PUNISHMENT FOR THOUGHTS

Those who attempt to answer either the question 'what is the nature of law?' or the question 'what is the nature of morality?' often also consider how law and morality are related. When they do this, they tend to give answers that emphasize differences rather than likenesses. They are interested, however, in not just any differences but in those that are 'essential'. Most believe that there is *one* such difference. They often express this in a 'formula' or 'maxim' that sums up their views both on law and morality and on the essential difference between them.[1]

The most famous and perhaps the most obscure of these formulae is: 'Law is concerned with external conduct; morality with internal conduct'. Short work has sometimes been made of this proposal.[2] If the claim is, as it is sometimes taken to be, that the law is concerned exclusively with conduct and morality exclusively with states of mind, it is only necessary to point out that states of mind are relevant to the law and conduct is relevant to morality. The definitions of burglary and murder, to take two obvious examples, demonstrate that states of mind are relevant to the law. And conduct seems relevant to morality, for we blame people for telling lies, breaking promises, killing people,

[1] E.g., Law aims at a minimum; morality at a maximum. Law is prohibitive; morality is injunctive. The aim of law is not to punish sin but to prevent certain external results.

[2] E.g., Edmond N. Cahn, *The Moral Decision* (Bloomington: Indiana University Press, 1955), pp. 44-46.

not just, or perhaps ever, for merely contemplating, desiring, or intending, to do these things. What, then, is left of the view that law is concerned with external conduct and morality with internal conduct?

The ease of this refutation may produce a vague disquiet, a feeling that perhaps the point of the maxim has escaped the critic. Could those philosophers who have thought it true been oblivious to these facts about our moral and legal life to which appeal is made in refuting it? The facts seem too obvious to be overlooked. It is reasonable to suppose that philosophers who have thought in terms of the external-internal distinction were getting at something.

This is the view adopted by other philosophers. They are in agreement that the maxim is obscure, but they think that it contains some important insight into the nature of law and morals. Stammler writes that we are given "only a suggestion of a difference."[3] Radbruch writes of "concealed" meanings.[4] Kantorowicz believes we must maintain the distinction provided that it is "rightly understood."[5] Hart believes that "though it contains a hint of truth it is, as it stands, profoundly misleading."[6] When the truth hinted at is brought into the open, these critics turn out to be not wholly in agreement on what is hidden. In some cases there are clear differences of opinion as to the truth it contains. In some cases what is proposed as an implication

[3] Rudolph Stammler, *Theory of Justice* (New York: The Macmillan Company, 1925), p. 41.

[4] Gustav Radbruch, "Legal Philosophy" in *The Legal Philosophies of Lask, Radbruch and Dabin*, trans. K. Wilk (Cambridge: Harvard University Press, 1950), p. 78.

[5] Hermann Kantorowicz, *The Definition of Law* (Cambridge [Eng.]: Cambridge University Press, 1958), p. 43.

[6] H.L.A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961), p. 168.

of the maxim seems to have little connection with it; the use of the words 'external' and 'internal' has simply called something to mind.

It seems to me, too, that there may be some truth in the formula. My aim in this paper is (1) to offer an interpretation of the formula; (2) to examine one limited aspect of it that relates to law; and (3) to offer a defense of this limited aspect.

There are at least three points that a philosopher committed to the view that 'law is concerned with external conduct, morality with internal conduct', may wish to make:

a. Law requires external conduct. In morality one may be blamed or praised for one's mental state alone; there are sins and virtues of thought.
b. In law, conduct by itself is sufficient to constitute compliance with rules. In morality conduct alone is never sufficient.
c. In law, conduct alone is (may be) sufficient to create liability. In morality one may never be blamed for conduct alone.

Each of these claims about law and about morality is, as it stands, obscure, suggestive and worth, I think, examining in some detail. That would be a large undertaking. In this paper my goal is relatively modest. I restrict inquiry to the first claim that law requires external conduct. I restrict myself still further by interpreting the claim as one made about the criminal law. When the word 'law' occurs, then, it should be understood as meaning 'the criminal law'.

There are at least two sources of obscurity with respect to the claim. First, if someone says, "for law there must be external conduct," we may be unsure what would and what would not satisfy this demand. Does the philosopher mean, for example, that punishment for omitting to do something

is, in some sense, unacceptable? Second, we may be unsure whether or not the cases that come readily to mind as possible counterinstances have relevance to the claim, not because, as with omissions, we are unsure what class of things would count for or against the claim, but because we are unsure about the status of the claim. By this I mean we may be unsure what procedures, if any, are appropriate for confirming or disconfirming the claim. Is it a factual claim or a moral claim or some other kind of claim? Does it make any difference to its validity, for example, that a statute has been enacted in accord with law that makes it an offense to intend to commit arson? We must look more carefully at each of these sources of obscurity if we are to settle whether or not this limited aspect of the maxim is valid. Let us turn to the first source of obscurity.

I

Among the things a philosopher may mean when he says 'law is concerned with external conduct' is 'for law there must be conduct'. If he means this, he is claiming not, as it is sometimes supposed he is, that law is exclusively concerned with conduct, a position that appears obviously untenable, but rather that law is not concerned with states of mind alone, a position that is not obviously untenable. What, then, would it be like for the law to be concerned with a state of mind alone?

In the remainder of this part of the paper I shall attempt to clarify the relationship between conduct and mental states in a variety of legal situations so that we have a better grasp of the kind of case to be ruled out by the philosopher's claim 'for law there must be conduct'.

1. Suppose that it is made a punishable offense *to disbelieve* the story of creation as recorded in the Old Testament. Suppose, further, that an admission in open court is required for conviction and that such an admission by itself is sufficient for conviction of the offense. Here we have a clear case of a law concerned with a state of mind alone. What are some of its features? First, the offense is defined exclusively in psychological terms. Second, an admission without any accompanying conduct is sufficient to convict a person for the offense. Third, there is no interest the law seeks to protect that is threatened by the admission, thus there is nothing paradoxical in the law's seeking to encourage the admission. Fourth, the law is prohibiting a state of mind. Fifth, in prohibiting a state of mind the object of the law is merely to induce persons not to have a state of mind, and we shall assume that the law's aim is not thereby to prevent some harm related to the state of mind.

