated high principle taught: (a) that the principle itself must be in doubt or there would be no justification for delay, (b) that short-range expediency and practicality are on the same plane as and properly moderate the scope and urgency of principle, and (c) that racial discrimination cannot be terribly wrong if it can be supported by considerations of expediency and practicality.

2. We pointed out that law is not merely a coercive force against bad behavior, but that it offers support and inducement for good behavior. Most people, we argued, are law-abiding and, in the absence of strong counterincentives, will conform to the law. Moreover, we maintained, many individuals who practice discrimination do so not because they favor the practice but because they fear the social and economic consequences of nonconformity to prevailing patterns. Many might even welcome the pressure not to discriminate. An example from my earlier experience, while I was a research associate of Mayor LaGuardia's Committee on Unity, may be of some interest. Branch Rickey, manager of the then Brooklyn Dodgers, came to the committee with the request that it turn the heat on him. He had a great black ballplayer whom he did not dare to hire for fear of the likely reaction. A Mayor's Committee on Baseball was duly formed, held hearings, and ruled that racial discrimination in baseball cannot be tolerated. This is how Jackie Robinson became a Brooklyn Dodger and how the color line in major league baseball was broken.

3. We argued that a properly conducted educational program geared to a legislative campaign might well be expected, regardless of the campaign's fate, to be more effective in helping to change attitudes than one aimed at changing attitudes but suspended in a vacuum of behavioral implications or demands.

These arguments are not irrelevant to Lewin's concern, bearing as they do on the proper use of law in the control of human behavior. Without gainsaying the potential value of other-than-legal approaches, they address themselves to the relation between law and its base of support. There is, however, a deeper issue of principle involved to which I shall return, but I want to concentrate first on the coercive aspect of law, particularly as it is expressed in the use of punishment as an instrument of social control.
PUNISHMENT AS DETERRENT

By far the most common rationale of law as an instrument of control is that punishment deters people from committing legally defined sins of omission and commission. Since I shall challenge this rationale, I expect to be attacked as one of those bleeding-heart liberals who care more about the criminal than about the victim. Let me therefore state at the outset that, in accord with both Judaic and Christian traditions, I do indeed feel compassion for those who commit crimes—not only because I see the rest of us as parties to their guilt, but no less so because, in committing their crimes, they debase themselves. As I understand it, God is not supposed to have created only the good people in his own image, but all people. Still, I must confess that my compassion tends to vary exponentially with the abstractness of the criminal. I am, regretfully, not immune to feelings of outrage and vindictive fury in response to particular crimes, sometimes even trivial ones. My feelings, religious beliefs, and spiritual frailties have nothing to do, however, with whether punishment does in fact, or can be made to, work as a significantly deterrent factor in relation to crime.

It does not seem to me that hard data will settle the issue in the foreseeable future. I shall therefore cast my challenge in the form of what are virtually truisms bearing on the conditions that have to be satisfied for punishment to work as a deterrent. I shall contend that the nature of our society and its values and the nature of the interrelations among the conditions themselves make it impossible to satisfy these necessary conditions to any significant degree.

It may well be argued, even before I develop my challenge, that however impeccable my logic may seem to be, the conclusion has to be false because it is contradicted in common experience. There are many who testify that there are crimes they would have committed had there been no punishment to fear. The testimony is, however, debatable. These people do not really know what they would have done if there had been no penalties provided by law. The testimony expresses their belief, not their experiences; it begs the question at issue. Moreover, it tacitly assumes a reasonably high probability of actually having to pay the penalty. If you were to examine it, I think you would find an irrational overestimation of this probability—the sort of thing I find in my own inner certainty that, although so many people get away with cheating on their income tax, if I were to cheat, I would
be caught, disgraced, and thrown into jail. An irrational increment in subjective probability must obviously derive from a source other than what would actually be likely to happen. The existence of legal penalties thus seems to serve as a peg on which to hang a radically different dynamic of deterrence, a dynamic of conscience. I shall return to this matter later. For right now, let me review the conditions of punishment as deterrent.

1. The punishment must be sure enough. A large proportion of even major crimes is, however, never reported or otherwise discovered. Of known crimes, only a fraction are ever considered solved. Of persons tried, only a fraction are convicted and a sizeable additional fraction get markedly reduced punishment by plea bargaining. Of the convictions, many are reversed on appeal. In brief, the odds are heavily against having to suffer the full consequences, if any, of a crime. However low “enough” may be, it seems that as things are now, “sure enough” is a condition that cannot be satisfied.

Can we increase the realistic certainty of having to pay the penalty? Granted some room for improvement in present enforcement processes, it does not seem that the improvement can begin to approach the needed level—short of sharply reducing controls over wiretapping and other privacy-invading measures and massively increasing inducements to informing and the numbers of persons prepared to become informers. Moreover, since escape hatches are not closed when one is merely caught, we would have to impose severe limitations on the measures that may be taken in the defense of the accused, reduce constraints on the cross-examination of defense witnesses and raise them for witnesses for the prosecution, diminish the consensus required for conviction by jury, and perhaps introduce star chamber proceedings.

