

# Villainy and Felony:

## A Problem Concerning Criminalization

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[Among the Lilliputians] Ingratitude is a capital Crime, as we read it to have been in some other Countries: For they reason thus; that whoever makes ill Returns to his Benefactor, must needs be a common Enemy to the rest of Mankind, from whom he hath received no Obligation; and therefore such a Man is not fit to live.

—Gulliver's Travels<sup>1</sup>

In this essay I take up a problem one is apt to think has been answered long ago in the vast and incisive literature on what should and should not be criminalized. Strangely and unexpectedly, it would seem that my problem has been almost completely overlooked.<sup>2</sup>

### I. THE PROBLEM OF THE NON-FELONIOUS VILLAIN

Paul Johnson, the conservative British columnist and author of several best-selling works of popular history (*The Birth of the Modern*,<sup>3</sup> *A History of the Jewish People*<sup>4</sup>) wields a famously ferocious pen. His voluptuously angry style is on consummate display in a short volume of biographical essays titled simply *Intellectuals*,<sup>5</sup> covering the lives of thirteen leading left-wing intellectuals: Rousseau, Shelley, Marx, Ibsen, Tolstoy, Hemingway, Brecht, Bertrand Russell, Sartre, Edmund Wilson, Victor Gollancz

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1. A Norton Critical Edition: Jonathan Swift, *Gulliver's Travels* 39 (Robert A. Greenberg ed., 2d ed. W.W. Norton & Co. 1970) (1785).

2. The conspicuous exception is Michael Moore. For elaboration, see below.

3. Paul Johnson, *The Birth of the Modern: World Society, 1815-1830* (1991).

4. Paul Johnson, *A History of the Jews* (1987).

5. Paul Johnson, *Intellectuals* (1988).

(the publisher), and Lillian Hellman. The book is intended, he says, as an

examination of the moral and judgmental credentials of certain leading intellectuals . . . to tell mankind how to conduct itself. How did they run their own lives? With what degree of rectitude did they behave to family, friends and associates? Were they just in their sexual and financial dealings? Did they tell, and write, the truth?<sup>6</sup>

Each essay is in fact a separate bill of indictments against its subject.

Here is a fairly representative sample from his essay on Marx, whom he accuses of the shameless exploitation of “anyone within reach, . . . in the first place his own family.”<sup>7</sup> While still a student, he would pepper his ailing, hard-working and generous father with insistent demands for more cash and react with outrage to any suggestion of greater frugality. When his father died, he did not bother to attend the funeral; he merely redirected his demands for cash to his mother.

[Later on] Engels was the new subject of exploitation. From the mid 1840’s, when they first came together, until Marx’s death, Engels was the main source of income for the Marx family. He probably handed over more than half of what he received himself. . . . The partnership almost broke in 1863 when Engels felt Marx’s insensitive cadging had gone too far. Engels kept two houses in Manchester, one for business entertaining, one for his mistress, Mary Burns. When she died Engels was deeply distressed. He was furious to receive from Marx an unfeeling letter. . . which briefly acknowledged his loss and then instantly got down to the more important business of asking for money. Nothing illustrates better Marx’s adamant egocentricity.<sup>8</sup>

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6. Id. at ix and 2.

7. Id. at 74.

8. Id. at 75.

Johnson sees exploitation even in Marx's treatment of his daughters whose education and marriage he tried to frustrate at every turn, because it suited his personal comfort to keep them at home. Johnson's most sneering words are reserved for Marx's treatment of his domestic servant and sometime lover, Helen Demuth:<sup>9</sup>

In all his researches into the iniquities of British capitalism, [Marx] came across many instances of low-paid workers but he never succeeded in unearthing one who was paid literally no wages at all. Yet such a worker did exist, in his own household. When Marx took his family on their formal Sunday walks, bringing up the rear, carrying the picnic basket and other impedimenta, was a stumpy female figure. This was Helen Demuth, known in the family as "Lenchen." Born in 1823, of peasant stock, she had joined the von Westphalen family [Marx's aristocratic in-laws] at the age of eight as a nursery-maid. She got her keep but was paid nothing. In 1845, the Baroness, who felt sorrow and anxiety for her married daughter, gave Lenchen, then twenty-two, to [her daughter] Jenny Marx to ease her lot. She remained in the Marx family until her death in 1890 . . . [S]he was a ferociously hard worker, not only cooking and scrubbing but managing the family budget, which Jenny was incapable of handling. Marx never paid her a penny. In 1849-50 during the darkest period of the family's existence, Lenchen became Marx's mistress and conceived a child. . . [I]t was a son . . . Marx refused to acknowledge his responsibility, then or ever, and flatly denied the rumors that he was the father . . . [T]he boy was put out to be fostered by a working-class family called Lewis but allowed to visit the Marx household. He was, however, forbidden to use the front door and obliged to see his mother only in the kitchen . . . [Marx] eventually persuaded Engels to acknowledge Freddy privately, as a cover-story for family consumption.<sup>10</sup>

Thus Johnson, the prosecutor. Let's take this thoroughly hostile, studiedly unbalanced depiction of Marx at its face

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9. "Demuth" incidentally is German for humility.

10. Id. at 79-80.

value. In other words, let's respond to it with a demurrer and assume Marx to be the villain Johnson makes him out to be.

To get to the question that I want to explore in this essay, contrast Marx's alleged villainies with those of another man, Jean-Jacques Rousseau. Actually, I would like you to consider but two instances of Rousseau's villainy, both of which he himself describes quite forthrightly in his *Confessions*.<sup>11</sup> The first of these involves some petty thefts during Rousseau's apprenticeship with an engraver. A fellow journeyman suggested he steal some asparagus from another's garden and sell it "thus realizing enough money for a luncheon or two."<sup>12</sup> As the other fellow "was not very nimble and did not want to take the risk himself, he picked on me for the exploit. After some preliminary flattery [of the sort] I have never been able to resist,"<sup>13</sup> Rousseau gave in and for several days running "went and cut the finest asparagus and took it to some old woman who guessed that I had stolen it and told me so in order to get it cheaper."<sup>14</sup> Other than flattery, there was not much in it for Rousseau. He gave the money to his "friend," who "immediately turned it into a lunch, which I went to fetch and which he shared with a comrade; as for me, I was content with what was left over. I did not even touch their wine."<sup>15</sup> A little later in life, Rousseau tells us he got into the habit of committing another crime—indecent exposure.

Being unable to satisfy my desires, I excited them by the most extravagant behaviour. I haunted dark alleys and lonely spots where I could expose myself to women from afar in the condition in which I should have liked to be in their

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11. Jean-Jacques Rousseau, *Confessions*, (J.M. Cohen trans., Penguin Books 1953) (1781).

12. *Id.* at 41.

