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# CULPABILITY, DANGEROUSNESS, AND HARM: BALANCING THE FACTORS ON WHICH OUR CRIMINAL LAW IS PREDICATED

ARNOLD H. LOEWY†

*Traditionally, criminal law has been based on two elements, mens rea and actus reus. In this Article Professor Loewy argues that analysis of criminal liability should not be so limited, but rather should focus on three factors: culpability, dangerousness, and harm. Professor Loewy examines the three factors and the relevance they have in connection with nine of the most controversial issues in criminal jurisprudence today. He also examines the roles that the three factors play in punishment, including capital punishment. Professor Loewy concludes that a proper focus on culpability, dangerousness, and harm would aid judges, legislators, and scholars in analyzing some of the more controversial issues of criminal law.*

Classically, criminal law is thought to be predicated upon two factors, *mens rea* and *actus reus*, which literally mean “evil mind” and “bad act” respectively. The thesis of this Article is that three factors—culpability, dangerousness, and harm—rather than two—*mens rea* and *actus reus*—need to be balanced in order to assess one’s criminal liability. Culpability, which is substantially subjective, refers to the defendant’s moral blameworthiness or state of mind. Dangerousness, which is more objective, focuses on the likelihood of harm emanating from the defendant’s conduct. Harm is the actual negative consequence occasioned by the conduct. Although culpability and harm roughly approximate *mens rea* and *actus reus*, dangerousness has no corresponding Latin term. Yet, as this Article will establish, dangerousness is frequently the decisive factor in assessing criminal liability.

In the typical case there is no conflict among these factors. For example, when *A*, with the intent to kill, shoots *B* in the heart, killing *B*, *A* has manifested a culpable mind and a dangerous capacity by wilfully inflicting the forbidden harm. More complex issues, however, divide judges, legislators, and theorists. Often these involve nothing more than deciding how much weight ought to be given to each factor, when reliance on one factor would yield a result different from reliance on another factor.

The crime of assault is an ideal paradigm for demonstrating the relevance of each of these factors in assessing the seriousness of the crime. Consider the following eight hypotheticals:

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(1) Alan intentionally pushes Barbara. Barbara hits the ground and suffers a few scratches.

(2) Carl intentionally pushes Deidra. Deidra's head hits the ground, causing brain damage.

(3) Edna throws Frank out of the window, intending to seriously injure Frank. Frank suffers only a few minor scratches.

(4) Gertrude stabs Harold's leg with a knife. Harold suffers a minor cut.

(5) Iris stabs James' leg with a knife. James goes into shock and is hospitalized for a month.

(6) Kristen throws a knife at Linda's chest, intending to seriously injure Linda. Linda ducks and is not hit.

(7) Mark throws Norman out of the window, intending to seriously injure Norman. Norman suffers two broken legs and is confined to a wheelchair for three months.

(8) Olivia throws a knife at Paul's chest, intending to seriously injure Paul. Paul's lung is perforated.

In most jurisdictions, Alan's simple nonaggravated assault would be deemed the least serious assault.<sup>1</sup> Many jurisdictions would convict Carl, Edna, and Gertrude of aggravated assault.<sup>2</sup> Carl's assault differs from Alan's only in the amount of harm it caused. Carl is not more culpable than Alan, nor is he more dangerous.<sup>3</sup> Nevertheless, Carl is subject to condemnation for a more heinous offense, carrying a more severe sanction. Similarly, Edna, because of a culpable intent to cause serious injury, and Gertrude, by using a dangerous weapon, are subject to aggravated penalties. Because Gertrude's crime is aggravated by manifest dangerousness rather than culpability or harm, the fact that Gertrude intended and succeeded in inflicting on Harold the same harm that Alan inflicted on Barbara will not reduce Gertrude's criminal liability to Alan's level.

Iris, Kristen, and Mark each have committed assaults aggravated by two of the three factors. Iris' crime is aggravated by dangerousness and harm, Kristen's by dangerousness and culpability, and Mark's by culpability and harm. In some jurisdictions, the multiplicity of factors aggravate these crimes beyond the single aggravating factor present in Carl, Edna, and Gertrude's crimes.<sup>4</sup> Even in those jurisdictions that maintain only one crime of aggravated assault, the presence of multiple factors is likely to exert an upward influence on the penalty

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1. The Model Penal Code deems mutual combat to be even less serious, classifying it as a petty misdemeanor. MODEL PENAL CODE § 211.1(1) (1962).

2. See, e.g., D.C. CODE ANN. § 22-501 (1981); N.Y. PENAL LAW § 120.10 (McKinney 1975); N.C. GEN. STAT. § 14-33 (b)(1) (1986); MODEL PENAL CODE § 211.1(2)(a), (b) (1962).

3. It would be possible for Deidra's brain damage to have been caused by Carl's unusual strength, which would make Carl more dangerous and—assuming that Carl knew of this strength—more culpable. This hypothetical, as well as the statutes that aggravate penalties for assaults on the basis of resulting injury, make no such assumption.

4. See, e.g., KY. REV. STAT. ANN. §§ 508.010 to .040 (Michie/Bobbs-Merrill 1986). N.C. GEN. STAT. § 14-32 (1981) provides:

imposed.<sup>5</sup> Olivia's crime, involving serious injury, dangerousness, and culpability, is likely to be punished most seriously either by statute or judicial discretion.

## I. THE RELEVANCE OF THE THREE FACTORS

### A. *Culpability*

Hardly any theorist questions the relevance of culpability to criminality. One partial exception is Lady Barbara Wootton, a nonlawyer magistrate in England. In Lady Wootton's view the function of the criminal law ought to be preventive rather than punitive.<sup>6</sup> Consequently, she perceives culpability as relevant only insofar as it sheds light on dangerousness, the elimination or reduction of which she views as the overarching goal of the criminal law. Even under this approach, culpability is not altogether irrelevant. A defendant who is culpably bent on mischief—who, for example, kills another person—will take longer to "cure" than one who inadvertently does the same thing.<sup>7</sup> Nevertheless, this approach, which no court or legislature has adopted, would limit the relevancy of culpability to its impact on dangerousness.<sup>8</sup>

Although courts and legislatures usually require at least minimal culpability, such as criminal negligence, there are exceptions. The most common of these are public welfare offenses, such as marketing impure food or drugs. Eliminating the requirement of culpability is thought to be justified by the great harm that these substances cause, coupled with the relatively minor penalties authorized.<sup>9</sup> In short, concern for harm is so predominant in these crimes that culpa-

(a) Any person who assaults another person with a deadly weapon with intent to kill and inflicts serious injury shall be punished as a Class F felon.

(b) Any person who assaults another person with a deadly weapon and inflicts serious injury shall be punished as a Class H felon.

(c) Any person who assaults another person with a deadly weapon with intent to kill shall be punished as a Class H felon.

Assaults aggravated by only one of the factors are punished less severely. N.C. GEN. STAT. § 14-33 (b)(1) (1986) provides that a person is guilty of a misdemeanor punishable by a fine or imprisonment for not more than two years or both if, in the course of an assault, the person "[i]nflicts, or attempts to inflict, serious injury upon another person or uses a deadly weapon." An unaggravated simple assault in North Carolina is a "misdemeanor punishable by a fine not to exceed fifty dollars (\$50.00) or imprisonment for not more than 30 days." *Id.* § 14-33(a).

5. See, e.g., ILL. REV. STAT. ch. 38, para. 12-2 (1982). In *People v. Simms*, 38 Ill. App. 3d 703, 348 N.E.2d 478 (1976), the Appellate Court of Illinois acknowledged that "[w]hile aggravated battery is a class III felony for which a minimum term of one year's imprisonment would be proper, the trial judge may set a longer term if, in his discretion, the nature and circumstances of the offense and the history and character of the defendant so warrant." *Id.* at 708, 348 N.E.2d at 482 (citations omitted). The appellate court found that the trial court did not abuse its discretion in setting a three-year sentence for an aggravated battery. Defendant, who used a deadly weapon, inflicted a serious injury and threatened to kill the victim. *Id.* at 708-09, 348 N.E.2d at 482-83; see also *People v. Holt*, 7 Ill. App. 3d 646, 656, 288 N.E.2d 245, 253 (1972) (trial court did not abuse discretion in sentencing defendant with no prior felony convictions to a term of one to ten years on an aggravated battery conviction, when defendant used a deadly weapon, inflicted serious injury, and manifested viciousness).

6. B. WOOTTON, *CRIME AND THE CRIMINAL LAW* 40-41 (1963).

7. *Id.* at 49.

8. *Id.* at 58. For a critique of Lady Wootton's view, see Kadish, *The Decline of Innocence*, 26 CAMBRIDGE L.J. 273 (1968).

9. See *Morissette v. United States*, 342 U.S. 246 (1952).

bility is rendered irrelevant. The Model Penal Code (M.P.C.) accepts strict liability under these circumstances only insofar as the offense is called a "violation" rather than a "crime" and has a penalty limited to a fine.<sup>10</sup> The M.P.C. would permit such "violations" to be treated as "crimes" when the State is able to establish at least minimal culpability beyond a reasonable doubt.<sup>11</sup>

Although no other type of crime entirely lacks the culpability requirement, some elements of crimes are defined exclusively in terms of harm or dangerousness, thereby rendering culpability irrelevant. For example, grand larceny may be defined as the theft of property worth at least five hundred dollars. Under such a statute, it is no defense that the thief acted on the reasonable belief that the property was worth less than five hundred dollars.<sup>12</sup> Similarly, a nighttime burglar who acts on the honest and reasonable but mistaken belief that it is daytime will be convicted of nighttime burglary.<sup>13</sup> In these cases, the subordination of culpability to harm (larceny) or dangerousness (burglary) is deemed proper because of the culpability inherent in the basic larcenous or burglarious state of mind. Essentially, this type of case is analytically identical to assault inflicting serious injury—that is, a crime aggravated by harm rather than culpability.

The victim's age in statutory rape is a much more dubious element from which to eliminate culpability. In many jurisdictions, one need only have sexual intercourse with a person who is a minor to be convicted for statutory rape.<sup>14</sup> The only intent required is the intent to have intercourse. The age of the minor is merely a circumstance, like the amount stolen or the time of the burglary in the above hypotheticals. So long as sex outside of marriage is criminal, a rough sort of analogy to these hypotheticals is plausible. When such sex is not criminal, and arguably not even immoral,<sup>15</sup> it seems impossible to condemn an intent to have consensual sex with an adult as a culpable state of mind. Some modern statutes excuse those who honestly and reasonably believe they are copulating with an adult.<sup>16</sup> The statutes that do not must either be predicated on the immorality of nonmarital sex, thereby requiring such "deviants" to ensure abso-

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10. MODEL PENAL CODE § 2.05(2)(a) (1962).

11. *Id.* § 2.05(2)(b). For a discussion of the burden of proof problem, see *infra* notes 41-50 and accompanying text.

12. "[I]t is the value of the property taken, not the thief's estimate of its worth, which governs." W. LAFAVE & A. SCOTT, CRIMINAL LAW § 8.4, at 719 (2d ed. 1986). Thus, one who steals a valuable necklace believing it to be costume jewelry is guilty of grand larceny. *Id.* at 719 n.17; see *Hedge v. State*, 89 Tex. Crim. 236, 229 S.W. 862 (1921). The *Hedge* court, in affirming a larceny conviction, stated that "the degree of guilt is determined by the value of the property actually taken, not by what he thought or intended as to its value or the amount so taken." *Id.* at 240, 229 S.W. at 864; cf. *People v. Earle*, 222 Cal. App. 2d 476, 35 Cal. Rptr. 265 (1963) (defendant's knowledge of money bag contents at time he took it held not necessary for grand theft conviction).

13. W. LAFAVE & A. SCOTT, *supra* note 12, § 8.13(d).

14. *E.g.*, *Commonwealth v. Murphy*, 165 Mass. 66, 42 N.E. 504 (1895).

15. According to Kinsey, nearly 50% of the females and 85% of the males surveyed in 1951 had had coitus before marriage. A. KINSEY, W. POMEROY, C. MARTIN & P. GEBHARD, SEXUAL BEHAVIOR IN THE HUMAN FEMALE 286 (1953). There is no reason to believe that these figures have diminished since the time of that survey.

