

## THE ROLE OF DETECTION IN RULE ENFORCEMENT

**THE ROLE OF DETECTION IN RULE ENFORCEMENT**

By

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## ***Abstract***

All rules or laws depend for their enforcement upon some means of detecting infractions. In this paper I argue that, particularly in the liberal state, the most appropriate and effective means of detection is the complaint of the victim, and I discuss the perils associated with legislation that fails to take this simple principle into account. My arguments are illustrated with examples both from my personal experience in designing rules for a live roleplaying game system (which I claim is a microcosm for the liberal state) and from such real-world cases as the War on Drugs, the exploitation of illegal immigrant labour, and the *zina* laws of Pakistan.

## *Preface*

The six chapters of this thesis may be divided in half, the first three providing an explication of and justification for the detection principle, and the final three dealing with the perils of its misapplication as well as its practical limitations.

Chapter One introduces the concept of the live roleplaying game as a microcosm for the liberal state, and the context in which the detection principle first became clear to me. Some might object to the indifference with which the detection principle requires us to tolerate illegal acts which do not provoke complaints to the authorities, on the grounds that lawbreakers *ought* to be punished, and Chapter Two is an attempt to address this sort of moralistic objection by drawing parallels between the æsthetic values of good roleplaying and an admittedly Kantian notion of morality, and demonstrating the futility of imposing either by external regulation. Chapter Three then constructs the paradigm of a law relying on the detection principle, and relates it to a practical concept of rights and freedoms.

Chapter Four reinforces the argument of Chapter Two and presents some of the dangers inherent to rules which fail to apply the detection principle, with the particular example of the War On Drugs. Chapter Five addresses the hazards of rules which perversely misapply the detection principle by directly criminalising the victim in addition to or instead of the victimiser, as illustrated with rape in Pakistan and the exploitation of

illegal workers in North America. Finally, Chapter Six articulates some of the inherent limitations to the detection principle (and legal systems in general).

I am indebted to my supervisor, Professor Mark Vorobej, for his guidance in the preparation of this thesis, as well as the occasional timely and diplomatic phone call to get me back on track. As well, I should like to thank my second and third readers, Professors Wil Waluchow and Elisabeth Boetzkes for their assistance, even before it was clear they would find themselves on my committee. Paul Viminitz deserves the blame for encouraging me to pursue the detection principle as a thesis topic. I must also acknowledge my gratitude to the past and present members of the Live Role Playing Society in Edmonton for their unwitting yet brilliantly performed roles as guinea pigs in my laboratory experiment. And finally, there is Crystal. In the past I had always wondered why, in the acknowledgements to their books, authors heaped such immense gratitude on their spouses for their superhuman patience and support. Now I know.

## ***Table of Contents***

Chapter 1: Introduction and Background	page 1
Chapter 2: Playing the Proper Role	page 15
Chapter 3: Protecting Freedoms and Waiving Rights	page 37
Chapter 4: Discretionary Enforcement and Complaintless Crimes	page 50
Chapter 5: Blaming the Victim	page 66
Chapter 6: Limitations and Lessons	page 85
Bibliography	page 94

# *Chapter I*

## *Introduction and Background*

The present thesis grew out of my involvement several years ago in the design of a system of rules for a live roleplaying game. Live roleplaying games are similar in many respects to the popular pencil-and-paper tabletop roleplaying games<sup>1</sup>, in which players assume roles of imaginary alter-egos and cooperatively (or competitively!) develop a story set in a fictional gameworld, often using dice and various rules to determine the outcome of contentious gameworld events. In a sense, the game rules constitute the laws of physics which govern all the events of the game world. The myriad factors of balance, speed, position and such which in the real world would determine the success or failure of an attempt to strike a foe with a sword, for example, are abstracted into a few probabilistic terms, which are then applied to a roll of dice. One member of the gaming group serves as “Game Master” or referee, and is responsible for manipulating and providing the events of the gameworld setting to which the characters of the other players must react. (While the players’ characters<sup>2</sup> may be on a

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<sup>1</sup> The most famous of these is TSR, Inc.’s **Advanced Dungeons & Dragons™**, or **AD&D™** as it is more commonly known, though it is certainly not the only (or best) such game on the market.

<sup>2</sup> I use the term “player” here to mean a real human being engaged in the activity of playing a game. A “character” is the fictional alter-ego adopted by a player *within* the game world, and whose actions are determined by the player, but whose identity is distinct from the player’s. Indeed, many roleplayers refer to their characters exclusively in the third person, much as actors discuss their roles.



quest to locate the Holy Grail, for example, the Game Master knows not only where it is, but all of the obstacles and surprises the players might encounter while trying to find it. In a sense, the GM represents Objective Reality for the players; a consciously solipsistic game universe would be no fun at all.)

The main difference with a live game is that instead of sitting around a table describing the actions of their characters, players dress up in appropriate costumes and act out their adventures, usually in an outdoor setting such as a wooded campground. Many of these games last a whole weekend, and players sleep out in tents and eat meals cooked over a campfire, trying to experience the “feel” of a fantasy quest as much as possible.

There are, of course, certain experiences in classic fantasy adventures for which authenticity is neither practical nor desirable. Few players would be willing to attend events staged on a site without modern toilet facilities, for example. More importantly for the rules designer, some activities (such as swordplay) are simply too dangerous to allow in an unaltered form, and purely fantastic phenomena (magic, fire-breathing dragons) can only be simulated. For this reason, some live games borrow many of the basic rules mechanisms of tabletop games, such as dice for resolving combat. As a result, a typical battle involves a shouted challenge between two or more fiercely beweaponed and armoured belligerents, who angrily charge one another until they are in range, where they both drop to their knees, roll dice, and scribble damage onto a scrap of paper, screaming battle-cries all the while. (It may look silly to an outsider, but the willing suspension of disbelief can quite effectively transform a five-inch weapon card into an intimidating battle axe, capable of inflicting gruesome wounds

on the Damage Point sheet which represents one's physical health.)

A critical difference between live and tabletop games for the purpose of this paper, however, is that while rules are in principle easily enforced in a tabletop game (since the game master or referee is always present as the final arbiter on what happens in the game world), it is somewhat more difficult to be sure the players in a live game will abide by rules which may not always be to their direct advantage. Live games of this sort suffer greatly from the problem of enforcement, which must be considered in every formal rules system from chess to criminal and civil law, and which is the focus of this paper.

In formal games like chess, of course, the problem of cheating is minimal, at least in serious tournaments, primarily because it is so easy (usually) to detect an illegal move. Indeed, the game of chess is so formal, almost mathematical, that its rules may be said to constitute the immutable laws of physics which govern the chess-world. A rook may no more move diagonally than I could walk through walls. (It is *physically* possible to move a rook diagonally, of course, but the question then arises as to whether or not the game being played is still chess. A case could be made that some other activity is going on which resembles chess, but has different rules.) Someone who wins a game of chess by cheating, therefore, has not actually won a game of *chess*, although she may enjoy all the accolades that go with convincing everyone that she *has* won. However, in so formal a game, if records are kept of every move for later analysis, the deceit is sure to be uncovered, and the victory will be short-lived. In this respect, winning a game of chess is similar to proving Fermat's last theorem; we may *believe* someone has solved it, only to discover later on that some critical step of the proof is in error.

On the other hand, it would seem strange to say that a basketball player who double-dribbles without being caught by a referee isn't *really* playing basketball.<sup>3</sup> In athletic games, the rules of the game are not so much the laws of physics of the game-world as they are in chess, in part because the *real* laws of physics all apply and play a critical role in the progress of the game. (Indeed, in most athletic sports, physical law almost constitutes an opponent in itself, as competitors struggle against it to jump higher, throw farther, and so on.) Rather, the game rules are more like a system of civil laws which influence the conduct of persons who are more absolutely constrained by natural law. In such games, as in real life, the emphasis can shift from trying not to break the rules to trying not to get *caught* breaking the rules. To this end it becomes necessary to make use of (hopefully impartial) supervisors or referees.

The situation in a live roleplaying game is actually much closer to basketball than to chess or even tabletop roleplaying games. While the rules actually *do* represent the physical laws of the game-world reality, since they are meant to determine what happens when players fight, who gets injured and how badly, what it takes to heal those (imaginary) wounds, and so on, much of the game is also influenced by real physical law (gravity still holds, and thus no rule is generally necessary to prevent players from drifting skyward). While chesspieces are kept in place by gravity and friction, these are principles which play no role whatsoever *within* the context of the game itself; the pieces are simply markers to represent entities in an abstract game reality which is only subject to the actual rules

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<sup>3</sup> Of course, winning athletes are occasionally disqualified for failing drug tests, for example, but these are cases of *getting caught*. Again, few would say that a sprinter who set a new world's record didn't *actually* run that fast, especially if no one ever finds out that he did it with the benefit of anabolic steroids.

of chess, and the particular mechanism for manipulating those symbols, whether they be physical wooden carvings or glowing phosphor pixels, are entirely outside the game. In a live roleplaying game, however, things like gravity and weather can have very important in-game effects; how successfully an outlaw may elude capture, for example, depends less on the formal game rules than it does on how skillfully the player actually hides himself in the real undergrowth.

Nevertheless, there are certain rules in a live game for which we cannot rely upon Natural law, just as in basketball there are rules against double dribbling which must depend on referees for enforcement.

Unfortunately, the nature of a live game is such that supervision by referees is generally impractical. There may be anywhere up to a hundred players camped here and there throughout the site, wandering about at will, while the total number of volunteers involved in organising and running an event like this is seldom greater than about twenty. Of these, only about six will be available as Referees at any given time, since the rest are usually busy acting in whatever dramatic roles are necessary to present and advance the plot or scenario for the players to resolve. Therefore, it is necessary to keep the rules as free from the need for supervision as possible.<sup>4</sup>

Apart from economy, there are other reasons for wanting to minimise the need for supervision. As mentioned earlier, a live game is a microcosm for a political state in the sense that it is governed by a violable rules system which is superimposed over inviolate Natural Law. It can

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<sup>4</sup> Some games have made efforts to supervise all player activities, but at great cost in realism and playability. Generally they require players to travel only as members of indivisible groups, greatly detracting from the natural spontaneity of the game. Oftentimes players will want to strike out on their own, or go off to scout ahead of the party, and it is unsatisfying to be denied this option for no good in-game-reality reason.

further be described as a liberal state in the sense that since the ultimate goal of the game is for the players to have fun (by roleplaying fantasy characters, and therefore exercising the free will of those characters), the right of every player to 'liberty and the pursuit of fun' is an implicit instrumental objective. It is nearly impossible to make any definitive pronouncements about what a given player will consider fun; some of the more competitively-minded delight in killing the most foes in the field of battle and amassing the most treasure, while those of a more dramatic bent concern themselves with exploring the inner souls of the complex roles they develop, and still others are only interested in acting out escapist adolescent power fantasies. It is difficult to say which of these interests is of any more intrinsic value than any other, and since the game attempts to model the real (fantasy) world in which different people have different motivations anyway, it seems reasonable to remain silent with regard to the 'proper' object of the game when designing the rules.

This is not to say that the liberal state does not in practice make certain assumptions about the desires of its citizens. The very most basic assumption about a legitimate desire to be protected, made by virtually every state (liberal or not), is that citizens will not wish to be deprived of their lives. (Presumably, of course, citizens who *do* wish to be rid of their lives will not usually require the assistance of the state to secure that end, notwithstanding the current debate about doctor-assisted suicide.) Beyond that, however, there are other goals, in particular economic goals<sup>5</sup>, which are usually given special emphasis. Under the assumption that citizens

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<sup>5</sup> In some capitalist states, the right of the individual to produce and keep wealth is protected even to the extent that in some circles the pursuit of non-monetary interests (such as art, environmental conservationism, or education for its own sake, for instance) comes to be seen as wasteful at best, and probably subversive.

will be more concerned with accumulating wealth than giving it away, laws are put in place to protect property rights against arbitrary seizure, yet which facilitate the redistribution of wealth through trade and the enforcement of contracts. There are no laws that *require* citizens to pursue wealth, however, and individuals who manage to achieve happiness through, say, philanthropy, are generally tolerated.

Similarly, in the live roleplaying game, certain interests are more in need of protection than others. In general, it is a player's relative power to influence the development of the plot which needs to be protected and therefore regulated. It is not at all unlikely that two or more players may come into a game, each with the desire to become known as the mightiest warrior in the land; since such a title is conceivably a legitimate objective within the context of the game, the rules system should provide a means by which this dispute might fairly be resolved. However, there are many players who are more interested in winning the award for Best Death Scene, and who would therefore be happier to lose a duel than to win. The game is thus liberal in that a player is not required to take victory on the field of battle as a personal objective. (Contrast this with chess, where the objective of checkmate is very clearly stated, and a player may win or lose the game quite regardless of her success in achieving any personal objectives that differ from the formal victory conditions of chess. Indeed, the player who does not at least take into account the formal objective will likely not survive long enough to realise any personal goals, such as an aesthetically pleasing arrangement of pieces, or having his knights trade

places.<sup>6)</sup>

As we have seen, there are several important similarities between live roleplaying games and liberal states. Not surprisingly, then, the practical constraints affecting the rules system for a live roleplaying game are remarkably similar to those facing legislators and policy makers in a liberal democracy. However, the completely artificial nature of the live game calls attention to factors of interaction which tend to be taken for granted in the real world. Whereas the accumulation of real wealth can be done without the mechanisms of the state, and there is an objective fact of the matter about whether or not a loaf of bread has been eaten and by whom, the entities and phenomena of the live roleplaying gameworld are almost entirely imaginary, and there may be real disagreement about whether or not a given character's sword has been broken, for example. Live games do not enjoy the benefit of an objective reality in which swords independently maintain records of their own damage simply by continuing to exist in whatever condition they happen to be in; the rules must also provide a mechanism for recording changes in the status of gameworld objects.<sup>7</sup>

Let us examine the system for resolving combat in the live fantasy roleplaying game. There are, of course, popular live roleplaying games in which players swat at each other with padded mock-up weapons. However,

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<sup>6</sup> Bernard Suits, in The Grasshopper: Games, Life and Utopia, refers to this sort of person as a trifter, someone who makes moves which are legal by the rules but which are not aimed at the game's object, and suggests that trifters are not actually playing the game (or at least, not the same game) at all.

<sup>7</sup> Here again, though, there is another parallel with real-world problems. Particularly now, at the dawn of the Information Age, we have to sort out systems for handling such things as intellectual property rights and electronic trading.

such games must either rely on the honour system<sup>8</sup> for each combatant to react honestly to successful hits, or there must be umpires present to evaluate who wins. Moreover, these games also by necessity put a great deal of value on a player's real-world abilities with weapons, thus potentially limiting a player's capacity for creative character development by effectively barring non-athletes from heroic warrior roles. A dice-based game system offers more flexibility, and while the honour system can in fact exert a strong influence on players of dice games, it seems more prudent to minimise cheating by simply avoiding rules which might provide tempting opportunities to cheat.