A person who understood this law would realize that he had committed an offense when he disbelieved the story of creation. He would understand that to admit disbelief was not to commit an offense but merely to reveal its commission. It is natural to say in such a case that a person punished for committing this offense is being punished for thought alone and hence that the law was concerned with a state of mind alone.[7]

2. Our first case may suggest that one is punished for thought alone if one is punished for committing an offense defined exclusively in psychological terms. I am not sure that this criterion will do. Suppose persons possessed the capacity to arouse fear in other persons merely by thinking

[7] I do not discuss in this paper those many difficult problems that arise if the states made punishable by law are ones over which we have no control.

in a particular way. Suppose that it were a punishable offense to arouse fear in others by exercising this capacity. It is at least arguable that this is an offense defined exclusively in psychological terms. Punishment for committing the offense, however, would not be for thought alone but for arousing fear by thought. From this it follows: (a) that some offenses may be defined exclusively in psychological terms and yet there be 'external conduct' and (b) that there may be 'external conduct' even though an offense may be committed without a person's doing anything that involves a bodily movement.

3. There is another reason why it is undesirable to restrict 'external conduct' to conduct that involves a bodily movement. It is, of course, understandable that we should think of external conduct in terms of bodily movements. A philosopher who says 'there must be external conduct' contrasts external conduct with, what is misleadingly labeled, 'internal conduct', that is, with mental states, such as beliefs, desires, wishes, and intentions. This seems clear enough. If we then ask what is meant by 'external conduct', it seems reasonable to suggest that it means 'a physical act or acts', for we often contrast the physical with the mental. If we then ask 'what is a physical act?' the response, no doubt, will be that it is or involves a bodily movement. If we then turn attention again to the claim, 'there must be external conduct', it looks as if it is being claimed that there cannot be a legal offense or there cannot be punishment unless there is some bodily movement. But now a difficulty presents itself. When we hold a person liable for an omission we do not hold him liable only on condition that he has moved his body. We may, then, wonder how omissions are accommodated by the philosopher's statement and conclude that they are not. Rules which require persons

to do things would, in some sense, be unacceptable to the philosopher.

If, when we say, 'there must be external conduct', we intend merely to rule out punishment for thought alone, it is strange to rule out omissions, for this would suggest that a person punished for omitting to pay taxes was being punished for thought alone. And this, of course, is not so. Suppose, however, that we were legally required to have certain thoughts. Punishment for omitting to have the thoughts would be punishment for thought alone. One reaches the conclusion that omissions are not external conduct only by identifying external conduct with bodily movements and interpreting one who claims 'there must be external conduct' as claiming that there is no legal offense without bodily movement whereas the aim behind the remark, I believe, is to preclude punishment merely for having or not having a certain mental state. Omissions then may or may not, depending on whether it is an omission to act or to think, be 'external conduct' within the meaning of this phrase as employed by one who insists that law can't punish for thought alone.

4. Suppose that it were a punishable offense *to intend* to assassinate a public official. Suppose, on analogy with the evidential requirement for conviction of treason,[8] that an evidential rule required, for conviction, that evidence be introduced that the accused took substantial steps toward assassinating a public official. In these circumstances, the class of those who may be convicted of *intending* to assassinate a public official may coincide with the class of those

[8] *U.S. Constitution* Art. III Sec. 3: "No person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on confession in open Court."

who may be convicted of *attempting* to assassinate a public official, for attempting may be defined as intending to perform some act and taking substantial steps in furtherance of one's intention. Now, if the philosopher would not object to punishment for attempts, would he object to the offense that we have imagined? There are grounds, I think, for believing that he would regard punishment under these circumstances as punishment for thought alone.

Suppose, first, a very unusual situation. The law's *sole* interest in or concern with the substantial steps might be evidential. If this were so, the law might even encourage those steps that reveal the intention. We could, in fact, understand the law providing inducements to persons to do all that they could to realize their intentions, for such behavior would provide the best evidence of one's intending to assassinate a public official. In these circumstances the law would be seeking to prevent what it prohibits and nothing else. If one were punished in such a case it would not be *for* acting any more than it was *for* admitting in our case of disbelief in the story of creation. While conduct is a prerequisite for conviction it is not *for conduct* that the person is being punished.

Clearly, the more realistic case is one in which there is a different attitude toward the conduct insisted upon by the evidential rule. In prohibiting an intention to assassinate a public official we naturally would be aiming at diminishing the number of such assassinations. And if this is so, it would be absurd to encourage the conduct that provides evidence of intention. Two preliminary questions are raised by such an offense where the concern with conduct is not exclusively evidential. First, what is the point of the evidential requirement? Second, why are the substantial steps not a defining element of the offense?

First, it is understandable that there should be such an evidential requirement. A balance is always struck between the aims of convicting the guilty and avoiding the conviction of the innocent. While fewer guilty persons will be convicted if we require substantial steps, rather than a mere confession, there will also be fewer innocent persons convicted. Persons innocent of intending might confess to intending for any number of reasons, but, so the theory might be, fewer of those innocent of intending would take substantial steps toward assassinating a public official.

Second, if in this system one may be punished for the separate crime of 'intending to assassinate a public official and taking substantial steps in furtherance of one's intention', that is, for attempting to assassinate a public official, what is the point of the additional offense of merely intending? To answer this question we must look at this law from the point of view of one seeking to comply with legal rules. The offense of intending to assassinate a public official may operate to disincline persons from forming such intentions. It may lead to an exercise of self-restraint at a stage earlier than a law with respect to attempts. I shall have some more comments on this explanation later on, but for the moment I propose we accept it.[9]

What shall we say about whether or not punishment for such an offense is punishment for thought alone? There are two respects in which conduct is relevant here that it was not in the case of disbelief in the story of creation. Conduct, apart from admissions, is insisted upon by an evidential rule. And it is harmful conduct and not merely an intention that we are, by hypothesis, seeking to diminish

[9] *Supra*, pp. 34-5.

by making the intention wrongful. But these differences do not warrant concluding that this is a case in which we are punishing for something apart from thought. First, the status of the conduct in the evidential rule is like that of the admission in our case of disbelief. Conduct simply affords more reliable evidence than a mere admission of the state made illegal. But this is not relevant to what it is that one is being punished for. Second, from the fact that we are interested in prohibiting intentions in order to diminish certain harm it does not follow that we punish, not for intentions, but for conduct or for harm. If we punish a person, for example, for behaving recklessly, in the absence of actual harm, we punish for his reckless conduct although our ultimate aim may be to diminish a type of harm the risk of which is increased by the reckless conduct. We must distinguish between *what* it is we are punishing *for* and *why* it is that we are punishing.