16. *E.g.*, KY. REV. STAT. ANN. § 510.030 (Michie/Bobbs-Merrill 1985); cf. *People v. Hernandez*, 61 Cal. 2d 529, 535-36, 393 P.2d 673, 677-78, 39 Cal. Rptr. 361, 365 (1964) (judicial rejection of liability when defendant made an honest and reasonable mistake of age).

lutely that their age assessment of each partner is correct,<sup>17</sup> or be rationalized as strict liability statutes with extraordinarily stringent penalties.<sup>18</sup>

The willingness of some states to focus entirely on harm to the exclusion of culpability in bigamy prosecutions<sup>19</sup> is even harder to explain. The law usually regards the intent of a single person to marry as honorable.<sup>20</sup> Thus, a person who honestly and reasonably believes her spouse to be divorced or deceased when contracting the bigamous marriage has acted with praiseworthy intentions. One rationale for excluding culpability seems to be that the integrity of marriage is so fundamental that when it is compromised by bigamy, we cannot pause to consider such matters as intent.<sup>21</sup> Another rationale is that so long as a person was once married, that person is aware of the possibility that the prior spouse is not divorced or deceased.<sup>22</sup> For this reason, even courts that impose strict liability for bigamous marriages will not impose such liability on the previously unmarried partner who was unaware that her apparent spouse ever had a different spouse.<sup>23</sup> Needless to say, such small regard for culpability in bigamy cases has not met with universal approval.<sup>24</sup>

## B. *Dangerousness*

So long as culpability is present, most authorities regard dangerousness as an aggravating factor. There is virtually no support, however—Lady Wootton excepted<sup>25</sup>—for convicting a dangerous but not culpable offender. To take the M.P.C.'s classic hypothetical, a man who, through no fault of his own, believed he was squeezing lemons rather than his wife's neck would not be guilty of murder.<sup>26</sup> He would, of course, be subject to civil commitment. When a mentally deranged, but not legally insane, defendant commits a crime, there is some question as to whether his condition mitigates or aggravates his liability. Some stat-

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17. *Cf.* Regina v. Prince, 13 Cox Crim. Cas. (Crim. App. 1875) (no defense to abduction charge that defendant reasonably and in good faith believed abducted girl was older than 16).

18. *See, e.g.*, Commonwealth v. Murphy, 165 Mass. 66, 69, 42 N.E. 504, 504 (1895) (court defers to legislative intent of treating statutory rape as a strict liability offense and providing a punishment as severe as that for second degree murder).

19. *See, e.g.*, Turner v. State, 212 Miss. 590, 55 So. 2d 228 (1951).

20. The United States Supreme Court has referred to marriage "as creating the most important relation in life, as having more to do with the morals and civilization of a people than any other institution . . ." Maynard v. Hill, 125 U.S. 190, 205 (1888).

21. State v. Goonan, 89 N.H. 528, 529, 3 A.2d 105, 106 (1938). The New Hampshire Supreme Court opined that "had it been the intention of the Legislature to include in the list of exceptions any person entertaining a reasonable belief that he has been legally divorced, it is unlikely, in view of 'the public concern for the stability of marriage,' that such legislative purpose would have been left to implication." *Id.* (quoting Heath v. Heath, 85 N.H. 419, 428, 159 A. 418, 422 (1932)).

22. *See* Braun v. State, 230 Md. 82, 185 A.2d 905 (1962).

23. *See, e.g.*, State v. Audette, 81 Vt. 400, 404, 70 A. 833, 834 (1908).

24. *E.g.*, IOWA CODE ANN. § 726.1 (West 1979); KY. REV. STAT. ANN. § 30.010(2) (Michie/Bobbs-Merrill 1985); ME. REV. STAT. ANN. tit. 17-A, § 51 (1964); MICH. STAT. ANN. §§ 28.694, 28.695 (Callaghan 1982); NEV. REV. STAT. § 201.170 (1979); *see also* People v. Vogel, 46 Cal. 2d 798, 801, 299 P.2d 850, 852-53 (1956) (wrongful intent required for bigamy conviction).

25. *See* B. WOOTTON, *supra* note 6, at 54; *supra* text accompanying notes 6-8.

26. MODEL PENAL CODE § 4.01 comment at 156 (Tent. Draft No. 4, 1953); *id.* § 4.01 comment at 166 (1962).

utes, relying on diminished culpability, mitigate liability.<sup>27</sup> Others, including the M.P.C., rely on dangerousness to aggravate liability.<sup>28</sup>

### C. Harm

The relevance of harm is probably the most disputed of the three criteria. Most statutes vary criminal liability greatly according to whether and what kind of harm occurred.<sup>29</sup> The M.P.C., with considerable vacillation, sometimes regards harm as relevant<sup>30</sup> and sometimes does not.<sup>31</sup> Professor Paul Robinson believes that harm is a *sine qua non* of criminal liability.<sup>32</sup> Professor Steven Schulhofer, on the other hand, contends that harm never should be relevant in assessing criminal liability.<sup>33</sup> As one might suspect, neither of these views has been completely embraced by the courts.

According to Professor Robinson, one never ought to be liable for an evil mind or dangerous behavior, so long as the end result was justifiable. For example, assume that *A*, a Ku Klux Klan member, devises a plan to burn the farms of twenty-five farmers (*B* through *Z*), all of whom are black. Upon his arrest for burning *B*'s farm, a diary containing the plan for burning the remaining farms is discovered. It is also discovered that, unbeknownst to *A*, the burning of *B*'s farm was necessary to start a backfire which successfully contained a raging forest fire that would have destroyed the farms of *C* through *Z*, had it not been contained. Because burning *B*'s farm in order to save the other twenty-four is justifiable, Robinson would not allow *A* to be convicted of arson.<sup>34</sup>

Although most authorities would impose liability in the above hypotheti-

27. See, e.g., FLA. STAT. § 921.141(2)(b) (1984); N.C. GEN. STAT. § 15A-1340.4(2)(e) (1984); PA. CONS. STAT. § 9711(e)(2), (3) (1986).

28. MODEL PENAL CODE § 4.01 (1962); see, e.g., ILL. ANN. STAT. ch. 38, para. 6-2 (Smith-Hurd 1972 & Supp. 1986) (following Model Penal Code rule).

29. For example, an attempt is usually punished less severely than a completed crime. In Alabama felonies are classified as A, B, or C. The sentence for class A felonies is life or not more than 99 years or less than 10 years; for class B, not more than 20 years or less than two years; for class C, not more than 10 years or less than one year and a day. ALA. CODE § 13A-5-6 (1982). Alabama law provides that the attempted crime is punishable as one class lower than that of the crime itself. *Id.* § 13A-4-2 (1975). Other states have similar statutes. See, e.g., KY. REV. STAT. ANN. § 56.010 (Michie/Bobbs-Merrill 1985); OHIO REV. CODE ANN. § 2923.02(E) (Anderson 1982 & Supp. 1986).

30. For instance, reckless endangerment (recklessly engaging in conduct that places another person in danger of death or serious bodily injury) is a misdemeanor. MODEL PENAL CODE § 211.2 (1962). If such conduct actually causes death, however, it is punished as a second degree felony. *Id.* § 210.3. Risking catastrophe is a misdemeanor, *id.* § 220.2(2), but actually causing catastrophe is a second degree felony. *Id.* § 220.2(1).

31. The Model Penal Code establishes a general rule that attempt, solicitation, and conspiracy are crimes of the same degree of the most serious offense that is attempted or solicited or is an object of the conspiracy. *Id.* § 5.05(1). Importantly, the Code does not distinguish between conspiracies that are actually carried out and those that are not, or between solicitation that actually results in the commission of a crime and solicitation that does not. *Id.* §§ 5.02-5.03. As an exception to the general rule, the Code provides that an attempt, solicitation, or conspiracy to commit a felony of the first degree is a felony of the second degree. *Id.* § 5.05(1).

32. Robinson, *A Theory of Justification: Societal Harm as a Prerequisite for Criminal Liability*, 23 UCLA L. REV. 266, 266-75 (1975).

33. Schulhofer, *Harm and Punishment: A Critique of Emphasis on the Results of Conduct in the Criminal Law*, 122 U. PA. L. REV. 1497 (1974).

34. Robinson, *supra* note 32, at 272. Robinson's hypothetical is not embellished with racial motivation. He leaves open the possibility of attempt liability but seems to oppose it.

cal,<sup>35</sup> they do so on the ground that harmful physical consequence actually occurred—i.e., *B*'s farm was burned. In cases in which the unknown factor totally negates harm, liability usually is not imposed. Thus, if *C* takes *D*'s car, not knowing that *D* already has transferred the car to *C*'s name, *C* will not be convicted of larceny.<sup>36</sup> Similarly, if *E* surreptitiously enters *F*'s room while *F* is sleeping and has sexual intercourse with *F*, which much to *E*'s surprise pleases *F*, *E* will not be guilty of rape.<sup>37</sup> Consequently, Robinson's view of the indispensability of harm is only slightly overstated.

Professor Schulhofer's view that harm should be irrelevant to criminality is almost universally rejected, at least by the courts.<sup>38</sup> According to this view, one who intentionally pushes another, thereby causing brain damage, should be treated identically with one who pushes another causing a few scratches.<sup>39</sup> Similarly, one who throws a knife at another intending to inflict serious injury should receive the same treatment whether the knife perforates the victim's lung, misses entirely, or kills the victim. The rationale for this punishment apportionment scheme is the fortuity of harm occurring and its consequent irrelevance to culpability.<sup>40</sup>

To the extent that culpability ought to be the sole criterion in assessing criminality, Schulhofer would undoubtedly be correct. At bottom, the question is one of fairness. Is it fair to allow a factor unrelated to culpability to affect one's liability? Unfortunately, there is no *a priori* answer. One could just as easily ask whether fairness permits a punishment differential on the basis of culpability or dangerousness when two people cause identical harm—for example, one person causes brain damage with a push while another causes brain damage by a blow to the head with a rock. Few, if any, jurisdictions are troubled by aggravating a crime for any of these reasons.

One factor supporting the persistent retention of harm as a relevant factor in criminal sanctions may be that it mirrors life. Consider the following hypotheticals: *A* calls his boss, *B*, a jerk; *B* fires *A*. *C* calls *D*, her boss, a jerk; *D* starts a dialogue with *C* to find the reason for *C*'s opinion. Ultimately *D* develops different characteristics and promotes *C*. *E* uses cocaine and dies from it. *F* uses cocaine and has a pleasant evening. Obviously, the list could be multiplied.

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35. Even Robinson concedes this point. Robinson, *supra* note 32, at 288. According to LaFave and Scott, lack of knowledge of the justifying circumstances will bar a defense of justification. See W. LAFAVE & A. SCOTT, *supra* note 12, § 3.6(a), at 230; *id.* § 5.4(d), at 446.

36. See Fletcher, *The Right Deed for the Wrong Reason: A Reply to Mr. Robinson*, 23 UCLA L. REV. 293, 295 (1976).

37. He may, however, be guilty of attempted rape depending on the jurisdiction's view of impossibility. Compare *United States v. Thomas*, 13 C.M.A. 278, 32 C.M.R. 27 (1962) (fact that female with whom defendants had sexual intercourse was dead at the time of intercourse is no bar to conviction of attempted rape) with *State v. Guffey*, 262 S.W.2d 152 (Mo. Ct. App. 1953) (as basis for its holding that defendants who shot stuffed deer in field could not be convicted of attempt to take deer out of season, court noted that it is no crime to attempt to murder a human corpse because a corpse cannot be murdered).

38. Indeed, Schulhofer wrote the article to change the law. See Schulhofer, *supra* note 33, at 1503.

39. This hypothetical assumes that the pushes were equally hard and with the same intent.

40. See Schulhofer, *supra* note 33, at 1577-80.



Suffice it to say, the world is full of instances in which equally culpable people wind up very differently. Consequently, it should not be surprising that one who chances driving while drunk and kills somebody will be dealt with more harshly than a drunk who wins his gamble and gets home safely or is stopped for drunk driving before a victim is killed. Similarly, one whose thrown knife kills another simply loses as compared to a similar knife thrower who misses the victim.

## II. PROBLEMS OF PROOF

Having introduced the relevance of the three factors—culpability, dangerousness, and harm—I will shortly explore how many of the most divisive issues in criminal law involve a balancing of these factors, and how one's ultimate view of the correct resolution will depend on the relative importance attached to each of these factors.<sup>41</sup> First, I will focus on the problem of proof of facts, a problem which often silently underlies criminal law doctrine.

Frequently, we are convinced beyond a reasonable doubt that a particular defendant caused substantial harm, but are not convinced beyond a reasonable doubt that the defendant acted with a culpable state of mind. Under classic Anglo-American jurisprudence, such a defendant should be acquitted. Hardly any principle is more dear to the hearts of those who defend our criminal justice system than our willingness to acquit a guilty person rather than convict one who is innocent. Consequently, our Constitution forbids conviction unless the State can prove every element of the crime beyond a reasonable doubt.<sup>42</sup>

Ascertaining what constitutes an element is an exercise in constitutional schizophrenia. For example, we believe that one should not be convicted of a crime without a culpable state of mind. We also believe that insanity, however defined, negates culpability.<sup>43</sup> Yet the Supreme Court permits insanity to be treated as a defense rather than an element, thereby allowing the burden of proof to be shifted to the defendant.<sup>44</sup> Most states have chosen to shift the burden on this issue,<sup>45</sup> thereby rendering it possible to convict a person even when the jury is not satisfied that the person possesses the requisite culpability for the crime.

The Supreme Court's criteria for permitting the burden of proof to be shifted is unclear at best and downright bizarre at worst.<sup>46</sup> For this and other

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41. See *infra* notes 51-185 and accompanying text.