13. *Id.*

14. *Id.*

15. *Id.*

company . . . The absurd pleasure I got from displaying myself before their eyes is quite indescribable.<sup>16</sup>

(When he got caught, he managed to secure his release by pretending to be an insane nobleman.)

Let us suppose that this is all we knew about the two, Marx and Rousseau. Which of the two would strike us as the greater cad? The answer seems easy: Marx. Rousseau's minor acts of juvenile pilfering and exhibitionism seem as nothing when set against the record of sustained emotional cruelty, callousness, selfishness, greed and hypocrisy that Johnson attributes to Marx.<sup>17</sup> But here is the puzzle: The criminal law will punish a Rousseau, but not a Marx. And not by an oversight. Once our imaginations are set on this course, we have no trouble thinking of many instances of non-felonious villainy which we would think it intolerable for the criminal law to deal with *even though they seem far more serious, indeed far more harmful, than the villainies which the law is willing to punish as felonies*. A felony, it seems, is not just a more serious kind of villainy. And yet, how can it be that we are less willing to punish what we are more willing to condemn? How can punishment and condemnation be so out of sync with one another?

Most fiction deals with villainy, not felony. The blackest villains in Balzac's novels are the ingrates, like the grown daughters of Pere Goriot, who abandon the father to whose sacrifices they owe their ascent. In the typical Gothic novel, the worst offense is emotional cruelty. Most of the things that we get outraged by in our daily lives have to do with non-felonious villainy. Non-felonious mendacity, selfishness, treachery, greed, cruelty, hypocrisy, cowardice is what gets decried in most editorials, exposed in most biographies, dramatized in most movies. Interestingly, often these stories of non-felonious villainy

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16. Id. at 90.

17. I am studiously limiting the facts of Rousseau's life we are considering. When considering everything in his Confessions, the balance might change considerably in Marx's favor.

derive their fascination from our instinctive befuddlement that such villainy should remain beyond the reach of the law. A particularly good illustration is Herman Wouk's splendid novel *The Caine Mutiny*<sup>18</sup> (known to most through the play<sup>19</sup> and the movie<sup>20</sup> based on it). What everyone remembers about *The Caine Mutiny* is the deranged Captain Queeg rolling those marbles in his hands, the officers that eventually mutiny against him, and the court-martial in which they arduously but successfully defend their actions to a skeptical navy bureaucracy. What tends to be forgotten is that the real villain of the story is not Captain Queeg, but one of his subordinates, a budding writer named Keefer, who, feeling peeved, insulted, and humiliated by Queeg's crude and petty manner, insinuates in various of Queeg's subordinates the belief that Queeg is not merely unstable—as he manifestly is—but downright insane. That belief becomes a kind of self-fulfilling prophesy. It leads to behavior on the part of Queeg's subordinates that serves to further unbalance the captain and lead him to the actions which then precipitate the mutiny. Keefer's involvement in the mutiny, though pivotal, is sufficiently indirect that he manages to escape even the hint of responsibility during the ensuing court-martial.—A perfect instance of non-felonious villainy and one that dramatically raises the question why such villainy should remain non-felonious.

Why is it that condemnation and punishment are so out of sync with each other? Why are there these two kinds of villainies, the felonious and the non-felonious kind? And what distinguishes them?

## II. UNSATISFACTORY ANSWERS

The question of what conduct we should criminalize has a long pedigree. There have been roughly three approaches to it—utilitarianism, the harm theory, and

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18. Herman Wouk, *The Caine Mutiny*, A Novel of World War II (1951).

19. Herman Wouk, *The Caine Mutiny Court-Martial*, A Play (1954).

20. *The Caine Mutiny* (Columbia Pictures 1954).

legal moralism. What sorts of answers would these approaches suggest to the above questions? For the most part, those developing each of these approaches have not expressly addressed themselves to the problem of non-felonious villainies; but implicit answers to it are not hard to find.

Let's start with utilitarianism. Not all variants of utilitarianism purport to give guidance on what to criminalize. Some utilitarians for instance take the position that utilitarianism only becomes relevant once we have decided what conduct it is we want to deter. Once we have figured that out, we should then assess the optimal sanctions—sanctions that are severe enough to deter and not so severe that the (marginal) cost of inflicting them exceeds the (marginal) deterrent benefit of doing so. This variant of utilitarianism simply fails to tell us which villainies to turn into felonies, and which to leave well enough alone.

But the most traditional type of utilitarianism—the one that instructs us to maximize utility, or some related index of well-being, like wealth—does in fact offer quite unequivocal advice on what to criminalize: all conduct that tends to lower overall utility. As far as this form of utilitarianism is concerned, there are no villainies that should not be turned into felonies. Conduct is villainous if it lowers overall utility; and that probably means it should be criminalized. The difficulty with this answer is of course that it is wildly at variance with our common sense intuitions. It suggests that as a matter of principle, there really would be nothing wrong with criminalizing what Johnson called Marx's "adamantine egocentricity,"<sup>21</sup> or the ingratitude of Pere Goriot's daughters, or Keefer's manipulative conduct on the *Caine*, provided that is what the balance of utilities suggests. In other words, the utilitarian answer is just to ignore our intuition that some villainies just aren't felony-material.

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21. Johnson, *supra* note 5, at 75.

The original version of the harm theory approach to criminalization is John Stuart Mill's:

The only purpose for which [state] power can rightfully be exercised over any member of a civilized community, against his will, is to prevent harm to others. He cannot rightly be compelled to do or forbear because it will be better for him to do so, because it will make him happier, [or] because, in the opinion of others, to do so would be wise, or even right.<sup>22</sup>

This principle is often taken to exemplify the liberal theory of punishment, liberal because it does not allow the state to infringe on someone's liberty unless someone else's liberty is being jeopardized by him. It makes it difficult to punish a great deal that others abhor, including prostitution, drug-use, and gambling, because it harms no one but the consenting participants, if that. It is strange to realize, then, that this seemingly restrictive harm principle would put nothing in the way of punishing harmful villainy! Nothing in it seems to preclude punishing someone for bad parenting, or for subjecting another to a wounding verbal tirade, or for ungratefully leaving a former benefactor in the lurch. Like utilitarianism, this version of the harm theory therefore seems deeply counterintuitive.<sup>23</sup>

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22. John Stuart Mill, On Liberty, in *On Liberty and Utilitarianism* 12-13 (Bantam 1993) (1859).