The first step is to devise a means of recording damage. This can be done fairly simply by equipping each player with a small sheet of paper called a Damage Point Tallysheet. Damage Points (DP) are a quantitative representation of how "tough" a character is; the more DP one has, the more punishment one is able to withstand before being incapacitated. The tallysheet has a number of circles on it corresponding to the current DP total of the character, and must be carried at all times in order for the character to be able to carry out actions in the game world; players without tallysheets can be assumed to be playing ghosts lacking bodies. Each time a character suffers an injury in battle, an appropriate number of circles are crossed off with non-erasable ink. Access to fresh tallysheets is limited to Referees, who must therefore be present for healing to occur. Healing itself is subject to various game-mechanical limitations in order to make wounds appropriately inconvenient and undesirable in game terms. Thus, when a

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<sup>8</sup> To be fair, the honour system is used in many such games, and as it turns out, peer pressure is an extremely effective means of keeping a fighter honest. A warrior who gains a reputation for habitually ignoring fair hits will soon run out of people willing to play with him.



character is wounded in one battle, those wounds remain until healed and their possible effects on future battles need not depend upon the honesty or memory of a player who may otherwise be sorely tempted to face new opponents without disadvantage.

A system for recording damage introduces a sort of objective reality in which characters have a stake. Assuming that players are interested in keeping their characters alive and healthy, it is of great concern to them whether or not their tallysheets are marked up with wounds. Insofar as they may wish their characters to be able to emerge victorious over a vanquished foe, they will also wish to be able to inflict damage on other player's tallysheets. Dice are used to arbitrate between an assailant character's desire to harm an opponent, and the opponent's desire to escape damage. Each player rolls two dice, and the player whose total is higher<sup>9</sup> prevails. The loser (the player with the lower dice total) must then, in plain sight of the opponent, cross off a number of circles<sup>10</sup> from his or her DP tallysheet.

With the use of dice, both players can readily confirm the results; no player may arbitrarily and unilaterally claim that the opponent's shot "missed". A player who fails to cross off a sufficient amount of damage can be immediately recognised as a cheater, and the winner of the dice roll can simply refuse to continue playing until the damage is recorded. Moreover, the fact that the tallysheet is marked by the owning player means that

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<sup>9</sup> These totals may be modified by bonuses to reflect player's character conceptions and advantages of superior weapons or armour. A skilled warrior may be allowed to add 5 to her dice total in all fights, for example, while a frail alchemist with a good shield in hand would be lucky to add 1 to his roll. The bulk of the game rules, in fact, concern the allocation of "Ability Points" towards various skills and abilities before the game even begins.

<sup>10</sup> The exact number is printed on the weapon card used by the successful attacker, and may be further modified by such factors as the strength of the attacker, the armour of the defender, and so forth.

excessive damage is not likely to be recorded. (If the player with the higher roll were allowed to cross off damage from the victim's sheet, an excessive amount could be "accidentally" crossed off, and it would be virtually impossible to prove to a Referee that the damage was intentional or even excessive and should therefore be negated. Indeed, even to allow such a possibility would introduce a whole new vector for cheating; players could remove inconvenient damage by claiming that it was mistakenly recorded. By making the players themselves responsible for recording their own damage, and simply declaring that damage recorded is real, both the problems of cheating by inflicting excessive damage and by recording insufficient damage are minimised.)

The reader will have noticed that the system described above does not require the supervision of a Referee at any point of the combat. Any time two players wish to resolve a fight between their characters, they may do so by themselves, immediately and impartially. (Referees will be needed for healing their wounds afterwards, but requiring that healing be done in fixed places, like shrines or enchanted glades where Healers find their magic to work most effectively, is much less of an imposition on gameworld believability than arbitrary restrictions on spontaneous duels.)

An important aspect of this self-policing combat system is that it is most effective at preventing cheating when that cheating threatens the quality of the game for any of the participants, while allowing much leniency where bending the rules does no harm. Since the player who is responsible for seeing that her opponent records damage fairly is the one who most directly benefits from enforcing such compliance, there is rarely anyone else who will complain if she is lenient in a given situation. Perhaps her character conception is such that instead of inflicting the

grievous seven-damage-point wound on her opponent to which the rules of the situation entitle her, she prefers to place a tiny warning scratch (worth no real damage points in game terms) on the tip of her opponent's nose, offering him a chance to lay down his weapons before he gets hurt. If she is willing to let her opponent off so easily in this case, where it is her own chances of winning (or even surviving) the battle that are at stake, then why not allow it? While it may technically be a violation of the rules for him to take less than the prescribed amount of damage, the harm of the violation is acceptable to the most interested party involved or is not even seen by her as harm at all, and so there is no reason to waste game resources on punishing such offences. Indeed, insofar as this sort of action livens play and adds to the variety and drama of the game, it would seem that a rigorous enforcement of the damage rules would in this case be detrimental.

On the other hand, it may well be that her opponent's own character conception is incompatible with her attempted interpretation of gameworld events. Perhaps he fancies himself so skilled a warrior as to afford her no opportunities for such finesse. Ironically, of course, he can easily veto her description of the wound by crossing off the full amount of damage or even more. Indeed, perhaps he imagines that any blow sufficient to penetrate his nearly invincible defences must be a fatal one. After all, it is *his* damage sheet. What other player on the field can have enough legitimate interest in the outcome of this battle to require a rigorous to-the-letter enforcement of the combat rules, to the extent that either player's right to waive their claims against each other should not be respected?

In any case, a rigorous enforcement would be doomed to failure anyway, thanks to the problem of detection. No offence which is undetected

can be effectively punished or remedied. Assuming that in our hypothetical case, both parties agree to the reduced damage which is a technical violation of the rules, enforcement would be dependent on the incident being observed and reported by a third party who would presumably need to be at the very least impartial, since an affiliation with either combatant, especially the one receiving the reduced wound, would introduce a bias against enforcement. However, if this encounter takes place somewhere off in the woods in the absence of witnesses, as is often the case, the detection problem becomes almost insoluble.

To be sure, it might be *technically* feasible to detect all violations. An intensive analysis of damage sheets, weapon cards, armour and whatnot after the game might reveal some discrepancies of damage suffered vs. opponents' capabilities, but that would require truly astonishing amounts of record-keeping and calculation, and any benefits there might be with such a system would be far outweighed by its expense. Moreover, the overall effect of such strict enforcement would undoubtedly be to make the game less enjoyable. The range of possible events (and therefore interest) in the game world would be reduced, player's dramatic creativity would be stifled, and all players would be deprived of a more interesting tale to be told around the campfire at game's end. Considering the fundamental objective of the game (fun through good roleplaying), the corresponding gain in gameworld integrity (and predictability) would seem rather hollow.

The frustration of fundamental objectives of fun or the pursuit of happiness aside, it was the experience of designing this live roleplaying game which led me to notice a simple but important principle: A rule can be much more effectively enforced if the primary means of detecting its infractions depends on agents (1) who have a vested interest in seeing it

enforced (usually the victim), and (2) who are by the very nature of the infraction most likely to know an offence has occurred (again, usually the victim). More broadly, a given sort of action will be most effectively deterred when it entails an empowerment of its victims (those who suffer in some way as a consequence of the original action) to retaliate or otherwise initiate a remedial response.<sup>11</sup> This **detection principle**, so simple in itself it would hardly be worth mentioning, is nonetheless often overlooked by legislators and other policy makers, and with disastrous results. This seems to happen most often when the government misunderstands its legislative role to be the enforcement of morality, rather than the protection of rights. I shall attempt to address this mistake in the next chapter.

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<sup>11</sup> It may be that the word “retaliation” is too strong for all cases. Given, however, that we are speaking of the concept of deterrence, it seems consistent to refer to the victim-initiated response as a retaliation, regardless of whether it is essentially punitive or rehabilitative in nature, since in any case the perpetrator can be assumed to wish to avoid this response. This is the essence of deterrence.

## ***Chapter II***

### ***Playing the Proper Role***

Most simulations provide a simplified version of the phenomena they attempt to model, and live roleplaying systems are for the most part no exception, at least insofar as the particular phenomena to be simulated (combat, magic, etc.) are concerned. Nevertheless, while abstracting the incredible complexity of real armed mayhem into a few numbers and dice rolls may make the system for combat resolution ridiculously simple, there is an interesting sense in which the in-game reality of the fictional world actually involves a few levels of complexity not found in the out-of-game reality. This is a result of the unique way the two realities overlap.

In the real world there are several sorts of fairly well understood limitations over the realm of possible events and the free will of individuals. We are absolutely bound by the Laws of Nature, we are influenced in our preferences and abilities by both nature and nurture, we are obliged by others through custom and law and other forms of social persuasion, and (perhaps most importantly) we are guided by conscience and our own moral capacities. These very same constraints exist for characters who live within the game reality as well; they are bound by the Natural Laws of their own reality, their preferences are strongly influenced by their own character backgrounds, they are governed by the customs and laws of their own tribes and kingdoms, and most importantly (if they are well-portrayed

by their players) they often have moral intuitions as well.

The complexity appears when one notes that the game world reality is subject not only to its own set of constraints, but also to a certain extent to those of the real world. While the dice of the game rules determine the outcome of a duel, whether or not the combatants meet and the duel takes place at all may depend on the real-world topography of the site and the amount of cover it provides for an unwilling duelist to hide in. Similarly, while a character's in-game cultural and personal history will play a large part in determining the preferences of that character, that very same in-game background is chosen largely on the basis of the real-world player's own preferences and their contributing influences. Even real-world legal statutes or political pressures might conceivably have an effect on in-game political reality, particularly under a regime which prohibited unfavourable (or favourable) portrayals of legal or religious authorities, for example.<sup>12</sup>

Perhaps most interesting, however, is the relationship between in-game and metagame morality. In one sense, in-game morality appears to be the most real component of the game reality, and not surprisingly, for the one constant in any roleplaying game is the free will of the players. The choices faced by characters, even though they are choices between one imaginary course of action and another, are nonetheless very real themselves, and insofar as morality is the business of making choices, the

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<sup>12</sup> For example, NERO, the New England Roleplaying Organisation is so concerned about offending the religious beliefs of the community that players are specifically prohibited from including any religion, real or fictional, as part of their in-game persona's background. Somewhat less extremely, some chapters of the Society for Creative Anachronism only permit established and still-existent faiths, such as Judaism, Christianity and Islam, while disallowing extinct beliefs like Druidism. This (excessive, I think) sensitivity probably stems from the campaigns waged by the religious right in the late 70's and early 80's to ban roleplaying games for their supposed satanic connections.

game's moral reality at least is every bit as real as our own. Indeed, one might well say that the moral reality of the game is identical to our own in its essential qualities; the virtues of patience, courage, wisdom and justice are recognisably the same, and the arguments over consequentialism, deontology and nihilism carry the same relevance to events and actions in the game world that they do here. Moreover, since the epic fantasy genre has traditionally been concerned with heroic deeds and the struggle between Good and Evil (or, as in the better works, a struggle with moral ambiguity), it would seem that if a moral fabric did not already exist in the game, it would be necessary to create one.

Of course, it must be remembered that, despite the apparent similarities between real world and game world moralities, there remains a fundamental difference in that moral agents in the game world, as puppets manipulated by their real world players, essentially lack free will. In this sense, then, the game's moral reality is not the real thing, but rather a depiction of moral reality. We may speak meaningfully of the moral character of in-game actions, just as we may intelligibly evaluate the morality of any fictional character, but to do so requires a certain amount of suspension of disbelief; fictional characters are not ultimately responsible for their actions, for it is the author who dictates their every move, thought and feeling.<sup>13</sup>

The distinction between an author and the fictional characters she creates, however, is somewhat more difficult to draw between the

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<sup>13</sup> Of course, *within* the game reality, there would be no way of knowing this, any more than we can know in our own reality whether or not we are free or just puppets of some meta-reality's denizens. Tom Stoppard's play *Rosencrantz and Guildenstern are Dead* is an interesting treatment of this concept. Nevertheless, for the purposes of the present discussion, I shall concern myself primarily with the reality inhabited by myself and, presumably, the reader.



roleplayer and his in-game persona. While a novelist must, to a certain extent, assume the identity of her characters in order to breath life into them, the roleplayer's identification with his character is much more complete. A novelist has complete control over the fictional reality of the novel, whereas the roleplayer has control over only one character. The novelist's experience of the novel's reality is vicarious and potentially omniscient, regardless of the narrative style selected; the roleplayer actually sees through his character's eyes. Most importantly, the novelist's involvement in the narrative is essentially atemporal, while the roleplayer necessarily experiences the character's reality sequentially, and must live by his decisions as he makes them, without the ability to go back and revise earlier episodes.<sup>14</sup>

Nonetheless, the characters of the roleplayer and the novelist alike are ultimately depictions, purely imaginary in status, regardless of whether or not they may be based upon or represented by real human beings. Thus their morality is in fact only a depiction of morality, and so if the roleplayer and the novelist are causally (and thus morally) responsible for their characters' actions, that responsibility is more appropriately evaluated on primarily an æsthetic, rather than moral, basis.

This is not to say that the conduct of the roleplayer's character within the game world is completely without moral significance in the real world. There are several ways in which a roleplayer's choice of action on behalf of her character may be subject to moral criticism. I shall briefly acknowledge a few here, along with defenses where appropriate.

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<sup>14</sup> There are exceptions, of course, but these are more often a matter of clarification or the addition of greater detail rather than altering established background. For example, someone might ask a character where he learned to speak Elvish, and the player suddenly realises that he hasn't thought about that part of his character's history, and will quickly ad lib an answer which will typically become canonical.

First, there is the concern that positive portrayals of violent or evil characters may promote unwholesome values. A game in which unscrupulous or immoral characters are made to appear glamorous or even heroic could lead players to admire and even emulate them in real life. In particular, the inevitable emphasis many players place on swordplay in the game context might be taken as a more general endorsement of violence as a legitimate means of conflict resolution, leading to an inappropriately positive attitude towards violence. Even when a roleplayer's character conduct does not actively promote violence, it may be argued that the high frequency of violent encounters typical of these games may contribute to a general desensitisation to violence. In fact, given that the "violence" of the game consists entirely of dice-rolling and paperwork, these concerns are somewhat exaggerated; real violence on the gaming field is almost unheard of, and universally condemned in the live roleplaying community. Curiously, the more savage the in-game violence, with screamed curses and grunts of pain, the more amicably the real-world players behave, cheerfully lending one another dice or helping to find a lost pen. Nevertheless, experiences in the game world reality almost certainly exerts a real, if subtle, effect on the attitudes of persons involved with the game, just as exposure to literature, film and personal experience do, and so on consequentialist grounds a roleplayer may be deemed to have some moral obligation concerning the content of her performance, i.e. the actions of her character. Thus, a player may have a duty to keep her character from killing other characters, not for the sake of her imaginary victims (who themselves have no moral standing), but because her action may indirectly influence a real person to commit real violence someday. (Of course, it may also indirectly influence a real person *away* from real-world violence, so

actually determining the moral duty of the player in this regard may be impossible.)