42. *Mullaney v. Wilbur*, 421 U.S. 684 (1975); *In re Winship*, 397 U.S. 358 (1970).

43. See *infra* notes 51-82 and accompanying text.

44. See, e.g., *Rivera v. Delaware*, 429 U.S. 877 (1976); *Leland v. Oregon*, 343 U.S. 790 (1952).

45. E.g., ILL. REV. STAT. ch. 38, para. 6-2(e) (1986); IND. CODE § 35-41-4-1 (1985); WIS. STAT. § 971.15(3) (1985).

46. In *Mullaney*, 421 U.S. 684 (1975), the Court held that because Maine defined malice aforethought as an essential element of murder, the prosecution must prove the absence of provocation beyond a reasonable doubt. In *Patterson v. New York*, 432 U.S. 197 (1977), the Court held that in New York the prosecution did not have to prove the lack of extreme emotional disturbance, which is the mitigating factor for manslaughter in New York.

Commentators, regardless of persuasion, find the two cases inconsistent because the laws in the two cases are substantively equivalent. Some commentators contend that the State should be required to prove every element, including the absence of any mitigating, excusing, or justifying factors. E.g., Underwood, *The Thumb on the Scales of Justice: Burdens of Persuasion in Criminal Cases*, 86 YALE L.J. 1299 (1976). To allow convictions on less would violate the presumption of

reasons, certain aspects of culpability are sometimes made irrelevant. For example, such matters as insufficient sobriety to know what one is doing,<sup>47</sup> reasonable belief that one's sex partner is an adult,<sup>48</sup> and extreme care to prevent the distribution of impure food<sup>49</sup> usually will not exculpate the defendant. Even if the burden could be shifted on these issues,<sup>50</sup> some states would disallow the defense for at least two reasons. First, there is a danger that the jury would believe the defense even if it were not true. For example, if a drunk who could not remember the incident testified to that lack of memory, a jury might wrongly conclude that absence of memory was tantamount to absence of intent. To prevent this possibility of error, such issues simply are made irrelevant. Second, apart from jury error, the mere possibility of a defense may encourage some to be less careful in the mistaken belief they will be able to persuade a jury that they acted with due care. A man who has sex with an underage girl may think he can persuade a jury that he reasonably believed her to be of age, and a woman who fails to inspect the purity of the food her company sells may believe she can persuade a jury that she made the requisite inspections. Even if these beliefs are false, the presence of the defense coupled with the uncertainty of the fact-ascertaining process creates something of an incentive to take the risk. Consequently, by withdrawing the defense, this incentive is also withdrawn.

### III. BALANCING THE FACTORS

This section will explore nine of the most controversial issues in substantive criminal law today: insanity, intoxication, state of mind necessary for rape, state of mind necessary for assault with intent to commit rape, self-defense, provocation, unintentional killings, felony murder, and inchoate criminality. Each section will focus on the conflict among the three factors, and the reasons for placing decisive weight on one factor over another.

#### A. Insanity

Insanity, which is seldom employed in cases other than murder,<sup>51</sup> balances dangerousness and harm on the one side against culpability on the other. In the

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innocence. Other commentators contend that the State should only be required to prove all factors necessary to establish a constitutionally sufficient basis to convict and punish the defendant, and that if the State wishes to provide a defense beyond what is constitutionally required it should be allowed to shift the burden of proof to the defendant on that issue. *E.g.*, Allen, *The Restoration of In re Winship: A Comment on Burdens of Persuasion in Criminal Cases After Patterson v. New York*, 76 MICH. L. REV. 30 (1977); see Jeffries & Stephan, *Defenses, Presumptions, and Burden of Proof in the Criminal Law*, 88 YALE L.J. 1325 (1979). Underwood supports *Mullaney* and opposes *Patterson*, while Allen supports *Patterson* and opposes *Mullaney*.

47. See *infra* notes 83-101 and accompanying text.

48. See *supra* notes 14-18 and accompanying text.

49. See *supra* text accompanying notes 9-11.

50. There is good reason to think that the burden could be shifted. See *Martin v. Ohio*, 107 S. Ct. 1098 (1987); *Patterson v. New York*, 432 U.S. 197, 207-09 (1977); *supra* note 45 (citing statutes).

51. See S. HALLECK, *PSYCHIATRY AND THE DILEMMAS OF CRIME* 216 (1967).

extreme case, the resolution is easy. The M.P.C.'s "lemon squeezer"<sup>52</sup> would not be convicted. Despite the extraordinary dangerousness of a person who cannot tell the difference between a lemon and his wife's neck, the total absence of culpability in such a case precludes resort to the criminal law. Such cases, however, are extremely rare. Few psychiatrists have ever seen a "lemon squeezer."<sup>53</sup> Even if we found one, it is unlikely that such a person would be mentally competent to stand trial.<sup>54</sup>

In the real world, the killer knows the difference between a lemon and his wife's neck, and knows that by squeezing her neck he will kill her. His defense usually is that he did not know it was wrong (*M'Naghten*),<sup>55</sup> he had an irresistible impulse to do it,<sup>56</sup> or he lacked substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the criminal law (M.P.C.).<sup>57</sup> In each of these cases, the defendant, by intentionally killing another human being, has manifested some culpability to accompany his dangerousness and harm. Consequently, some jurisdictions have abolished the insanity defense entirely—except for those who, like the "lemon squeezer," lack the intent to kill<sup>58</sup>—or added a verdict of guilty but mentally ill.<sup>59</sup>

Jurisdictions that retain the insanity defense differ in the amount of culpability required for criminal liability, and range from a strict reading of *M'Naghten's Case*<sup>60</sup> to an expansive reading of the M.P.C. Under the most stringent view of *M'Naghten*, only those individuals who totally lack the capacity to understand that the law forbids murder would have a defense. These individuals are very nearly as scarce as "lemon squeezers" and just about as likely to be incompetent to stand trial.<sup>61</sup> The only practical difference between jurisdictions with such a stringent test and those that have abolished the insanity defense entirely is that the strict *M'Naghten* jurisdictions give the jury the opportunity to nullify the law by acquitting a defendant in what it perceives to be an especially compelling case.<sup>62</sup> As the test becomes more liberal, defendants with relatively more culpability will be acquitted.<sup>63</sup> The question becomes:

52. MODEL PENAL CODE § 4.01 comment at 156 (Tent. Draft No. 4, 1953); *id.* § 4.01 comment at 166 (1957); see *supra* text accompanying note 26.

53. See S. HALLECK, *supra* note 51, at 213.

54. This would not be the case, of course, if the person regained sanity prior to trial.

55. *M'Naghten's Case*, 8 Eng. Rep. 718 (1843).

56. *United States v. Kunak*, 5 C.M.A. 346 (1954).

57. MODEL PENAL CODE § 4.01(1) (1962).

58. *E.g.*, IDAHO CODE § 18-207 (Supp. 1987).

59. *E.g.*, ALASKA STAT. § 12.47.030(a) (1984); GA. CODE ANN. § 17-7-131-(c)(2) (Supp. 1987); MICH. STAT. ANN. § 28.1059 (Callaghan 1985).

60. 8 Eng. Rep. 718 (1843).

61. See Diamond, *Criminal Responsibility of the Mentally Ill*, 14 STAN. L. REV. 59, 60-61 (1961).

62. Examples include killings which run contrary to our expectations, such as a mother killing her child. This ethic may explain in part the success of the defense in political killings or attempted killings from *Regina v. Hadfield*, 2 All E.R. 765 (1954), and *M'Naghten*, 8 Eng. Rep. 718 (1843), through *United States v. Hinckley*, 525 F. Supp. 1342 (D.D.C. 1981), in which the court held that "[o]nly an insane person would want to kill our President." Hinckley, however, was exculpated under a very different test. See *infra* text accompanying notes 69-72.

63. This result assumes that jurors will follow instructions. Some evidence indicates that they do not. H. KALVEN & H. ZEISEL, *THE AMERICAN JURY* (1966).

How much culpability should we demand before a dangerous killer can be condemned as a murderer?

One means of liberalizing the strict *M'Naghten* test is to limit liability to those defendants who are capable of emotionally appreciating the illegality of their conduct as opposed to those whose capacities are limited to an intellectual understanding of it.<sup>64</sup> Another closely related device is to limit liability to those who can understand or appreciate the moral, as opposed to legal, wrongness of their acts.<sup>65</sup> Under this standard, one who appreciates the illegality of killing his wife, but because of an insane delusion believes that God commanded him to kill her, would not be guilty of any crime. Those supporting such expansions of the defense argue that unless one appreciates the moral wrongness of one's conduct, culpability is insufficient to impose criminal sanctions.<sup>66</sup> Those opposed contend that such highly dangerous people, who are not deterred by a common sense of morality, need to know that their failure to adhere to the criminal law (which they intellectually understand) will result in severe sanctions.<sup>67</sup>

Under *M'Naghten*, in any form, one who fully understands the immorality of his conduct but lacks capacity to control it has no defense. Much of the criticism of *M'Naghten* is predicated on this total emphasis on cognition.<sup>68</sup> Some jurisdictions responded by superimposing on *M'Naghten* an irresistible impulse test under which one who knew right from wrong but had an irresistible impulse to do wrong could not be punished.<sup>69</sup> Some think that this test still convicts too many nonculpable or marginally culpable people, because in some forms it is only available to those who would have acted the same "with a policeman at the elbow."<sup>70</sup> Others contend that the test potentially could free too many dangerous and culpable defendants, and argue that it is essentially circular because the only measure of the irresistibility of the impulse is whether or not it was resisted.<sup>71</sup> Obviously this problem is exacerbated in those jurisdictions that require the State to prove resistibility beyond a reasonable doubt. For one or the other of these reasons, most jurisdictions currently reject the irresistible impulse test in favor of either the more stringent *M'Naghten* test or the more liberal standards of the M.P.C.<sup>72</sup>

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64. See Zilboorg, *Misconceptions of Legal Insanity*, 9 AM. J. ORTHOPSYCHIATRY 540, 552 (1939).

65. *Id.*

66. See J. SMITH & B. HOGAN, CRIMINAL LAW 175 (5th ed. 1983).

67. See W. LAFAVE & A. SCOTT, *supra* note 12, § 4.1(c)(4).

68. See *Durham v. United States*, 214 F.2d 862, 875-76 (1954); MODEL PENAL CODE § 4.01 comment at 156-57 (Tent. Draft No. 4, 1953); *id.* § 4.01 comment at 166-67 (1962).

69. See, e.g., COLO. REV. STAT. § 16-8-101 (1973) (amended to strict *M'Naghten* rule in 1986); GA. CODE ANN. § 16-3-2 to -3 (1984).

70. *United States v. Kunak*, 5 C.M.A. 346, 359 (1954).

71. Waite, *Irresistible Impulse and Criminal Liability*, 23 MICH. L. REV. 443, 454 (1925).

72. MODEL PENAL CODE § 4.01 & commentaries at 168 (1962). Colorado now applies the strict *M'Naghten* test, which inquires whether the defendant is "incapable of distinguishing right from wrong." COLO. REV. STAT. § 16-8-101 (1986). Delaware rejected the irresistible impulse test in favor of the liberal M.P.C. test, which inquires whether "the accused lacked substantial capacity to appreciate the wrongfulness of his conduct or lacked sufficient willpower to choose whether he would do the act or refrain from doing it." DEL. CODE ANN. tit. 11, § 401 (1974).

Support for the M.P.C. test, requiring substantial capacity both to appreciate the criminality of one's conduct and to conform such conduct to the criminal law, comes from those who believe that too many nonculpable people are convicted under the other tests. Those opposed to the test worry about the number of highly dangerous and somewhat culpable people who may totally escape liability under it, particularly when the Government must prove substantial capacity beyond a reasonable doubt. As Seymour Halleck once mused in reference to the *Hinckley* case, which was decided in a jurisdiction that required the Government to prove substantial capacity beyond a reasonable doubt: "How can anyone prove the substantial capacity to control anything of a defendant who believes that Jodie Foster will fall in love with him if only he would assassinate the President?"<sup>73</sup>

All of these tests are complicated by at least two factors. The first is the all-or-nothing nature of the insanity defense: the killer is either on one side of the line in which case there is no liability, or on the other side in which case there is full liability.<sup>74</sup> In fact, most people who kill without justification are probably somewhat mentally disturbed. Indeed, increasing evidence indicates that such behavior frequently can be traced to such physical abnormalities as the XYY chromosome,<sup>75</sup> premenstrual syndrome,<sup>76</sup> or a brain with a damaged frontal lobe.<sup>77</sup> Consequently, any but the most stringent insanity tests tend to make a monumental decision rest on a microscopic distinction.<sup>78</sup>

The other complicating factor is the uncertainty of extensive civil commitment. A convicted murderer who is not executed usually will receive life imprisonment. Although parole is sometimes possible, the public is guaranteed the protection of a substantial prison term. Civil commitment of the insanity acquittee is less certain. Many jurisdictions require civil commitment,<sup>79</sup> but some do not.<sup>80</sup> Even if incarcerated, a civil detainee, because she has not been convicted of a crime, is entitled to release after convincing a court that she is no longer dangerous.<sup>81</sup> Consequently, the public knows that a person who has been found

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73. Dr. Seymour Halleck, Remarks at the University of North Carolina School of Law (Nov. 4, 1986). Dr. Halleck credits Dr. Allen Stone as the inspiration for his remark.