23. What was Mill thinking? Surely this objection must have occurred to him? The closest he comes to addressing this possibility is this: "The acts of an individual may be hurtful to others, or wanting in due consideration for their welfare, without going the length of violating any of their constituted rights. The offender may then be justly punished by opinion, though not by law." This sounds a lot like the line Joel Feinberg pursues and which I critique in the next few paragraphs. That is just one problem with it. The other is his puzzling insistence elsewhere that the same criteria determine not merely someone's eligibility for punishment, but also his eligibility for social disapprobation. He prefaces the statement of his famous principle by saying "The object of this Essay is to assert one very simple principle, as entitled to govern absolutely the dealings of society with the individual in the way of compulsion and control, *whether the means used be physical force in the form of legal penalties, or the moral coercion of public opinion*" (italics mine).

The harm theory has recently been greatly refined at the hands of Joel Feinberg in his four-volume landmark work, *The Moral Limits of the Criminal Law*.<sup>24</sup> To begin with, Feinberg supplements it with a second principle, the “offense principle,” which is to make it possible to punish some who do not actually harm, but merely offend, those around them.<sup>25</sup> Of course the addition of this principle does nothing to preclude the punishment of harmful villainies; this aspect of the work is really irrelevant to our problem. But Feinberg also amends the harm principle itself, and what he does here is more pertinent. He would only count something as a harm if (1) it infringes someone’s rights, and (2) it constitutes a set-back to his interests.<sup>26</sup> Let us explore what each of these mean and how they would affect the treatment of what I called harmful villainies. If Feinberg’s approach is to work, harmful villainies must be ineligible for criminalization either because they do not infringe anyone’s rights or because they do not constitute a setback to anyone’s interests.

Start with set-backs to interests. No doubt there are some things I might have called harmful villainies that Feinberg would declare not to be setbacks to anyone’s interest. Interests, says Feinberg, are things in which we have a significant stake; and harm is an incursion that does real damage to those things.<sup>27</sup> For instance some of what comes under the rubric of bad parenting, Feinberg would probably dismiss as a mere “hurt,” or the frustration of a “want,” rather than something that cuts deep enough into the fabric of our existence to count as a harm. (He explicitly draws those distinctions.)<sup>28</sup> He might say the same thing about a verbal tirade. Indeed most of the harmful, non-felonious villainies alluded to so far can occur in a sufficiently transient form that they don’t quite amount to the requisite deep and lasting impairment of

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24. Joel Feinberg, *The Moral Limits of the Criminal Law* (1984-1988).

25. 2 Feinberg, *The Moral Limits of the Criminal Law* 1 (1985).

26. 1 Feinberg, *The Moral Limits of the Criminal Law* 31-64 (1984).

27. *Id.*

28. *Id.*

one's interests "taken as a miscellaneous collection of all those things in which one has a [significant] stake."<sup>29</sup> But that still leaves a lot of harmful villainies ripe for criminalization which intuitively seem as though they should be immune. Feinberg might also dismiss some harmful villainies on the ground that the harming is carried out in too "passive" a fashion—like failing to help a former benefactor, or not devoting enough attention to one's children. Harming, he might argue requires that one *does* something that results in harm, not that one merely *fail* to help someone threatened by harm. Strangely, Feinberg actually goes to great length to argue that failures to avert harm should count as harmings.<sup>30</sup> But even if he had not taken this line, distinguishing between active and passive harmings would not be enough to dispose of the bulk of non-felonious villainies.

Feinberg's requirement that a harm be a rights infringement seems more promising. Could it be that this is the reason we do not want to punish mere harmful villainies, that they are not really rights infringements? Marx's "exploitativeness" as described by Johnson, the ingratitude of Pere Goriot's daughters, or Keefer's manipulateness in *The Caine Mutiny*—these may be harmful, but perhaps do not infringe anyone's rights. In fact that would probably be what a lot of people would first say when confronted with the suggestion that such conduct should be criminalized: "I don't like it; but the defendants are within their rights"—and therefore not infringing on anyone else's.

The problem with this approach becomes apparent once we ask what Feinberg means by a right. A right, he tells us, not implausibly, is a "a reason-backed claim against other individuals, for example not to be treated rudely, or against the state, for example not to be victimized by the passage into law of invidious legislation."<sup>31</sup> If that is what a right is, then anyone who is

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29. *Id.* at 34.

30. *Id.* at 126-185.

31. 1 Feinberg, *supra* note 26, at 110.

the victim of a harmful villainy can presumably complain of a rights infringement: he has a reason-backed claim that seems no less sturdy than that of the victim of rude treatment. To be sure, there may be a few harmful villainies that could be argued to not constitute rights infringement. Feinberg, for instance, dwells on the fact that conduct to which the victim consents cannot be considered harm.<sup>32</sup> Certain harmful villainies, like Marx's spunging, his refusal to pay his servant a wage, his interference with his daughters' marriage plans, might be declared to be perfectly consensual *folies à deux*. But those are special cases. And our visceral outrage should make us wonder whether perhaps Feinberg is wrong to think that freely given consent necessarily precludes a rights infringement, since it does not seem to preclude moral outrage. Assuming the moral outrage is well-founded it would seem to give Marx's victims a "reason-backed claim" against his maltreatment, and according to Feinberg, a right.<sup>33</sup>

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32. Id. at 35-36.

33. It is interesting to note the confusing, inconsistent things Mill (who flirts with the "rights"-approach Feinberg develops more fully) has to say about "harmful" interactions between consenting adults. He is generally taken to put them beyond the state's right to punish. Now consider his comments on anti-polygamy laws. When he begins his discussion of them, he sounds exactly as one would expect: "The article of the Mormonite doctrine which is the chief provocative to the antipathy which thus breaks through the ordinary restraints of religious tolerance, is its sanction of polygamy; which, though permitted to Mohammedans, and Hindoos, and Chinese, seems to excite unquenchable animosity when practised by persons who speak English and profess to be a kind of Christians." Mill, *supra* note 22, at 105. That sounds like he is gearing up for an argument to leave those who freely enter a polygamous arrangement well enough alone. But then he continues: "No one has a deeper disapprobation than I have of this Mormon institution; both for other reasons, and because, *far from being countenanced by the principle of liberty, it is a direct infraction of that principle, being a mere riveting of the chains of one-half of the community, and an emancipation of the other from reciprocity of obligation towards them.*" Id. at 105 (Italics mine). Really? The principle of liberty would allow the state to prohibit voluntarily chosen polygamy? Things get even more baffling, because immediately after making this assertion about polygamy and the principle of liberty, he continues by saying something that sounds like a flat contradiction of what he has just asserted:

"Still, it must be remembered that this relation [i.e. polygamy] is as much voluntary on the part of the women concerned in it, and who may be