Judging by the noise made by the “get the bastards” school of thought and the fervor generated by the funktionslust of many law-enforcement personnel, many must consider such measures reasonable. The question is, noise and fervor aside, how far is our society prepared to move towards a police state? But assuming full readiness, the next question is whether we would still have achieved the necessary level of “sure enough” to markedly increase the deterrent power of punishment. The record of the police states themselves does not seem to be too reassuring on this score.

2. The probability of suffering the punishment must be sufficiently less for the innocent than for the guilty. In the extreme case, if everyone were to be thrown into jail, it would be certain that all of the
guilty would suffer punishment, but how deterring would such punishment be? Unfortunately, history suggests that the measures needed to increase the probability of punishing the guilty disproportionately increase the probability of punishing the innocent. What the thunderers on the right overlook is that obstacles to the detection and conviction of the guilty are not there out of any bleeding-heart sympathy with the criminal, but out of the need to protect the rights of the innocent. My point, however, concerns the conditions of deterrence. The more easily the innocent become enmeshed in the toils of the law and the harder it is for them to extricate themselves, the less deterring must punishment be. Condition 1 is inimical to condition 2.

3. The punishment must be quick enough. The longer the delay between an action and its consequence, the less likely is an association to be formed between them. The more remote a consequence is in the future, the less real does it seem and the less is its bearing on the valences of the present. There are, however, inherent delays between the commission of a crime and its legal consequences. If taxpayers were willing to bear the costs, we probably could cut down on some of the delay by increasing staffs and resources of the police, the prosecution, and the courts; but, short of adopting police state methods, we cannot totally eliminate the time needed by the prosecution for the preparation of its case nor the time delays associated with the rights of the defendant.

We might also save time by more intensive and aggressive use of the practice of plea bargaining, but then we run into the problem of condition 2. No one knows how many innocent persons have "copped a plea" because the implicit utility function involved made this the best of available alternatives. Unless one assumes that accusation is tantamount to guilt and that innocent persons never confess even without the incentive of the offered bargain, the number must be substantial. Strengthening the odds against the defense can only increase that number.

Wherever we call a halt, there is the bound of "quick enough."

4. The punishment must be severe enough. Unfortunately, as recent experience with the New York State (Rockefeller) drug law indicates, this condition is in conflict with conditions 1 and 3. Not even the guilty will plea bargain if this does not offer an escape hatch from the severity of the penalties, with resulting strain on court calendars, defense generated delays, and so on. And going to trial does offer a chance of "beating the rap" entirely, so that the more severe the penalty, the more favorable is the
coefficient of risk in going to trial. Moreover severer penalties make it harder to convict. An error in judgment resulting in a relatively minor injustice is more tolerable than one resulting in a relatively greater injustice. With unbiased juries, therefore, the range of reasonable doubt expands (and the burden of proof of guilt increases) with the severity of the punishment entailed; and honest judges become more fussy in protecting the rights of the defendant.

5. The punishment must be interpreted as evoked by the offense rather than as generated by the willfulness or wickedness of the punisher. Optimally, the punishment should stem directly and immediately from the offense without the intervention of any outside party. Every moment of delay reduces the perceptibility of the connection between the two events, and the intervention of outside parties introduces the issue of the latters' motivation.

Also, plea bargaining, apparently so necessary for the functioning of our judicial system, increases the distance between the particular offense and the associated punishment. The prosecutors are obviously not overly concerned with just what it was that you were accused of having done, so long as they get you for something. The implicit attitude is one of vindictiveness rather than of an impersonal monitoring of a system of justice.

Condition 2 is also relevant here. If one believes that innocent persons are convicted and punished, it is hard to believe that punishment pertains to the offense rather than to being caught up in the toils of the law. A related condition is so fundamental as to rate its own number. Hence:

6. The processes leading from crime to punishment must be experienced as absolutely impartial. To the degree that certain sectors of the population experience a greater likelihood of punishment than is the case for others committing equally reprehensible offenses, attention is diverted from the relation of the offense to the punishment and shifted to the relation between the prosecutors and the defendants. Unfortunately, there are apparently insuperable obstacles to impartiality. Rich and poor alike can, for example, be guaranteed legal counsel, but there is a difference between a relatively inexperienced and overloaded legal-aid lawyer and a highly experienced and successful criminal lawyer with extensive staff support and related resources. And if the court should assign experienced counsel, it cannot command the earnestness with which the case will be taken or the time and resources devoted to it, not to mention the costs of appellate procedures.
Moreover, in a society which, despite efforts at change, is still racist—that is, one in which individuals suffer the consequences of alleged statistical characteristics of the minority groups of which they are members—it is easy to apply differential standards of justice, especially if the minority group members happen to be poor. Thus, in a society in which it seems reasonable for communities to rally against "scattersite housing" on such grounds as that their neighborhood crime rates will go up (although this means that minority group members who will never commit crimes are thereby condemned to live in extremely high crime-rate areas), or to rally against the influx of minority group children into relatively privileged schools (although this condemns the excluded children to schools with lower standards), in such a society one may instruct jurypersons to disregard anything but the evidence, but how does one prevent them from bringing their assumptions to bear on their definitions of the subjective bounds of what constitutes reasonable doubt?