5. Suppose we had a device for detecting sincere confessions. Would we then seek to punish persons who intended to assassinate public officials but who, subsequent to intending and before taking steps, changed their minds? If our purpose is to prevent harm, what, we might wonder, is to be served by punishing such persons? Someone may then suggest that we should be interested not in mere intentions but in firm ones. Let us, then, suppose it is a punishable offense 'to have the *firm intention* to assassinate a public official'. Suppose an evidential requirement similar to the one we have been considering. Would punishment for this offense be for thought alone? What is 'firm intention'?

Perhaps a 'firm intention' is to be contrasted with a state of indecision. If one's mind is made up, one's intention is firm or fixed. But is it, then, clear what 'an intention'

that is not firm might be? It may be that 'firm' is to be contrasted with 'weak' rather than with 'not yet definite'. 'Firmness' would be a function of one's beliefs and feelings with regard to a change of mind. If, for example, a person believes that nothing will dissuade him from seeking to realize his intention and if his feelings are strong on the matter, his intention may be regarded as firm. If he believes that only extraordinary circumstances will make him change his mind and feels rather strongly, then his intention may be considered only relatively firm. If he is prepared to change his mind at any moment and for almost any reason, he may be considered merely to intend. Given the law's aim to strike some balance between preventing harm and not interfering with those who will do no harm, one could understand the law's drawing a distinction between those who intend and those who firmly intend. The latter are more likely to invade interests protected by law. Still, for the reasons offered in the preceding case, a person would be punished for thought alone if punished for this state of mind whatever our ultimate object in punishing such persons.

6. Sometimes firm intention is used interchangeably with another phrase, 'firm resolve' or 'constancy of purpose' and this suggests another situation.[10] Suppose it were a punishable offense 'to have the *firm resolve* to assassinate a public official'. Suppose, again, the evidential requirement. Now what class of persons interest us here? Some class, by hypothesis, that differs from those who intend and those who firmly intend as we have understood these phrases. This class may be described as the class of those

[10] See Glanville Williams, *Criminal Law* (London: Stevens & Sons, Ltd., 1953), p. 485 (hereafter cited as CL).

'who really intend' or the class of those whose 'purpose is constant'. Let us attempt to clarify the notion.

In those cases in which intention and firm intention were made criminal, it did not seem particularly difficult to understand what state it was we were not to have in order to conform to the law. It was assumed that a person could have the state in question, realize that he had it, and realize that his conduct served merely to reveal his inner state to others. Were we to have a machine that could reliably test when one was sincerely reporting his state of mind, such a machine would allow us to determine whether or not one intended or firmly intended even in the absence of conduct in furtherance of intention.[11] What shall we say of 'firm resolve'? This phrase may be introduced to cover the following situation. We may believe that a person was sincere in expressing an intention, sincere in expressing a firm intention and yet not believe that he 'really intended' or that 'his resolve was firm' or that 'his purpose was constant'. We might hold such beliefs if, when the occasion arrived for the person doing what he said he intended to do, he did nothing. When 'the chips are down' he didn't come through as he said he intended to. Now someone may say that law should be restricted to those who firmly resolve, to those who 'really intend'. But what, then, does 'firm resolve' imply?

It seems to me that conduct is related to 'firm resolve' in a way unlike we took it to be related to intending and firmly intending. In those cases we viewed conduct merely as a sign of the intention. With 'firm resolve', however, the

[11] I do not wish to suggest by this that conduct is in no way connected with the meaning of intention. Certainly in some cases a person can intend to act without acting. Whether this could generally be the case and our concept of intention remain the same, I leave open.

conduct is not only a sign of the intention or resolve but part of the meaning of 'firm'. If a person, for whatever reason, does not do what he believes necessary to realize his intention one cannot say his resolve was firm. Lie-detecting devices might come to be accepted as reliable guides to intention and firm intention, but hardly for 'firm resolve' as I am construing it. For 'firm' implies that the person does what he believes necessary to realize his resolve.[12] To detect 'firm resolve', then, we would need a device that could foretell the future. But now, if 'firm resolve' implies more than merely having a certain mental state, what is it that persons are to avoid doing if they are to comply with the law making it criminal to have a firm resolve to assassinate a public official? What does the law direct persons not to do? It must be to avoid *acting* with a certain state of mind. But if this is so, are we prohibiting a state of mind by itself?

The topic of 'firm resolve' leads to the next major problem in understanding what constitutes 'punishment for thought alone'. Sometimes it is suggested that a person is punished for thought alone despite the fact that the offense he has committed is defined partly in physical terms. Laws, for example, with respect to conspiracy, vagrancy,[13] and possession of burglar's tools may occasion such an observation. It is most often made about the law of attempts.[14]

12 Williams, CL, p 485. In commenting on attempts: ". . . what of the supposed rule that repentance after the proximate act and before consummation of the full crime comes too late? Such repentance would seem to be the clearest indication that there was never a firm resolve, whatever the accused himself may have thought."

13 *See State v. Grenz*, 26 Wash. 2d 764, 175 P. 2d 633, 637 (1946).

14 John Austin, *Lectures on Jurisprudence* (London: John Murray, 5th ed. 1885), p. 441: (hereafter cited as LJ).

"Where a criminal intention is evidenced by an attempt, the party is punished in respect of the criminal intention. . . . Why the party should be punished in respect of a mere intention, I will try to explain hereafter. The reason for requiring an attempt, is probably the danger of admitting a mere confession. When coupled with an overt act, the confession is illustrated and supported by the latter. When not, it may proceed from insanity, or may be invented by the witness to it."