Another way in which we may consider a player to have moral obligations concerning her character's conduct has to do with the close identification between player and character. There is no other artistic medium, with the possible exception of theatre and film, in which one must identify so strongly with the role one is playing. And whereas on stage and screen an actor almost always works from a script and enjoys atemporal omniscience of the whole story (even though *in character* that knowledge is suppressed), the roleplayer's knowledge of a scenario is temporally limited to what the character knows at any given instant as the plot unfolds. Roleplaying is method acting run amok; where an actor strives to feel surprise in order to appear surprised in a given situation, for example, the roleplayer ideally will actually *be* surprised for the sake of the experience itself. This becomes problematic in the case of the player of an evil character, for instead of simply trying to *appear* evil, the player must deliberately attempt to engage evil modes of thinking. If Aristotle is right about virtues (and vices) as the acquired habit of performing virtuous (and vicious) acts, then the player whose character does evil is cause for concern. However, while the roleplayer may indeed be practising the vices of her character, she is also practising a virtue which her character is not: empathy. Roleplaying promotes the practice of trying to understand apparently antagonistic behaviours from different perspectives, thus lessening the primary cause of conflict, which is ignorance.

But are villains truly deserving of such efforts to understand them? That is, aren't the victims of evil entitled to a greater share of our finite imaginative resources? This argument sounds persuasive enough, but it is

misleading and even possibly dangerous. Victims are certainly entitled to whatever aid they need that we can provide, and we must of course remain sensitive to their suffering, but their actions stand in no need of justification; they have done nothing wrong. The behaviour of the perpetrators, on the other hand, poses a question that demands an answer: Why do they do it? More importantly, it is not in our role as potential victims that morality lies, but in our role as potential villains. We can and should take sensible precautions against becoming victims, of course, but whether we are eventually victimised anyway is ultimately beyond our control. We *do* have, on the other hand, a categorical duty to see to it that we never become villains, which is increasingly likely the more we identify ourselves as or with victims.<sup>15</sup> We should therefore strive always to be aware of our own capacity for villainy. A good part of the reason we should appreciate the suffering of others, after all, is to ensure we do not (further) victimise them ourselves.

The escapist nature of roleplaying presents yet another moral dimension to the portrayal of evil characters. For many players, the appeal of these games is the opportunity to do things which are impossible or which have prohibitive consequences in real life. Make-believe swordplay is a chance to let off steam without really hurting anyone. Certainly it does no real *harm* to anyone if I should choose to play a sadistic bandit, but the important question is this: What kind of person am I if, in a world where I can be just about anyone I want, I choose to be a person who robs, tortures and kills people for amusement?

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<sup>15</sup> Consider how many perpetrators actually consider themselves to be the victim. For every Paul Bernardo or Charles Manson who revels in evil for its own sake, there are a hundred Marc Lepines, Baruch Goldsteins or disgruntled postal workers who, as a result of real or imagined past wrongs, feel forced into crimes of horrendous brutality.

This is a serious objection, and indeed there are many players whose idea of a good time, even if only in a fantasy game, is this sort of wanton cruelty. The moral character of such players might well be called into question, but it is not necessarily the case that a player whose character commits evil acts desires in any way to commit these acts himself. Not all roleplayers play for escapist reasons; as I have suggested before, there are also those who play more to explore reality than to escape it. The exploratory player might well choose to play a morally reprehensible character for completely admirable reasons, such as to come to a better understanding of how evil is possible, or even just to shock the above mentioned escapist player with just how horrible evil characters *really* are.

In general, the blameworthiness of a character's action does not translate directly into a similar culpability on the part of the character's player. There is, however, a significant exception. Whereas participants at a live roleplaying game are remarkably tolerant of most of the evil that occurs within the gameworld, there is a strong consensus that players ought never cause their characters to rape.<sup>16</sup> There are several reasons for this, but perhaps the most persuasive is that while it is a reasonably safe bet that one's fellow players have never been killed in a real swordfight or eaten by cannibals, there is no assurance that they have not actually been rape victims, and thus it may be traumatic to put them into that role again. Even for players who have never actually been raped, there is the strong possibility that roleplaying a rape situation can be felt as threatening, given

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<sup>16</sup> Dangerous, distasteful or simply impossible actions in the gameworld are described or simulated with dice, so gameworld rapes generally consist only of one player informing another of what his character is doing. This applies also to the rare but not unheard of consensual sexual contact between characters whose players are not actually romantically involved in real life.

the close parallels between the in-game and out-of-game realities.<sup>17</sup> Indeed, it *ought* to be threatening, just as a player should ideally be frightened when a costumed actor playing a monster leaps out and roars, since the success of a roleplaying exercise is often measured by the degree to which players actually experience their characters' emotions. Unfortunately, for a female player to experience her character's fear of rape while actually alone off in the woods somewhere with a male player may blur the distinction between in-game and out-of-game realities somewhat. The received message may be, "See, I could do to you what my character is doing to your character right now," regardless of whether or not this is the meaning intended by the player of the rapist character. To the extent that this roleplayed rape constitutes an actual threat to the player of the rape victim, there is a close relationship between the morality of the in-game and out-of-game realities.<sup>18</sup> However, it is important to stress that what makes it wrong for a character to rape another character is not precisely what makes the player's action wrong. The fictional rapist character is undoubtedly fictionally blameworthy for a fictional violation of his fictional duty towards his fictional victim. The real player, on the other hand, has no duty to the fictional characters of the gameworld, and so may cause them to be raped without incurring blame. The player *does* have a moral duty to his fellow players in the real world, and should therefore avoid speech, acts or omissions which harm them. In those cases where roleplaying a rape

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<sup>17</sup> Consider that when telling a ghost story around a campfire, the story can often be made more frightening by relating it to the immediate circumstances. "It was a dark, moonless night as a group of campers sat around a fire telling stories, rather like tonight, actually..."

<sup>18</sup> This is consistent with some feminist arguments against pornography, in particular those of Catherine MacKinnon, who argues that (some) depictions of rape are morally equivalent to rape themselves. I hesitate to say that roleplaying a rape is *equivalent* to physically raping someone, but it seems clear that it can be the same *kind* of offense, even if of a lesser magnitude.

might intimidate or disturb the other player(s) involved, then, he should not do so. (This also applies to any other subject, depending on what is known of the sensitivities of the other player. If her mother was actually eaten by cannibals, for example, then one may have some duty to avoid game acts of cannibalism. On the other hand, if it is known that a subject can be handled without upsetting the other player, then it would almost certainly be acceptable to roleplay a scenario involving that subject, including rape.)

I have shown, hopefully, that the moral status of a roleplayer is largely independent of the conduct of the character portrayed. Within the context of a roleplaying game, the moral duty of the roleplayer is not to do what is right within the game world (that is the duty of the character), but to do what is right in the real world. Aside from the various moral concerns about in-game conduct outlined in the preceding pages, a player's control over her character's actions must ultimately be evaluated on æsthetic grounds, rather than ethical ones. Thus, the question to ask is not whether the player is portraying a good or evil character, but whether or not she is engaged in good *roleplaying*. (And, in the social context of the live roleplaying game, it could be argued that there is a moral obligation to engage in the best roleplaying one can.)

There is a generally accepted canon of what constitutes good roleplaying, the essence of which is that the player should only act in such a way that the character would act in the game world reality offered. This means taking the game world seriously, and accepting the characters who live in it as real. This is why players of compassionate characters often (though not always) roleplay better than those who play brutal characters, for compassion involves identifying with others and appreciating their

suffering, and poor roleplayers do not recognise characters in the game world as beings capable of suffering. (Of course, they *are* only fictional creatures, but good roleplaying demands the suspension of disbelief. Poor characterisation in a novel is not justified on the grounds that “it’s just fiction.”) In other words, the characters of poor roleplayers are (within the game reality) genuine sociopaths.

Good roleplaying means staying in character, and that often requires maintaining a clear distinction between the identity of the character and the identity of the roleplayer. The character’s actions should be the *character’s*, and not the player’s. When the character’s actions come under the influence of the player’s own motivations, the quality of the performance is compromised, and may even in some cases be grounds for moral concern, insofar as the character/player’s behaviour is the result of *actual* vice on the part of the player rather than the fictional vice of the character. For example, it may be appropriate for a character to pursue a vendetta against a sworn enemy within the game context, if that character has an in-game reason for such enmity (even if that in-game reason is completely irrational, so long as it is in character), but it would be completely inappropriate for a character to pursue such a vendetta in the absence of in-game reasons because the player had a personal dislike<sup>19</sup> for the player of the other character. Similarly, it could be poor roleplaying for a loyal knight to refrain from carrying out an order to slay a known outlaw simply because the players of both characters happened to be friends in real life.

The very same character action, then, such as slaying or refusing to

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<sup>19</sup> Or, in fact, affection. Charging over to attack the character of a friend one hasn’t seen in a long time as a way of saying hello is not at all uncommon, and while it may not exactly be a moral wrong, it is still poor roleplaying.



slay another character, for instance, can be either good or bad roleplaying depending solely upon whether or not they are performed in-character. What makes this difficult for the game organiser, however, is that there is no practical way to determine if a given action is in fact in-character. While some instances of blatantly poor roleplaying can often be recognised quite easily (“Hey, watch out for Bob! He’s telling everyone he’s a Healer, but his character sheet says he’s got the Pickpocket ability!”), it is not always clear whether or not a player is in character in other cases. A player’s character conception can always include some deeper private reason for actions which appear out of character to everyone else, or a player may simply portray a shallow stereotype whose superficial consistency is mistaken by others for excellent roleplaying. Only the player herself can know with any certainty whether or not she is playing in character.

Now, as I have said before, the attainment of fun through roleplaying is the objective of the whole live roleplaying enterprise. Players may have, of course, a variety of different ideas of exactly what gives them the most fun, but most of these ideals (escapist fantasy, experience of adventure, awards for roleplaying, dramatic exploration of the human condition, etc.) are furthered by good roleplaying, and most of the rest (accumulating treasure, meeting new friends, dressing up in strange costumes) are at the very least not impeded and almost always facilitated by it. Certainly there are people who do not consider roleplaying to be fun at all, but it is difficult to imagine why such a person would have anything to do with the practice; it is, after all, a *roleplaying game*. It might therefore seem appropriate that the designer of a rules system for a live roleplaying game would want to promote good roleplaying above all else. Nonetheless, any attempt to *enforce* good roleplaying would constitute an overextension of authority on the part

of game organisers, whose responsibility is to facilitate the maximisation of player autonomy; only the individual player can be responsible for the quality of her roleplaying.

In any case, the game rules are quite helpless when it comes to identifying, let alone encouraging good roleplaying. It is simply not practical to introduce a rule to the effect of "All characters must have in-character reasons for every action or omission during the game," as there is no way to enforce such a rule. Given the fantastic nature of the game reality, a player accused of poor roleplaying would be able to make up a plausible in-character reason for just about any action. "My character's maternal grandmother put a curse on him, making him do strange things every once in a while." Such a story might well be a deliberate deception to protect the bad roleplayer from punishment, but is rooting out such deceptions worth the insult to sincere roleplayers whose motivations are challenged? Indeed, allowing motivations to be challenged at all, in addition to seriously interrupting the flow of the game, would create untold opportunities for abuse, since there is no reason to suppose that good roleplayers will be the only ones to complain about other characters' conduct. Good roleplayers, in fact, are *least* likely to protest in-game events, because of their more willing acceptance of the game reality; they are more likely to react to unfavourable actions in-character.<sup>20</sup>

Surely, though, there must be *some* sorts of game actions which can be disallowed on the basis of inappropriate motivations? What about the following case: Player A's character, through legitimate in-game means of

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<sup>20</sup> This is an interesting parallel to some of the traits we find admirable in the real world. We are more inclined to favour a person who accepts an imperfect reality the way it is, and then does whatever she can to remedy the situation over the person who moans about how unfair the universe is, as if God might step in and alter the fabric of reality for his benefit.

coercion (e.g. magical compulsion, possession, hypnosis, etc.) forces Player B's character to forge the signature of a third party on a blank cheque. The third party is Player B (of whom Player B's *character*, residing in the game reality and not the real world, will of course know nothing, and so has little in-game reason for refusing to comply, apart from any general moral concerns the character may have about forgery in general.) Clearly, Player A's intention here is to obtain real-world advantage through exploiting in-game powers, and as such is as clear a case of poor roleplaying as one could ever hope to find; certainly Player A's interest is not one to be entertained by the game designers by requiring Player B to sign the cheque?

Player A's goal here is objectionable, but it is of no concern to the game rules. Only interests in the *game world* reality fall under their jurisdiction, and real world interests, whether they be to explore the psyche of a nomad warrior, to win a roleplaying award, to meet new friends or even just to use one's character as a vehicle for the distribution of advertising material, simply lie outside of the rules' consideration. The rules will recognise as legitimate Player A's in-game interest to have Player B's *character* forge any signature on any document *within the game's own reality*, but they need say nothing about Player A's desire to have Player B *actually* sign a cheque in the real world. Weapons and armour in the game world are represented in reality with simple weapon cards; there is no reason to expect that Player A's in-game forged document should have to be represented by a real-world financial instrument.

The rules can only govern the tangible interactions between players' characters within the game reality. While they cannot determine whether or not it is in character for Zack the Mighty to attack Grog the Vindictive, they *can* determine how to resolve the combat between the two, and leave

the question of what is in character up to the players themselves. At best, the game designer can try to make these rules as fair as possible in protecting the interests of the players which need to be protected (i.e. the players' respective power to influence the development of the plot, in particular with regard to the character's ability to impose effects against the will of others). The designer who attempts to impose rules aimed at requiring good roleplaying will at best merely fail, and at worst may well ruin the game by wasting scarce game resources on futile and intrusive efforts.

The state faces an almost identical situation when it attempts to enact legislation aimed at promoting morality in its citizens. Overt behaviour, like the formal interactions between players in the live roleplaying game, can be legislated, but morality itself cannot, for the same reason that good roleplaying cannot be enforced. Just as good roleplaying cannot be equated with a certain type of game action (for a character to steal, for example, can be either good or bad roleplaying) but lies rather in the relationship of consistency between the act and the player's character conception, so too is morality more a matter of the integrity of a person's actions and conscience than a simple division of acts into good and evil categories.

That is not to say that morality is exhausted by conscience. We may still find blameworthy the person whose conscience demands acts that we find reprehensible, of course, but at the same time, we would hardly find blameless the person who disregards sincere moral reservations, no matter how laudable the resulting action might be. The point to be made here is that at least a large part of morality must lie in the conscience.

We can see that this is so by considering the case of a person who, acting in good faith on the basis of faulty information, performs a deed which later turns out in the light of more accurate knowledge to be wrong. We may conceivably berate her competence for her failure to recognise the misleading data, or we may criticise her for not choosing her action so as to minimise harm should the data prove wrong, but so long as her desire to do good is sincere we cannot impugn her moral character. Likewise, we would surely not praise the character of the malicious person who inadvertently performs a beneficial act.

Since the moral status of an act depends so much on the inner state of the agent, it is very difficult (if not impossible) to ascertain, and policies aimed at promoting moral rectitude are almost farcical in their futility.