A third approach to the question of what to criminalize is legal moralism. The legal moralist maintains that the criminal law should punish all immoral conduct, generally in proportion to the degree of immorality. Legal moralism and retributivism are really different labels for the same thing, the former focusing on what ought to be criminalized, the latter focusing on how severely it should be punished. On the face of it, legal moralism fares no better than utilitarianism or the harm theory in avoiding the punishment of mere villainy. At least one legal moralist, however, Michael Moore, has spotted the problem and tried to remedy it. He does so in the final chapter of his magnum opus, *Placing Blame*,<sup>34</sup> in a chapter revealingly titled "Liberty's Limits on Legislation."<sup>35</sup> He begins by readily acknowledging that the existence of harmful, immoral conduct which legal moralism would seem to require us to criminalize, but which he admits should not be. His examples are similar, but not identical, to mine:

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deemed the sufferers by it, as is the case with any other form of the marriage institution, and however surprising this fact may appear, it has its explanation in the common ideas and customs of the world, which teaching women to think marriage the one thing needful, make it intelligible that many a woman should prefer being one of several wives, to not being a wife at all. Other countries are not asked to recognize such unions, or release any portion of their inhabitants from their own laws on the score of Mormonite opinions. But when the dissentients have conceded to the hostile sentiments of others, far more than could justly be demanded; when they have let the countries to which their doctrines were unacceptable, and established themselves in a remote corner of the earth, which they have been the first to render habitable to human beings; it is difficult to see on what principles but those of tyranny they can be prevented from living there under what laws they please, provided they commit no aggression on other nations, and allow perfect freedom of departure to those who are dissatisfied with their ways."

Id. at 106. This is such a strange about-face on Mill's part, that I continue to wonder whether I am not overlooking something crucial here. If so, I beg the reader who sees what it is, to point it out to me.

34. Michael S. Moore, *Placing Blame: A General Theory of the Criminal Law* (1997).

35. Id. at 737-795.

Suicide is often deeply hurtful to persons other than the actor, persons to whom the actor is bound by many ties and to whom the actor owes an obligation to stay alive . . . [Y]et my firm sense is that no one (including the state) has the right to prevent someone from killing themselves.

There are many kinds of parental abuse apart from physical and sexual abuse. Some parents make their favouritism between siblings apparent on a daily basis, making the less favoured develop feelings of worthlessness and despair. Some parents when they divorce poison their children against the other parent. Some parents make servants out of their children, others spoil them rotten. Some parents dominate their children's ambition, telling them exactly what they will be in all aspects of life. Some imbue them with religious beliefs that can only be described as deranged, and some simply ignore their children emotionally, leaving them to find what warmth they can in this life. . . . [T]hese are deeply immoral behaviors, yet we tend to think that the state should not use the criminal law to punish such wrongs.

[O]r consider free speech. . . . Revealing a damaging truth from a distant past of a now well-respected and virtuous citizen . . . purely for motives of private gain is a plausible candidate for a serious moral wrong, and thus the punishment for such wrong is a legitimate state concern. Despite this, [we don't think it should be punished.]<sup>36</sup>

But on what grounds could a legal moralist possibly decline to punish such immoral conduct? Moore suggests that legal moralism take on board a further principle, beyond the general one calling for the punishment of all immoral acts in proportion to their immorality. It is a principle that would protect what he calls "basic liberties" from state interference.<sup>37</sup> Basic liberties encompasses what I have called harmful villainies. But how do we know which villainies qualify as basic liberties? Moore makes the intriguing observation that the line of Supreme Court cases descended from *Griswold v. Connecticut*,<sup>38</sup> and engendering

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36. Id. at 763-764.

37. Id. at 763-777.

38. 381 U.S. 479 (1965).

most controversially *Roe v. Wade*,<sup>39</sup> corresponds to exactly this category, and that whatever the Supreme Court has said on why the state may not meddle with contraception and abortion can be used more generally to tell us which villainies may not be turned into felonies. In those cases, Moore explains, “the Court has sought to define a constitutional right ‘that a certain sphere of individual liberty will be kept largely beyond the reach of government,’ . . . Thus the court has been for thirty years engaged in precisely the kind of political philosophy that is our concern here.”<sup>40</sup> To be sure, the Court has not actually been very explicit about what that sphere encompasses, but a number of the Justices have been more forthcoming. Moore finds special merit in Justice Blackmun’s idea that certain choices “make us who we are and are in that sense self-defining.”<sup>41</sup> Choices which are “self-defining” should be immune from state regulation, because if we are not permitted to make those freely we are being stripped of an essential ingredient of our human character:

John Stuart Mill had the same idea insofar as he defended liberty on the grounds that we have to be allowed to make [certain] choices about what we shall desire, feel and believe, on pain of our having no character at all. “A person whose desires and impulses are his own . . . is said to have a character. One whose desires and impulses are not his own has no [more character] than a steam engine . . .” Our desires, feeling and beliefs are not our own, according to Mill, if they are merely the product of social coercion or mere conforming imitation of social convention. “He who lets the world . . . choose his plan of life for him has no need of any other faculty than the ape-like one of imitation. . . . But what will be his comparative worth as a human being?” Both Blackmun and Mill are articulating a version of one of Aristotle’s ideals. This is the ideal of the self-made individual, in a distinctly non-economic sense of the phrase. It is the idea of each of us choosing our character without

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39. 410 U.S. 113 (1973).

40. Moore, *supra* note 34, at 771.

41. *Id.* at 772.

undue influence of others (including the heavy-handed influence of state coercion).<sup>42</sup>

The problem with Moore's suggestion is that "self-definition" does not seem to be what separates the villainies from the felonies. Are suicide, bad parenting, speech that invades someone's privacy, non-felonious mendacity, selfishness, treachery, greed, cruelty, hypocrisy, or manipulateness any more intimately connected with the self-definition of the wrongdoer than murder, rape, or theft? I simply cannot make out why that would be so.

In sum, none of the three major approaches to criminalization manage to tell us how to separate mere villainy from felony, what I call the problem of non-felonious villainy. The failure to solve this problem is of more profound significance than may initially appear. Although the problem would at first glance appear to merely concern the Special Part of the criminal law, the portion of the criminal code painstakingly listing all punishable offenses, it is in fact no less relevant to General Part, the general rules governing the attribution of criminal responsibility. Many of the most deeply entrenched doctrines of the General Part raise it. Start with the act requirement. Criminal law insists on an act as a prerequisite to punishment, subject to certain modest exceptions having to do with familial obligations, the creation of peril, various statutory and contractual duties, and the like. Yet there seem to be plenty of situations in which a villainy falls well short of an act, and does not fall within those modest exceptions to the act requirement either. To begin with, while the criminal law does not permit the punishment of mere thoughts, moral condemnation knows no such limit. The would-be assassin who schemes for years on end how to do away with his enemy, without however reaching the stage of actual implementation as of the time that we evaluate his conduct, clearly merits serious condemnation. Yet we feel

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42. *Id.* at 772-773.

viscerally disinclined to bring the criminal sanction to bear on him.<sup>43</sup>

Another facet of the criminal law's act requirement is the non-punishment of mere omissions. We have no trouble condemning the bad samaritan who could at trivial cost pull the drowning baby out of the pond and fails to. We would surely think him worse than the run-of-the-mill pickpocket. Yet we feel moral scruples about punishing him. Occasionally we do. But only under the most restrictive of circumstances, circumstances far more restrictive than those under which we are willing to condemn him.