J.W.C. Turner, "Attempts to Commit Crimes," in *Modern Approach to Criminal Law*, eds. Leon Radzinowicz and J.W.C. Turner (London: The Macmillan Company, 1945), pp. 277-8:

"The important point is, however, that the *actus reus* in attempt need not be forbidden in itself. It follows, therefore, that whereas in most crimes it is the *actus reus*, the harmful result, which the law desires to prevent, while the *mens rea* is only the necessary condition for the infliction of punishment on the person who produced the harmful result, in attempt the position is reversed, and it is the *mens rea* which the law regards as of primary importance and desires to prevent, while a sufficient *actus reus* is the necessary condition for the infliction of punishment on the person who formed the criminal intent. . . . If then, in attempt, the sole purpose of the *actus reus* is to establish the existence of *mens rea*, it is necessary to decide . . . what will be a sufficient *actus reus*."

Patrick John Fitzgerald, *Criminal Law and Punishment* (Oxford: Clarendon Press, 1962), pp. 97-98:

"An intention to commit a crime does not by itself suffice to make a person guilty of a crime. . . . Although mere criminal intention is not punishable, punishment is not reserved only for cases where the intention is fulfilled. Midway between the mere intention and the completed crime stands the inchoate crime of Attempt. . . . In some instances statutes provide a lesser punishment for the attempt than for the full offense. The reason is no doubt the fact that less harm results from the former than from the latter. In fact, here the law would seem to be penalizing mere criminal intention, contrary to the general rule."

Glanville Williams, *Criminal Law* (London: Stevens & Sons, Ltd., 1953), pp. 485-6:

"Austin put forward the interesting view that in attempt the party is really punished for his intention, the act being required as evidence of a *firm* intention. There is much to be said for this. Admitting that intention in general can be proved by a confession, a confession is not sufficient proof in attempt because, standing alone, it gives no assurance that the accused would have had the constancy of purpose to put his plan into execution. The commission of the proximate act proves not merely the purpose but (in considerable degree) the firmness of the purpose."

Herbert Wechsler, William Kenneth Jones, and Harold L. Korn, "The Treatment of Inchoate Crimes in the Model Penal Code of the American Law Institute: Attempt, Solicitation, and Conspiracy," *Columbia Law Review* 61, No. 4 (1961), 573: (hereafter cited as Wechsler, Jones and Korn).

". . . the crime becomes essentially one of criminal purpose implemented by an overt act strongly corroborative of such purpose."

It has been claimed that the sole purpose for requiring conduct in the law of attempts is to establish the *mens rea*. This assimilates the conduct requirement in such laws to the evidential status of conduct in our earlier cases of intention and firm intention. Such claims are misleading. But showing why this is so does not settle the issue whether or not we punish for thoughts alone when we punish for attempts. I want first to suggest three reasons why conduct is an element of the offense.[15]

First, crimes of attempt allow enforcement officials to prevent both those who have set out to commit crimes from consummating them and those who failed to consummate crimes through some accident or mistake from trying again. The law of attempts enables enforcement officials to interfere with individuals before any harm has been done so that harm may be prevented. This power to interfere, however, is circumscribed. While we wish to protect individuals against theft and murder we also wish to protect individuals against interference by the state if these individuals, whatever their state of mind, would not in fact commit crimes. There is a point, an ill-defined one, at which the risk of harm to interests the law seeks to protect becomes so great that it is thought desirable to interfere with individuals who might change their minds. Now at what point does the law decide that that interference is worth the risk of penalizing those who would change their minds? Those who claim the sole purpose of requiring conduct is to establish the *mens rea* seem to imply that the law would, if sufficiently reliable evidence were available, interfere with those who intend or firmly intend to commit crimes. And, indeed, there might be some justification for

15 Cf. Wechsler, Jones, and Korn, 572-3.

such a viewpoint, for it is probably the case that individuals with such states of mind are more likely than the general run of persons to act to realize their intentions and invade the interests of others protected by law. But if our ultimate aim is to balance the policy of preventing harm to persons with the policy of minimizing interference with those who would not do all they believe necessary to realize their intentions, then the law may insist upon conduct because, comparing the class of those who firmly intend with the class of those who firmly intend and who take steps to realize their intentions, members of the former class are more likely than those of the latter to change their minds. In drawing the line at 'performing the proximate act' the law assures that fewer of those who would change their minds are convicted although it also thereby, of course, assumes a greater risk that the sphere of protected interests will be invaded.

Second, a person who takes steps in furtherance of his intention to commit a crime may be regarded as more disposed than the general run of persons to criminal activity generally. It is understandable that we may wish to have control over such persons in order to apply whatever corrective measures are thought beneficial. Those who intend to commit crimes, those who firmly intend to commit crimes, those who take steps to realize their intentions are all more disposed to criminal activity than the general run of persons. But it is also the case that those who take steps in furtherance of their intentions are more disposed toward criminal activity than those who do not take any steps to realize their intentions. It is reasonable and compatible with the definition of the offense of attempt that the law draw a line guided by this consideration so that those who take no steps are excluded from liability.

Third, were we to exculpate individuals who attempted to commit crimes but failed, say, through some fortuity, there would be an inequality of treatment of persons who were equally guilty from a moral point of view. Now, if we consider the class of persons who intend, the class of those who firmly intend, the class of those who take steps to realize their intentions, and the class of those who take the last step necessary to realize their intentions, we may regard them all as more morally blameworthy than the general run of persons. But they are not equally so. Those who take the last step are, in general, as blameworthy as those who succeed. Those who take the 'proximate step' may, of course, change their minds before the last step, but as we have seen, they are less likely than the general run of persons who intend to commit crimes to do so. Because of this it is less likely that they differ significantly in blameworthiness from those who actually commit the crime.

It might be admitted that the foregoing was a fairly adequate explanation of why the offense is defined in physical terms and still be maintained that when a person is punished for attempting to commit a crime he is being punished *for* his state of mind alone and not for what he has done. What he has done may be harmless, and it cannot be for what is harmless that we are punishing him.

In assessing this view it is advisable, I think, to distinguish those attempt situations in which the individual has done all he believes necessary to realize his intention and fails for one reason or another and those in which, while he has taken substantial steps in furtherance of his intention, he has not yet taken the last step he believes necessary to realize his intention. Let us consider the first class of attempts.