One can, of course, guarantee the presence of minority group members in the venire, and perhaps even in actual jury service. As Kurt Lewin pointed out, however, minority group members are apt to be less than immune to absorbing from the dominant groups of the society the beliefs about, and the evaluations of, their own group members. The societal biases are thus not denied entree even through the minority groups themselves. And how does one prevent prosecutors from exploiting the voir dire to the utmost so as to eliminate "troublemakers," i.e., minority group members who might not share the societal biases and who might be expected to withstand the pressures of majority group members?

7. The normal lot in life of the persons to be deterred must be free of suffering and want. The punishment that the underprivileged take in their daily lives as a concomitant of being underprivileged inevitably attenuates the gravity of punishment for crime. If you live in a prison without walls, the addition of walls adds relatively little to the constraints of your normal life. If your daily lot is one of frustration, hopelessness, humiliation, and insult to human dignity, how much worse can penitentiary life offer? Does it not follow then that, crime for crime, the punishment of the underprivileged must be far more severe to have equally deterrent effects? Can we live with that conclusion? And, to refer back to condition 6, how shall we teach the underprivileged to believe that this is impartial justice?

8. The approach to issues of punishment must not negate or
adulterate whatever deterrent effect punishment might have by generating attitudes that are themselves supportive of crime. Yet the emphasis on punishment as deterrent violates this condition. The notion that what one stands to lose is not worth the risk does not diminish the attractiveness of what one stands to gain. It, rather, raises the issue of how to minimize the risk without sacrificing the gain. It thus puts a premium on successful crime, and it adds zest to the game and the joy of winning to the value of the prize. When you teach that crime does not pay, you do not teach that crime is wrong, but that it is OK if you can make it pay. As a desideratum, the risk of punishment can make for greater circumspection, more careful planning, motivation to develop greater competence and to join one's skills and resources with those of others, and incentive to meet police force and developments in police science with counterforce and counterdevelopments in the science of crime.

Moreover, there are at least two counterproductive lessons that the loudest advocates of more severe deterrent measures teach, albeit unwittingly. They denounce the mollycoddling of criminals bitterly. They fervently preach that it is high time to turn our sympathy and concern to the victims, and show a remarkable indifference to the fact that victims also need the protection that the law offers against invasion of privacy, police harassment, and unjust arrest, prosecution, and conviction. What comes through, therefore, is vindictiveness masquerading as concern for the victims of crime but aimed at inciting to legalized vigilanteism and lynch law. That they do have the restraint to demand the cover of legal reform before joining the mob or the night riders is lost behind the venom of their thrust. Thus they teach that when you are aroused enough, it is proper to resort to violence and to ride roughshod over the rights of others. What is good enough for those who parade under the banner of law and order ought to be good enough for those who do not.

Second, in the vehemence of their concern over the alleged mollycoddling and pampering of criminals, these upstanding proponents of deterrence commonly manifest a marked disposition to overstep the bounds of essential human decency. After all, one way of increasing the severity of punishment is to make life in jail a veritable hell on earth. I need not go into the gory details.

The trouble is that it is not the treatment of prisoners that is at stake, nor the hemorrhaging hearts of social reformers, but
a major principle. Suppose we were to agree that the criminal has brought his treatment on himself, that he has given up his claim to being considered human. Suppose we were to agree with Ms. Nettie Leaf who, on the Op-Ed page of the New York Times of July 30, 1975, tells of her conversion from strong opposition to capital punishment to strong advocacy, including public execution. Referring to two cases of vicious and unrepentant young killers who went free, she says:

Are we really to believe that letting these two killers go free shows a reverence for human life? That seems to me insane.

And later in the same article,

A final word about revenge. Those who lobby against the death penalty deride revenge as its justification. Under other circumstances, perhaps, they would deride jealousy, envy, gluttony, and pride. But these are all real and honest feelings that most people . . . give in to at some point in their lives. For the same reason that we sometimes eat too much . . . we hope to taste revenge against one who has killed someone we love; because it tastes good.

Ms. Leaf and others like her do not show how countersavagery restores “the reverence and dignity the innocent victims deserved.” More important, by venting such sentiments publicly, these people help to legitimize the acting out of impulse and affect. How many crimes could not be justified on the grounds that they “taste good” to the perpetrator?

Doubtless, few potential murderers and still fewer potential muggers read the Op-Ed page of the New York Times, but such sentiments do get around. And they do contribute to the moral climate on which crime thrives. I submit that in agreeing that the state of being human and the essential dignity that inheres in that status are not irrevocable endowments, we contribute to an attitude that is itself supportive of crime. One who firmly believes in the irrevocable character of essential human dignity has a powerful inhibition to overcome before he can violate another person. Else, one does not have this problem. If you are free to decide who is and who is not worthy of at least minimum respect, why am I not equally free? Why should I not decide for myself who, if anyone, is entitled to immunity from my depredations?