The doctrine of proximate causation draws a sharp line between those consequences of which we are the but-for cause for which we can be held responsible and those for which we cannot. A third party's intentional intervening act, or an abnormal event, will break the required causal nexus between the defendant and the bad consequences he has precipitated. This happens despite the fact that it does not really affect our inclination to condemn what he did. The defendant who eggs a depressed friend on to commit suicide might repel us but will not be deemed the

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43. Sanford Kadish & Stephen Schulhofer, *Criminal Law and Its Processes* 180 (6th ed. 1995). Blackstone suggested the reason for this was evidentiary: How are we to look into people's hearts and find out what they are planning without an act to cue us in? The suggestion dissolves upon just a moment's thought. Just imagine the defendant recorded his thoughts in a diary—would that not solve the evidentiary problem? To be sure, most defendants do no such thing; but so what? Many murderers also fail to leave tell-tale evidence, thus escaping punishment; but we don't think that counts against making murder a crime. Other suggestions of an equally practical sort area often advance in criminal law texts: How are we to tell the difference between someone's merely entertaining a fantasy, or a daydream, as opposed to a genuine plan? And if we were willing to punish thoughts, would not everyone be subject to punishment? Those are natural things to worry about, but ultimately irrelevant. If we are not sure that the defendant did more than merely entertain a fantasy, we should not punish. But if we are sure, why do we not? And are were really all subject so such violent thoughts? Violent fantasies and daydreams, of course, but what about sustained planning of a violent act? I should think not. There seems little doubt that the perpetrator of thought-crimes merits our condemnation, but escapes punishment on account of moral scruples that have little to do with such simple practical concerns.

proximate cause of his friend's death: the victim's actions break the chain of proximate causation. The assassin whose bullet in some perverse and circuitous way finally reaches its intended target seems no less condemnable than the one whose bullet reaches its target in the usual straightforward manner, but he too will not be deemed to be the proximate cause of the victim's death: the bullet's abnormal path breaks the chain of causation.

Both the law of attempts and the law of complicity draw a strict line between defendants who act intentionally and those who act knowingly or recklessly. The law of attempts carefully distinguishes between the reckless driver who almost but not quite runs someone over, and the intentional would-be killer who almost but not quite does the same thing. The latter is guilty of an attempted homicide; the former is guilty of nothing (or maybe the comparatively trivial offense of reckless endangerment). From the point of view of condemnation that seems strange. From the point of view of condemnation, the difference between an unsuccessful "reckless killer" and an unsuccessful intentional killer seems no greater than the difference between a successful reckless killer and a successful intentional killer. Both would be guilty of a homicide if they had in fact run someone over. But only the latter will be guilty of a crime if no harm ensues. Equal condemnation notwithstanding, however, the law does not bestow equal punishment. And somehow or other, that actually feels right to many. It goes similarly with the law of complicity. The defendant who hands someone a gun, reckless as to the possibility that he will use it to kill does not thereby become an accomplice in the killing. Indeed he is not guilty of anything. The defendant who hands someone a gun, hoping he will use it to kill, will of course be considered an accomplice in the killing. It seems that intuitively we would be inclined to dole out condemnation in both cases. But we only dole out punishment in the latter.

The criminal law's treatment of consent draws some curious lines as well. Deception does not invariably

invalidate consent, even if the victim would never have consented but for the deception. A sale carried off with the help of diffuse and vaguely stated misinformation, accompanied by high-pressure sales tactics and deft psychological manipulation will make us condemn the salesman who uses these tactics, will make us think of him as on a par with a conman, and will make us denounce him just as roundly as someone committing criminal fraud. Nonetheless we decline to punish him. What he has done does not rise to the level of criminal fraud. The treatment of consent and deception in the law of rape is particularly perplexing. Suppose a man pretends to be someone other than he is: he sneaks into the victim's room under cover of darkness and pretends to be her husband, and thus manages to have intercourse with her. He is of course guilty of rape: her consent is invalidated by his deception. But suppose instead that he encounters her in broad daylight and introduces himself as the prominent CEO of a well-known company, whom he in fact happens to physically resemble. He manages to get her to have sex with him, something he would never have succeeded in doing without this ruse. This latter deception will not vitiate the woman's consent. This latter kind of non-consensual sex does not constitute rape. We would, I think, have no trouble condemning what the second fellow did, and perhaps nearly as much as what the first fellow did. Nonetheless the criminal law does not let us act on that impulse. This kind of deception is eligible for condemnation but not the criminal sanction.

But even though none of the three theories of criminalization manage to solve the problem of non-felonious felony, I would not therefore conclude that the problem is intractable. After all, we do have some fairly robust intuitions about what should and what should not be criminalized. By looking at enough cases, it should not be too difficult to come up with a descriptive principle that demarcates the line between the punishable and the merely contemptible. (At the very least a principle that consisted of a conjunction of our judgments in all the

particular cases.) Once we have such a principle in hand, each of the existing approaches to criminalization need merely take that principle on board, and it will then be impervious to this particular line of attack. I even have some idea what the required descriptive principle is going to look like. It will probably have something to do with the notion of “invasiveness,” that is, felonies will turn out to be in some sense more invasive kinds of harms than villainies. Let me explain what I mean with some examples.

Compare two kinds of wrongdoers. (1) *Desperate-For-A-Kidney* suffers from a fatal kidney ailment from which he can only be rescued with a kidney transplant. There not being a suitable donor around, *Desperate* assaults an innocent bystander and appropriates one of his two kidneys. We will suppose the assault and the subsequent surgery to be completely painless, risk-free, and without any deleterious health consequences for the victim. He is left with one of his two kidneys, and that is fully adequate for a normal life. The second kidney is, as it were, redundant. (This is not far from the truth.) Thus my first scenario. (2) *Eager-For-A-Kidney* suffers from a minor kidney ailment which adversely affects his life but is not going to kill him. He too would be much helped by a kidney transplant. It comes to his attention that a kidney from a recently deceased patient has been slated for transplant into another patient. That other patient is doomed to a life of great suffering unless he gets the transplant. Moreover, that other patient, being much higher on the organ transplant list, is the only one entitled to receive that kidney. But as things stand, the kidney is still in cold storage waiting to be implanted. *Eager*, by fraudulently manipulating some paperwork, manages to have that kidney mis-delivered to his own doctors, and to have it implanted in himself instead. Now compare the two wrongdoers, *Desperate* and *Eager*, as to the severity of their wrongdoing. *Desperate* stole a kidney from someone who had much less need for it than he. *Eager* stole a kidney from someone who had much greater need for it than he. That suggests we ought to condemn *Eager* more sharply