For example, consider the phenomenon of the marriage of convenience, where a would-be immigrant formally marries a citizen, with no other purpose but to gain legal resident status. This is generally viewed as an abuse of a humanitarian policy which was intended only to prevent immigration laws from needlessly breaking up families. However, for the policy to be enforced requires intrusive investigations into the private lives of the parties involved which, although they might occasionally succeed in uncovering a fraud, can hardly be effective enough to justify their expense, or the insult to genuine couples whose relationship simply does not conform to the expectations of the investigator. Since there can be no guarantee of the mental or emotional states behind the observed facts of the couple's behaviour (that they constantly profess to love one another is no more guarantee that they actually do than their failure to say so is evidence they do not), the policy's real effect is simply to oblige couples to adopt a particular set of superficial behaviours (which, in themselves, are of no

possible value to the state or society) in order to qualify for a certain legal right. Why should the legal validity of a couple's marriage depend on something so arbitrary as whether or not they share the same toothbrush?

It would be far more sensible to dispense with the pretence of protecting family values (which in practice can only mean protecting the superficial behaviours that fit an official's possibly quite narrow notion of what a real family is), and ask instead just what sort of *action* it is that the policy is intended to permit. In the case of the spousal immigration sponsorship, it is for a citizen to sponsor a spouse as an immigrant. It is not meant to be limited only to married couples who share the same toothbrush, or even the same residence. It is not meant to be limited only to perfectly happy marriages (and indeed, ought not to be, for some unhappy marriages may be the result of the same prolonged separations the policy is meant to avoid.) Efforts to determine the sincerity of the relationship are the responsibility of the couple themselves, and the business of no one else.

Indeed, the very same sort of moralising confusion can be seen in the current debate over whether or not same-sex couples should be able to enjoy the benefits of a legal marriage. Those who oppose extending such rights appeal to the traditional view of marriage as an essentially reproductive institution, where the decision to marry indicates an intention eventually to have children, and point out that same-sex couples are physically unable to procreate within such a marriage. But there is no requirement that heterosexual couples undergo medical exams to ensure fertility before they are allowed to marry, and moreover, *they* are allowed to adopt.

Again, it would seem worthwhile to stop and ask exactly what it is we are trying to accomplish through the legal institution of marriage. We can know nothing about the sincerity of the relationship between the two

partners, so any attempt to use that as a standard can only end up punishing or rewarding whatever arbitrary set of superficial traits are used as indicators of that relationship. We are thus left with a set of tax laws that facilitate the pooling of resources within a household, and the sharing of legal kinship rights and responsibilities (such as guardianship of children, inheritance of property and debt, and next-of-kin status when proxy consent is needed for medical procedures.) Given the general tendency of human beings to form households, this sort of legal partnership seems like a reasonable option to provide to any couple who wants it. When one considers that this particular contract gives the power of proxy consent to the very partner who also stands to inherit one's wealth in the event of accidental death, it would seem that the very fact that a couple is willing to sign should be more than enough evidence of the depth of their trust in one another. Why, then, should further evidence be required to allow one to sponsor a spouse as an immigrant?

Now, this is not to say that the state can have no responsibility whatsoever in ensuring the sincerity of the couple initiating a legal marriage contract. It seems entirely appropriate to observe the usual restrictions that govern the signing of contracts in general, such as requiring that the signatories are mentally competent, and taking reasonable precautions to be sure that they have read and understood the terms to which they are agreeing. However, this responsibility can go no further than giving the couple every chance to make an informed choice; it is only the couple themselves who are in any position to decide if they are truly willing to accept the responsibilities entailed by the marriage contract.

A somewhat more problematic case is the crime of barratry, which occurs when a litigant files or threatens to file a groundless lawsuit, not for

the purposes of seeking justice but rather to injure an opponent by forcing him to allocate resources to an expensive legal defence.<sup>21</sup> It is not, of course, a crime to file a suit which is later found in court to be unfounded, so it would seem on the face of it that the legal offence of barratry is distinguished solely by the intention of the perpetrator, and not the nature of the action itself. Moreover, it is certainly desirable that such an abuse of process be illegal. How do we reconcile this with the claim that the law must consider only actions, and not the intentions which lie behind them?

The very act of filing a lawsuit requires presenting to the court an allegation of wrongdoing by the defendant, and the deliberate entry into court records of any statement which one knows or ought to know is false is the crime of perjury, which is an especially serious offence for officers of the court, and which requires no consideration of the perjurer's motives to be classified as an illegal act. Any act of barratry therefore must necessarily involve at the very least one act of perjury (in filing a false allegation) or the threat to commit such an act<sup>22</sup>, but barratry is treated as a special crime of greater magnitude than mere perjury because of the particularly damaging power it represents (just as perjury is a greater crime than simply telling a lie). In any event, it is possible to devise an effective legislation against barratry without invoking reference to the sinister intentions of the barratrous attorney.

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<sup>21</sup> This is most effective as a bluff, since the frivolity of the plaintiff's case can rapidly become evident if it reaches a courtroom, possibly resulting in the award of legal costs and even punitive damages to the defendant. It therefore works best against victims who cannot afford sufficient legal counsel even to recognise the bluff through the arcane legal jargon.

<sup>22</sup> It does not matter that the victim does not know the threatened suit to be without merit, any more than it matters that the gun used in a robbery contains no bullets. Indeed, it matters less; a gun one knows to be empty can be safely ignored (provided it is the only threat posed by an assailant), while it may be expensive even to call the barratrous attorney's bluff, since there is no guarantee one would be able to recover legal fees should she actually file the suit.



A similar argument can be made in almost every case where the state concerns itself with the inner moral states of its subjects rather than their actions. The state can only observe and evaluate external behaviours, not the attitudes behind those behaviours, so any time it attempts to make moral distinctions based on such external signs it stands likely to be misled, and in practice the policy can only promote or discourage arbitrary superficialities.<sup>23</sup> The true moral values in which the state professes to be interested can only be promoted through education. While the state may endeavour to provide advantages which in practice tend to benefit only those who share the favoured values (in the example above, only couples who literally trust one another with their lives would be likely to receive the legal benefits of marriage), it cannot use those advantages to instil such values in citizens who do not already share them (tax benefits may encourage a couple to get married, but are not likely to create trust between them). As Confucius said, "The people may be made to follow a course, but not to know the reason why."<sup>24</sup>

This is not to say that the state cannot make allowances for morality in the administration of the law. At times one may be forgiven for technical violations of the law if one has overriding and persuasive moral reasons to excuse the offense. Part of the reason for the jury system, after all, is to introduce some flexible measure of community standards of morality when deciding whether or not a defendant is to be found guilty and punished for a crime. Similarly, in the live roleplaying game, Referees will on occasion overlook technical rule violations for the sake of good roleplaying. It is

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<sup>23</sup> This may be acceptable, if the state holds such things as which end of a hardboiled egg should be opened as being in the national interest, or considers it necessary that all married couples should share the same toothbrush. It is important to stress, however, that even so these remain legal and not moral issues.

<sup>24</sup> *Analects*, Book VII, Chapter IX. Translation by William Edward Soothill, 1910

important to note, however, that in both cases the standards of morality or good roleplaying are used to mitigate or dismiss charges of illegal conduct, rather than to define them. That one had a suitably urgent reason to be driving at 150 km/h may influence the judge not to impose a fine or record demerits, but it does not render the act of speeding lawful. Moreover, punishment is only imposed in the case of a violation of the law, not of the moral standards which occasionally excuse such violation; plainly immoral but lawful conduct is not subject to legal sanction, no matter how much we might like it to be.

So, if the state is helpless (outside of the educational arena) to promote values directly, what can it do? And why do we have laws against murder, say, unless it is because we as a society condemn murder as a moral evil?

My answer to this, in the classic liberal tradition, is that the role of the state is closely analogous to that of the designer of the live roleplaying game. The ideals of good roleplaying, the emphasis on consistently staying in character, correspond to a Kantian standard of good conduct, where morality lies in the consistency of an autonomous act with a coherent set of maxims. And, just as the good Kantian must respect above all the autonomy of rational agents, the good roleplayer is one who accepts the autonomous actions of other players, and reacts to them in-character rather than attempting to impose her own plot conception through metagame means. The objective of the game designer overall, then, is to facilitate the roleplaying freedom of the players (as an instrument towards the satisfaction of their various individual roleplaying goals), and analogously the good Kantian legislator is obliged to maximise the autonomy of the rational agents of the state. Both must adopt, in some

sense, a somewhat consequentialist attitude in formulating their rules or civil laws; the standard for evaluating a prospective rule must be: "Will this increase or decrease the total freedom of all players to develop their characters?" and for a law: "Will this increase or decrease the total freedom of all citizens to pursue their autonomous goals?" The standard must not be "Will this make people into better roleplayers?" or "Will this make people into better citizens?" not because these are not admirable goals or even attainable goals, but because they simply cannot be directly achieved through legislation.

### ***Chapter III***

#### ***Protecting Freedoms and Waiving Rights***

Freed from the duty to reform the moral character of the citizenry, the role of the legislator becomes a technical matter of balancing one freedom against another, regulating where necessary to obtain the maximum possible amount of autonomy for each individual. As a technical endeavour, it becomes subject to practical considerations of efficiency and cost-effectiveness. The most obvious cost involved, of course, is the expense of a police force and judicial system through which to enforce a system of laws. This is a particularly important consideration in these times of fiscal restraint, but even if the material resources available for law enforcement were unlimited there is a stronger reason to be sparing in the use of law in a liberal state, and that is the nature of law itself.

First of all, it is important to note that the laws of the state are not at all like the laws of nature. Natural Law is obeyed absolutely out of necessity, while legislation is obeyed by convention, backed up by physical force where necessary and possible. Practically speaking, the force of law as wielded by the state (when respect for custom alone does not suffice to produce obedience) is little different from the force of a demand or ultimatum issued by any individual or group, except for the relative power of the state to pose credible threats. Legislators should not mistake the scope of their power;

while a deity might impose natural laws on a universe, or a programmer might assign a string of commands to a computer and both may know that their instructions will be followed to the letter, the lawmaker is in the position of dealing with wilful and autonomous citizens who may simply disregard her decrees, or even interpret and use them in a completely unintended way, in much the same way that a toolmaker cannot predict (much less dictate) how the tools he makes will be used when released into the society. Laws may be *created* by legislatures, but they are *used* by members of society at large, particularly police and judiciaries, but often also by any individual or organisation who finds a way to use the law to further their own interests.

Indeed, it may be more apt to describe laws as weapons rather than tools, as their sole use is against people (or groups of people) and their sole effect is to reduce the degree of freedom enjoyed by their victims.<sup>25</sup> Laws cannot of themselves create freedoms, except as the freedom to restrict another freedom. No act of parliament can enable a person to survive in a methane-ammonia atmosphere. A law could, conceivably, impose a prohibitive penalty on anyone whose lungs were found to be capable of such a feat, effectively removing the freedom to breathe on Venus. If the ultimate objective of the liberal state is to protect freedom, any law is *prima facie* a bad thing in that it must necessarily impose a limit on freedom if it is to have any effect at all.

The law can only protect a freedom by limiting those freedoms which,

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<sup>25</sup> H.L.A. Hart argues that in addition to limiting freedoms, laws may empower us to do certain things, like making out valid wills or establishing contracts. I do not dispute that laws have a net effect of making us freer, but I maintain that on their most basic mechanical level, they do so by restricting some freedom or other. The power to make out a will, for example, is really the power to restrict the freedom of other people to dispose of one's estate. Likewise, the power to establish a binding contract is nothing but the power to restrict the signatories' freedom to stray from its terms.

if exercised, would curtail the protected freedom. The freedom to commit murder, for example, cannot be exercised without completely and permanently removing all other freedoms (including the freedom to commit murder itself) from the victim, thus leading to a net reduction in the total amount of freedom. To maximise freedom, then, a law restricting the freedom to commit murder can be defended as a necessary evil.

Designing an efficient set of laws (or live roleplaying rules system) is therefore a sort of *triage*, a matter of deciding which freedoms can be saved and which must be abandoned for the sake of others. Several freedoms appear to be basic to all others, and it is therefore a useful strategy to give them special protection as “rights”. A prime example, as demonstrated in the previous paragraph, is the right to life; if one is not permitted to live, one is deprived of all one’s other freedoms.

It is tempting to try to identify which freedoms, like the freedom not to be killed, are fundamental, give them special protective status as rights, legislate accordingly and leave it at that. However, this may not turn out to be an efficient allocation of legislative resources. Some freedoms, while perhaps philosophically important, are in practice less often in demand than others. A homogeneous and orthodox religious community<sup>26</sup>, for example, may see little need to protect religious freedom for its members, but may hold sacred the right to be addressed politely, if such is a tenet of their faith. At the same time, some important freedoms may simply be less vulnerable to infringement, and therefore less in need of protection than others. The right to freedom of speech is perhaps less “basic” than the right to freedom of thought and belief, but it is in greater need of protection in the

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<sup>26</sup> Assuming, of course, that membership in the community is completely voluntary, and there are no obstacles preventing people who do not share the orthodox belief from leaving.

sense that while one may effectively and easily infringe upon the former through censorship, the latter can only be violated through exotic techniques of mind-control. Moreover, to protect certain rights at all costs may be to make unfounded assumptions about the actual interests of citizens.

If any right merits the allocation of legal resources to its protection, certainly the right to life would. It is a necessary condition for the enjoyment of any other right, and almost universally desired. It is also especially vulnerable, and what's more, once infringed it cannot be restored. In contrast, the right to die is somewhat less in need of protection, because relatively few people actively wish to die, and it is so difficult to prevent those few from doing so. Indeed, in most cases, it is impossible to restrict the freedom to die without restricting a great many other freedoms in the process, and in any case, the right to die can only be temporarily deferred, and not violated with the finality that the right to life may be.

Not surprisingly, then, very little effort has been made to protect the right to die, and rightly so, for the most part. In general, the incidental protection afforded by other rights, such as the right to bodily autonomy and the right to refuse medical treatment, suffices to enable those who wish so to die. It is only in the case of people who are physically debilitated to the point that active suicide is impossible without assistance that the right to die is really an issue at all. When it is debated, opponents of euthanasia and doctor-assisted suicide often argue that since the desire to die is fundamentally irrational, the right to die can never be freely exercised and

is therefore null.<sup>27</sup>

In the context of the live roleplaying game, it is possible to treat matters of life and death somewhat more dispassionately. Certainly it can be generally assumed that a player's interest is in exercising some control over the development of the plot, and to that end, keeping one's character alive is of definite instrumental value. However, it would be wrong to assume that a player can have no legitimate interest in the death of her character, since that death may well be vital to the particular plot goals the player has in mind.