9. The crimes themselves must be of a character that permits them to be governed by foresight and the comparison of utilities. Crimes of passion are not subject to considerations of possible consequences. Neither are crimes in which striking opportunity triggers
strong desires or activates a program rehearsed in fantasy with no conscious intention of implementation. Nor those that occur in states in which the potency of normal inhibitory controls is markedly diminished. Nor the explosion of lesser offenses into greater ones. Nor crimes committed by persons who, perhaps despite contrary experience, are convinced that they, unlike others, are protected from consequences—a feeling akin to that found in compulsive gamblers. I do not mean to imply that these groups of crimes are mutually exclusive, but merely to indicate that many crimes—perhaps most—are resistant or totally immune to deterrent influences.

All in all, on reviewing the conditions that have to be satisfied, I am forced to the conclusion that the deterrent effect of punishment on rate of crime has to be negligible, whether one is considering crime collectively or by type and/or degree.

**Punishment vs. Quarantine**

A radically different concept of how to reduce the volume of crime—radically different in concept, that is, although typically not distinguished in practice from the philosophies of deterrent and/or vindictive punishment—is the theory of quarantine. Regardless of the spirit in which it is advocated and of the fact that the consequences to the alleged criminal may be the same as if he were being punished, quarantine theory has nothing to do with punishment. It strikes directly at the statistical problem.

In essence, quarantine theory holds that if you lock criminals up then there will be fewer criminals around to do their dirty work. Crime rates must, therefore, be lower than they would be if these people were allowed to roam free. The clearest and most revealing exposition of this theory I have encountered, albeit in a special application, was when I heard a prominent district attorney declare at a public meeting, “We know that addicts will commit crimes [A challengable premise]. Under our Constitution, we cannot lock a person up for a crime he is going to commit, but we can lock him up for being sick.”

Alas, there is a hidden and highly questionable assumption in the theory, viz., that most crimes are committed by criminals—that is, that most crimes are committed by people who have a criminal nature, acquired if not inherited, and that they commit their crimes because of this criminal nature. On this assumption and on the further assumption that we can make reasonably reliable and valid diagnoses of the condition, it seems reasonable to lock
Consider the following alternative construction. Suppose that all of us have various dispositions, attitudes, motivations, conditions of arousal, disinhibition, and so forth that under appropriate circumstances would lead us to commit crimes, including crimes that take planning and preparation. Suppose further that the strength of such dispositions, etc. varies in each of us more or less randomly and more or less in concordance with particular instigations and opportunities which themselves occur on a random basis. On these assumptions, there would be a definite probability, $p$, the same for all of us, that each of us would commit some crime, planned or unplanned, at least once during a given time interval. Also on these assumptions, there would be a definite probability that each of us would commit crimes in two of any series of intervals, a definite probability of committing crimes in three, and so on. The probabilities of committing crimes in later intervals would, however, remain exactly the same, regardless of our crime record in the earlier intervals. I have stated the probabilities in terms of "at least one crime during an interval" but we could obviously take intervals that are too short for more than one crime. Apart from a change of reference to the Poisson distribution instead of the binomial, my basic point would not be affected, viz., that on the given assumptions it is entirely a matter of random probability distributions whether we commit zero, one, two, three, or more crimes and that multiple crimes have nothing whatever to do with the possession of a criminal nature.

Now to complicate the alternative construction just a bit. I have presented it as if we constituted a homogeneous population. The general population can, however, be subdivided into component populations each of which is homogeneous with respect to the factors at issue. That is, within each of the subpopulations, the suppositions I have asked you to make hold, but the parameters of the distributions of strengths of dispositions, attitudes, motivations, etc. and of the distributions of instigations, opportunities, etc. vary from population to population. The conclusion in terms of the general population must still hold within each of the subpopulations; the only effect of the complication is that the probability values involved will vary from subpopulation to subpopulation.

To concretize the construction, consider a population in which the value of $p$ equals .05 for a series of ten time intervals. We
would then expect that, by sheer chance, 60 per 100 persons will have been entirely free of crime in all ten periods, 32 will have committed crime in one, 7 in two, and 1 in three or more. If \( p \) were .10, 35 would be expected to stay clean, 39 to commit crime in one, 26 in two, and 1 in three or more. At \( p \) equals .25, only 6 would be expected to stay clean in all ten periods, 19 to sin in one, 28 in two, and 47 in three or more. By the time we strike a \( p \) of .50, we would expect fewer than 1 in 1000 to stay clean through the ten periods, and only 1 per 100 to be guilty in one of them, 9 in two, and 90 in three or more.

It becomes clear, then, that on the basis of my construction it might be reasonable to speak of certain populations as crime prone. Our problem would become one of trying to identify these crime prone populations.

It also becomes clear that the logic of quarantine applies to crime prone populations and not to individuals. It is the entire population that needs to be quarantined, not selected individuals. Given that a person is a member of such a population, the number of crimes that he has committed, be it zero or many, has no particular prognostic implication with regard to his subsequent crime record. In other words it is entirely obvious, on my construction, that whether or not an individual should be placed in quarantine has nothing to do with his own criminal record, but with the criminal record of the population of which he is a member. Now note that, if any crime prone persons actually exist, they constitute a special case of my construction—that is, they are members of a subpopulation with extremely high \( p \) values. In other words, even in the case of crime prone persons, the quarantining of any subgroup has no bearing on the expected crime rates of the rest. A random selection of those to be quarantined would have the same effect as selection on the basis of previous individual crime records.