74. In some jurisdictions, insanity may be relevant to prove lack of premeditation. However, unless premeditation has to be meaningful and mature—as it once was in California, see *People v. Wolff*, 61 Cal. 2d 795, 394 P.2d 959, 40 Cal. Rptr. 271 (1964), but no longer is, see CAL. PENAL CODE § 189 (West 1970 & Supp. 1986)—it is not likely to make much difference. In any event, if the defendant actually did premeditate, his mental condition would be irrelevant to that issue. If he did not premeditate he would not be guilty of premeditated murder anyway. Indeed, those jurisdictions that do not permit insanity to negate premeditation when it in fact does negate it actually use insanity to aggravate liability.

75. W. LAFAYE & A. SCOTT, *supra* note 12, § 4.8, at 377-82.

76. Press, *Pre-menstrual Stress Syndrome as a Defense in Criminal Cases*, 1983 DUKE L.J. 176.

77. Krieger, *What Makes People Kill?*, Chapel Hill Newspaper, July 6, 1986, at 9E, col. 1 (originally printed in San Francisco Examiner).

78. This consequence perhaps explains Lady Wootton's willingness to abolish principles of culpability entirely. See *supra* text accompanying notes 6-8.

79. *E.g.*, COLO. REV. STAT. § 16-8-105(4) (1978); DEL. CODE ANN. tit. 11, § 403 (1984); ME. REV. STAT. ANN. tit. 15, § 103 (1964).

80. *E.g.*, ALA. CODE § 15-16-41 (1975); MICH. STAT. ANN. § 14.800 (1050) (Callaghan 1980).

81. *E.g.*, COLO. REV. STAT. § 16-8-120 (1978); DEL. CODE ANN. tit. 11, § 403 (1984); ME. REV. STAT. ANN. tit. 15, § 104 (1964).

beyond a reasonable doubt to have intentionally killed another human being can be freed as soon as the killer or his smart lawyer can persuade a judge that the killer is no longer dangerous. Although statistics seem to indicate this problem is more theoretical than real,<sup>82</sup> a populace concerned with even this theoretical possibility is not likely to turn dangerous killers away from the apparent certainty of the criminal justice system. This factor, along with the *Hinckley* acquittal, may explain the current trend towards minimizing the insanity defense.

## B. Intoxication

Intoxication, like insanity, balances dangerousness and harm against culpability. Even more than with insanity, courts facing an intoxication defense tend to subordinate culpability to dangerousness. For example, a defendant who kills another while so inebriated or drugged that he thinks he is squeezing a lemon rather than a human neck will usually be guilty of murder<sup>83</sup> or manslaughter.<sup>84</sup> Similarly, a drunk who swings a baseball bat at another's head, either unaware of what he is doing or believing the head to be a baseball, will be convicted of assault.<sup>85</sup> Only those who become intoxicated involuntarily are likely to escape liability.<sup>86</sup>

Usually such expansive liability is predicated on the concept of general intent crimes. Black-letter law classically provides that intoxication, regardless of how extreme, cannot negate general intent.<sup>87</sup> Frequently, instead of defining general intent, courts use it simply as an epithet to justify convicting the lemon squeezer or baseball batter.<sup>88</sup> Courts that do attempt a definition often define a general intent crime as one requiring no particular state of mind.<sup>89</sup> As a consequence, because there is no particular state of mind to be negated, it matters not that the defendant thought he was squeezing lemons, hitting home runs, or not thinking at all. The difficulty with such analysis, of course, is that it simply is not correct. Although jurisdictions vary with regard to the state of mind required for murder, manslaughter, or assault, they all require some sort of culpa-

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82. S. SHAW, W. CURRAN & L. MCGARRY, *CRIMINAL RESPONSIBILITY IN FORENSIC PSYCHOLOGY AND PSYCHOLOGY EXHIBITS* 186-87 (1986).

83. See *State v. Hall*, 214 N.W.2d 205 (Iowa 1974) (defendant found guilty despite drug-induced hallucination that he was shooting dog).

84. See, e.g., *Regina v. Lipman*, 3 All E.R. 410 (1969) (defendant convicted of manslaughter after killing victim while "tripping" on LSD).

85. *D.P.P. v. Majewski*, 2 All E.R. 142 (1976); *People v. Hood*, 1 Cal. 3d 444, 462 P.2d 370, 82 Cal. Rptr. 618 (1969).

86. Involuntary intoxication occurs when the defendant is unaware that he has ingested an intoxicant or has been forced to ingest it. Sometimes pathological intoxication is deemed involuntary. Pathological intoxication occurs when a person without knowledge of any peculiar susceptibility becomes grossly more intoxicated than would normally occur from the amount of intoxicant ingested.

87. W. LAFAVE & A. SCOTT, *supra* note 12, § 4.10(a), at 389-90.

88. See, e.g., *State v. Brough*, 112 N.H. 182, 291 A.2d 618 (1972). The Supreme Court of New Hampshire held that "[t]he offense with which this defendant was charged [aggravated assault] was a 'general intent crime' and his intent could be inferred from the evidence of his conduct. Under this view, the defendant's intoxication could be no defense." *Id.* at 185, 291 A.2d at 621 (citations omitted).

89. See, e.g., *Kane v. United States*, 399 F.2d 730, 736 (9th Cir. 1968) (drunkenness irrelevant in general intent crimes because no particular state of mind is required).

bility. For example, no jurisdiction would convict a golfer of assault if the golf ball he hit accidentally hit a passerby whose presence was not reasonably apparent to the golfer. Thus, it follows that some particular state of mind is required even for general intent crimes.

Justice Traynor of the California Supreme Court developed a somewhat more plausible theory to explain the irrelevance of intoxication to a crime such as assault with a dangerous weapon. Traynor opined that

a drunk man is capable of forming an intent to do something simple, such as strike another, unless he is so drunk that he has reached the stage of unconsciousness. What he is not as capable as a sober man of doing is exercising judgment about the social consequences of his acts or controlling his impulses towards anti-social acts. He is more likely to act rashly and impulsively and to be susceptible to passion and anger. It would therefore be anomalous to allow evidence of intoxication to relieve a man of responsibility for the crimes of assault with a deadly weapon or simple assault, which are frequently committed in just such a manner.<sup>90</sup>

Without question, Justice Traynor's analysis accurately describes most intoxication cases that come before experienced judges. Indeed, in the very case before the California court, the defendant had questioned a police officer, the ultimate victim of the assault, about his lack of a warrant.<sup>91</sup> Such concern for legal niceties is not the hallmark of one whose intoxication is so extreme that he cannot understand what he is doing. Nevertheless, Traynor's analysis is unsatisfactory in those unusual cases in which an intoxicated or drugged defendant really does not know what he is doing.

The M.P.C., not without some internal difference of opinion,<sup>92</sup> chose to retain the traditional rule for intoxication. The rule provides that "[w]hen recklessness establishes an element of the offense, if the actor, due to self-induced intoxication, is unaware of a risk of which he would have been aware had he been sober, such unawareness is immaterial."<sup>93</sup> Under this test, the inebriated or drugged lemon squeezer would be guilty of murder. Although he was unaware of the risk that his "lemon" might have been a human neck, he would have been aware of that risk had he been sober. The M.P.C. makes reckless homicide murder when "it is committed recklessly under circumstances manifesting extreme indifference to the value of human life,"<sup>94</sup> certainly an apt description of one who is squeezing a human neck.

Part of the M.P.C.'s rationale for this rule is that

awareness of the potential consequences of excessive drinking on the capacity of human beings to gauge the risks incident to their conduct is by now so dispersed in our culture that [it is not unfair] to postulate a general equivalence between the risks created by the conduct of the

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90. *People v. Hood*, 1 Cal. 3d 444, 458, 462 P.2d 370, 379, 82 Cal. Rptr. 618, 627 (1969).

91. *Id.* at 448, 462 P.2d at 371, 82 Cal. Rptr. at 619.

92. MODEL PENAL CODE § 2.08 commentary at 350-56 (1962).

93. *Id.* § 2.08(2).

94. *Id.* § 2.10(2).

drunken actor and the risks created by his conduct in becoming drunk.<sup>95</sup>

This effort to postulate an equivalence between getting drunk and attacking, let alone strangling, another human being simply will not wash. One who wilfully gets drunk or drugged to excess, while culpable, is not nearly as culpable as one who wilfully or recklessly harms another person—unless, of course, the drunk or drugged person knew of his propensity to cause injury while drunk.

The M.P.C.'s other reasons for adopting its rule are more persuasive. One is the problem of proof. In an overwhelmingly high percentage of cases the drunk will have the requisite state of mind; he knows the difference between a head and a baseball. Yet he usually cannot remember his state of mind or anything else surrounding the incident. Consequently, it is difficult for a jury to ascertain his state of mind at the time. By making the question irrelevant, the jury need not worry about it. Even though this might seem harsh in a legal system dedicated to the presumption of innocence, it is less harsh than the irrelevancy of a number of other questions, such as awareness of the age of a statutory rape victim. Many states believe that protecting minors is so important that one who has sex with a minor will be deemed a rapist even if he reasonably believed her to be an adult.<sup>96</sup> Similarly, a drunk is required to comply with the law while drunk, not because drunkenness is culpable, but because it is dangerous.

Ultimately, the bottom line is that insofar as intoxication is concerned, we regard dangerousness as more important than culpability. This sentiment was most apparent in *D.P.P. v. Majewski*,<sup>97</sup> a case in which the English House of Lords, despite impressive academic criticism, continued to reject the intoxication defense.<sup>98</sup> The critics argued that it was illogical and unjust to obtain an assault conviction against one who was too drunk to know that he was assaulting another person. The Lords' objections to the academic critics was best summarized by Lord Russell, who argued that

[t]he ordinary citizen who is badly beaten up would rightly think little of the criminal law as effective protection if, because his attacker had deprived himself of ability to know what he was doing by getting himself drunk or going on a trip with drugs, the attacker is to be held innocent of any crime in the assault.<sup>99</sup>

This placing of dangerousness and harm above culpability is not so illogical as the English academics claim. Their arguments seem to be predicated on the assumption that criminal liability ought to be proportionate to culpability. Once one accepts the notion that criminal liability can vary markedly according to dangerousness and harm so long as minimal culpability is present,<sup>100</sup> it is entirely logical to hold a drunk liable for a more serious crime than the one he

95. *Id.* § 2.08 commentary at 359.

96. See *supra* text accompanying notes 14-16.

97. 2 All E.R. 142 (1976).

98. See, e.g., J. SMITH & B. HOGAN, *supra* note 66, at 193 ("*Majewski*, itself, fails to reveal any consistent principle.").

99. *Majewski*, 2 All E.R. at 171.

100. All of the academics concede that getting too drunk to know what one is doing results in at



thought he was committing. Furthermore, given that an appallingly high percentage of crimes are committed under the influence of an intoxicant,<sup>101</sup> it may well be good policy to continue to do so.

### C. *Mens Rea of Rape*

Much of the argument for and against an expansive intoxication defense applies to the *mens rea* requirement for rape. The problem arises when a man who forces an unwilling woman to have sexual intercourse with him claims that he thought she had consented. The resolution of this issue, like intoxication, involves balancing culpability on the one hand, against dangerousness and harm on the other. Indeed, in most such cases, the rapist *vel non's* misperception is due, at least in part, to intoxication.

In the United States the resolution of this issue is fairly simple: an honest and reasonable mistake will excuse the defendant.<sup>102</sup> As a practical matter, this normally will mean little to the defendant. Unless the unwilling victim manifests substantial resistance, except when the defendant's threats make resistance useless, she will be deemed to have consented.<sup>103</sup> Because a court need not reach the mistake issue unless it has found nonconsent, the same substantial resistance that defeated the nonconsent claim should also defeat any claim based on *reasonable belief*.<sup>104</sup>

In England, however, even an unreasonable belief in consent precludes a conviction for rape. The House of Lords made this ruling in the celebrated case of *D.P.P. v. Morgan*.<sup>105</sup> Exalting culpability as the primary criterion, Lord Hailsham for the majority opined that

to insist that a belief must be reasonable to excuse [rape] is to insist that either the accused be found guilty of intending to do that which in truth he did not intend to do, or that his state of mind, though innocent of evil intent, can convict him if he be honest but not rational.<sup>106</sup>

Much to the delight of most British academics,<sup>107</sup> Lord Hailsham refused to so hold. Instead he held that only a defendant who believes his victim is not

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least minimal culpability. See, e.g., J. SMITH & B. HOGAN, *supra* note 66, at 192-93 (discussing effect of intoxication on specific intent).