To be sure, death in the live roleplaying game is not an exact analog of death in the real world, since it does not necessarily remove the character from play entirely. Players of dead characters may still influence the plot as "ghosts", and there are game mechanisms for magically resurrecting the dead as well. Without speculating about the actual existence of similar incorporeal entities in the real world, death for real people translates into a complete and utter end to all autonomy; the game world equivalent would have to include a similar loss of all control over future plot developments. Even this, though, is not necessarily something we can dismiss as a fundamentally undesirable outcome, for there may still be worthy player goals that may best be achieved through a complete surrender of plot control. Reading a novel or watching a film is no less worthwhile for the lack of control the audience has over the plot, after all,

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<sup>27</sup> To the best of my knowledge, the right to life is the only one over which there is any serious debate about whether it can ever be waived voluntarily. There may be special circumstances under which one is compelled to speak, such as when called as a witness in court, but in general the right to freedom of speech does not preclude the right not to speak. As well, though one may desperately seek to rid oneself of a property for which legal ownership conveys some financial liability, no one seems to think that the right to own property is incompatible with the right not to own property. Moreover, in both of these cases, we recognise that the desire not to speak or not to own property may be rational, even if it is defeated by other overriding interests, whereas the desire to die is often considered to be a sufficient condition for a declaration of incompetence.



and there are several conceivable circumstances in which a player's enjoyment of the game might be enhanced through adopting a passive role in plot development.

For example, a player may cede control over his character's actions to another player, perhaps by portraying a mindless zombie who obeys unquestioningly the commands of another character. This player may be more interested in exploring the degree to which power corrupts the other character than in trying to bring about any particular outcome of his own choosing. Another possibility would be the player who chooses to play an evil character, hoping that the other players will defeat this villain, but playing in earnest so as to make it a challenge for them; this player might well be glad to see her character slain, and her own influence over the plot ended.

It is interesting to note that in both of these cases, the abdication of direct control over the events within the game is in fact an exercise of free choice in the pursuit of the player's own game objectives. In the first case, the player of the zombie has willingly given the power to control the zombie's actions to another player, because giving over that power is instrumental in achieving his personal goal of observing how the other player uses that power. In one sense, it is true that the player's control over the events within the story has been given up. On another level, though, the player's control over the game reality is intact, and is exercised with every command the zombie obeys; the very existence of a perfectly obedient zombie in the game world is a result of the choice of the player.<sup>28</sup> (Similarly in the

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<sup>28</sup> Indeed, so long as the player stays true to the original character conception, the perfectly obedient zombie is as close to Kant's perfectly self-legislating (and therefore autonomous and free) being as any other character one might choose to play, in the sense that the "noumenal" player's maxim absolutely governs the "phenomenal" character's actions.

real world, one cannot truly surrender one's autonomy so long as one remains alive, for even the decision to obey is a decision. And, while slavery is justifiably prohibited, there is nothing to prevent a person from voluntarily obeying another person's every command to the best of one's ability, especially if he chooses also not to consider any of the consequences.)

The second example is somewhat closer to the problem of the right to die in the real world. The player of the evil villain, after having exercised direct control over the development of the game plot through the actions of her character, then chooses at some point to remove her character from the game completely by allowing her to be defeated by more heroic characters. Unlike the zombie character, whose very obedience is an ongoing manifestation of the free will of his player, the evil villain's death can be more binding; once the character has been destroyed, the player may genuinely be powerless to re-enter the game later, even if she wants to. It is a choice that cannot be revoked, and while most choices may limit our future range of options (breaking a glass, for example, permanently removes the option of drinking from it later), the choice to remove oneself from the game in this fashion removes *all* future game options.

The question here is ultimately whether free will is seen as an end in itself, or as a means to some other end. In the roleplaying context, it has been treated as a practical means to the ultimate goal of allowing players to enjoy the game. Accordingly, if the above player's enjoyment of the game is best secured through allowing her to withdraw from the plot at an aesthetically satisfying point, then that is what should be done. The game organisers are in no position to dictate that her best interests are actually served by keeping her character in the game against her will.

Nonetheless, it must be admitted that the player of the defeated

villain may still experience the game, if only as a passive observer. Afterwards, she will be able to share in the tales of valour told around the campfire, and may take interest even in those game events which took place after her character's death. Religious promises aside, there is no guarantee that people in the real world may similarly continue to experience consciousness once they have shuffled off this mortal coil. Thus a proper parallel for real death in the roleplaying game should include not just the permanent abdication of plot influence, but also the forswearing of any further experience or knowledge of the game reality. In practice, this is not especially likely, since it is almost always possible to run into someone later who might be able to tell how the game ended, but even if this were not the case it would be unreasonable of game organisers to attempt to prevent players from quitting the game entirely, just to protect the player's ability to experience the game whether she wants to or not. If a player decides she just doesn't want to have anything more to do with live roleplaying, it is not the place of the game organisers to discount this as an irrational desire.

While it is not the purpose of this paper to discuss whether or not the law should make provision for assisted suicide, it may be similarly unfounded to assume that it is always in a person's best interests to be kept alive without regard to his wishes. The point here is simply that in a liberal state, it is unnecessary and undesirable to make value judgments about whatever interests the citizens may have. Rather, the laws of the state should be designed so as to allow as many of those interests as possible to be satisfied, and "rights" are a useful means to this end. However, if we do not wish to beg any questions about interests, it should be in practice possible to waive one's rights. Thus the law enforcement system should be flexible enough to ensure that only unwanted violations of a person's rights are

prevented.

Fortunately, this is not as difficult as it sounds. In fact, most laws already work this way, and those which do not are almost always more difficult to enforce. Of course, the problem of enforcement only applies for that segment of the population that does not simply obey the law out of a sense of duty, but this segment is usually large enough to necessitate devising and maintaining a system of law enforcement.

Almost all laws<sup>29</sup> either depend on the threat of sanctions to deter infractions, or provide for some means to rehabilitate or reëducate offenders so that they do not continue to break the law in the future. Both approaches, however, depend upon some means of identifying the perpetrator, and that in turn depends on detecting when an infraction has actually occurred in the first place. While it may conceivably work simply to rehabilitate every member of a society in order to be sure of providing rehabilitation to those who may have transgressed (at tremendous cost in resources, to say nothing of the intrusion into the lives of law-abiding citizens!), the principle of deterrence depends fundamentally upon there being a known connection between the offence and the punishment; potential offenders must believe that committing a crime substantially increases their chances of suffering as a result, and conversely that refraining from crime is a good way to avoid punishment.

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<sup>29</sup> This would at first glance appear to apply primarily to criminal law and non-criminal laws and bylaws that are aimed directly at prohibiting or requiring certain actions, rather than laws specifying the procedures for producing wills or defining jurisdictions, for which it seems inappropriate to speak of the nullification that accrues to an improperly prepared will as a sanction, as Hart rightly points out. I am prepared to limit my discussion to criminal law for the sake of brevity, but I think a strong case can be made that the force of law in a will or contract lies not in specifying how it is to be produced but in what happens to an executor who fails to adhere to its provisions, and who is subject to sanctions. The procedural aspects of the law limit the extent to which it may be arbitrarily applied, just as the procedural rules concerning the arrest of criminal suspects limit the arbitrary use of criminal law as a weapon to oppress the innocent.

Now, there are several possible ways to detect infractions, but by far the most effective for the purposes of a liberal state is to rely wherever possible upon the victim to report a violation of his or her rights. The victim in general is almost assured to be aware of having been wronged<sup>30</sup>, and it is considerably easier simply to transfer that knowledge to law enforcement on their own initiative by registering a complaint, rather than expect law enforcement to rediscover it on their own. However, the victim is still an autonomous being, and can no more be expected to assist the police out of a sense of civic duty than could the perpetrator. Therefore, it is important to ensure that the victim's interests are at least not defeated (and preferably, they would be furthered) if they choose to report the crime. Let us take the offence of assault as a paradigm of just how a good law ought to work.

If I punch you in the nose, I shall have committed the crime of aggravated assault. You, as the victim of this crime, know that an offence has been committed. Indeed, to a certain extent, the legal status of the collision between my fist and your nose as an assault depends upon how you as victim interpret the event. Perhaps you perceive that you tripped and the collision was genuinely your fault, or you feel you deserve it somehow, or even have good reasons for wanting me to adjust your nose. (Consider the physical "harm" of surgery, in which a patient is cut open with a knife, which is in the absence of consent a fairly heinous assault.) But if my intention in punching you is to cause you harm and suffering, then almost by definition your dissatisfaction and therefore awareness of the offence is a

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<sup>30</sup> Of course, murder is an apparent exception to this rule. However, the discovery of a corpse is usually at least as effective as a formal complaint (if not more so) in alerting the authorities and getting the investigative machinery rolling. Alternatively, a missing person report can lead to a murder investigation, if the circumstances of the disappearance warrant. In either case, the first hurdle (knowledge that a particular crime has been committed against a specific victim, within a certain timeframe and locale) to investigation is already passed.

necessary condition for my success. You, if anyone, will be interested in seeing me punished or at least dissuaded from hitting you again. Ideally, you would have nothing to lose and everything to gain by filing a complaint with the police about my behaviour. Thus I, as a potential assailant, may be deterred from striking you, since I know that my doing so provides you with an opportunity to do me legal harm (through legal agencies). Moreover, your opportunity for revenge is (ideally) only possible if I *have* wronged you; you are powerless to sic the authorities on me if I have not actually assaulted you in the first place.

To illustrate the importance of letting the victim report the crime, suppose that well-meaning but misguided legislators, concerned about the number of people being punched in the nose, decided to crack down on it by punishing people found to be sporting broken noses or bruised faces, perhaps by imposing harsh fines intended to deter them from being punched in the first place. As one can well imagine, such a law would be a godsend for malicious assailants who would now be able to inflict legal harms upon their victims as well physical injury, and with near impunity. The sole deterrent to such assaults at this point is the likelihood that one's victim might be able to hit back.<sup>31</sup> The preferred tactic for a person intent on harming a victim in this case would be to punch him first, and then report him to the police for having committed the crime of being punched.

Even if these misguided lawmakers were to try to avoid the latter circumstance by imposing harsh penalties on assailants as well as victims, the law would remain largely ineffective, and assailants would be able to assault people with little fear of the law by the simple expedient of attacking

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<sup>31</sup> This sort of deterrent is somewhat unstable, though, since refraining from hitting someone is no guarantee that they won't hit you anyway. Moreover, it may even give an incentive to hit first, and hard enough to preempt any retaliation.

them in an area without witnesses. The victim could be trusted not to report the crime, for fear of being punished for his own role in it, and so the only way such a law could be enforced effectively would be through constant surveillance of everyone who might punch or be punched by someone else, in the hopes of catching the perpetrators red-handed (and red-nosed). Of course, this surveillance would be prohibitively expensive, as well as unacceptably intrusive.

The contrast between these two cases is intended to demonstrate once again the importance of the detection principle in enforcement of regulations. In the former case, the victim, while not necessarily rewarded for bringing the case to light (apart from the personal satisfaction of seeing his assailant punished), is at least not punished for doing so. In the latter, on the other hand, the victim is subject to further punishment should he attempt any sort of protest, and therefore effectively silenced. While this might make for an attractive statistic to report to the press by driving down the number of reported offences, it would be completely ineffective in reducing the actual number of offences *committed*, and may very probably contribute to an increase, which presumably is contrary to the original intention of the law. In effect, such a law effectively deters victims from reporting the crime, rather than perpetrators from committing it.

Legislators should remember that the laws they create are by nature weapons, and take into account how they may be used and abused. Unlike guns, knives or cudgels, however, one may design a law with much greater subtlety and discretion; while a gun may kill or maim anyone at whom it is fired, a law can be written so that it may only be used by or against certain classes of person. Only murderers are supposed to be vulnerable to the laws against homicide, for example. The important thing to keep in mind is how

the existence of a law will affect the balance of power between potential offenders and their victims. Where the victim is empowered through the retaliatory capabilities of the law, effective deterrence is possible. Where the balance of power is unaffected, the rate of offence is also unlikely to be significantly altered, as we will see in the following chapter.



## *Chapter IV*

### *Discretionary Enforcement and Complaintless Crimes*

When a violation of the law runs counter to the interests of one or more of the parties to the violation (as in the case of assault), the detection principle is usually effective in encouraging compliance with the law by ensuring detection of the offence and making real the threat of legal sanction. Even when the offence is not completely deterred, the fact that the victim is empowered with the ability to launch legal retaliation is often effective in persuading the perpetrator to make amends. However, when the nature of the offence is such that none of the parties directly involved feel their interests to have been violated, effective enforcement can become very nearly impossible. In many such cases, continued efforts at wiping out the behaviour through regulation can create greater problems than they solve, and are therefore better abandoned, however undesirable the behaviour in question may be.

An example of this sort of problem in the live roleplaying game arises with the weapons used by the characters in the game reality. As mentioned in Chapter I, the swords and spears wielded by game characters are represented in the real world with pieces of paper or cardstock, on which are printed all of the relevant statistics (damage inflicted on a successful attack, durability, special effects or limitations on use, etc.) for the

particular weapon the card stands for. In general, this works quite well, and these paper chits can be nearly as prized and respected in the game world as the cherished blade of a knight was in the Middle Ages, and for nearly as good reason, but there is at least one significant obstacle to the suspension of disbelief: a weapon card simply does not have the weight or volume of even a small dagger, let alone a four foot claymore. One can slip a few halberds and other polearms into one's boots, a bundle of spears in one pocket and a selection of shields in the other, and keep a couple of broadswords literally up one's sleeve just in case the spiked ball-and-chain flail in hand is not enough. It is remarkably easy for players to carry enough heavy weaponry to equip an entire army, without even appearing to be armed.

Clearly, one should not be able to conceal large weapons like halberds and claymores on one's person, and it is very hard to justify allowing a character to fight effectively while carrying more than one or two extra weapons at a maximum. There is almost universal agreement that these actions constitute bad roleplaying, and frequently players ask why there is no rule imposing carrying limits to weapon cards.

The answer is that such a rule would be unenforceable, or at least that its enforcement would create greater obstacles to game enjoyment than simply allowing the occasional poor roleplayer to haul around an armoury. This is because the only person who must necessarily know that a player is carrying or concealing more than the allowed number of weapon cards is the player himself, and since presumably he must feel it is in his interests not to be prevented from doing so, he is unlikely to report himself for the infraction. If indeed no one else knows of his concealed weapons (and since they are concealed, this is likely the case), then Referees cannot rely on

complaints as an effective detection system. Without some other measures to detect infractions, only those violations which are not sufficiently surreptitious will be punished, and these will tend to be accidental or inadvertent technical violations rather than the genuine bad-faith poor roleplaying the rule is intended to curb. Worse, the threat of punishment may force otherwise sincere roleplayers to slip into a cheating-mentality as they cover up their occasional unintentional infractions.

What of these other measures? It is possible, of course, to institute periodic spot-checks of players by referees in the hopes of catching offenders red-handed. This would most certainly interrupt the dramatic flow of the game, however, and do greater damage to the players' enjoyment than any arms smugglers such searches might catch, especially given how intrusive these measure would have to be to eliminate all the possible places a dishonest player might hide a sheet of paper.

It might be feasible to introduce a rule rendering invalid any weapon card which has been folded, thus limiting the possibilities for concealment and hopefully allowing less thorough spot-checks. In practice, this is not a particularly desirable option, because of the tremendous difficulty involved in keeping chits in pristine condition while running through the woods. The chance to disarm one's opponent is a strong enough incentive for a player to seize on any crease or blemish on a card as evidence of concealment, and the zealous destruction of weapons that would result would be disastrous to players' overall enjoyment of the game.