The problem of identification of crime prone populations thus becomes a critical one to any implementation of the quarantine theory. Needless to say, no readily available basis exists—e.g., race, ethnicity, age, gender, social class, place of residence, or any combination of these—for identifying subpopulations in which the \( p \) values are high enough to characterize these populations as sufficiently crime prone to justify quarantining them in their entirety. Nor does it seem likely that any known psychodiagnostic technique, or one that is on the foreseeable horizon of development, can identify crime prone populations of sufficient size to have any material effect on the rates of crime, even if conjoined
with patterns of demographic and residential criteria.

No matter. You might argue that relatively high crime rate populations, identifiable on demographic-residential bases, must contain within them substantial proportions of truly crime prone populations, and that offenders, particularly multiple offenders, from these relatively high crime rate populations must contain among them even higher proportions of truly crime prone populations. On this basis, you might argue that half a loaf is better than none. Quarantine the offenders or multiple offenders from the relatively high rate populations and you will have quarantined a substantial proportion of the crime prone population. But what proportion? High enough to materially affect overall crime rates? Your guess is as good as mine. And remember that, when you have separated out the crime prone subgroup from the relatively high rate population, the crime rate for the residual subgroup is considerably lower than for that population as a whole. The risk, therefore, of including in the quarantine random offenders and multiple offenders from the relatively low rate residual subgroup is much higher than might appear on the surface.

For my part, the quarantine approach leaves me with a, to say the least, very queasy feeling. I find the idea of locking people up for crimes they have not yet committed abhorrent, even if it is done under the guise of a diagnosis of mental illness. I see the quarantine approach as a rationalized subversion of basic norms under which we live, as enraged vengeance masquerading under the banner of social welfare, and as, perhaps unwittingly, an instrument of social bigotry. I am all too aware of how sloppy diagnostic process can get when it comes to the poor and to the members of racioethnic minorities, not to mention the built-in sociocultural biases in psychiatric and psychodiagnostic instruments and procedures. I am all too sensitive to the ease with which the continuing immediate influences of criminogenic environments are translated into allegedly enduring dispositions and character traits of the persons who live in them. I know too much of how defenseless the underprivileged sectors of our society are apt to be in the face of commitment and criminal justice procedures. These already existing beams in our eyes leave me much too suspicious and distrustful of the possible integrity of any prospective quarantine system. Our need to reduce crime may be acute, but can we afford it at the price of making a mockery of social justice? Nor am I unmindful of the point I have already discussed in the context of condition 8 of deterrence,
 viz., that social injustice for the sake of reducing crime has a way of being self-defeating—in the present context, that it has a way of increasing the $p$ values in the populations subject to it. The effect is not limited, however, to those who suffer injustice. Witnessing widespread injustice tends to add a vector away from faith in the relevance of standards of right and wrong and toward the conviction that the only truly relevant law is that of the jungle.

**What, Then, the Role of Law?**

Let me suggest that, in the context of constraining bad behavior and supporting good behavior, the essential role of law is to make explicit those norms of individual conduct which are vital to the preservation of society and to the progressive actualization of what we take to be its ideal form, in order to facilitate their incorporation by autonomous individuals as self-regulatory subsystems. Deterrence rests on a dynamic of conscience, not on court administered punishment; and public safety rests on the prevailing moral climate, not on the quarantine of criminals. A body of law that functions as an external coercive force contains within itself the seeds of its own destruction. This, I believe, is the fundamental principle to which I referred at the outset, the principle behind Lewin's concern.

Law in this perspective is not an end in itself, nor its own master. It derives its strength from the normative-ideal system of society and, to the degree that it takes root, it gives sustenance to that system. I must emphasize, however, that it is not the mores, the set of statistical norms, that I am talking about, but the guiding ideals that set the ultimate standards of conduct. Statistical norms can be incorporated into the normative-ideal system, but they are often merely consequences of it and, more importantly, they can remain irrelevant to it. They can be generated as a consequence of the parallelism of motivation and situation among individuals. To appeal to the fact that practically everyone does so-and-so as a standard of conduct is to betray moral confusion and blindness. When a Kinsey, so to say, becomes a Moses in the public eye or when success on the basis of what one can get away with becomes a standard of conduct, society suffers because its basic normative-ideal system is obscured and debilitated. Viewed in this light, that is, in the light of the contextuality of law in the system of normative ideals, a new set of criteria for the evaluation of law and its implementation emerges.

To begin with, law should belong to the people, not to the
lawyers. To the degree that the comprehension of law rests on familiarity with an esoteric terminology and that its letter overshadows its essential messages and directives, law is stripped of its contextuality in the normative-ideal system. Laws should be written by prophets rather than lawyers—prophets in the sense of the ancient ones who were far less concerned with foretelling the future than with upholding the claim of standards of right conduct.