than *Desperate*. And yet, it seems quite clear that we think that *Desperate's* conduct is much more deserving of criminalization than *Eager's*. Why is that? The key factor that works in the otherwise more reprehensible *Eager's* favor is that his intrusion upon his victims was far less invasive than *Desperate's*. *Desperate* has physically invaded his victim's body; *Eager* has merely taken action which had effects in his victim's body. As far as informal condemnation goes, we will be more sympathetic to *Desperate* than to *Eager*; but as far as punishment goes it is the other way around. As far as criminalization is concerned, it is invasiveness that counts and trumps other considerations. Non-felonious villainies—like mendacity, selfishness, treachery, greed, cruelty, hypocrisy, or manipulateness—seem by and large distinctly less invasive than prototypical crimes like murder, rape, and theft.<sup>44</sup>

This is still awfully sketchy. Invasiveness is but a vague idea, and it is probably not all by itself sufficient to serve as a necessary and sufficient condition for criminalizability. Equally important, it still leaves a very fundamental question unanswered—why we should need such a principle at all. Why is the set of villainies divided in this curious way into two categories, the invasive and the insufficiently invasive, the punishable and the non-punishable one? Considered in the abstract, it seems more natural to expect that if a villainy is villainous enough that makes it eligible to be considered a felony. Yet that does not seem to be how “legal morality”<sup>45</sup> is organized: Marx's conduct might qualify as more villainous than Rousseau's, but only Rousseau's qualifies as felonious.

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44. It would not surprise me if an intuition about the importance of invasiveness hovered in the back of Mill's mind when he first stated his harm principle. The principle looks to me more persuasive if restated thus: “The [main] purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent [invasive] harm to others.” I have replaced “only” with “main” and qualified harm by the interpolation of “invasive.” Mill, *supra* note 22, at 12.

45. As I am inclined to call the moral rules most directly relevant to law.

## III. THE PROBLEM BEHIND THE PROBLEM

It would appear that once we have established that there are these two categories, only one of which is eligible for punishment, and once we have figured out by what criterion to sort misconduct into each of those two categories, and why, nothing more is left to be done. But a further problem lurks, which only comes into full view once we fully face up to the fact that there are these two distinct categories of villainy.

Consider the following case. A helicopter is hovering high above someone's property. In the process of trying to carry out some difficult bit of maneuvering, the pilot loses control, and crashes straight into the house below, killing several of its inhabitants. Is the pilot, who we will suppose survived, guilty of reckless killing? Recklessness is a function of at least two variables: the risk (or expected cost) someone imposes on others by his conduct, and the purpose (or benefit) for which he does so. The simplest way of combining those two variables into a test for recklessness is Learned Hand's: Monetize the expected cost and the expected benefit, and if the former exceeds the latter, there is recklessness. There are other ways of conceptualizing recklessness, but what they all will have in common is that they make recklessness a positive function of risk and a negative function of the sought-after benefit. The question we are therefore required to ask to determine whether the photographer was reckless is whether the pilot's purpose in doing what he was doing was worthy enough.

I have not said anything so far about his purpose. Now let us consider two possibilities. (1) He is a tabloid news photographer trying to obtain an embarrassing and titillating shot of some wealthy residents. (2) He flies an ambulance and is on his way to rescue someone in an adjacent property. Presumably our verdict is going to be affected by whether we are dealing with (1) or (2). And therein lies the problem. (1) is an instance of a non-criminal villainy, and (2) is not. Having barred non-criminal villainies at the front-door, it seems they are

sneaking in through the back. If we find the pilot to be reckless because he is on a tabloid venture rather than a rescue mission, it seems we have to take cognizance of the fact that he was engaged in some villainy. But that villainy, invading the privacy of the rich, is of the non-criminal variety. Didn't I just get through arguing that the criminal law is not supposed to take cognizance of non-criminal villainies?

The foregoing case is a perfectly generic one. Any risk-creating activity could be put in place of the one I chose; lots of different villainies could be used. Many instances of recklessness will resemble this scenario. As long as we have a concept of recklessness, it seems we cannot keep villainy out of the criminal law after all. And that seems like a very worry-some breach in the firewall we hoped to erect between felonies and villainies. If direct criminalization of mere villainy is impermissible, is this indirect criminalization any more tolerable? On the other hand, would it really be better to just ignore the pilot's villainous purpose? This uncomfortable dilemma is what I mean by *The Problem Behind The Problem*.

The dilemma is not peculiar to the doctrine of recklessness. Recklessness is not the only doctrine to offer back-door access to non-criminal villainy. Let me point to a few other doctrines—by no means the only ones—that raise this problem as well.

### *Self-Defense*

Again, it is best to start with a concrete case. *Slighted* has suffered an insult—a purely verbal one, but very stinging. More insults appear to be forthcoming from his “attacker,” one *Railer*. He would like to use force to stop the “attacker”'s verbal onslaught. May he do so? Insults are not criminally prohibited acts of aggression. It would therefore seem strange to permit conduct that would ordinarily be considered criminal—the use of force—to be used to avert them. To be sure, as a matter of non-criminal morality, the use of preventive force might not seem so bad.

But since we are now within the criminal law, we are presumably not to take account of the fact that *Railer* was committing a non-criminal villainy.

Unfortunately taking that position is going to have some unpalatable consequences. Let's go back to the kind of case we considered in connection with recklessness, a defendant who is engaged in a course of action posing some danger to third parties—like that helicopter pilot carrying out a risky maneuver. We noted that whether he may engage in that course of action will depend on the goodness of his purpose, and not all non-criminal purposes are equally good. Now imagine that the third parties he is endangering are themselves engaged in some disapproved activity—some kind of non-criminal villainy, perhaps the hurling of insult and ridicule at a war veteran with a grotesquely disfigured face. The helicopter's actions, its noise, and its menacing presence, naturally tend to interfere with that activity. That presumably counts in favor of the helicopter's undertaking that course of action, and *might* (though of course it need not!) tilt the balance in favor of finding the pilot not to have acted recklessly. Now change the pilot's motivations slightly. Assume that a significant part of his purpose is the villainy, the insult-hurling. He would now be using physical force to deflect a purely verbal attack against a third party. It is hard to see that he could be blamed for doing that, if he could not be blamed if it was not part of his purpose. Finally, change the facts just one further notch: Assume the insults are directed at the pilot himself. (Assume he is the disfigured war veteran.) It seems he still cannot be blamed. But note that we have now constructed a case of morally acceptable physical self-defense against mere insult. In other words, if we let non-criminal villainy play a role in the assessment of recklessness, it will be hard to avoid letting it play a role in the assessment of self-defense as well.