Here it is surely strange to say that we are punishing for a state of mind alone. If we view the situation as it actually exists, a particular person held liable for an attempt may have done no harm. We can hardly, however, infer from this that we are punishing such a person for his state of mind alone. This would suggest that we are punishing him for precisely what we would be punishing a person for if mere or firm intention were made criminal. The natural thing to say for this class of attempts is that we are punishing the person for doing all that he believes necessary to accomplish his intention. The person has engaged in conduct with a certain state of mind and the law has deemed that that conduct with that state of mind creates risks the law seeks to diminish. From the fact that one who drives recklessly is punished in the absence of harm one cannot, as we have seen, legitimately infer that the person is not being punished for reckless driving. Such conduct creates risks of harm and though it may not in a particular case result in harm the law may seek to diminish the risk. Likewise, persons who perform all they believe necessary to achieve their intentions generally do succeed, which suggests that in conducting themselves as they do, these persons create serious risk of harm.

The more interesting case is that of attempts in which the last step has not been taken. Are we not in such cases punishing for a state of mind alone? It is seriously misleading to say we are. It may suggest that were lie-detecting devices regarded as reliable, admissions of intentions, tested by such devices, would provide precisely what substantial steps now provide us in attempted crimes. And this is mistaken, I think, for several reasons. First, it cannot be disputed that one may intend to commit a crime and provide reliable evidence of one's intention and not be guilty of

attempt. In attempt it is those persons with 'firm resolve' that interest us; it is those who 'really intend', those whose purpose will be constant, and this no lie-detecting machine that tests one's mental state before action can reveal. The conduct in attempt is part of the meaning of the state we are concerned with detecting. In order to prevent harm, we believe it desirable to interfere with persons before they do all that they believe necessary to realize their intentions. This does not mean that we are punishing for mere intention. We are punishing such persons in the belief that they are members of the class of those who will not change their minds, the class of those whose purpose is constant. In interfering before the last step we must always feel some doubt that the person had the state that we label 'firm resolve'.

Second, suppose that the state could be defined independently of conduct and that machines could provide what the conduct is now taken to provide. There might still be good reason for distinguishing those persons who take substantial steps in furtherance of their intention from those who do not. First, the person who intends to assassinate a public official and who takes steps may be regarded as *making it* less likely that he will change his mind. The theory would be that the closer one gets to the actual commission of the deed the greater one's psychological commitment to perform the deed and the progressively diminishing probability of a change of mind and the corresponding progressively increased probability that harm will come about. One is, then, by one's acts putting oneself into a state that may be regarded as socially undesirable because it creates the risk that one will be less likely to change one's mind and this creates a greater risk that the harm we seek to prevent will come about. Further, the taking of steps

makes it easier for the person to realize his aims. In this respect, too, it may be regarded as socially undesirable because in making it easier for harm to be done, it makes it more probable that harm will be done.

We can now turn to our second source of obscurity in the claim that 'for law there must be external conduct'.

II

When someone says 'there must be external conduct' we may be troubled not just by what would and what would not be acceptable as external conduct but by the claim that there *must* be such conduct. How shall we take this claim? There are a number of possible interpretations.

First, when people thinking of law say 'there must be external conduct', they may have in mind no more than what is and what is not in fact taken into account by all or most legal systems that have existed. They convey to us information that legal systems explicitly or implicitly preclude punishing persons for having or failing to have a certain state of mind. One who puts forward such a claim, if confronted by a case in which there is such an offense, may simply limit his generalization and admit that there are exceptions. Changes in the actual content of legal systems reflect on the adequacy of the claim and given a sufficiently large number of legal rules addressed to thought alone, one who makes such a claim may say, 'it is no longer true that there must be external conduct'. Such a reaction, of course, gives it away that the remark is not philosophical.

Second, it has been suggested that external conduct is necessary, for without outer signs it is impossible to prove inner states and were we not to insist upon some conduct

we should have to rely upon unfounded charges. Blackstone wrote in explanation of the overt act requirement:

> . . . as no temporal tribunal can search the heart, or fathom the intentions of the mind, otherwise than as they are demonstrated by outward actions, it therefore cannot punish for what it cannot know. For which reason in all temporal jurisdictions an overt act, or some open evidence of an intended crime, is necessary in order to demonstrate the depravity of the will, before the man is liable to punishment.[16]

Blackstone appears to have believed that the overt requirement is justified by the limited access we have to the minds of others. This view differs from that of philosophers who have defended the view that 'there must be external conduct' in at least two respects. First, there are situations in which by appropriate evidentiary requirements we might take into account our limited access to the minds of others and nevertheless be 'punishing for thought alone'. Second, were we to enact rules making certain mental states criminal and accept confessions as reliable evidence for conviction, Blackstone would not be troubled by the character of such enactments as laws. But it would be precisely their character as laws that would trouble the philosopher.

Third, someone may think that conduct is necessary in another respect. The law, it might be argued, aims at promoting peace in the community. To this end there are rules that prohibit violence, theft, and deception and which set up institutions to interpret rules and to determine guilt. A legal system is a refined substitute, so it may be suggested, for private war. Now if we were to imagine a society in which all the rules were such that what people did to others was irrelevant for the applicability of the rules, then those

[16] William Blackstone, *Commentaries* Bk. IV, Chap. II.

rules could not possibly realize peace in the community. There must, then, be external conduct in precisely the same sense as a carpenter must use certain materials if he desires a chair to withstand pressure.[17]

First, it is not clear that such a system would totally fail to effectuate the aims of law. Suppose offenses were defined in terms of intentions to kill and in terms of those states of mind associated with reckless and negligent conduct. In principle many more persons would be guilty of legal wrongs within such a system than now are within our own. Those who intend to kill but who do not yet do anything would have committed a legal offense. But we might then accomplish what we now do and something besides. Those who now kill, steal, etc. would under this imagined system be punished as under our own. Their conduct would stand to their thoughts in precisely the relation that confessions stand to thoughts except that we might regard the conduct as more reliable evidence. When it was established that a person killed we should be able to infer the criminal state of mind. Thus, a failure to have the overt act requirement would not entirely defeat the aim of diminishing external harm. There are, however, two cautionary remarks needed here. Were the system to address itself to states of mind unrelated to harm, the system would presumably fail to effectuate these aims associated with law. And if all offenses consisted in the having of a state of mind and none in the doing of certain things, the system would be irrational in

[17] Cf. Lon Fuller, *The Morality of Law* (New Haven: Yale University Press, 1964), p. 96. With respect to such features as the generality of legal rules, their promulgation, their clarity, etc., and the relation of such features to law he writes:

> "They are like the natural laws of carpentry, or at least those laws respected by a carpenter who wants the house he builds to remain standing and serve the purpose of those who live in it."

not rewarding restraint from harm. Persons who merely intend and those who do all that they believe necessary to realize their intentions would be treated alike. But, as we remarked above, this peculiarity, which we shall examine more carefully in a moment, does not mean that there would be a total lack of effectiveness to the system.