What if the spot checks were only applied when referees had reason to suspect a violation, perhaps based on a tip from another player? This might work to reduce the number of unnecessary searches of innocent players, but at the same time it would introduce new avenues for abuse.

First, player informants might be tempted to use their ability to instigate spot-checks for purposes other than simply catching cheaters, such as delaying a rival or frustrating legitimate efforts to conceal items other than weapons.<sup>32</sup> Second, since the spot check would be at the discretion of the referee, personal prejudices can begin to play a greater role in the enforcement of the rules, compromising impartiality. Some male referees may be more inclined to stop and search female players than males, as an arbitrary example.

The solution to the weapon carrying problem is more likely to be achieved through technical innovation than through enforcement strategy alone. The most promising solution is to require more obvious physical representations of gameworld items than mere slips of paper. Ideally full-sized mock weapons of cardboard or foam rubber<sup>33</sup> could be used, with the weapon information included on a card attached to the item. This would effectively remove the problem entirely, by making excess weapons difficult to carry and impossible to conceal in the first place.

Fortunately, the only obstacle to this solution is the additional time and expense in creating the props. Game designers have somewhat more control over the nature of game reality than we do over the real world, however; while it is possible for the game designers to decree that weapon cards lacking appropriate props need not be recognised by opponents, no amount of legislation can render a real-world pistol harmless by virtue of

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<sup>32</sup> And, as mentioned in Chapter 2, the better roleplayers are disinclined to complain in the first place.

<sup>33</sup> More realistic weapons are to be avoided for safety reasons. To allow for situations where an intrepid hero sneaks up behind a guard and clubs him unconscious, there is a special skill within the game called Surprise Attack which allows a character to incapacitate or kill an unsuspecting victim, and which requires the attacker to touch the victim on the head or torso with the weapon card without the victim making any effort to stop him. Weapon props of greater substance than cardboard or foam rubber could make this dangerous.

its concealability. In the real world, we must take Natural Law as a given and work within it. Barring revolutionary technological developments, that means that enforcement policies intended to deter crimes in which there is no complainant often face insurmountable difficulties.

Whether or not such a law is enforceable usually depends upon how easy it is to conceal the proscribed activity. Public nudity, for example, is by definition unconcealable; if one conceals one's nudity, one is no longer nude, and laws against public nudity require very little in the way of special surveillance to enforce. Similarly, most traffic violations are reasonably conspicuous (in that they are committed in plain sight on public streets), and accordingly the chance of being caught speeding is high enough that most drivers take it seriously. Other sorts of crimes, especially those involving sexuality or drugs, generally tend to take place in more secluded environments, and therefore cannot be detected without extraordinarily severe measures.

The hazards of policies of the latter type are perhaps best illustrated in the War on Drugs. Illicit drug use is an excellent example of a so-called "victimless" crime, although as Christina Jacqueline Johns points out, a more accurate term would be "complaintless"<sup>34</sup>. Certainly a great many lives are ruined through addiction and dependency, and it would be wrong not to say that these people are victims, especially considering that they are so often deliberately lured into drug use by the dealers who profit from their addiction. What is important from the perspective of detection is that of the parties directly involved in illegal drugs, namely the dealers and the users, neither has any *prima facie* interest in filing a complaint with police.

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<sup>34</sup>Johns, Christina Jacqueline: Power, Ideology and the War on Drugs: Nothing Succeeds Like Failure (Praeger Publishers, New York, 1992), page 1.

Unlike a case of assault, which takes place against the will of the victim, a drug deal does not usually happen unless both buyer and seller consent to the transaction. While the buyer might resent unfair prices, and indeed may feel trapped by his addiction, the particular occasion of the deal itself is essentially dependent upon his own wish to buy drugs.

In the interests of simplicity, however, we may limit our discussion to the single offence of possession, and leave aside for the time being crimes such as trafficking which require at least two participants. In any case, possession tends to be the most common drug-related charge, as it includes the crime of possession for the purposes of trafficking, and is moreover basic to any activity involving illicit drugs; one cannot produce, sell, buy or use substances if one does not at some point possess them, so (in principle at least) banning possession will effectively criminalize the rest.

Since it is quite possible that an individual might grow, find or manufacture illegal drugs without the assistance or knowledge of any other person, the offence of possession does not necessarily entail the existence of a potential witness other than the perpetrator himself, who will of course in most instances have no interest in seeking punishment, and will therefore be quite unlikely to volunteer his knowledge of the crime to the authorities. Law enforcement agencies are therefore at a significant disadvantage in attempting to detect infractions, since most illicit substances are also as a matter of fact relatively easy to conceal. Legislators here lack the advantage of game designers; where game designers might be able to defeat the problem of concealed weapons by enacting a rule disabling any game weapon that is not represented by a full-size prop, legislation can never hope to take away the psychoactive effect of insufficiently conspicuous substances. Curiously, however, attempts to enforce the law may have the

indirect effect of making drugs both more psychoactive and more concealable.

As one would naturally expect, the more conspicuous substances tend to be the ones which are more frequently caught by law enforcement agents. Marijuana is, dollar for dollar, more voluminous than cocaine or heroin, and therefore it is harder to hide \$1000 worth of marijuana than \$1000 worth of either of the two harder drugs. Predictably, marijuana is more often affected by law enforcement actions<sup>35</sup>, and not surprisingly, this also means that it is more profitable (and less risky) to deal in cocaine or heroin, especially so when one includes the additional demand addiction creates for these drugs. Furthermore, if the psychoactive components can be extracted and shipped in a concentrated form to be reconstituted at the point of sale or use, more efficient use can be made of limited space available for smuggling. Thus, law enforcement efforts inadvertently create an economic selection pressure favouring more concentrated, (and therefore more dangerous) drugs.<sup>36</sup>

This is but one manifestation of a serious danger associated with surveillance-based enforcement strategies: when there is a positive correlation between the harm of an offence and the degree of secrecy surrounding it, the law encourages greater secrecy and thus greater harm<sup>37</sup>, as we saw with the problem of hiding weapon cards in the live

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<sup>35</sup> To be sure, it is also far more widely used, which certainly contributes greatly to its higher arrest rate. However, even once this is taken into account, the relatively harmless marijuana is still disproportionately affected by law enforcement efforts. See Kenneth J. Meier's *The Politics of Sin: Drugs, Alcohol and Public Policy* (M.E. Sharpe, 1994), p. 90.

<sup>36</sup> It has been suggested that crack cocaine was developed for precisely this reason. Similarly, an epidemic of heroin overdoses in Vancouver in 1994 was attributed to the appearance of a new and unprecedentedly pure form of the drug, also developed in response to the economic demands of smuggling.

<sup>37</sup> Of course, this works in reverse, also: when greater secrecy results in *less* harm, such laws can work very well indeed. If public nudity does more "harm" than private nudity, then indecent exposure laws are a good example of this. More on this in Chapter 5.

roleplaying game, where it is the most benign inadvertent offenses which are most likely to be caught, while the most egregious acts of deliberate concealment go undetected. This particular danger appears in many forms in the War on Drugs. For example, in addition to indirectly promoting purer and thus deadlier drugs, the policy of “zero tolerance” effectively deters addicts from seeking needed medical help and perhaps quitting their habit. Indeed, fear of arrest can isolate addicts from all the social services and supports enjoyed by mainstream society, making them vulnerable to harms unrelated to drugs. Addicts may come to be seen as unwilling to report robbery or assault, for example, and may therefore become especially inviting targets for these crimes.

As illicit drugs go further underground, the measures needed to detect them become more and more draconian, and impose greater costs upon society, especially as regards civil liberties and the security of one’s person. One problem is that intrusive surveillance measures subvert the presumption of innocence. In crimes which are initially detected through a complaint, there are certain known particulars (who is the victim, where and when did the offence take place, and so forth); investigators start with a crime and look for suspects. The detaining and questioning of those suspects may be justified on the grounds that we know *someone* is guilty, and it is only a matter of finding out who. With most cases of possession, this process is reversed; investigators begin with a suspect, and then attempt to discover whether or not a crime has been committed.

One might object that in fact the investigators *do* know that a crime has been or is being committed, for it would be ridiculous to deny that at any given moment, thousands of people are in possession of illegal drugs, and the investigators are simply trying to find out who some of those people are.



There is a crucial difference, however. We know, after all, that murders take place, and that on any given day there may be thousands of unsolved murder cases open across the continent. Nonetheless, we usually do not simply pick suspicious looking people randomly off the street and investigate to see if they might be murderers, unless we have a specific case or cases in mind. The unsolved murders are fairly definite in number, and if our suspect is not guilty of any of the murders we know to have taken place, he is probably not guilty of any murder at all, and we have no justification in continuing to probe in the hopes of finding some as yet undiscovered murder for which he is responsible. To charge someone with murder, we must be able to specify whom he killed; if there is no victim, there is no crime. If perchance all of the murder cases on the books today were solved and their perpetrators put behind bars, there would be no grounds whatsoever for suspecting that a random person on the street should be investigated as a possible murderer. With drug possession, on the other hand, we only know as a matter of statistical probability that there is a non-zero amount of controlled substance out there somewhere. Except in cases where a particular shipment of a known quantity of heroin is being traced by the authorities, or when for example a bag of cocaine is seen falling to the ground from among a cluster of people standing on a street corner as a policeman approaches, there is usually no specific instance of possession to be investigated. Or if there is, it is only the hypothetical instance of the current suspect possessing a postulated specimen of drugs, which may not actually exist. The number of potential murderers to be arrested is a function of the number of reported victims, while the number of potential drug-possessors is precisely equal to the population. Thus, in effect, *everyone* is a potential suspect for his or her own crime which may

or may not even have occurred.

While all citizens are presumed innocent until proven guilty, it is also true that persons who are suspected of crimes can be subject to more extensive and intrusive searches than those who are not. Since everyone is a potential suspect for the crime of drug possession, it follows that law enforcement authorities would be given broader discretionary powers of search and seizure. The harm to society from this alone is evident, as citizens are subjected to the humiliation and inconvenience of searches for which they must also pay through taxes. In addition, though, the discretion afforded the authorities can create or exacerbate greater social ills in several ways, in a large part by exaggerating the power imbalance between members of the society. This invariably works to the detriment of the least powerful.

There is ample historical evidence that drug laws have been enacted for the purpose of exerting greater control over ethnic minority populations. According to Johns, "Prejudice against the Chinese was a large factor behind widespread legislation prohibiting opium smoking in the latter nineteenth century."<sup>38</sup> Other forms of opium use were not similarly proscribed; "...smoking opium was perceived to be a working-class Chinese habit."<sup>39</sup> "...Mexican immigrants were the perceived source of marijuana, Puerto Ricans and blacks were used as examples in the 1950s drug law debates, and crack, a drug used primarily by blacks, has been the subject of higher penalties than other forms of cocaine."<sup>40</sup> In effect, such laws can be

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<sup>38</sup> Johns, p. 74.

<sup>39</sup> Meier, p. 23.

<sup>40</sup> Meier, p. 71. As well, the United States Supreme Court is currently considering *United States vs. Armstrong*, No. 95-157, and whether or not Federal prosecutors must explain the racial disparity in crack prosecutions. (*New York Times*, October 31, 1995, A1.)

an effective way to punish people for an "offence" which cannot easily be concealed, but against which it is politically or constitutionally impossible to enact laws directly, i.e. the colour of their skin. But even assuming that drug legislation is motivated by the most tolerant and progressive of values, laws that make everyone a potential suspect tend to have a powerful amplifying effect on any existing prejudices that may be held by individual members of the law enforcement community.

Allowing investigators to choose suspects at their own discretion, rather than relying upon a complaint, means that the personal prejudices of the officers will inevitably play a larger role in the way the law is enforced in practice. This need not reflect any outright bigotry or desire to persecute a particular race or other identifiable group (although such bigotry can certainly be indulged quite easily under these systems); it may simply be a slightly higher tendency to be suspicious of members of one group over those of another. Worse, such prejudices can rapidly become empirically self-validating. An agent with even a mild distrust of blacks, for instance, will tend to stop and question black persons more often and more thoroughly than he would others. Even assuming that the chances any given individual is carrying drugs is the same for all races, this officer will find as a matter of fact that a disproportionate number of his arrests for possession are of black suspects. If he does not take into account the disproportionate rate at which he selects his suspects by race, he may come to the conclusion that blacks are indeed more likely to be found in possession of drugs, simply on the basis that they constitute such a large proportion of his total arrests. He will therefore tend to continue in his unfounded suspicions, and what's more, the empirical arrest data he provides may easily convince other officers to look more suspiciously at

black citizens.<sup>41</sup> Indeed, many law enforcement agencies in the United States actively use “courier profiles” to aid in the selection of persons to be searched; such profiles very often include race as an indicator.<sup>42</sup>

In addition to the likelihood that unjust prejudices will be effectively (even if unintentionally) institutionalised, reinforced and perpetuated, highly discretionary surveillance creates obvious opportunities for deliberate abuse as well. Investigators may on occasion find it in their personal interest to pretend suspicion of a person, whether for the purposes of blackmail or sheer malicious harassment. When mere suspicion is sufficient warrant to instigate a search, it becomes the responsibility of the victim of a groundless search to prove the absence of a legitimate suspicion. The difficulty of this task means that there is little or no deterrent to protect innocent persons from arbitrary search and seizure.<sup>43</sup> Moreover, officers may often be able to protect themselves against complaints by planting and then pretending to find controlled substances on the suspect anyway; if drugs are “found”, then the search obviously *was* warranted. (The victim will most certainly be aware of the subterfuge, but will usually find it very difficult to prove what happened, especially since guilty suspects are just as likely to protest that they were framed, and since the concept of innocent-until-proven-guilty may continue to be applied to officers accused of wrongdoing long after it has been suspended for drug suspects. It then

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<sup>41</sup> Meier reports that “States with more black residents have higher arrest rates for all drugs, serious drugs, sale of drugs and possession of drugs.” (p.114) The same is largely true of states with higher Hispanic populations. He goes on to say that this is “...consistent with the notion that law enforcement agencies are more likely to arrest minorities for drug violations. This higher arrest rate might result from either racial targeting of enforcement or more contact between police and minorities.”

<sup>42</sup> Johns, p. 91

<sup>43</sup> To be sure, there are supposed to be legal guarantees against arbitrary search and seizure, but these can be suspended under martial law. Perhaps it is no accident that the current enforcement campaign is called the *War on Drugs*.

becomes a matter of which person's testimony has more credibility in court, and police officers often start out with an advantage in this regard.)

At the same time, in most cases there is very little to prevent an officer from *failing* to search a person who might actually merit suspicion. Given the lucrative nature of the illicit drug trade, dealers can often provide enough pecuniary incentive for officers to look the other way (more so in areas where officers are paid inadequate salaries or have reason to fear being laid off). Since there is no complaint on hand from a victim and thus no formal record that this particular instance of possession has occurred, the bribed agent will rarely have to answer for his failure to search this one suspect. It is no secret that drug enforcement is rife with corruption<sup>44</sup>, just as Prohibition was in the United States in the 1920s. Similar corruption can be found wherever discretionary enforcement or control of a lucrative trade exists: drugs, weapons, pornography, blue jeans, exit visas...