The problem is that if we do allow it to play such a role, that too is going to have unpalatable consequences. To begin with, it seems mighty disturbing that if we are not willing to apply the criminal sanction to some activity—like

insult-hurling—we should be willing to allow something far worse, the application of physical force against it. And then there is a subtler point as well. Think of a case in which the defendant faces a physical, rather than a purely verbal threat. He happens to be armed, and averts the threat by force. Now suppose he could have avoided the use of physical force by submitting to the attacker's relatively modest request, say, by surrendering the cheap watch he happens to be wearing. He is not required to do so, of course as a matter of criminal law, but we would probably condemn his choosing to kill rather than forfeit that wrist watch: We would regard it as a non-criminal villainy. Here then is a case of self-defense in which we do not allow non-criminal villainy intrude on our assessment of someone's right of self-defense. It seems strange to refuse to do so here, when we were willing to do so in the other self-defense case. It is true that in that other case it was the attacker who was guilty of a non-criminal villainy and here it is the self-defender who is. But it seems as though even-handedness would require us either to permit non-criminal villainy to figure in the evaluation of both cases, or to permit it in neither.

#### *Proximate Causation*

How does villainy enter in the assessment of causation? Here is one way. I can only get it stated somewhat roundaboutly.

Suppose the defendant, by his reckless actions, has placed several people in great peril, from which a bystander seeks to rescue them. Let us suppose that the rescue succeeds, but the rescuer dies. Is the defendant guilty of manslaughter for having recklessly caused the death of the rescuer? That will depend on whether the rescuer's intervention breaks the chain of proximate causation. Conventional analysis tells us that it breaks the chain if it was a sufficiently voluntary action. "Danger invites rescue," in Cardozo's memorable phrase, and therefore the rescuer's action is generally not judged to be so voluntary

as to break the causal chain. The defendant will be found guilty of manslaughter.

Now there is a problem with the conventional analysis which comes out if we vary the case slightly. Suppose that the defendant's peril-creating action was not in fact reckless. Suppose further that merely by undertaking the peril-creating action, the defendant made it virtually certain that the rescuer would embark on his hazardous rescue mission. Finally, imagine that the rescue operation is so dangerous as to be a virtual death sentence. Under these circumstances, the defendant knows that what he is doing, though not reckless, is virtually certain to result in death. Has he knowingly caused the rescuer's death, and is he therefore guilty of murder? Under the conventional analysis, we would have to say that if there is proximate causation in the previous case, there is proximate causation in this one, and the defendant is guilty. Intuitively that seems very strange, considering that the defendant did nothing wrong when he undertook his peril-creating action.

There is a better way to analyze these cases, that will get us the intuitively correct answers to each. In both of the previous cases, the defendant has done something which narrows the options of the would-be rescuer. In both cases, the would-be rescuer will have to intervene if he wants to see the victims survive. However, this narrowing of the rescuer's options is in the first case due to a wrongful action of the defendant (his recklessness) and in the second to a rightful one (no recklessness there!). It is this narrowing of the rescuer's options which precipitates his intervention. It thus seems clear that for the defendant to be liable he must have narrowed the rescuer's options by a wrongful act, which he did in the first case, but not the second. Hence there is liability in the first case, and not in the second. But now a puzzle emerges: If the defendant is to be held liable for knowingly causing the rescuer's death by a wrongful action, in what sense must the action be wrongful? Must it be a crime? May it be a mere tort? Could it be a mere non-criminal, non-tortious villainy? Any

of those would do, it seems. As long as the defendant is not entitled to do what he does, whether it be as a matter of criminal law, tort law, or just ordinary morality, as long as he takes action which he knows will eventuate in the rescuer's death, we will be prepared to hold him liable. If that is so, then non-criminal villainy has found a further foothold in the criminal law. Even though we may not be prepared to criminalize the defendant's wrongful conduct, we do seem to be prepared to make it the basis for a criminal punishment if this wrongful conduct is used as a means for knowingly or intentionally causing harm to someone.

The presence of this further foothold will have some uncomfortable implications. Consider: A wife has an adulterous affair and her husband thereupon commits suicide. Let us suppose that she knew all along, from his frequent warnings to that effect, that this is what he would do. Perhaps she even told him of her affair hoping that she would thus be rid of him. Should she be liable for his death? Only if she proximately caused his death. According to conventional analysis, she did not, because his intentional voluntary action breaks the chain of causation. Under the revised analysis suggested above, she might be liable. She committed a wrongful action that narrowed his options in certain ways (he could not go on without feeling perpetually humiliated); and therefore should be held liable for the consequences. There is the problem, however, that her wrongful action was not criminal, but a mere villainy. (Never mind that some states actually make adultery a crime! No one really thinks it should be and the laws go unenforced.) Do we or do we not take account of that? If one believes that adultery should not be criminalized, it will make one uneasy to hold her liable. On the other hand, as we just got through establishing, it is not only *criminal* narrowings of the defendant's options that can qualify as proximate causes. We saw that a person who knowingly triggers a suicidal rescue attempt by a third party through his non-criminally reckless actions can be held to have proximately caused the rescuer's death. It will

force us to draw a fine and capricious-looking line to say that the adulterous wife who knowingly triggers a suicide by her husband through her non-criminal infidelity cannot be held to have proximately caused her husband's death.

### *Necessity*

The doctrine of necessity offers villainy a further foothold in the criminal law. Suppose two hikers are stranded in the woods. One hiker has run out of provisions; the other still has plenty left. The first hiker could save his friend from starvation by sharing some of his provisions with him. But if he fails to, he will be guilty of mere villainy, not a felony. Now suppose the hiker with some remaining provisions is too stingy to share them, but also does not want to let his friend starve. Instead, he decides to break into a nearby cabin to steal some food in his friend's behalf. Is he guilty of a crime for doing so? Are his actions protected by the necessity defense?

The conceptual puzzle lies in deciding whether the theft was legally necessary. Colloquially speaking, it was not really necessary: the defendant could have shared his provisions with his friend. Of course he was not obligated, as a matter of criminal law, to share them; although he was obligated to do so as a matter of non-criminal morality. If we say the break-in was not only colloquially but legally unnecessary, we are to some extent criminalizing the villainy of not sharing.