Suppose, however, that it were necessary to prohibit conduct in order to preserve peace in the community. The test of the philosophical character of the claim that 'there must be external conduct' would be brought out in this way. If the system did not insist upon conduct for violation of the law, would this occasion the remark, 'it's merely an ineffectual legal system', or the remark, 'it's not a legal system at all or if it is, it is a very atypical one'? Is there an inclination to say that a legal rule prohibiting thought is not a legal rule or is there merely an inclination to say that it is impractical and ineffectual? The philosopher is inclined to make the former type of comment.

Fourth, in saying that 'there must be external conduct', one may put forward a moral demand. The claim might be construed as 'it is morally undesirable to make psychological states by themselves legally wrongful'. The person who holds this view reacts to instances where thought is prohibited or required by law in this way: (1) he resembles the philosopher, for he doesn't withdraw his statement or claim, however many instances there are of legal rules that prohibit thought; (2) he differs from the philosopher because he isn't necessarily inclined to say such things as 'it is not really law' or 'it is a strange kind of law'. He places a demand upon the content of legal rules which, if unsatisfied, reflects not on the enactment's being a law but on its being a moral law.

III

The claim that law insists upon external conduct may be unlike the claim that in fact legal systems do not punish for thought alone, unlike the claim that given our limited access to the minds of others legal systems must insist upon conduct, unlike the claim that in order to be effective legal systems must insist upon conduct, and unlike the claim that to be moral legal systems must insist upon a person's doing something wrong. What, then, is the character of the claim? It is, of course, a conceptual remark. Something is being said about the concept of law. We have now to look more closely at the character of the conceptual observation.

First, some philosophers believe that law is essentially linked to morality. For them a necessary condition for a rule to be a legal rule is that it not be immoral. Such philosophers may also believe that it is immoral to prohibit thought. They might, then, conclude that a rule making thought alone criminal was not a legal rule. They would reach this conclusion because they believe there exists some necessary connection between law and morality. This is one possible line of argument, but it has all the limitations associated with the view that an immoral law is not a law.

Second, a philosopher may believe that the connection between a legal rule and external conduct is more like the connection between being a legal rule and simply being a rule than it is like the connection between being a legal rule and being enforced by men rather than women. It is more like the connection between being a widow and being a woman than it is like the connection between being a woman and dying before one reaches the age of 120 years. Such a philosopher may argue that it is not only more like the former types of cases than the latter but that it is pre-

cisely the same. He might recognize his divergence from ordinary usage by remarking about rules making thought alone criminal, 'such rules aren't really legal rules'. He would be aware that there is a difference between 'if x is a legal rule, then x is a rule', and 'if x is a legal rule, there must be external conduct'. He is aware also that moral criticism of such enactments condemns them as 'immoral laws'.

Now what might account for the philosopher's straying from ordinary language? Let me suggest this possibility. He may be led to his position by an inability to find a comfortable middle-ground between 'if x is a legal rule, then x is a rule' and 'if x is a legal rule, then x is enforced by men'. He compares the relation between a legal rule and external conduct with the relation between a legal rule and enforcement by men rather than women. He believes that were women to enforce the law it would not alter our judgment that it was law. But with respect to external conduct he feels the situation is different. Law seems to him an ordering for the promotion of peace and this seems to imply that regulating the conduct of people is connected with the meaning of law. When concepts are connected in meaning, it is natural to think them connected as a legal rule is connected with simply being rule, for that is so obviously a connection in meaning. But it seems clear that the concepts of legal rule and external conduct are not connected in that way. How, then, are they connected if they aren't connected as legal rules are connected with rules nor as enforcement by men is connected with legal rules?

Third, some may take this line. The connection is more subtle than that suggested by the philosopher who believes that a rule is not a legal rule unless it prohibits or requires conduct. Consider, again, the punishable offense of disbelieving in the story of creation. Is not such a rule a legal rule? There are several grounds for saying that it is. Such an enactment may resemble in a number of relevant particulars typical legal rules. And it may be an element in a system, the purpose of which is to promote values normally associated with law. Admitting this, someone might argue that law was still essentially a matter of preventing men from harming one another and that while this purpose is compatible with an atypical use of legal rules, it is not compatible with the general use of rules that prohibit merely thought. If we imagine a system, no rule of which is concerned with what men do but all of the rules of which are concerned exclusively with what they think, we would not be imagining a legal system. In saying, then, that 'for law there must be external conduct' one may be making the point that it is necessarily the case for a system to be a legal system that some subset of its rules prohibit persons from harming one another. And this is like, someone might say, the connection between rules and a legal system, for while there are elements of legal systems that are not rules, it is necessary that there be at least some rules if there is to be a legal system at all.

This suggestion is bothersome. Suppose a system in which all of the rules defining offenses prohibit thought alone. Is such a system a legal system? The answer to this question is surely not as clear-cut as the answer to the question 'Is a "system" without rules a legal system?' We can surely foresee disputes arising over whether or not a system in which only thought is punished is a legal system. There is clearly something to be said in favor of the view that it is a legal system. It doesn't seem to me a necessary condition for a system to be a legal system that some, at least, of its rules prohibit persons from harming one another.

Fourth, it is possible, however, to claim that external conduct is connected in meaning with law and that it is not connected as the idea of a rule is connected with the idea of a legal system. It seems to me that the alternative I shall now elaborate provides the most defensible position.

Prohibiting harm stands to the idea of law as the legs of a chair stand to the idea of a chair. Neither the absence nor the presence of such a feature is determinative of a thing's being of a certain kind though it is relevant to a thing's being of a certain kind. That there are rules which prohibit harm is not a necessary condition for a system's being a legal system. That there are rules prohibiting harm is a feature that would incline one to classify a system as a legal system. That there are no rules prohibiting harm is relevant to classifying the system as other than a legal one. Prohibiting harm stands to the idea of law, I believe, as provision for a sanction stands to the idea of law. Not every legal rule need be supported by a sanction for the system of rules to be a legal system. But were a system of rules to have no provision whatsoever for sanctions, the general absence of the feature would weigh against our classifying the system as a legal one. Its absence is not, however, determinative of the system's being a legal system.