It is not immediately clear whether or not the private recreational use of drugs is a matter in which the state has any legitimate interest, especially when policies aimed at controlling drugs are so often based on a moral conviction that the use of certain drugs is simply wrong, rather than an impartial evaluation of the harms and benefits involved.<sup>45</sup> It is less controversial that corruption produces definite harms of its own, in addition to exacerbating existing ones. Thus the state should undoubtedly be willing to commit significant resources to combating corruption wherever necessary.

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<sup>44</sup> See especially Johns, pp 19-24

<sup>45</sup> If this were not the case, then alcohol and tobacco would be illegal, and marijuana would not. According to estimates in Ostrowski, 1989:47, quoted in the preface to Meier's book, tobacco alone accounts for roughly 390,000 deaths per year, or 650 deaths for every 100,000 users, while marijuana use is blamed for no deaths at all. Heroin and cocaine kill respectively 80 and 4 out of every 100,000 users.

Unfortunately, crimes like bribery present exactly the same obstacles to enforcement that drug transactions do. In principle, both the party who offers the bribe and the party who accepts it gain utility from the deal. In most cases, neither will have any interest in alerting the authorities. Worse, unless the entire transaction is captured on tape or the details of the agreement are otherwise recorded, there is seldom any clear proof that bribery has in fact taken place; the possession of money itself is usually no crime, and it is extremely difficult to prove that an officer's dereliction of duty in a discretionary matter is anything more criminal than an unfortunate chance decision to look in the wrong direction at the wrong time. It can therefore be even more difficult to deter corruption than it is to make a dent in the use of illicit drugs.

How, then, can the state deal with these sorts of crimes? In the case of corruption, some degree of vigilance will probably always be necessary, but since such measures decrease in effectiveness as corruption becomes more widespread, non-deterrent means of prevention should also be sought out to keep the problem manageably small to begin with. In particular, the conditions which breed corruption should be avoided wherever possible, and that means legislators should think very carefully before enacting laws against practices which can only be detected through active and discretionary surveillance by enforcement agencies.

So far as the War on Drugs is concerned, it is clear that the current policy of interdiction and deterrence is not working, and indeed there is good reason to think that no policy at all would be better than the one we have. This is not to say that drugs do no harm, but rather that the harm they do now, combined with the additional harms that are attributable to enforcement efforts, are certainly greater than the harms that would result

from drug use alone in the absence of such laws. It may even be that the higher profits associated with the illegal drug trade provide a strong incentive for drug dealers to encourage potential users to take up the habit; without their efforts, drug addiction and its associated harms might well be far less prevalent.<sup>46</sup> Moreover, remediation of those harms would be greatly facilitated without the legal threats which presently drive drug culture underground.

If we exclude the harms associated with the *illegality* of drug use (corruption, violence, erosion of civil rights, etc.), we find that the real problems inherent in the recreational use of narcotics are ultimately health-related. A habitual drug user may put other persons at risk, perhaps by driving or performing surgery while intoxicated, but the same is true of anyone who suffers from a medical condition that might impair performance of certain critical tasks (e.g. blindness, epilepsy). The fact that a drug addict's condition is largely self-inflicted is moot; many other illnesses (e.g. black lung, skin cancer, tennis elbow) are traceable to volitional actions or lifestyle choices as well, and yet we do not balk at making the appropriate accommodations for patients with these conditions on that account.

Treating drug abuse as a health problem rather than a moral evil would have the advantage of allowing the allocation of assistance to be determined by the particular interests of individual citizens, as we saw in Chapter III. It may well be in the interests of certain individuals not to seek

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<sup>46</sup> In one English municipality, the price competition of a program offering free heroin prescriptions to addicts has driven dealers out of the community, and the result is a remarkably low rate of addiction. Without the aggressive promotion of the dealers, very few people become addicted, and with legitimate access to medical advice along with free, safe drugs, existing addicts are much likelier to be successful in kicking the habit. It is interesting to speculate how long tobacco advertising would continue if our government were to offer prescriptions for free cigarettes...

treatment for some conditions, after all. For some, infertility is a tragic illness in dire need of an immediate cure, while others might count themselves lucky to be able to lead a sexually active lifestyle without having to worry about the possibility of an unwanted pregnancy. Likewise, most people would probably find drug addiction to be an unacceptable burden, and would seek assistance in freeing themselves from it if only that assistance were available, but there may be some individuals who might consider the benefits of drug use to be worthwhile. So long as society is prepared to make appropriate allowances for the various abilities and disabilities of its members, whether by making all public buildings wheelchair-accessible or by imposing sensible and fair physical requirements for certain kinds of responsibilities<sup>47</sup>, it seems reasonable to suggest that the decriminalisation of drugs would be on the whole a step in the right direction.

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<sup>47</sup> Such as requiring minimum standards of visual acuity before granting a driver's license, or making it unlawful to drive while intoxicated, for example.



## *Chapter V*

### *Blaming the Victim*

So far as drug abuse itself is concerned, the laws involved in drug interdiction generally represent a fairly benign misapplication of the detection principle. Since the sale of drugs is a transaction from which both parties derive utility, and moreover since both would likely derive disutility from their clandestine business coming to light, the balance of power between them remains more or less equal. The only way to upset this balance of interests is to introduce a positive incentive to either party to report the deal to the authorities, but it is doubtful whether such a solution would be politically viable. In any case, the reward offered would not only have to be enough to outweigh the informant's lost utility from the illicit transaction, but also to compensate for all the negative social costs associated with the betrayal of confidence involved, and this may be a price higher than society is willing to pay directly to a participant in the very behaviour it is trying to eradicate.

The civil rights abuses deriving from the War on Drugs, on the other hand, are a more sinister example of a perverse misapplication of the detection principle, perverse because whereas there is no potential informant available for drug offenses themselves and so the detection principle simply cannot be applied to those cases, the victims of corrupt

practices such as blackmail and extortion who might otherwise be inclined to report the abuse are at greater risk of punishment if they complain. Nonetheless, insofar as the policy is aimed at curtailing drugs and not corruption *per se*, the resultant corruption could conceivably be written off as an unfortunate side effect of an otherwise moderately effective treatment (that is, assuming enforcement measures actually did have some useful effect in reducing drug use). And in any case, we might be tempted to write off any abuse as justified anyway; the victims should not have been carrying drugs in the first place, so they deserve what they get if they are robbed or blackmailed as a result.

This sort of rationalisation is somewhat less plausible, however, in the case of the *zina* laws of Pakistan, which are derived from the Islamic laws of the *Koran*, in particular the following passages:

“If any of your women commit fornication, call in four witnesses from among yourselves against them; if they testify to their guilt confine them to their houses till death overtakes them or till God finds another way for them.”<sup>48</sup>

“The adulterer and the adulteress shall each be given a hundred lashes.”<sup>49</sup>

“Those that defame honourable women and cannot produce four witnesses shall be given eighty lashes.”<sup>50</sup>

Vern S. Bullough points out that “The effect of this was to let the woman off without punishment so long as she avoided prostituting herself in a public place because otherwise it would be impossible to get four witnesses.”<sup>51</sup> While Bullough is talking specifically about prostitutes, the law as stated would have similarly protected any woman from damaging

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<sup>48</sup> *The Koran*, (Penguin Classics, translated by N.J. Dawood, 1993) 4:15 p.62

<sup>49</sup> *ibid.* 24:1 (p. 246)

<sup>50</sup> *ibid.* 24:4 (p. 246)

<sup>51</sup> Vern S. Bullough, *The History of Prostitution*, 1964 University Books.

accusations for any but the most flagrant behaviour. Ultimately, Koranic law seems to have been aimed, intentionally or not, more at instilling a sense of decorum into Muslim society than trying futilely to eradicate adultery, since it would encourage fornicators to be discreet while curtailing idle and unsupported rumourmongering about other people's private affairs.

This might work fairly well so long as it were applied only to voluntary or consensual interactions. Unfortunately, as the law is currently applied in Pakistan, *zina* encompasses any sexual intercourse (defined in terms of actual physical penetration) occurring out of wedlock whatsoever, including rape. Thus a woman who has been raped could well face the punishment meted out to those found guilty of adultery or fornication, which in the case of married offenders can go as high as death by stoning (somewhat beyond the house arrest prescribed in the *Koran*). So long as the rape takes place out of the sight of four adult male Muslims, though, she is not likely to be prosecuted — unless she files a complaint (or, in some cases, becomes pregnant), in which case the very fact of her legal complaint necessarily constitutes a confession of *zina*! Since she would need to produce four male witnesses to prove a case of rape, and it is almost inconceivable that males willing to testify would not have intervened to prevent the rape itself, it is virtually impossible to prosecute rapists in Pakistan, but women are frequently charged with *zina*, and very often for the “crime” of having been raped. If the reduction of rape is an objective of these laws, then this is precisely the wrong way to go about it. Obviously, accurate figures are difficult to come by for a country in which the reporting of a crime is deterred more effectively than the crime itself, but there are reasons indeed for believing that the actual incidence of rape is at

least as common in Pakistan as anywhere else, if not more so.<sup>52</sup>

Prostitutes in the West face a similar predicament in that they, too, are largely deprived of legal recourse for the abuse and exploitation they suffer. Moreover, while it is difficult to say whether or not *zina* laws actually cause rape, it is clear that to some extent the laws prohibiting prostitution are responsible for a large part of the degradation for which prostitution is blamed.

Strictly speaking, of course, anti-prostitution laws might more properly be classified along with anti-drug laws, since the act of prostitution itself is by and large a consensual matter. Notwithstanding the social and economic factors that force many unwilling women to become prostitutes<sup>53</sup>, the basic nature of the business can plausibly be described as a voluntary exchange of money for services rendered. As with drugs, both parties gain utility from the transaction, and neither is likely to have any incentive to participate with official efforts to deter it. Worse from the perspective of prosecution, there is rarely if ever any clear evidence that a crime has been committed, since the two component acts of prostitution (sex and the exchange of money) are by themselves perfectly within the law (notwithstanding the existence in some jurisdictions of adultery statutes<sup>54</sup>, which again suffer from the detection principle). At least with drugs, the

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<sup>52</sup> For more on this topic, see Jan Goodwin, *Price of Honor*, Little, Brown & Company, 1994. See especially pages 49-54.

<sup>53</sup> I do not mean to downplay the importance of these factors in determining the voluntariness of prostitution. However, the empirical fact that in practice many, most or even all prostitutes are forced into the business against their will by circumstances does not mean that the basic act itself is inherently coercive, or else so is most employment, for it is unlikely that people would choose to flip burgers at McDonald's unless they needed the money.

<sup>54</sup> Bullough (p.75) mentions that Islam allows a way around this by recognising *mut'a*, temporary marriages for fixed, often short, terms.

mere presence of an illicit substance is sufficient evidence to indicate (or indeed, to constitute) an offence; with prostitution, neither the presence of money nor the fact of sexual activity is in itself a case. Nor even does the transfer of money immediately before, during or after a sexual act necessarily mean that prostitution is taking place; the money must be offered *in exchange* for the sex in order for the interaction to qualify as prostitution. This can only be proven if the perpetrators are actually caught in the act of negotiating a price, which is probably part of the reason that it is not prostitution itself which is illegal in many jurisdictions, but communication for the purposes of prostitution.<sup>55</sup> This usually requires police to pose either as prostitutes or as prospective clients and then arrest anyone who propositions them, which is an inherently discretionary enforcement strategy, and therefore produces a great potential for corruption<sup>56</sup>, just as in the War on Drugs. In the respect that both prostitutes and their clients are subject to the threat of arrest in this regard, the balance of power between them is unaffected, and attempts at interdiction have the same general results as for any other complaintless crime. The same may be said of a variety of laws sometimes used to suppress street prostitution, such as anti-loitering and public decency ordinances.

Predictably, then, such legislation fails to deter prostitution effectively, although it certainly transforms the nature of the activity, in much the same way that the drug trade is driven underground. This has many unfortunate consequences, of which official corruption is only one.

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<sup>55</sup> Ostensibly, of course, the reason for laws against soliciting is to protect citizens from being harassed on the street by prostitutes or their prospective clients.

<sup>56</sup> See Richard Symanski's The Immoral Landscape: Female Prostitution in Western Societies (Butterworth & Company, 1981)

The secrecy surrounding any illicit market creates a climate in which unofficial abuses flourish as well, since reliable information on which prostitutes or clients are reputable is hard to come by, and there is little or no accountability. Another danger is that illegality can trap people who might otherwise wish to leave the profession; once one has a criminal record, it can be exceedingly difficult to find legitimate employment, and prostitution becomes for many the only source of income available. Moreover, once a prostitute begins to identify herself as a criminal, there may be less of an obstacle to her adopting other criminal activities.

None of these effects are significantly different from what one finds in the illegal drug trade, or indeed any black market. However, a number of factors unique to prostitution combine in such a way that in practice the laws prohibiting it ultimately end up punishing the victims.

First, the law has traditionally been harsher with prostitutes than with the men who patronise them.<sup>57</sup> In fact, prior to 1919, only in the state of Indiana was it actually illegal to make use of a prostitute's services. That men have not much been punished for doing so is evidenced by the etymology of the term "john"; while prostitutes' names were duly recorded for posterity upon arrest, the client's name was often entered as "John Doe", thus ensuring that no criminal stigma might follow him through the rest of his life for what was regarded as a temporary indiscretion (although, ironically, while the use of prostitutes is typically a lifelong habit for men, in the U.S. the average number of years a woman spends in the profession is four years.)<sup>58</sup>

One effect of this disproportionate allocation of legal culpability is that

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<sup>57</sup> Symanski, p. 83

<sup>58</sup> Priscilla Alexander; (1986); "Customer Violence against Prostitutes"; cited in Jean D'Cunha's The Legalisation of Prostitution (1991)

the client is automatically put in a position of relative power, in that he has available to him the threat of official sanction to enforce his wishes, while the prostitute has no such recourse. For any other commodity, this might have little practical effect other than to drive down the price of the good or service, but prostitution is a different matter. This is because in many cases, what the prostitute sells is not just sex, but a sense of power which is only partly sexual. For those men who feel a need to enhance their virility through domination of women, the fact that a prostitute is especially disempowered (politically as well as economically) makes her a particularly desirable target, thus contributing to their demand for prostitution in the first place. While it is certainly true that not all men who go to prostitutes do so for this reason, the psychological association between virility and aggression is widespread enough to be significant here. Under this analysis, prostitution is a point (or range of points) along a continuum that leads eventually to rape, and thus laws which make it a crime to be a prostitute are not different in kind from laws which punish women for being raped.

Secondly, even in jurisdictions where both parties to the transaction are held to be equally guilty before the law, it is still true that the prostitute bears the lion's share of the moral condemnation of the community. As a matter of common usage, "whore" is among the most derisive epithets one might apply to a woman, while baby boys are still innocently named "John" by adoring parents. Recently an instructor at Ryerson Polytechnic was suspended following his admission that he works part-time as a prostitute; it is doubtful anyone would have taken notice if he had admitted only to being a customer...