If we do that, this might have some uncomfortable further implications. Suppose the defendant has been resolutely refusing to share his own provisions with his friend until the latter lapsed into such a severe state of starvation that mere food could no longer save him; medication of some kind is required. It is at this point that he breaks into the cabin to steal some of that medication. Does he now get the necessity defense? If we focus on the fact that at the very moment at which he carries out the break-in, his own provisions would no longer suffice to save his friend, he seems to be entitled to it. If instead we focus

on the fact that at some earlier point he could have averted the need for the break-in, by sharing his provisions, that inclines us to deny him the defense. But if we here deny him the defense, we would then have come even closer to criminalizing mere villainy. His earlier non-criminal villainy serves to combine with his later, perfectly virtuous act to produce a crime, which seems incredibly weird, since the later act is one we very much want him to undertake, *at least at the very moment that he undertakes it*. (Indeed we would judge it a villainy if he fails to undertake it on the grounds that he wants to avoid committing a crime, though that is in fact what he would be doing.)

#### IV. SOME IMPLICATIONS

The direct upshot of what I have argued so far should be reasonably clear: Harmful conduct we abhor falls into two categories, the “felonies” (quotation marks are necessary because the term includes misdemeanors) and the mere villainies. None of the dominant theories of criminalization seem to acknowledge the existence of these two separate categories, or to suggest a way of drawing the line between them. Nevertheless, it seems just a matter of time and effort before we have a reasonably precise statement of the line in hand. But even after the line is drawn, that does not mean that mere villainies have absolutely no role to play in the criminal law. They will still influence liability via a variety of other doctrines.

There are two less direct lessons as well. Often the question will arise whether a given villainy should be permitted to influence liability, despite the fact that we are quite sure it should not be criminalized. The question whether it should can only be properly addressed once one recognizes that it is distinct from the question of outright criminalization. A good example of how this question might arise has to do with the premeditation doctrine. There is the long-standing dispute whether premeditation should be used as a grading device for homicide. The Model Penal Code familiarly takes the position that it

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should not be and makes the following commonsensical argument:

[The premeditation formula] rests on the premise that there exists some dependable relation between the duration and the gravity of the offense. Crudely put, the judgment is that the person who plans ahead is worse than the person who kills on sudden impulse. This generalization does not, however, survive analysis . . .

[T]he case for a mitigated sentence on conviction of murder does not depend on a distinction between impulse and deliberation. Prior reflection may reveal the uncertainties of a tortured conscience rather than exceptional depravity. The very fact of a long internal struggle may be evidence that the homicidal impulse was deeply aberrational and far more the product of extraordinary circumstances than at true reflection of the actor's normal character. Thus, for example, one suspects that most mercy killings are the consequence of long and careful deliberation, but they are not especially appropriate cases for imposition of capital punishment. The same is likely to be true with respect to suicide pacts, many infanticides, and cases where a provocation gains in its explosive power as the actor broods over his injury.

It also seems clear, moreover, that some purely impulsive murders will present no extenuating circumstance. The suddenness of the killing may simply reveal callousness so complete and depravity so extreme that no hesitation is required.<sup>46</sup>

In other words, since we have no trouble thinking of premeditating killers who are less bad than unpremeditating ones, the distinction is an unreliable grading device. The argument seems compelling.

Too compelling. We could readily extend it to bash criminal law distinctions the Model Penal Code prizes: like that between knowing killings (murder) and reckless ones (manslaughter), or that between killing and letting die.

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46. Model Penal Code § 210.6 cmt. at 127 (Official Draft and Revised Comments 1980).

Using almost the identical examples the Model Penal Code constructed to criticize the premeditation formula, one could show that some reckless killings seem more reprehensible than some knowing killings, and some instances of letting-die are more reprehensible than some instances of killing. A husband who kills his terminally ill, pain-wracked wife upon her express request kills knowingly and by an act. Nevertheless he will seem to many to be less reprehensible than a criminally reckless driver who runs someone over or a cold-hearted bystander who fails to rescue when he easily could. This of course prompts the question: Why would we not permit the Model Penal Code's argument to be extended to the distinction between knowledge and recklessness and between acts and omissions? In the case of acts and omissions the answer is crystal clear: We don't criminalize villainy. The bad samaritan is more villainous than the mercy-killer, but that we now know is not grounds enough to punish him. Our commitment to the line between knowing and reckless killings suggests that we also do not want to let villainy play the more subordinate role of influencing our ranking between those two types of homicides. That leaves us with the question of whether we should let it play a similarly subordinate role in distinguishing between premeditated and unpremeditated killings. I don't know the answer. My aim is merely to draw attention to the existence of the question.

Although I have dwelt in this essay on one particular category of non-criminalizable misconduct, the harmful villainies, it has implications as well for our thinking about the other, more established categories of non-criminalizable misconduct: so-called harmless wrongdoing (like gambling, or prostitution) and self-harming (like hallucinogenic drug-use). What my analysis suggests is that even if one is persuaded by the long-standing and highly convincing line of argument against criminalizing these two categories, one still needs to address a host of other questions regarding their criminalization, questions analogous to those I asked about harmful villainies.

To-wit: Even if we do not criminalize those activities, do we allow them to influence our assignment of liability more indirectly, in the way harmful villainies do?

- For instance, how do we proceed in the evaluation of recklessness, if the risk being imposed is imposed for the sake of some gambling or prostitution related venture?
- How do we proceed in the application of the necessity defense in the following kind of case: The defendant physically interferes with someone's suicide attempt, or his highly self-endangering use of a hallucinogenic drug. Technically he is engaged in an assault upon someone who is trying to do something that is no longer a crime—commit suicide, use a dangerous drug. Does our refusal to criminalize those actions preclude us from granting the necessity defense to someone trying to stop them?
- How do we proceed in the application of the self-defense doctrine in this kind of case: A bookie is trying to persuade a gambling addict to participate in a game. The addict's wife knows that if he loses, as of course he is likely to, he is apt to become violent toward his family. She tries to get the bookie to stop tempting her husband. When he refuses, she threatens force. Does the fact that bookmaking is a harmless, consensual wrongdoing necessarily preclude her from using such force?

Our refusal to criminalize gambling, bookmaking, suicide, or even drug use does not seem to settle these issues.

## V. CONCLUSION

Etymology notwithstanding, not all seriously harmful villainies qualify as felonies. Or at least our moral intuition tells us that they should not. Traditional approaches to criminalization—like utilitarianism, the harm theory, legal moralism—have real trouble accounting for that, indeed have rarely even addressed it, and need to be revised somewhat to deal with it. But even if we know which harmful villainies we do not want to criminalize and why, we are still left with difficult and unexplored questions about whether we should let the non-criminalizable misconduct figure more indirectly in our application of criminal law doctrines, in determining for instance the scope of self-defense, or recklessness, or proximate causation, or necessity. Although this essay has dealt mostly with harmful misconduct, the analysis has implications as well for more familiarly uncriminalizable wrongdoing, like self-injurious behavior, and certain interactions between consenting adults.