Now let us imagine two different types of system: (a) a system in which all of the rules prohibit or require states of mind believed to be unrelated to conduct that harms others, and (b) a system in which all the rules prohibit intentions to do harmful things and where our aim in making intentions criminal is to diminish harmful occurrences.

With respect to the first system there are apparent oddities and divergencies from what would be regarded as a legal system. I want to elaborate on the second system, for

the pull to say that it is a legal system seems to me stronger and if one appreciates the oddity of this system, a fortiori one will accept it with regard to the first system.

When we ask ourselves what is law or what is a legal system, a defining characteristic that naturally comes to mind is that of organized sanctions for the enforcement of rules. This feature has, of course, been regarded by some as an essential characteristic of law. Putting aside the issue of its essential character, it would be accepted, by most persons, as a feature quite central to our idea of law. The primary role of the sanction is to induce compliance among those who might be inclined to violate the rules. Sanctions, then, are provided for when there is law and these sanctions are, when the system is functioning, generally effective. If there were a system in which no provision were made for sanctions or a system in which it was known that the sanctions provided for were never applied, we would only hesitantly, if at all, apply the label 'legal' to the system.

Now if we turn to our imagined system in which all of the offenses are defined in terms of intentions to act, the following argument may be made. Threats of punishment in such a system play an entirely different role from what they do in most legal systems, for in law such threats generally operate to induce compliance with the rules among those inclined not to obey. In the system we have imagined, however, threats do not generally operate to induce compliance among those inclined to disobey. The threats operate merely to induce individuals to refrain from giving evidence of their criminal state. Thus, we would have a system in which the laws could, in general, be violated with impunity, a system, in other words, in which sanctions exist on paper but in which their characteristic role is absent.

We have a system, then, that diverges in a respect relevant to classification from a clear case of a legal system.

I think that there is something wrong with this argument. With respect to some states of mind it has, I think, some validity. With respect to intentions I do not think that, as it stands, it is adequate.

Imagine the order, 'Don't intend to raise your arm!' issued by one who has made it clear that if one does intend, the person will be shot. The foregoing line of argument would lead to the conclusion that this was an absurd type of situation. One could with impunity disobey the order, for the person ordered need only intend to raise his arm and not reveal his intention. We are to imagine a person who thinks to himself, 'I'll intend to raise my arm but not raise my arm'. But an order is not merely a form of words. In general, when one orders, one has the capacity to induce fear in a person that if he does not do what he is ordered to do he will suffer some harm. But here there is no such capacity nor would there generally be in such cases. Thus, one may conclude that it is not really an order or that it is an unusual kind of order.

There is, of course, something strange about this argument. If the person intends to raise his arm, this is no doubt compatible with his changing his mind and not raising his arm. But if one intends to raise one's arm, it is incompatible with one's believing that one will not raise one's arm where this belief derives from one's intending not to raise one's arm. In a word, if the person intends to raise his arm, he hasn't decided not to raise his arm. Thus, in ordering a person not to intend and threatening harm in case of disobedience, one may induce a person not to form an intention. From this it seems to follow that threats may play a role in a system in which one is prohibited from intending

similar to the role they play in a system in which persons are prohibited from doing.

Still, there is something strange about ordering a person not to intend to raise his arm.[18] What is it? If one's aim is to induce a person not to intend to raise his arm, one can accomplish what one wishes by ordering him not to raise his arm. And if one's aim is to induce him not to raise his arm, the natural thing is to tell him not to. But more than this, if one were to order a person not to intend to raise his arm, one would be suggesting that one wanted him to refrain from doing something other than not raising his arm, that is, one would be suggesting that it was his intending that interested one and not his raising his arm. But if his raising his arm is what one wishes him not to do then simply ordering him not to raise his arm would accomplish what one wishes.

Nevertheless, there may be a point to framing laws, at least some laws, in terms of intentions rather than acts. There will be some persons who form intentions despite the existence of rules prohibiting the acts they intend to perform. By framing offenses in terms of intentions we may be enabled to interfere with such persons at the stage of intending and thus prevent them from doing what they intend to do. It is not, then, that a rule framed in terms of intentions has any greater deterrent value than one framed in terms of acts or harm but it may well have a greater pre-

[18] Cf. John Austin: LJ, 460-1:

"We might . . . be obliged to forbear from intentions, which respect future acts, or future forbearances from action; or, at least, to forbear from such of those intentions as are settled, deliberate, or frequently recurring to the mind. The fear of punishment might prevent the frequent recurrence; and might, therefore, prevent the pernicious acts or forbearances, to which intentions (when they recur frequently) certainly or probably lead."

ventative value. We have seen that this was so with respect to attempts.[19] We are to imagine, then, a system the thrust of which is primarily preventative rather than deterrent. Now, I think, that one can see that the implications of such a system are such that it diverges considerably from what we understand by a legal system.

First, the system we are considering is described as one whose aim is the prevention of harm. This emphasis on prevention of harm naturally inclines us toward regarding the system as a legal one, for this is a commonly accepted aim of legal systems. But given that this is the aim of our imagined system, what can account for its restricting its offenses to those that exclusively prohibit intentions? Mustn't a system with such an aim have some prohibitions on persons doing harm so as to encourage self-restraint at some point before commission of the harm that the law aims at preventing? Once the person reaches the stage at which he provides what the law regards as sufficient proof of intention he will have no incentive to restrain himself from continuing. With respect to this point, one may say

[19] Cf. Jerome Michael and Herbert Wechsler, "A Rationale of the Law of Homicide II," *Columbia Law Review* 37, No. 8 (1937), 1295-6 and Wechsler, Jones, and Korn, *op. cit.* 572:

> "Since these offenses always presuppose a purpose to commit another crime, it is doubtful that the threat of punishment for their commission can significantly add to the deterrent efficacy of the sanction—which the actor by hypothesis ignores—that is threatened for the crime that is his object. There may be cases where this may occur, as when the actor thinks the chance of apprehension low if he succeeds but high if he should fail in his attempt, or when reflection that otherwise would be postponed until too late is promoted at any early stage—which may be true of some conspiracies. These are, however, special situations. Viewed generally, it seems clear that deterrence is at most a minor function to be served in fashioning provisions of the penal law addressed to inchoate crimes; that burden is discharged by the law dealing with the substantive offenses."

that the system is irrational or that it is not as effective as it might be and yet argue that its irrationality does not reflect on whether or not it is a legal system.