101. Shupe, *Alcohol and Crime*, 44 J. CRIM. L. & CRIMINOLOGY 661, 661-64 (1954).

102. See W. LAFAVE & A. SCOTT, *supra* note 12, § 5.1, at 408-10. Some jurisdictions, however, do not allow even a reasonable mistake to exculpate the defendant. See, e.g., *State v. Reed*, 479 A.2d 1291, 1296 (Me. 1984) ("The legislature, by carefully defining the sex offenses in the criminal code, and by making no reference to a culpable state of mind for rape, clearly indicated that rape compelled by force or threat of force requires no culpable state of mind.").

103. See, e.g., *State v. Dizon*, 47 Haw. 444, 451, 390 P.2d 759, 764 (1964) ("the resistance must be in good faith, real, active, and not feigned or pretended").

104. But see *People v. Mayberry*, 15 Cal. 3d 143, 158, 542 P.2d 1337, 1346-47, 125 Cal. Rptr. 745, 754 (1975) (jury found no implied consent, but factual issue of whether defendant reasonably believed victim consented left unresolved).

105. 2 All E.R. 365 (1975).

106. *Id.* at 367.

107. See S. KADISH, S. SCHULHOFER & M. PAULSEN, *CRIMINAL LAW AND ITS PROCESSES* 290-91 (4th ed. 1983); *London Times*, May 7, 1975, at 15 (letter from Professor J.C. Smith); *id.* May 8, 1975, at 15 (letter from Professor Glanville Williams).

consenting or who acts "recklessly and not caring whether the victim be a consenting party or not" can be convicted.<sup>108</sup> Lord Hailsham gave no example of what he meant by "recklessly and not caring," but presumably he was thinking of a defendant who forcibly overpowered a woman without bothering to find out what her desires were. After much furor,<sup>109</sup> Parliament codified the *Morgan* result.<sup>110</sup>

From the perspective of harm and dangerousness, there is much to commend the American view. Focusing on harm in his dissenting opinion in *Morgan*, Lord Simon said: "A respectable woman who has been ravished would hardly feel that she was vindicated by being told that her assailant must go unpunished because he believed, quite unreasonably, that she was consenting to sexual intercourse with him."<sup>111</sup> Regarding dangerousness, it cannot be denied that one who cannot tell that a kicking and screaming woman is not consenting is extraordinarily dangerous. Furthermore, for any such defense to have the remotest plausibility of being believed, the defendant would have to be extremely intoxicated. Thus, all of the problems of proof discussed in the immediately preceding section are again relevant. Moreover, the presence of such a defense might encourage a mildly intoxicated defendant to ravish a woman whom he knows is resisting in the belief that he will be able to persuade a jury that he did not know. Consequently, *Morgan* is not likely to be followed on this side of the Atlantic.<sup>112</sup>

#### D. Mens Rea for Assault With Intent to Commit Rape

The *mens rea* issue in assault with intent to commit rape can arise in a case identical to *Morgan*, except that the defendant's attempt to have sexual intercourse is thwarted. A paradigm case from the Court of Military Appeals, *United States v. Short*,<sup>113</sup> involved a drunken soldier who attempted to have sexual intercourse with a woman whom he claimed to have mistaken for a consenting prostitute. Such a defendant is as dangerous as the *Morgan* defendants.<sup>114</sup> Unlike them, however, he has caused less harm. Consequently, considerations of both harm and culpability seem to call for an acquittal, while dangerousness alone seems to call for conviction. The courts are split on this issue. In *Short*, the defense was disallowed, but the prevailing view is probably

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108. *Morgan*, 2 All E.R. at 367.

109. In response to the *Morgan* holding, one concerned commentator stated, "As a consequence of this regrettable judgement we can expect an increase in rape and decrease in the percentage of proceedings against rapists . . . . Waiting to see if the judgement becomes a 'rapist's charter' is indefensible. And the introduction of emergency legislation to reverse this ruling is indispensable." London Times, May 12, 1975, at 15 (letter from Jack Ashley) (quoted in S. KADISH, S. SCHULHOFER & M. PAULSEN, *supra* note 107, at 292).

110. Sexual Offenses (Amendment) Act, 1976, ch. 82, § 1(b).

111. *Morgan*, 2 All E.R. at 367.

112. *Morgan* continues to be criticized in England as well, largely on the ground that it ignores dangerousness. See Wells, *Swatting the Subjective Bug*, 1982 CRIM. L. REV. 209, 212-14.

113. 4 C.M.A. 436 (1979).

114. A defendant is as dangerous as the *Morgan* defendants when, as in *Short*, he was thwarted only because of the arrival of a policeman who arrested him. Conceivably, a defendant who tries to overcome his victim's resistance but eventually desists would be less dangerous.

to the contrary.<sup>115</sup>

Those courts which allow the defense emphasize that assault with intent to rape is a crime requiring specific intent, which can be negated by intoxication. In this context, specific intent means an intent to cause more harm than occurred. In *Short*, the harm that actually occurred was the assault, whereas the intended harm allegedly was the rape. Because the defendant did not intend the additional harm in that, as the dissent stated, "he did not desire intercourse without full consent . . . or . . . was just not the sort of person who worries about hypothetical problems,"<sup>116</sup> he cannot be convicted of assault with intent to commit rape. Of course, the defendant still would be guilty of simple assault, a crime which merely requires general intent.<sup>117</sup> Courts that disallow the defense do so either because in their jurisdictions intoxication cannot negate even specific intent,<sup>118</sup> or simply because they apparently are unaware of the problem.<sup>119</sup>

One's assessment of these views depends on the importance attached to each of the three factors. If one views assault with intent to commit rape as an assault aggravated by culpability, the defense should be allowed. The defendant is guilty of assault for causing harm under an unreasonable belief that the victim desired to be touched. He does not, however, have the further intent to have intercourse with the victim against her will. Just as one who assaults another without intending to inflict serious injury cannot be convicted of assault intending to inflict serious injury, one who assaults without intending to rape should not be convicted of assault with intent to rape. Those wishing to uphold the conviction exalt dangerousness above culpability. Under such a view, a drunken defendant whose efforts to force himself on a screaming woman are thwarted only by an alert policeman is every bit as dangerous as a would-be rapist who knows that his victim is not consenting. Perhaps there ought to be crime aggravated by harm or dangerousness, such as assault putting a person in fear of rape, or assault creating a danger of rape. So long as these are not aggravating factors, however, and the aggravating factor purports to be only culpability, defendants such as *Short*, who do not have the requisite culpability, should not be convicted of the aggravated crime.

### E. *Self-Defense*

As with rape and assault with intent to commit rape, a major issue surrounding self-defense is what to do with the person who in self-defense employs such force that a reasonable person would know is not necessary. Classically, one who employs such force is guilty of an assault, which can be aggravated if serious injury is inflicted or intended, or if a deadly weapon is used.<sup>120</sup> If such

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115. See, e.g., *Michael v. State*, 1 Md. App. 243, 229 A.2d 145 (1967) (per curiam); *People v. Guillett*, 342 Mich. 1, 69 N.W.2d 140 (1955); *State v. Adams*, 214 N.C. 501, 199 S.E. 716 (1938).

116. *Short*, 4 C.M.A. at 446 (Brosman, J., dissenting).

117. See *supra* notes 87-89 and accompanying text.

118. E.g., *Chittum v. Commonwealth*, 211 Va. 12, 174 S.E.2d 779 (1970).

119. E.g., *Short*, 4 C.M.A. at 446.

120. See, e.g., *State v. Manis*, 95 Ariz. 27, 29-30, 386 P.2d 77, 78 (1963); *People v. Bramlett*, 194 Colo. 205, 210, 573 P.2d 94, 97 (1977) (en banc), cert. denied, 435 U.S. 956 (1978).

unreasonable defensive force causes death, some jurisdictions deem the act to be murder,<sup>121</sup> while most of the remainder call it manslaughter.<sup>122</sup> A few jurisdictions reject the classic view by exculpating those who kill in self-defense, even when objectively unreasonable.<sup>123</sup>

Before assessing the factors relied on by the classic and minority jurisdictions, it is helpful to analyze the characteristics of three types of self-defense defendants: (a) those who correctly assess the necessity for defensive force; (b) those who erroneously but reasonably believe in the necessity of defensive force; and (c) those who erroneously and unreasonably believe in the necessity of defensive force. A type (a) defendant is clean on all counts, being neither culpable, dangerous, nor the cause of harm.<sup>124</sup> A type (b) defendant, although no more culpable or dangerous than a type (a) defendant, has caused more harm, namely the *unnecessary* injury or death of her apparent attacker. Nevertheless, because harm alone is not enough to convict, type (b) defendants are universally excused.<sup>125</sup> Type (c) defendants, whose liability is at issue, are slightly more culpable than type (b) defendants in that they are at least negligent. More importantly, they are substantially more dangerous.

Those jurisdictions that acquit type (c) defendants believe that negligence in the face of perceived danger simply is not culpable enough to justify conviction for an intentional crime. The M.P.C., accepting this principle, would allow a type (c) defendant to be convicted only of a crime for which negligence is sufficient, such as negligent homicide.<sup>126</sup> The case for more serious liability is predicated on dangerousness. One who cannot act reasonably before killing or injuring another human being is extraordinarily dangerous. Such a person poses the same kind of threat to the populace as the sexually aggressive individual who cannot understand that his kicking and screaming victim is not consenting.<sup>127</sup>

The negligent self-defender arguably is less culpable than the negligent rapist in that circumstances sometimes compel him to make a split-second decision regarding the necessity of force, whereas the rapist usually spends more time completing the sex act with his victim. Furthermore, society may be more tolerant towards one whose life or safety is at stake than one who merely seeks sexual gratification.<sup>128</sup> Perhaps for this reason, most jurisdictions that convict unrea-

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121. See, e.g., *Saylor v. State*, 251 Ga. 735, 737, 309 S.E.2d 796, 797-98 (1983); *Lloyd v. State*, 448 N.E.2d 1062, 1071 (Ind. Ct. App. 1983).

122. E.g., ILL. REV. STAT. ch. 38, para. 9-2 (1979); PA. CONS. STAT. ANN. § 2503 (Purdon 1983).

123. See, e.g., *Gunn v. State*, 174 Ind. App. 26, 365 N.E.2d 1234 (1977). The Court in *Gunn* held that "the question of the existence or appearance of danger to the defendant, the necessity of defending himself, and the amount of force necessary must be determined from the standpoint of the accused at the time and under the existing circumstances." *Id.* at 34, 365 N.E.2d at 1240; see W. LAFAVE & A. SCOTT, *supra* note 12, § 5.7(c), at 457.

124. Killing or injuring one who otherwise would unjustifiably kill or injure the actor is not harmful; it is a consequence the law desires to prevent.

125. See *supra* notes 29-40 and accompanying text.

126. MODEL PENAL CODE § 3.04(1) and commentaries at 36 (1962).

127. See *supra* notes 102-12 and accompanying text.

128. Many, perhaps most, rapists seek domination over and humiliation of their victims rather than sexual gratification. One who believes his victim has consented, however, is not in that category.

sonable self-defenders reduce a killing so committed to voluntary manslaughter.<sup>129</sup> Nevertheless, because of the dangerousness of such a person—coupled with the difficulty of proving one's subjective state of mind, as well as the temptation to falsely raise the defense<sup>130</sup>—it is unlikely that a large number of jurisdictions will reject the classic reasonableness requirement of self-defense.<sup>131</sup>

#### F. *Provocation*

Classically, voluntary manslaughter has been defined as an intentional killing committed pursuant to provocation sufficient to cause both the defendant and a hypothetical reasonable person to act in the heat of passion.<sup>132</sup> Occasionally a court will define the necessary provocation as that which is sufficient to justify the violence used by the killer.<sup>133</sup> Obviously, if this were the correct standard, manslaughterers would be no more culpable or dangerous than the ordinary reasonable person in society, and presumably should not be criminally liable at all.<sup>134</sup> Of course, such a standard would not help anybody because as several commentators have noted: "[T]he reasonable man, however greatly provoked he may be, does not kill."<sup>135</sup> The correct theory, of course, is that the killing is mitigated, not justified. One who kills only when a reasonable person would be governed by passion is less culpable and less dangerous than another who would kill under less provocative circumstances.

Whether the provocation ought to be sufficient to inflame a reasonable person is a question frequently rethought by commentators. Arguably one who kills in the heat of passion engendered by objectively inadequate provocation is less culpable than one who coolly and calmly kills another.<sup>136</sup> Nevertheless, such a person is probably more culpable than one who is reasonably provoked.<sup>137</sup> More importantly, such a person is considerably more dangerous. A potential victim can conduct herself by not doing anything to antagonize an ordinary person. There is no way that one can avoid antagonizing a person who is subject to irrational fits of anger. If reasonableness were not required, a man who flew into a rage and killed a woman for refusing to have sex with him would be guilty of nothing more than manslaughter. Furthermore, when the law re-

129. Some cases have mitigated the charge to involuntary manslaughter on the M.P.C. gross negligence theory. The more sound rationale, however, is voluntary manslaughter because the killing is intentional, but is mitigated to manslaughter because of fear. See *infra* notes 132-45 and accompanying text.