I do not wish to imply that lawyers cannot also be prophets or that linguistic precision has no place in the writing of law, but that the prophetic spirit must remain fundamental. Nor do I wish to imply that there is no place for the legal profession, but that legal scholarship, training, and profession need to be imbued with a profound understanding of the normative-ideal system in historical and contemporaneous depth, and that the study of ethical and moral issues ought to rank at least as high in the training of lawyers as minutiae of legal precedents. I do not even want to challenge the adversary system in the administration of justice, but I do insist that it is a perversion to make the winning of cases the basis for professional status and reward. Call me a starry-eyed dreamer if you will, but I have only contempt for the practices of lawyers who use all of their wiles to pick jurypersons not for fairmindedness but for likelihood of favoring their side, who resort to tricks of the trade in the conduct of trials, and whose appeals are addressed to the passions of the jury rather than to its enlightenment. Unless the profession finds some way of distributing its contempt on the same basis, it must share responsibility with the lowest of criminals for the prevalence of crime. For the legal profession does occupy a critical position in relation to the normative-ideal system and these practices violate it and diminish its potency.

Second, legal codes need to be consistent across jurisdictions. This is more than an issue of cognitive consistency. It is most difficult to bear in mind that law has to do with the rightness and wrongness of actions when crossing a state border makes the difference between lawful and unlawful, or between a graver and a lesser offense. How can we expect people to internalize the constraints articulated in law if they cannot see that an act is unlawful because it is wrong and only derivatively that it is wrong because it is unlawful?

Third, any fundamental change in law must derive its sanction from a fundamental change in the normative-ideal system itself or else from the apprehension of a previously uncomprehended
THE ROLE OF LAW

but implicit requirement of the existing system. The tragedy of our national experiment with prohibition and the consequent entrenchment of organized crime and generalized spread of lawlessness was that it involved the imposition of the morality of the few upon the many. The frequent violation of this law, with no accompanying sense of wrongdoing could only result in the lessening of respect for all law.

A cogent current issue concerns the campaign against legalized abortion on the basis of the right of human beings not to have their lives taken from them by the arbitrary actions of other persons. The trouble is that the "right to life" is not the issue in controversy. There are two basic issues that are, and unfortunately the antiabortionists do not even acknowledge the existence of these issues, to say nothing of responding to them, as they relentlessly pursue their legal objective. The first concerns the question of whether a fetus is already a human being. The arbitrary assertion that it is is not a resolution of the issue but, on the face of it, an instance of the genetic fallacy—equivalent in form to the assertion that an acorn is an oak tree because it may eventually become one. The second issue concerns the meaning of "arbitrary" in the claim that legalized abortion sanctions the arbitrary taking of life. It is noteworthy that much of the support for the antiabortion movement comes from people who favor capital punishment and who are not only not absolute pacifists but who do not even show any signs of repentance for their earlier support of the Vietnam War. That is, they implicitly acknowledge qualifications on the right to life, and it is precisely the question of the qualifications that constitutes the second issue. The antiabortionists have every right to advocate their views, but the success of their power-bloc tactics in imposing their norm on the unconvincened many who do not share it can only result in the weakening of the entire fabric of law. The permissiveness of legalized abortion, on the other hand, can in no way generate defiance and criminal subversion of the law. The analogue to the prohibition amendment is clear.

Civil rights legislation must have a similar effect save as it advances under the banner of our commitment to the ideals of justice and human equality that constitute our common moral heritage. By the same token, once the issue has emerged, organized resistance to the correction of social inequities must bear some of the onus of the impotentiation of law—especially when the resistance receives support and leadership from prominent politi-
cal, civic, and religious personages.
Fourth, private acts involving only consenting persons simply do not belong within the province of law, directly or indirectly, and those who engage in such acts are entitled to the full protection of their civil liberties and rights. These acts may violate the normative-ideal code, but do not in themselves threaten it. The publicization of private acts as a result of prying into private affairs itself violates one of our higher norms, the right to privacy, and should bring contumely only on the priers and publicizers. On the other hand, identical acts committed *in flagrante* do involve the public and may threaten the normative-ideal code. In general, the flagrancy of any violation aggravates the offense. Law should respond appropriately, depending on the measure of the threat. The flaunting of homosexuality, for example, should be in principle subject to legislative response—just as fornication in the streets would be, even if conducted under the aegis of a demonstration against sexual hypocrisy. But public advocacy of homosexuality, fornication in the streets, or any other change in the normative-ideal code comes under the protection of that code’s highest norms so long as that advocacy stops short of flagrant violation and incitement to such violation.

Fifth, the normative-ideal system itself must be prepared to meet the challenge of changing human circumstances. It must remain open to its own substantive emendation or reinterpretation in accord with fundamental transformations of human needs corresponding to the changed circumstances, or the discovery of previously unrecognized contradictions or uncomprehended implications contained in it.