Second, whatever truth there is in the view that there is an oddity in the idea of a legal system that exclusively prohibits thought must derive from our concept of law. What, then, are the features of this concept relevant to our inquiry?

Law is not merely a system of enforceable rules where the rules might have any content whatsoever.[20] The law establishes an ordering of men so as to reduce certain recognized evils. It involves an accommodation of the interests of human beings that may come into conflict. But there is more to it than this. The general, though not universal, rule is that violations of the law involve interferences with the interests of others. We can understand that there might be some laws—indeed all legal systems have such—whose violation did not occasion interference with others. But that laws might in general be violated and people remain unaffected conflicts with our concept of law. At the core of any legal system is a set of rules, then, general compliance with which provides benefits for all persons. The benefits consist in one's having a sphere of interests immune from interference by others. There is good reason for believing that one has a moral obligation to obey such rules. This obligation derives from the fairness of one's assuming certain burdens that others have assumed and which make these benefits possible. Further, it is reasonable to support such kinds of rules with sanctions, for if there were no sanctions for noncompliance, those who voluntarily complied

[20] That the legal rules regulate conduct and not thought is usually assumed. One need only recall classic definitions of law.

with the rules would have no protection against those prepared to accept the benefits of the system without assuming the burdens. But the burdens one morally assumes are merely those which are necessary for persons to assume if the benefits of the system are in fact to accrue.

Now, the peculiarity of our imaginary system when compared with such law is that when the rules are violated the interests of others are unaffected. As long as persons restrain themselves from doing what they intend to do interferences with others are avoided. It is never in the forming of an intention, the only thing made illegal, that one harms others. If the world were to change drastically we might harm others merely by forming intentions. But, then, of course, it would not be for mere intention that one was being punished. Under our imagined system, given men as we know them, harm can only come about from conduct. Still, general compliance with the rules prohibiting intention may be thought, like compliance with rules prohibiting conduct, to confer benefits of precisely the kind that a legal system normally confers and thus to impose upon all, as is the case when legal rules are involved, a moral obligation to obey such rules. No doubt, benefits would accrue if people did not form certain intentions. There would be a diminished risk of harm. But the benefits we associate with a legal system, namely the creation of a sphere of interests immune from interference, would also accrue if, given that persons formed intentions, they changed their minds and did not act in a way harmful to others. To be sure, in accepting the benefits of a system of rules one assumes the burdens necessary to realize those benefits. But one does not morally assume burdens beyond what is necessary. And because restraint from harming others is all that is necessary to achieve the aim of a sphere of interests immune from interference the only obligation derivable from acceptance of the benefits of such a system is not acting in certain ways. One doesn't, then, have an obligation to obey such 'laws' as one has an obligation to obey laws that prohibit conduct. But, then, the system diverges from law as we understand it, for we commonly accept an obligation to obey the law.

Compare, too, the function of sanctions in our imagined system with their function in a legal system. Rules of law are such that those who voluntarily comply with them take on a special risk which becomes acceptable only because of the presence of sanctions which gives some assurance that those who voluntarily comply will not suffer at the hands of those who are not prepared to voluntarily comply.[21] But in a system in which exclusively intentions are prohibited, persons who do not form intentions that the system prohibits are not by such voluntary compliance with the rules, thereby putting themselves in any special way at the mercy of those who don't comply. Thus, the sanctions in such a system do not have their ordinary function, namely to reduce the risks of complying with the rules. Sufficient for protection of persons who voluntarily comply would be sanctions for persons acting in certain ways.

This paper opened with the claim 'law is concerned with external conduct; morality with internal conduct'. We had put aside any consideration of the claim with respect to morality. But have we, ironically, returned to issues of morality and come upon, not some difference, but some connection between law and morality? It has been suggested, with some justification I believe, that it is a principle of a just constitution that "each person has the equal right to the most extensive liberty compatible with a like

21 Cf. Hart, *op. cit.* p. 193.

liberty for all."[22] Now if this is so, we can see that the system we have imagined involves a universal rejection of this principle. By merely intending to do harm one does not interfere with the liberty of others. Thus, in prohibiting intentions the law would deny a person a liberty compatible with a like liberty for all. But a system that did this as a general rule would also, I have argued, be a system that diverges from what we conceive of as a legal system. Is a system, then, that fails to give minimal respect to this principle of justice not only an unjust system but a system that diverges from what we understand as a legal system? I think so.

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22 John Rawls put forward this claim in "Justice as Fairness," *Philosophical Review* 67 (1958), 164.

THE ACCEPTANCE OF A LEGAL SYSTEM

In developing the notion of 'acceptance of a legal system', and especially of its ultimate 'rule of recognition', in *The Concept of Law*, H. L. A. Hart has introduced an important new element into contemporary discussions in legal philosophy. A further analysis of this notion, however, may well lead in directions neither foreseen nor, perhaps, desired by Professor Hart himself. I propose to explore the range of possible meanings of 'acceptance of a legal system', taking my cue from a remark made by Alf Ross in a brief review of Hart's book.

Ross, though he tries to minimize the differences that exist between his and Hart's legal philosophies, admits to a disagreement with Hart at least on the question of 'internalization', as Ross puts it, of a legal system; the gist of his objection is that Hart has transferred to his conception of a legal system as it is to be found in ordinary times a phenomenon, that of 'acceptance' or of "an attitude of allegiance," the occurrence of which Ross is only willing to allow in "extraordinary situations," notably revolutionary periods. As Ross common-sensically points out, the language of 'acceptance' suggests the concept "of a deliberate decision," of a choice.[1] I think (although Hart would demur) that Ross is correct in making this last point. The more interesting question, however, is whether this constitutes a very damning criticism of Hart. If it does not, and if we can vindicate the usefulness of the notion of 'acceptance'

1 Ross, *Yale Law Journal*, 71, 6 (1962), 1189.

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