130. See *supra* notes 41-50 and accompanying text.

131. See, e.g., *State v. Simon*, 231 Kan. 572, 646 P.2d 1119 (1982).

132. *Austin v. United States*, 382 F.2d 129, 137 (D.C. Cir. 1967); W. LAFAVE & A. SCOTT, *supra* note 12, at § 7.10, at 653.

133. See, e.g., *Bedder v. D.P.P.*, 2 All E.R. 801, 802 (1954).

134. In a few jurisdictions this is thought to be the case when one catches a spouse in the act of adultery. See, e.g., N.M. STAT. ANN. § 30-2-5 (1978).

135. W. LAFAVE & A. SCOTT, *supra* note 12, § 7.10(b), at 654; see Michael & Wechsler, *A Rationale of the Law of Homicide*, 37 COLUM. L. REV. 1261, 1281-82 (1937).

136. For this reason, many jurisdictions that retain the premeditation-deliberation formula for first degree murder would convict such a defendant of second degree murder. See, e.g., *People v. Caruso*, 246 N.Y. 437, 159 N.E. 390 (1927).

137. Of course, a whole host of factors, from background to genetics, might have to be explored in any given case.

wards irrational behavior, it encourages people to feign irrationality. Thus, if the man in the above hypothetical had coolly decided to kill the woman as punishment for her refusal, he would be encouraged to feign rage in order to mitigate his crime.

Some jurisdictions are so concerned about the potential abuse of the provocation mitigation that they have restricted it to certain categories, called legally sufficient provocation. In such jurisdictions, no provocation, however reasonable, can mitigate murder to manslaughter unless it is one of the specifically enumerated categories such as adultery<sup>138</sup> or battery.<sup>139</sup> Along these same lines, many jurisdictions specifically preclude "words alone, however insulting" from reducing murder to manslaughter.<sup>140</sup> Under this view, a jury's ability to mitigate murder to manslaughter, arbitrarily or otherwise, is severely circumscribed.<sup>141</sup>

The M.P.C. would mitigate to manslaughter "a homicide . . . committed under the influence of extreme mental or emotional disturbance for which there is reasonable explanation or excuse. The reasonableness of such explanation or excuse shall be determined from the viewpoint of a person in the actor's situation under the circumstances as he believes them to be."<sup>142</sup> This test, a remarkable hybrid of subjectivity and objectivity, has been adopted by a growing minority of jurisdictions.<sup>143</sup> Although retaining elements of objectivity, the test focuses much more on culpability and less on dangerousness than the classic reasonable person provocation test. This focus seems justified. Unlike a dangerous defendant who seeks exculpation on the ground of insanity<sup>144</sup> or intoxication,<sup>145</sup> a defendant who successfully invokes a provocation argument will be convicted of voluntary manslaughter, a serious felony. Moreover, the grand criterion classically distinguishing murder from manslaughter is "malice aforethought," a term which appears to be concerned more with culpability than dangerousness.<sup>146</sup> These factors, coupled with the M.P.C.'s retention of significant elements of objectivity, render this test a reasonable concession to human frailty without unduly compromising the public safety.

### G. *Unintentional Killings*

The harm involved in an unintentional killing almost always exceeds the culpability of the killer. Unintentional killings can range in severity from excus-

138. *E.g.*, *State v. Davis*, 328 S.W.2d 706, 709 (Mo. 1959).

139. *E.g.*, *State v. Young*, 51 N.M. 77, 83-86, 178 P.2d 592, 596-98 (1947).

140. *State v. King*, 37 N.J. 285, 299, 181 A.2d 158, 165 (1962).

141. *See, e.g.*, *Freddo v. State*, 127 Tenn. 376, 155 S.W. 170 (1913).

142. MODEL PENAL CODE § 210.3(1)(b) (1962).

143. *See, e.g.*, CONN. GEN. STAT. § 53a-55(a)(2) (1972); KY. REV. STAT. ANN. § 507.030(b) (Michie/Bobbs-Merrill 1985); N.Y. PENAL LAW § 125.20(2) (McKinney 1975); OR. REV. STAT. § 163.118(1)(b) (1983).

144. *See supra* notes 51-82 and accompanying text.

145. *See supra* notes 83-101 and accompanying text.

146. Interestingly, the Model Penal Code avoids the term "malice aforethought." Nevertheless, it generally seems to focus on culpability rather than dangerousness to a much greater extent than the common-law courts.

able homicide to murder, depending on two variables: culpability and dangerousness. Culpability runs the gamut from reasonable unawareness of a homicidal risk to complete awareness of an extreme risk. Dangerousness, which focuses on the magnitude of the risk, varies from a slight risk that somebody will be killed to an outrageously high risk that a large number of people will be killed. Dangerousness also varies according to the justification for the risk. A person driving ninety miles per hour through town creates the same risk of death whether she is transporting a heart attack victim or simply joy riding. Nevertheless, the law would deem the former instance less dangerous because the risk is balanced by the possibility of saving a life.

To the framers of the M.P.C., culpability is the overarching criterion. Absent at least a subjective awareness of the risk, the most serious homicidal crime to which a person can be subjected is negligent homicide. Even this crime is possible only when dangerousness reaches a fairly high level: "The risk must be of such a nature and degree that the actor's failure to perceive it . . . involves a gross deviation from the standard of care that a reasonable person would observe in the actor's situation."<sup>147</sup> When the actor is aware of such a risk and takes it anyway, she is guilty of manslaughter. In some jurisdictions, dangerousness is more important than culpability. Such jurisdictions do not require subjective awareness of the risk for manslaughter<sup>148</sup> or even murder.<sup>149</sup>

All jurisdictions, including those that have adopted the M.P.C., vary liability with the degree of dangerousness. Unintentional killings that are committed with an "abandoned and malignant heart,"<sup>150</sup> or committed "under circumstances manifesting extreme indifference to the value of human life"<sup>151</sup> have been condemned as murder. Some jurisdictions require that the risk endanger more than one person to constitute murder,<sup>152</sup> but most do not. Some jurisdictions purport to distinguish manslaughter from reckless, negligent, or vehicular homicide on the basis of the magnitude of the risk. Candor compels acknowledging that such distinctions tend to be more tautological than real, and that their only legitimate purpose is to provide juries with a lesser offense to convict dangerous drivers who may be perceived as less culpable.<sup>153</sup> A few jurisdictions subordinate culpability to dangerousness by convicting of manslaughter those who kill with ordinary negligence.<sup>154</sup>

#### H. *Felony Murder*

Although felony murder is a type of unintentional killing, it can be better analyzed separately. The theoretical rationale for felony murder is that the in-

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147. MODEL PENAL CODE § 2.02(2)(d) (1962).

148. See, e.g., *United States v. Bradford*, 344 A.2d 208, 215 (D.C. 1975); *Commonwealth v. Garcia*, 474 Pa. 449, 463-64, 378 A.2d 1199, 1206-07 (1977).

149. See, e.g., *Commonwealth v. Malone*, 354 Pa. 180, 47 A.2d 445 (1946).

150. *Welch v. State*, 254 Ga. 603, 607, 331 S.E.2d 573, 577 (1985).

151. MODEL PENAL CODE § 210.2(1)(b) (1962).

152. E.g., *Northington v. State*, 413 So. 2d 1169 (Ala. Crim. App. 1981).

153. See *Cichos v. Indiana*, 385 U.S. 76 (1966).

154. See, e.g., *State v. Williams*, 4 Wash. App. 908, 484 P.2d 1167 (1971).

tent to commit the underlying felony—typically arson, burglary, kidnapping, robbery, or rape<sup>155</sup>—provides the “malice aforethought” required for murder. Frequently, the doctrine is defended on the ground that these felonies are potentially dangerous to human life.<sup>156</sup> The M.P.C. accepts the doctrine only to the extent of creating a rebuttable presumption that a killing perpetrated during one of the enumerated felonies was committed with the requisite recklessness and extreme indifference to human life necessary for murder. Some states, including a few that have revised their criminal laws to comport substantially with the M.P.C., do not accept the M.P.C.’s limitation on felony murder.<sup>157</sup> Undoubtedly, problems of proof<sup>158</sup> contribute to the persistence of the felony murder rule in this country.<sup>159</sup> We know that most armed robbers kill their victims either intentionally or with extreme indifference to human life, but we believe that without the felony murder rule, some of these murderers would be able to successfully claim that the killing was accidental.<sup>160</sup>

Problems of proof alone would not permit a first degree murder conviction, which is the usual conviction under felony murder. Why then should a felon who has not created an outrageously reckless risk of death be treated as or more harshly than a nonfelon who has? The answer is culpability. Although a robber whose victim dies of a heart attack may not have created an outrageous risk of death,<sup>161</sup> his culpability in committing the robbery differentiates him from another who simply created the same risk.<sup>162</sup> If culpability is the key, why should the robber not be treated the same as any other robber? The reason is harm. Crimes such as robbery and the other underlying felony murder crimes, unaggravated by additional harm, are usually punished almost as severely as murder.<sup>163</sup> If the crime were called robbery inflicting death, life imprisonment

155. Some statutes have an *ejusdem generis* clause. See e.g., N.M. STAT. ANN. § 30-2-1(A)(2) (1978); PA. STAT. ANN. tit. 18, § 2502(b) (Purdon 1983). Other statutes include other dangerous crimes, such as forcible deviate sexual intercourse and felonious escape. See, e.g., N.Y. PENAL LAW § 125.25 (McKinney 1975); N.D. CENT. CODE § 12.1-16-01 (1985); OKLA. STAT. tit. 21, § 701.7(B) (1983); PA. STAT. ANN. tit. 18, § 2502(d) (Purdon 1983); R.I. GEN. LAWS § 11-23-1 (1981); TEX. PENAL CODE ANN. § 19.03(a)(4) (Vernon 1974).

156. See W. LAFAVE & A. SCOTT, *supra* note 12, § 7.5(b), at 624.

157. See, e.g., N.J. STAT. ANN. § 2C-11-3(a)(3) (West 1982 & Supp. 1986).

158. See *supra* notes 42-50 and accompanying text.

159. The felony murder rule has been abolished where it was created, in England. English Homicide Act of 1957, 5 & 6 Eliz. 2, ch. 11, § 1.

160. See Crump & Crump, *In Defense of the Felony Murder Doctrine*, 8 HARV. J.L. & PUB. POL’Y 359, 376 (1985).

161. See *People v. Stamp*, 2 Cal. App. 3d 203, 82 Cal. Rptr. 598 (1969), *cert. denied*, 400 U.S. 819 (1970).

162. Even without the aggravation of the underlying robbery, such a person probably would be guilty of at least manslaughter. For example, if a movie director decided to stage a robbery against a real victim in order to film his reactions as he was robbed, the director’s recklessness should be sufficient to warrant a manslaughter conviction if the victim dies of fright.

163. In North Carolina, arson is punishable by a maximum of 40 years and a presumptive sentence of 12 years, and first degree rape is punished by life imprisonment. N.C. GEN. STAT. §§ 14-27.2, 14-1.1, 14-87, 15A-1340.4 (1986). In Illinois, armed robbery, aggravated sexual assault, and aggravated arson are all class X felonies punishable by 6 to 30 years. ILL. REV. STAT. ch. 38, paras. 1005-8-1, -12-14, -18-2, -20-1.1 (1982 & Supp. 1987).

In Washington, armed robbery, first degree rape, first degree assault, kidnapping, and arson are punished by imprisonment for a maximum term of not less than 20 years. WASH. REV. CODE §§ 9A.56.200, 9A.36.010, 9A.40.20, 9A.48.020, 9A.20.20 (1977). In Texas, armed robbery, aggra-



would not seem to be a disproportionate penalty.<sup>164</sup> Consequently, by viewing felony murder as an aggravated form of the felony, principles of culpability plus harm can justify its retention.

### I. *Inchoate Criminality*

Inchoate crimes—attempt, conspiracy, and solicitation—are the mirror images of unintentional killings other than felony murders. Although unintentional killings are relatively low in culpability and high in harm, inchoate crimes by definition are high in culpability, requiring an intent to commit the crime,<sup>165</sup> and low in harm; if the harm had occurred, the crime would not be inchoate. Dangerousness then emerges as the factor determining the criminality of culpable people who have not caused harm. In the easiest case, one who deeply desires the murder of his enemy but is unprepared to carry it out is not dangerous enough to be guilty. One who solicits another to commit a crime for him is obviously more dangerous than one who merely desires the crime. Nevertheless, because the danger is not solidified until acceptance—at which point there would probably be a conspiracy<sup>166</sup>—many jurisdictions do not generally punish solicitation.<sup>167</sup> Most of these jurisdictions do punish solicitation selectively—e.g., solicitation to murder.<sup>168</sup> In such cases, the severity of the potential harm is so great that even the remoteness of the solicitation to the crime does not sufficiently negate the danger to preclude criminal liability. Because of the remoteness of the danger, however, these jurisdictions usually punish solicitation far less severely than the completed crime or even an unsuccessful attempt.<sup>169</sup> The M.P.C., focusing more on culpability than dangerousness, usually punishes solicitation to commit any crime as severely as it would punish the completed

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vated kidnapping, and aggravated sexual assault are punishable by not more than 99 years and not less than 5. TEX. PENAL CODE ANN. §§ 12.32, 20.04, 22.02, 29.03 (Vernon 1974). Alabama includes first degree kidnapping and forcible rape as class A felonies, punishable by not more than 99 years and not less than 10. ALA. CODE §§ 13A-5-6, 13A-6-43, 13A-6-61 (1982).