When it comes to basic human values, I do not myself believe that the mere demonstration of the existence of alternative value systems in different subcultures, societies, or historical eras constitutes a sufficient test or measure of their respective validities for the human beings who live by them. I am definitely not a cultural relativist in that sense, although I hold most dearly to the ideals of cultural democracy on an intrasocietal or intersocietal basis. I am not prepared to assume, however, that any given set of normative ideals, no matter how ultimate or universally shared we may deem them to be (whether as an interpretation of divine will or of human nature or of human experience), is necessarily fully known or understood, and immune to improvement. The continual reexamination of what we take to be basic and ultimate normative ideals, it seems to me, must remain a perennial task and obligation implicit in the fact of human existence.
But, again, beyond my personal beliefs there stands a general principle. Frozenness is incompatible with vitality. Any normative-ideal system and derivative body of law must remain open to challenge if only as a necessary condition of its continuation as a vital force. Still, false prophets are much more common than true, and we cannot afford to follow blindly or precipitously in the footsteps of every Thomasita, Tom, Dick, and Mary who has experienced a great insight or revelation, no matter how valid the latter may seem to be when examined in isolation.

Any change in a system has potentially far reaching but not necessarily obvious consequences for every component of that system. A system that has displayed its viability as a precipitate of human history cannot be safely tampered with except through an orderly process of the most careful scrutiny and testing of proposals for change—except of course when delay itself entails the risk of immediate human extinction. Normally, however, there are ample channels for orderly processes of change. Tension between the mores and normative ideals and among mutually competing sectarian ideals, openness of the marketplace of ideas to debate about the substantive and implicative contents of the presumptively shared normative-ideal system and to even the most radical honest advocacy of changes in the system, and tolerance of relatively minor and unthreatening public deviations from the ideal norms and of even major deviations that involve only private arrangements between consenting individuals—all of these provide channels of orderly process, regardless of whether changes are in the end effected. But even if the established order remains in force, the very need to confront and cope with orderly challenges in a reasonable way must serve to keep the entire system vibrantly alive.

The law itself is also subject to similar orderly processes of change. It, however, also entails the awesome obligation and responsibility on the part of all those who are directly engaged in formulating, administering, and interpreting the law to remain attuned to the character of the normative-ideal system and to bring to bear all of their acquired sensitivity and wisdom in grasping, articulating, and promoting the contextual role that law must play in that system.

Sixth, the impact of flagrant violations on the normative-ideal system is probably an exponential function of their number as well as of their place in the hierarchy of values, and law should respond appropriately. Not even serious and relatively frequent violations, however, endanger the code if they are perceived as
caused by factors not subject to voluntary control. This of course is the rational basis for the McNaughten rule and its subsequent extensions. To the degree that violations are interpreted as due to mental retardation, psychosis, and situation-generated uncontrollable impulse, they do not set a model for others to follow. The integrity of the defense of nonresponsibility has to be protected, however, by taking it out of the adversary arena and putting it into the hands of a publicly appointed, independent board of qualified psychiatrists and psychologists with enough time and resources to listen to opposing counsel and to do adequate studies of the individual cases. The purchasability of adversary professional testimony makes a mockery of this proceeding. Instead of being a justifiable exemption it becomes, in the eyes of the public, another device for evading the law—a device that permits those who can afford it to get away with murder.

Seventh, the status of the offender can seriously aggravate the crime. Holders of public office (especially those in higher office, and judges, districts attorney, and the police), civic and religious leaders, and perhaps even teachers and college professors ought not to be considered as ordinary citizens before the law. They have entered their respective positions voluntarily and in many instances have taken a special oath to uphold the law. Inherently, they serve as models to the public and through precept and conduct they interpret the normative-ideal system to the public. When they misbehave, they tempt and implicitly invite others to do no less in the latters own ways. And when their misbehavior corrupts the integrity of the executive, legislative, and judicial functions of government, they constitute a far graver menace to the social order than any comparable number of nonorganization criminals roaming free. The haste with which Mr. Ford pardoned his predecessor while still not finding it possible to forgive the misguided act of conscience of draft evaders and deserters in the Vietnam War threatens respect for law more than any act of wanton murder I have ever heard of.

Eighth, the normative-ideal system and therefore also the law cannot be expected to take hold on people if the latter do not feel an investment in the social order that the code is designed to protect. Those who are not already content with their lot must find at least the honest promise and realistically fair possibility of bettering it.

Finally, ninth, there is indeed a place for punishment in the framework of law viewed in the context of the normative-ideal system. The prescription of punishment for certain acts is properly a specification of the gravity attached to these acts. It is impossible
to master, except by rote learning, no less to internalize, a legal code in which the prescription of punishment displays no rational hierarchical order of priorities—and rationality always presupposes some embracing intention, the preservation of the normative-ideal system, in the present context.

To be sure, if there were no earnest effort, within the limitations of rules that derive from the normative-ideal system, to apprehend, prosecute, and mete out the prescribed punishment to violators, the entire structure would become a mess of empty words; and the existence of laws that are not enforced weakens the entire fabric. Yet it is a perversion of the role of law to take the administration of punishment as an end in itself or even as a means to an end—and this entirely apart from my previous arguments that as an end in itself punishment violates our normative-ideal system, and that as a means to an end it has to be ineffective. The basic role of law is to hold up to the people a constant reminder of what their shared values and their shared commitments require of them, and the provision of punishment is a manifestation of this role.