164. Accomplice liability in felony murder, without more, is constitutionally inadequate to support the death penalty. See *Enmund v. Florida*, 458 U.S. 782 (1981); cf. *Tison v. Arizona*, 107 S. Ct. 1676 (1987) (allowing possibility of capital punishment for felony murder accomplices under certain circumstances); *infra* text accompanying notes 198-204 (discussing *Enmund* and *Tison*). Not all jurisdictions merge the felony with the murder. In those jurisdictions, liability for both the robbery and murder is arguably disproportionate. Fortunately, most jurisdictions do merge the crimes. W. LAFAVE & A. SCOTT, *supra* note 12, at § 7.5(g)(3).

165. In traditional jurisdictions, inchoate crimes are still said to require a specific intent. Consequently, even outrageously reckless conduct will not suffice for attempt. E.g., *Free v. State*, 455 So. 2d 137, 147 (Ala. Crim. App. 1984); *State v. Huff*, 469 A.2d 1251, 1253 (Me. 1984).

The M.P.C. suggests that knowing as well as purposeful conduct will suffice. As a practical matter this makes little difference and in any event involves substantial culpability. MODEL PENAL CODE § 5.01 and commentary at 304-05 (1962).

166. The State still may need to prove an overt act. See *infra* text accompanying note 181. Of course, if the crime required two people, Wharton's rule might preclude conviction. F. WHARTON, CRIMINAL LAW § 218 (12th ed. 1932).

167. See W. LAFAVE & A. SCOTT, *supra* note 12, § 6.1(a), at 487; see, e.g., OKLA. STAT. ANN. tit. 21, § 701.16 (West 1987).

168. See e.g., CAL. PENAL CODE § 653f (West 1970 & 1986 Supp.); OKLA. STAT. ANN. tit. 21, § 701.16 (West 1987).

169. See, e.g., CAL. PENAL CODE § 653f (West 1970 & 1986 Supp.); OKLA. STAT. ANN. tit. 21, § 701.16 (West 1987).

crime.<sup>170</sup>

The various tests for attempt are designed to measure dangerousness. The "dangerous proximity" test obviously speaks for itself.<sup>171</sup> "Probable desistance" is simply a more precise manner of explaining dangerous proximity.<sup>172</sup> Jurisdictions adopting the "unequivocality" test desire objective evidence that the defendant really is dangerous.<sup>173</sup> The M.P.C.'s "substantial step" test requires less dangerousness than any of the others.<sup>174</sup> This is in accord with the M.P.C.'s usual emphasis on culpability. Given proof of culpability, the M.P.C. finds dangerous proximity simply unnecessary.

The recurrent question of legally impossible attempts basically boils down to a question of objective versus subjective measurement of dangerousness.<sup>175</sup> For example, consider *People v. Jaffe*,<sup>176</sup> the classic case in which defendant purchased goods that he wrongly believed were stolen. Those who would acquit defendant for attempting to receive stolen goods emphasize that he has taken no steps which objectively brought him close to receiving stolen goods.<sup>177</sup> Those who would convict him emphasize that subjectively he did everything he could to bring about the crime. As one might suspect, the M.P.C., with its emphasis on culpability, adopts the subjective perspective and supports conviction.<sup>178</sup>

170. MODEL PENAL CODE §§ 5.02, 5.05 (1962). Section 5.05 limits solicitation to commit a capital crime or a felony in first degree to felony in second degree.

171. MODEL PENAL CODE § 5.01 and commentaries at 322 (1985). Under this approach, the question is whether the defendant's act was dangerously proximate to the intended crime. W. LAFAVE & A. SCOTT, *supra* note 12, § 6.2(d)(1), at 504-05; *see, e.g.*, *People v. Bracey*, 41 N.Y.2d 296, 360 N.E.2d 1094 (1977) (to constitute attempt to commit crime, act need not be final one toward completion of offense, but it must carry project forward with dangerous proximity to criminal end to be obtained).

172. The probable desistance test provides that for an act to be a criminal attempt, it must be one that would result in the commission of the crime but for the intervention of some extraneous factor. W. LAFAVE & A. SCOTT, *supra* note 12, § 6.2(d)(2), at 506-07; *see, e.g.*, *People v. Buffum*, 40 Cal. 2d 709, 256 P.2d 317 (1953); *West v. State*, 437 So. 2d 1212 (Miss. 1983); *Hamiel v. State*, 92 Wis. 2d 656, 285 N.W.2d 639 (1979).

173. J. SALMOND, JURISPRUDENCE 404 (7th ed. 1924); *see* Salmond's discussion of theory in *King v. Barker*, 1924 N.Z.L.R. 865; Turner, *Attempts to Commit Crimes*, 5 CAMBRIDGE L.J. 230 (1934). Expressing the unequivocality approach, Salmond states: "An attempt is an act of such a nature that it is itself evidence of the criminal intent with which it was done. A criminal attempt bears a criminal intent upon its face." J. SALMOND, *supra*, at 404.

174. The "substantial step" test provides:

A person is guilty of an attempt to commit a crime if acting with the kind of culpability otherwise required for commission of the crime, he . . . purposely does or omits to do anything that, under the circumstances as he believes them to be, is an act or omission constituting a substantial step in a course of conduct planned to culminate in his commission of the crime.

MODEL PENAL CODE § 5.01(1)(c) (1962). The M.P.C. states that only conduct "strongly corroborative of the actor's criminal purpose will be held to constitute a substantial step." *Id.* § 5.01(2).

175. The term "legal impossibility" as used in this Article, refers to situations in which what the defendant thinks he is doing is against the law, but what he is in fact doing is lawful—for example, "stealing" one's own suitcase. This situation can be distinguished from "true legal" impossibility, in which what the defendant thinks he is doing, as well as what he is in fact doing, is not forbidden by the law. *See, e.g.*, Elkind, *Impossibility in Criminal Attempts: A Theorist's Headache*, 54 VA. L. REV. 20, 26 (1968); Enker, *Impossibility in Criminal Attempts—Legality and the Legal Process*, 53 MINN. L. REV. 665, 676-87 (1969).

176. 185 N.Y. 497, 78 N.E. 169 (1906).

177. *See* G. FLETCHER, RETHINKING CRIMINAL LAW 182 (1978).

178. MODEL PENAL CODE § 5.01(1) and commentaries at 307-20 (1962). The Code rejects the

Jurisdictions that allow abandonment as a defense attempt do so on the ground that the requisite dangerousness has been dissipated.<sup>179</sup> Involuntary abandonment, such as the arrival of a policeman, is never a defense because the failure to proceed under those circumstances does nothing to negate the already manifested dangerousness. Indeed, even when the defendant desists only because the circumstances turn out to be different from his expectations, such as his prospective rape victim's being pregnant, abandonment is not allowed.<sup>180</sup>

The crime of conspiracy permits criminal liability to be imposed at a significantly earlier stage of the planning than is possible under attempt. All that is required for conspiracy is an agreement to commit a crime, and in some jurisdictions an overt act in furtherance of the agreement.<sup>181</sup> The act does not have to be substantial, and certainly does not have to be dangerously proximate to completion.<sup>182</sup> The reason for such liability is that the agreement of more than one person renders it more likely that the crime will actually be committed. One person's thoughts, without more, may not be sufficiently dangerous to concern the law. But the prospect of a multiparty agreement resulting in crime is thought to be so much more dangerous that intervention of the criminal law is justified.

Because conspiracy is sufficiently dangerous to warrant such early intervention only because of the multiparty agreement, most jurisdictions will not allow a conspiracy conviction unless both parties are actually agreeing to commit the crime. Thus, if one of two parties is merely feigning agreement, neither will be liable for conspiracy because the one would-be conspirator has nobody with whom to conspire.<sup>183</sup> The M.P.C., on the other hand, defines conspiracy in terms of one person agreeing with another.<sup>184</sup> Thus, the person who actually agreed with another to commit a crime is guilty even though her cohort did not agree with her. The M.P.C. concedes that the play-along conspirator probably has decreased rather than increased the danger of success. Nevertheless, the M.P.C. justifies liability on the ground that the play-along conspirator's phoni-

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defense of impossibility by providing that defendant's conduct should be measured according to the circumstances as he believes them to be rather than the circumstances as they may have existed in fact. *Id.* at 307. In accordance, the commentary explicitly states that "[the] *Jaffe* case . . . would result in a conviction under the Code because the defendant would have purposely engaged in conduct that would constitute the crime if the attendant circumstances were as he believed them to be." *Id.* at 317.

179. See, e.g., *id.* § 5.01 and commentary at 359.

180. See, e.g., *Hamiel v. State*, 92 Wis. 2d 656, 661, 285 N.W.2d 639, 646 (1979); see *Lebarron v. State*, 32 Wis. 2d 294, 297, 145 N.W.2d 79, 82 (1966).

181. See MINN. STAT. ANN. § 609.175(2)(2) (West 1964 & Supp. 1986); N.J. REV. STAT. § 2c: 5-2d (1982).

182. *Kaplan v. United States*, 7 F.2d 594, 596 (2d Cir. 1925).

183. *State v. Kihnel*, 488 So. 2d 1238 (La. Ct. App. 1986).

184. MODEL PENAL CODE § 5.03(1) (1962). The Code provides:

A person is guilty of conspiracy with another person or persons to commit a crime if with the purpose of promoting or facilitating its commission he: a) agrees with such other person or persons that they or one or more of them will engage in conduct that constitutes such crime or an attempt or solicitation to commit such crime; or b) agrees to aid such other person or persons in the planning or commission of such crime or an attempt or solicitation to commit such crime.

*Id.*

ness does nothing to diminish the culpability of the real conspirator.<sup>185</sup>

#### IV. PUNISHMENT AND THE THREE FACTORS

Focusing on the most relevant of the three factors can assist a legislature or judge in apportioning punishment. The significance of deterrence, retribution, restraint, rehabilitation, and compensation can vary substantially depending on the most important factor in the particular case. When culpability is paramount, considerations of deterrence and retribution are most important. Restraint and rehabilitation are especially important when dealing with dangerous defendants. Finally, compensation should be paramount when harm is the principal reason for the severity of the crime. Although many cases involve more than one of the factors, it is often possible to allocate punishment in accordance with the most significant factor in the case.

##### A. *Culpability*

Crimes involving significant wilfulness and premeditation seem especially amenable to deterrence. One acting on the emotions of the moment is relatively unlikely to be deterred by the prospect of substantial punishment. On the other hand, one who, Bentham-like,<sup>186</sup> coolly and calmly calculates the benefits and detriments to be obtained from criminal behavior is more likely to be deterred by such an unpleasant prospect. Furthermore, to the extent that retribution is deemed appropriate, such a person is a prime candidate for it. When deterrence and retribution are overarching concerns, mandatory minimum sentences are most appropriate.

Armed robbery is a good illustration. Although armed robbers are undoubtedly dangerous and harmful, which may provide a basis for additional penalties, the calculated nature of such a crime has caused many states to adopt mandatory minimum sentences.<sup>187</sup> Many merchants in such states post signs in their windows stating the mandatory minimum sentence in order to maximize the deterrent effect of the statute. For such an approach to be effective, other factors need to be overlooked. Thus, even if a particular defendant can establish that this was an isolated occurrence and that he would not be a danger to society if released on probation, he could not receive less than the minimum sentence. Although such an approach subordinates the defendant's best interest to the larger societal goal of deterring others from implementing their culpable thoughts, the subordination is appropriate because it follows in direct response to the defendant's own manifested culpability.

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185. *Id.* § 5.03 and commentary at 400.

186. See J. BENTHAM, *Specimen of a Penal Code*, in TEN WORKS OF JEREMY BENTHAM 469 (1843).

187. See, e.g., FLA. STAT. ANN. § 775.087(2) (West 1984) (three-year minimum term of imprisonment for selected crimes); ME. REV. STAT. ANN. tit. 17-A, § 1252(5) (1964) (minimum imprisonment of one to four years for conviction of certain classes of crimes); N.C. GEN. STAT. § 14-87(d) (1985) (minimum seven-year sentence for armed robbery conviction); 42 PA. CONS. STAT. ANN. § 9712(a) (Purdon 1983) (five-year minimum sentence for certain crimes).