A historical illustration may be instructive. The Mosaic code, often regarded as the sternest legal code in human history, contains a basic rule of evidence that should make any of our contemporary self-touting proponents of law and order scream with anguish. The code specifies 613 explicit rules of conduct along with the particular punishments to be meted out by the courts for the violation of many of them. In many instances, the sentence calls for death by stoning, burning, beheading, or hanging, depending on the particular offense. Severe punishment indeed by contemporary standards, and especially so when one remembers that these sentences were prescribed for a large number of offenses that, among others and on our own premises, most of us would regard as relatively trivial. Yet, in the very chapter of Deuteronomy that expresses the talion law ("An eye for an eye," etc.), the categorical rule is laid down that no one may be convicted of any offense whatsoever save on the testimony of two actual witnesses—not circumstantial evidence, not one witness, but two. The accompanying Oral Law imposed the further constraint that the culprit must have been warned that he was committing a violation. Even under the first of these rules alone, conviction must have been most difficult. The one court which actually imposed a death sentence under the code, and in only one instance at that, became known in Jewish tradition as "the butchering Sanhedrin."

What then was the function of the prescribed punishments?
As I see it, they served the primary purpose of providing a road map of the moral terrain. What would otherwise be an incomprehensible confusion becomes a comprehensible order which can also become a basis for inferring implicit directives. Comprehensibility makes it possible to assimilate the terrain as one's own; incomprehensibility establishes it as personally alien territory. The hierarchial order of punishment brought home and underscored the essential order in the code. Thus, the prescription of death by stoning for the offense of obdurately remaining a defiant and disloyal son underscored and gave point to the placement of the commandment, "Honor your father and your mother," in the Decalogue—unlikely as it was that parents would actually denounce a wayward son, given so severe a punishment. Observe, however, that the Decalogue itself, along with the rest of the legal code, is given point in this system by such supralegal norms as that contained in the injunction, "And you shall be holy, for I, the Lord your God, am holy."

Why not read the effectively impunitive prescription of punishment in reverse, i.e., as implying a hierarchy of permissiveness? But this is an absurdity. A crime for which the prescribed punishment is hanging, considered the least severe of the death sentences, is to be viewed as more permissible than one for which the sentence is stoning, considered the most severe? No! It was the legal code as a whole that was enjoined upon the people, the minor as well as the major rules of conduct. The function of the prescribed punishments was, to change the figure of speech, to provide anchor points around which the whole could be organized and rendered into an assimilable unity. Thus, it is difficult to grasp that wanton injury to another is an offense if it is not made clear that murder is an even graver offense. The penalties for graver offenses give contextual meaning to the lesser offenses. The whole thus becomes a differentiated but coherent unity. The mere listing of a large number of prohibitions and injunctions, as if they were all of equal gravity, can only generate a cognitive-affective-conative chaos.

I am not saying that the enforcement of the law, including the meting out of punishment, was a matter of trivial concern in the Mosaic code, but that actual punishment was entirely subordinate to the major function of the prescription of punishment, viz., the revelation in concrete terms of the underlying order in the code. I am certainly not advocating the adoption of the Mosaic code, but merely suggesting that it offers an important perspective on the role of punishment.
**Summary**

The key to directing people toward good conduct and away from bad is to find ways of enabling society to generate a coherent moral climate compatible with its own normative-ideal system and of facilitating the development of individuals so that they autonomously respect their obligation to this system and to the laws that derive from it. I have reinterpreted the role of law in this context and have suggested nine conditions that need to be satisfied for the law to contribute to these ends. I have argued that both law focused on deterrence and law focused on the philosophy of quarantining criminals are not only doomed to ineffectiveness, but actually tend to be self-defeating in this context. I do believe that it is possible to develop a legal system that serves the proper functions of law. That is why I believe that there ought to be a law, but if, and only if, it is calculated to fulfill its mission.

**Postscript**

In response to queries I have received concerning the possibility of determining, on any but a wholly subjective basis, the existence of a normative ideal, I suggest that the following implicit properties of a normative ideal system point to the kinds of judgmental decisions and, in principle determinable, data on which the assessment depends:

- All normative ideals consist of principles which are prescriptive or proscriptive of modes of conduct.
- Every normative ideal that characterizes a society evokes at least majority assent among persons who are not mentally deficient, psychotic, senile, or very young children that the explicit rejection of the principle involved is not intended seriously or that it is aberrant, weird, and/or wicked.
- The rank of a principle of conduct in the normative ideal system is a function of (a) the size of the majority, (b) the range and variety of behavior situations to which the principle is relevant, (c) the median level of discomfort, shame, and/or guilt experienced by individuals when they detect in themselves the desire to violate the principle, and (d) the median level of anger and/or disgust experienced by individuals upon observing or being informed of violations of the principle in the absence of what they, individually, consider to be extenuating circumstances.
- No principle of conduct can be said to belong to the normative ideal system if, as formulated, its observance is inherently incompatible with any higher-ranking principle.
In accord with the foregoing, the frequency and character of violations of a principle of conduct have no bearing whatsoever on whether the latter is a normative ideal, even though they may possibly have profound causal effects on the standing of the principle with respect to criteria (2) and (3) above.