## B. *Dangerousness*

Defendants who have manifested themselves as dangerous frequently warrant flexible maximum sentences. To the extent that the criminal law is viewed as a societal protection device, it is desirable to keep such defendants restrained until they are no longer dangerous.<sup>188</sup> When such a defendant's dangerousness is caused by a mental abnormality—thereby minimizing culpability—a flexible minimum also seems appropriate. For such a defendant, an indeterminate sentence ought to be available.

A psychologically unstable, but not legally insane, child molester is such a person. Because child molestation is not usually deterred by the prospect of punishment,<sup>189</sup> a guaranteed mandatory minimum sentence such as an armed robber might receive is not likely to have much deterrence value. Moreover, because a psychologically unstable defendant is less culpable than one who is simply evil, retribution—punishment for its own sake—is not particularly important. What is critical is restraint while necessary and rehabilitation if possible. If such a defendant can be rehabilitated quickly, limited incapacitation should be sufficient. On the other hand, if he cannot be rehabilitated, lengthy incarceration should be a possible sentence.

One difficulty with this approach is the uncertainty of rehabilitation. If a defendant is wrongly deemed rehabilitated, he can be released to perpetrate more atrocities on innocent children. If he is wrongly believed to be unrehabilitated, however, he can languish unnecessarily in prison, possibly to his and society's detriment. Given that the defendant's wrongful act, coupled with sufficient culpability to be accountable for his crime, is responsible for his predicament, it seems reasonable to require him to prove his rehabilitation as a condition of release.<sup>190</sup> On the other hand, his burden should not be so great as to render an early or moderate release date practically impossible.

## C. *Harm*

Activity that is criminal primarily because of the harm caused involves different penological considerations. When culpability and dangerousness are relatively insignificant, the rationale for deterrence, retribution, restraint, and rehabilitation is concomitantly diminished. Of increasing significance in such a case is the emerging concept of victim or societal compensation.<sup>191</sup> This concept, which literally focuses on the defendant's debt to society, can be catego-

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188. Defendants should be restrained at least to the extent that the sentence is not disproportionate to the crime. For example, a defendant with a history of inebriation and minor property crime, whenever free, may be substantially certain to continue on such a path. Nevertheless, life imprisonment without the possibility of parole constitutes cruel and unusual punishment for such a person. See *Solem v. Helm*, 463 U.S. 277, 296-303 (1983).

189. Cf. Curran, *Commitment of the Sex Offender in Massachusetts*, 37 MASS. L.Q. 58, 61 (1952) (stating lack of deterrent effect of criminal punishment on persons with "uncontrollable" sexual desires).

190. This assumes that the defendant's maximum sentence is not cruelly disproportionate to his crime. See *supra* note 188.

191. See Sugarman, *Doing Away with Tort Law*, 73 CALIF. L. REV. 558, 591-96 (1985).

rized as a "tort plus" punishment as opposed to more traditional criminal sanctions which leave compensation to civil courts. Illustrations of "tort plus" punishment include uncompensated community service and payment of the victim's medical bills.

Strict liability crimes are ideal candidates for such an approach. A bartender who serves liquor to a minor in jurisdictions in which this conduct is criminal without fault could perform several hours of service in an alcoholic rehabilitation center. Similarly, one who sells misbranded drugs could be sentenced to pay the medical costs of anybody harmed by them, or to perform uncompensated public service in a hospital that treats victims of such drugs. This approach tailors the punishment to the harm, which in these cases is the only justification for imposing criminal liability.

The same approach may be appropriate in cases of involuntary manslaughter by automobile. Although such drivers are somewhat culpable and manifest more than a little dangerousness, the principal reason for their punishment is the harm they have caused. Involuntary manslaughter is usually regarded much more seriously than driving while intoxicated. Of course, such individuals do need to be restrained, but from cars and/or liquor, not from society in general. They are not dangerous if so restrained. Consequently, an appropriate sentence might include substantial community service and/or compensation to the victim's family, coupled with suspended imprisonment on the condition that the defendant neither drive nor drink. Violation of these conditions would, of course, show the ineffectiveness of the restraint in the particular case and mandate the reinstitution of the suspended imprisonment.

## V. CAPITAL PUNISHMENT AND THE THREE FACTORS

The constitutional key to capital punishment is proportion. Unless aggravating circumstances sufficiently preponderate over mitigating circumstances, the death penalty may not be imposed.<sup>192</sup> Because of the uniqueness of the death penalty, it may not be imposed if any of the three factors warrant a lesser punishment.

### A. *Harm*

Absent sufficient harm, usually murder,<sup>193</sup> a state may not impose the death penalty. Regardless of how dangerous or culpable a defendant may be, if he causes insufficient harm to warrant the death penalty, he may not be executed. A good example of such a defendant is Ehrlich Coker, the petitioner in

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192. *Cf. Gregg v. Georgia*, 428 U.S. 153, 193 (1976) (citing MODEL PENAL CODE § 201.6 comment 3, at 71 (Tent. Draft No. 9, 1959), with approval for its approach of weighing aggravating and mitigating circumstances against each other).

193. It is theoretically possible that some other harm might suffice, such as treason. *Cf. Rosenberg v. United States*, 346 U.S. 273, 287-88 (1953) (vacating stay of execution for espionage conspiracy). No decision since *Gregg*, however, has upheld the death penalty for a crime other than murder.

*Coker v. Georgia*.<sup>194</sup> While serving three sentences for life, two for twenty years, and one for eight years—all of which were to run consecutively—for the rape and murder of one young woman and the rape, kidnapping, and assault of another, Coker escaped from prison. Before being apprehended, he broke into the home of a young couple, robbed them at knifepoint, raped the sixteen-year old wife in the presence of her husband, kidnapped the wife, and threatened them both with death. Fortunately, he was recaptured before implementing his threat.

In terms of dangerousness, it is hard to imagine a stronger case for capital punishment. Coker demonstrated an extraordinary propensity for all sorts of violence, including indiscriminate murder. Moreover, by virtue of his escape, he showed himself to be one of the few people who cannot be adequately restrained by prison walls. Just as drunk drivers who violate a court order against further driving may need to be imprisoned, violent criminals who escape from prison to commit more violence arguably need to suffer the ultimate restraint. Notwithstanding these appeals to considerations of dangerousness, appeals which persuaded the dissenting Justices,<sup>195</sup> the Court held that unless the harm was more serious than the robbery, rape, and kidnapping perpetrated during Coker's most recent escapade,<sup>196</sup> no amount of aggravating circumstances could justify execution.<sup>197</sup>

## B. *Culpability*

In *Enmund v. Florida*<sup>198</sup> the Supreme Court limited the instances in which one convicted of felony murder can be executed. Emphasizing the importance of personal culpability as a *sine qua non* of capital punishment, the Court held that the death penalty could not be imposed "on one such as Enmund who aids and abets a felony in the course of which a murder is committed by others but who himself does not kill, attempt to kill, or intend that a killing take place or that lethal force will be employed."<sup>199</sup> Enmund, who drove the getaway car, was never proven to have intended such violence. Without this personal culpability in regard to the killing, the Court held that no amount of aggravating circumstances—in this case Enmund planned the robbery and previously had been convicted of a crime of violence—or absence of mitigating circumstances could justify execution.<sup>200</sup>

*Enmund* was limited by *Tison v. Arizona*,<sup>201</sup> which upheld the possibility of capital punishment for two brothers, aged nineteen and twenty, who were con-

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194. 433 U.S. 584 (1977).

195. *Id.* at 606-07, 610-11 (Burger, J., dissenting).

196. Coker probably was also guilty of burglary in that he broke into and entered his victim's house. *See id.* at 587. For reasons that do not appear in the record, however, he was not charged with burglary.

197. *Id.* at 598.

198. 458 U.S. 782 (1981).

199. *Id.* at 797, 801.

200. *Id.*

201. 107 S. Ct. 1676 (1987).

victed of felony murder, notwithstanding that they did not kill, attempt to kill, intend that a killing take place, or intend lethal force to be employed. The Tison brothers had armed themselves and their imprisoned father, along with another prisoner, in a successful attempt to escape from prison.<sup>202</sup> After escaping, the armed defendants flagged down a car, kidnapping and robbing its four occupants, whereupon the escaped prisoners, apparently to the surprise and disappointment of the defendants, killed all four victims. In the Court's view, the Tisons' major role in the felony, coupled with their reckless indifference towards human life,<sup>203</sup> constituted sufficient culpability to warrant the death penalty. As the Court stated, "These facts not only indicate that the Tison brothers participation in the crime was anything but minor, they also would clearly support a finding that they both subjectively appreciated that their acts were likely to result in the taking of innocent life."<sup>204</sup> Although the Court in *Tison* emphasized its continuing requirement of a high degree of culpability as a *sine qua non* of capital punishment, the extraordinary level of dangerousness inherent in the defendants' conduct may have persuaded the Court to reduce the necessary level of culpability from intentionally causing death to reckless indifference.

Any possibility that *Tison* portended the subordination of culpability to harm in capital cases was dashed a few weeks later by *Booth v. Maryland*.<sup>205</sup> The Court in *Booth* held that a victim impact statement describing the goodness of the murder victims and the impact of the murder on their family could not be introduced by the State to justify capital punishment. Rejecting the relevance of such factors, the Court emphasized that "[t]hese factors may be wholly unrelated to the blameworthiness of a particular defendant."<sup>206</sup>

The dissenting Justices—Rehnquist, White, O'Connor, and Scalia—in opinions by White and Scalia, emphasized the relevance of harm as an aggravating factor. As Scalia wrote: "It seems to me, however—and, I think, to most of mankind—that the amount of harm one causes does bear upon the extent of his 'personal responsibility.'"<sup>207</sup> He then illustrated his point by comparing the fate of the reckless driver who kills somebody with the equally reckless driver who does not, and the bank robber who fails in his attempt to kill the bank guard with the robber who succeeds.

On the surface, the dissenters appear to have the better of the argument. Harm is unquestionably relevant in capital as well as other cases. For example, one could hardly doubt that an arsonist who burns down a house, killing two people in the process, is more likely to receive the death penalty than an otherwise similar arsonist who kills only one person. Consequently, the Court's opinion lacks intellectual coherence to the extent it implies that additional harm, unrelated to culpability, can never be relevant to imposing capital punishment.

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202. The defendants' liability for murder was not predicated on their role in the prison break, but on their role in the subsequent kidnapping and robbery. *Id.* at 1679-80.

203. Their father had killed a prison guard during an earlier escape attempt. *Id.* at 1678.

204. *Id.* at 1685.

205. 107 S. Ct. 2529 (1987).

206. *Id.* at 2534.

207. *Id.* at 2541 (Scalia, J., dissenting).



Another dimension to the *Booth* Court's opinion, however, is the question of what can constitute harm for purposes of capital punishment. It is one thing to say that killing two people is more serious than killing one. It is quite another to say that killing a good person is more harmful than killing a bad one. Although the status of a murder victim might sometimes make a difference (e.g., a police officer in the line of duty),<sup>208</sup> the reluctance of the Court to allow the victim's character to make a difference is understandable.<sup>209</sup>

Apart from the goodness of his victims, the only additional harm inflicted by *Booth* was the suffering of his victims' family and friends. The Court found this harm to be too attenuated to have a just bearing on capital punishment. Had the victim impact statement focused on special suffering of the murder victims themselves—for example, torture—rather than the suffering of their relatives, there is no reason to believe the Court would have found it to be constitutionally irrelevant. In sum, *Booth* holds that unless some harm beyond the killing itself is imposed directly on the victim, some form of aggravated culpability normally will be required to justify capital punishment.

### C. *Dangerousness*

Although no Supreme Court decision has ever explicitly required dangerousness as a condition of capital punishment, decisions such as *Coker*, *Enmund*, and *Tison* ensure that only the most dangerous criminals will be executed. Although one certainly can be dangerous without causing harm<sup>210</sup> or being culpable,<sup>211</sup> it is not possible to culpably inflict death without being dangerous.

## VI. CONCLUSION

The purpose of this Article is not so much to answer questions as to ask them. When culpability should prevail over dangerousness is a question that can and should engender disagreement. It is, however, a question that must be asked unless the factors which really influence judges are to remain unanalyzed. The classic criminal concepts of *mens rea* and *actus reus* can perhaps roughly translate to culpability and harm. Neither of these concepts encompass dangerousness, a factor that successfully influences everything from intoxication to self-defense. Besides aiding analysis of several of the most controversial issues in the criminal law, including the nine topics explored in Section III, a proper focus on culpability, dangerousness, and harm can assist judges and legislatures in making difficult decisions concerning punishment.<sup>212</sup>

My challenge to judges, legislatures, and other commentators is simply to be aware of the importance that the criminal law traditionally has attached to each of these concepts and to consider each of them when analyzing criminal doctrine.

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208. See *id.* at 2540 n.2 (White, J., dissenting).

209. Cf. *McCleskey v. Kemp*, 107 S. Ct. 1756 (1987).

210. For a discussion of inchoate criminality, see *supra* notes 165-85 and accompanying text.

211. For a discussion of the insanity defense, see *supra* notes 51-82 and accompanying text.

212. See *supra* notes 186-91 and accompanying text.