Since prostitutes are so widely seen as morally blameworthy, it is

unsurprising that many people consider them to be deserving of punishment besides. And, since johns are not subject to the same degree of condemnation, some feel this gives them license to beat, rape or even kill prostitutes as a form of vigilante justice, perhaps even reasoning that their initiative in punishing the prostitute counts to atone for whatever guilt they may have earned for their contact with her in the first place. As well, since the victimised prostitute can expect little sympathy from the police in a society which holds these attitudes, she may be less likely to report the assault against her, or if she does report it, she is less likely to gain the assistance of the state in prosecuting her assailant. So, whether prostitution laws treat the prostitute and the client equally or not, the almost universally established attitude that prostitutes are worse than their clients means that in practice, prostitutes will continue to be disempowered with respect to their clients in either case.

Moreover, even in a hypothetical society in which prostitute and client were genuinely held to be equally culpable legally and morally, the physical differences between the sexes would ensure that anti-prostitution laws would disproportionately affect (female) prostitutes. There is a certain inherent risk of assault in any profession that exposes women to intimate and unsupervised contact with unknown men, but in the case of prostitution this risk is vastly exacerbated, in part because of the psychological association between sex and male aggression, but also because as criminals, prostitutes are often unwilling to seek police protection, and are therefore safer targets from the assailant's perspective of avoiding punishment. In principle, the law is supposed to protect everyone, criminals included, from assault, but the fact remains that



prostitutes continue to suffer disproportionately in this regard.<sup>59</sup>

Finally, treating prostitution as a criminal enterprise disempowers prostitutes by depriving them of the legal means to enforce their contracts. There is therefore nothing in the law that can be used to prevent a john from refusing to pay after receiving the prostitute's services. In theory, of course, this means that the client cannot appeal to the courts to secure for him the services for which he has paid either, and indeed there are many examples of schemes used by prostitutes to defraud would-be customers of their money.<sup>60</sup> The law's refusal to recognise prostitution contracts as legally binding permits this sort of abuse on both sides, and in essence represents an island of anarchy in the civil state, an arena governed only by the Law of the Jungle, where one is left to one's own devices in the protection of interests. Prostitutes and clients are thus free to cheat and defraud one another without opportunity for legal redress.

Now, this may on the face of it seem an elegant solution, if the state is committed to the idea that people should be deterred from engaging in prostitution at all, since the activity then carries a substantial risk of natural punishment without the need for active state intervention; if one gets involved with prostitution, one is very likely to get cheated. The trouble appears with the other side of the coin; if one is looking for opportunities to enrich oneself by cheating others with impunity, prostitution becomes an obvious choice. As well, people who think they are smart, tough, or lucky<sup>61</sup> enough to avoid being cheated will not be deterred, and of course, those in deperate economic straits will continue to have little choice but to turn to

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<sup>59</sup> Symanski, p.52

<sup>60</sup> Symanski, pp 220-225

<sup>61</sup> That there are many such people can be shown by the enormous popularity of lotteries.

prostitution.

In any case, the simple fact that men tend in general to be physically stronger than women means that, all other things being equal, men will have an immediate advantage in this dog-eat-dog environment. While physical intimidation or violence certainly remain illegal even in this context, in practice they will tend to play a significant role in determining the outcome of prostitution negotiations, simply because the threat of physical harm is relatively immediate and credible, compared to the likelihood that the assailant will eventually face punishment (which itself may be of little comfort to the victim of the assault). Moreover, given the atmosphere of deceit surrounding these illicit contracts, the credibility of the victim as a witness can be easily called into question, and it can be next to impossible for her to prove that an uttered or implied threat of violence actually took place.

Thus, to counteract the clients' natural advantage in upholding their own interests under illicit contracts, an economic niche appears for extralegal entrepreneurs to press the interests of the supply side and offer some degree of protection to the prostitute. This "protection" does not come without a price, of course, and since pimps are already operating outside of the law, there is little reason to expect them to adhere to the conventions of labour relations that apply to legitimate businesses. It is not uncommon, then, for pimps to rely on such means as drug addiction, emotional dependency and psychological and physical violence to dominate and exploit their workers. These and other tactics used by pimps are themselves illegal, to be sure, but the detection principle is again foiled because the victims of this exploitation (the prostitutes) usually reason that they are better off with their pimps than without them, and are therefore effectively

deterred from complaining about them to the authorities for fear of being left completely to the mercy of the johns. To some extent, this is a rational choice in that a pimp has at least some interest in maintaining the prostitute's long(er) term productivity, whereas the john's interest is in immediate gratification without any regard for her future beyond that; she may be more immediately expendable to the latter.

The irony of all this is that anti-prostitution measures are so often justified on the grounds that they are intended to protect women from a degrading and exploitive industry, when the truth is that it is precisely those measures which contribute to making the industry just so dehumanising. Unfortunately, this argument is self-validating; the more we enact measures to fight prostitution, the more brutal it becomes, and subsequently we have ever more reason to wish to stamp it out.

Many have argued that the way to deal with this problem is to legalise prostitution, to turn it into a legitimate business. This, they claim, would have the advantage of enabling authorities both to collect taxes from a trade worth billions of dollars a year, and to require regular health inspections to prevent the spread of sexually transmitted disease, as well as ensuring the safety of the prostitutes themselves by making practical more vigorous prosecution of their abusers and assailants.

There are, however, serious problems with such an approach. For one thing, it would require tremendous political courage to introduce any such legislation, since it would be so easy to paint this as a positive endorsement of the practice of prostitution. Indeed, to a certain extent, this charge would be true in the sense that the state would then be actively involved in the industry, not just by virtue of the tax revenues collected from it but by actually granting explicit approval to practice prostitution to those

women who passed the requisite examinations.

On a practical level, though, any attempt at regulating prostitution that fails to work directly to the advantage of the participants will ultimately run up against the detection principle, given the nature of the act itself. The very same things that make it so difficult to catch prostitutes and their clients under current laws would continue to apply to any effort to catch unlicensed prostitutes, so there would be no immediate advantage to registering in the first place. Indeed, there would undoubtedly be disadvantages; in addition to the sheer inconvenience of dealing with bureaucrats and paperwork when one could be out earning money, there would very likely be a fee for the health inspection which, if failed, could also impose significant costs on the prostitute. Perhaps the only way such a system could work would be through an advertising campaign aimed at the clients to create a demand for certified and approved prostitutes, but this is politically improbable, to say the least.

Rather, it seems that a more effective solution would be simply to decriminalise prostitution entirely<sup>62</sup> and treat the transaction between prostitute and client as a private matter between two individuals, subject to the same general laws that govern all other interactions. Both parties to the exchange would then be able to appeal to the courts to enforce the terms of their contract in case of disputes, and both would enjoy more fully the legal protections against assault, theft, and other abuses. As well, the atmosphere of secrecy would be largely removed and with it, the better part of the corruption and graft that comes with any discretionary system of enforcement. Finally, the natural mechanisms of the free market would be allowed to produce standards of quality and price, which would be to the

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<sup>62</sup> In 1958, the United Nations passed a resolution calling for just this.

benefit of customers as well as the prostitutes themselves.

While anti-prostitution laws may enhance the demand for prostitution to some extent, it would be naïve to think that prostitution would disappear in the absence of those laws. Though the laws against prostitution are certainly responsible for much or even most of the more degrading aspects of the industry, they can hardly be blamed for its existence. Sometimes, however, a perverse misapplication of the detection principle can generate conditions that strongly promote the very activity the law is intended to curb , as can be seen in the commercial exploitation of illegal immigrants.

There is a natural tendency to look for scapegoats to blame for one's own misfortunes, and in time of economic distress, immigrants are often the easiest choice. Conveniently overlooking the fact that immigration creates as many jobs as it fills, it is tempting to attribute one's own unemployment to "unfair" competition from immigrants who are willing to work longer hours for less pay. The common perception is that these workers are usually fleeing harsh economic conditions in their home countries, and are therefore quite willing to work for sub-minimum wages, which may constitute a sizable improvement in their standards of living. While this is certainly true often enough, by itself it would hardly make that much of a difference if minimum wage and other labour laws still applied in practice to aliens. The trouble is, they do not, thanks to the "solution" seized upon by populist politicians, which is to impose ever tighter limits on immigration, with harsher and harsher penalties imposed on illegal immigrants. In many countries, if foreign nationals are allowed to work at all, they are required to obtain special permission from the government,

and working without such authorisation is a criminal offence, punishable by deportation.

The problem with this strategy, as the reader will have guessed by now, is that it perversely misapplies the detection principle. It does this by making out the illegally employed immigrants to be the chief villains, and thus giving them an incentive to keep their employment (and often their very presence in the country) a secret. This puts considerable power into the hands of their employers; as de facto fugitives, aliens are literally at their mercy. Unscrupulous employers can therefore effectively blackmail illegal workers into accepting horrendous working conditions and wages far below the true market value of the labour. Some employers even avoid paying immigrants wages altogether by consistently putting off payday as long as they can, and then anonymously calling in the Immigration enforcers.<sup>63</sup> So long as the employer continues to profit from his exploitation of the immigrant, though, he is unlikely to report it to the authorities, and so much the more so if he is also subject to any form of punishment.<sup>64</sup> As a result, the only way such illegal employment can come to light is through active surveillance on the part of immigration and employment authorities. And, just as with the War on Drugs and attempts to regulate or prohibit prostitution, this creates potential for official corruption. As well, it hardly need be pointed out that racism can and does play a large part in both the design and the practical application of anti-immigration policies; U.S. attention on illegal aliens focuses almost exclusively on Mexican nationals,

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<sup>63</sup> For anecdotal accounts of this practice, see Victor Malarek's Haven's Gate, p.171, and Slave Trade Today, by Sasha Lewis, p.9.

<sup>64</sup> Although, in a fashion strikingly similar to the discrepancy between the respective legal culpabilities of prostitutes and their clients, the sanctions applied to employers are almost invariably lower than those applied to the employees, if they exist at all. In the U.S. Immigration Act of 1952, employers were exempted from penalties for hiring illegal aliens.

while virtually ignoring the large numbers of Canadians working illegally.

In practice, then, illegal aliens have virtually no legal or economic rights at all, since any appeal to legal mechanisms meant to enforce those rights carries with it the serious risk of deportation. (One *can* be prosecuted for murdering an illegal immigrant, of course, but in that case detection of the crime depends upon discovery of a body in the death of which foul play is suspected, and not upon the deliberate complaint of the victim.) This makes them almost ideal employees, since they are so especially vulnerable to exploitation. As a result, there are always employers willing to hire them, and thus there is no shortage of job opportunities for illegals for whom the risk of being exploited is preferable to their economic prospects at home. As well, there is a thriving industry devoted to the smuggling of foreign nationals across the border and delivering them to places of employment; the “coyotes”, as they are called, sometimes actually receive a commission from employers for each worker delivered, in addition to the substantial fees they draw from the workers themselves. Often the transport fees (plus the cost of room and board, sometimes with considerable interest) are deducted from the workers’ wages, so that in effect one ends up with a form of indentured labour.<sup>65</sup> So, the very fact that illegal aliens are considered to be committing a crime by working is largely responsible for the economic incentives to hire them in the first place.

Illegals are also subject to exploitation in many other ways besides employment. Fear of immigration officials often deters them from filing complaints about unrelated crimes committed against them, and they become attractive targets for robbery, rape, fraud and extortion. Landlords

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<sup>65</sup> Sasha Lewis goes so far as to equate this practice with slavery, and it is difficult to dispute his arguments. See especially Chapter 8 of Slave Trade Today.

can collect a month's rent in advance and have their tenants deported long before the month is over so they can rent to a new tenant and repeat the process. Lawyers and lobbyists offer expensive (and often useless) advice or assistance in acquiring legal resident status. All of these abuses are facilitated greatly by the fact that the illegal alien often stands to lose more by complaining than by quietly accepting the mistreatment.

How might such a situation be remedied? Certainly there are a great many factors complicating this issue, and it is naïve to expect any single measure to be completely successful, especially without addressing the deep economic inequalities that drive such migrations. Moreover, the question of whether or not immigration (legal or not) is such a bad thing, and how much harm (if any) illegal immigrants cause has not really been answered. However, assuming for the time being that a legitimate goal of government is to minimise the hiring of aliens, it would seem that reversing the power disparity between these workers and their employers by decriminalising alien workers would be a step in the right direction.

To do this would require several changes to existing policy. Most important would be a complete change in attitude towards foreign nationals and the conditions for their admission into the country. We must first do away entirely with the presumption that non-permanent residents somehow "steal" jobs from citizens; foreigners should be considered legally entitled, indeed *welcome*, to seek employment during their stay, with the full protection of existing labour laws. This would have the advantage of streamlining the application process for visitor's permits or visas, since no effort would be needed to screen out those applicants who might be likely to look for work. It would also cut down significantly on illegal immigration by making it much easier to obtain legitimate visas. As well, it would



remove the better part of the economic advantage to be gained by hiring illegals in the first place, since they would enjoy the same rights as any legal resident of the country with respect to working conditions and minimum wages.

If the rate at which foreign workers are hired were still deemed too high, the next step would be to enact strict legislation to provide disincentives to the *employers* of non-residents. Perhaps a steep tax could be imposed in the form of a tariff on imported labour. Enforcement of this tax could be enhanced by taking advantage of the detection principle with the offer of a tangible reward (perhaps an accelerated application for landed immigrant status?) to working visitors who report their employers. The penalties specified for failure to pay this tax must be severe enough to outweigh any likely advantage to be gained through violation of the statute (including any reasonable bribes an alien may offer to secure employment); otherwise it might become practical for employers to accept bribes from would-be immigrants to hire them and deliberately neglect to pay the tax so that the immigrant can collect the reward for filing the report.

Now, consider how these changes would affect the market for imported labour. Employers, realising that any alien they might hire has a vested interest in reporting them, will be forced either to pay the tariff or offer a bonus to the foreign worker for keeping silent. In either case, it would be cheaper and easier simply to hire a permanent resident instead. The whole reason for hiring aliens in the first place would vanish, and the job market for foreigners would dry up almost overnight. As a result, one of the main incentives for immigration would also disappear, and the flow of immigrants would dwindle to a fraction of its current level. Assuming for the sake of argument that a reduction of immigration, whether legal or not,

is in fact a desirable goal, it would seem clear that this would be the optimum strategy to adopt.

The alternative to this approach is continued surveillance and policing, with draconian efforts to catch employers and employees red-handed. At best, such methods will only catch a small percentage of perpetrators. As the likelihood of being caught falls, the penalties exacted on those who *are* caught must be made sufficiently harsh that the expected disutility must outweigh the expected benefits. However, it seems difficult to imagine that such penalties could be imposed without deeply offending popular ideals of justice; the punishment should fit the crime, and few people would agree that hiring the wrong person to paint your garage merits a six-figure fine or a prison term. And, as the interests of employers are invariably better represented among lawmakers than those of non-voting foreign workers, it is especially unrealistic to expect employers to bear much in the way of penalties at all.

My critique of these policies has been essentially practical in the sense that they fail to achieve their stated or implied goals. Of course, it may be that the real purpose of immigration and employment laws has nothing whatsoever to do with protecting the jobs of citizens or limiting the annual number of immigrants after all, for they do neither very well. Perhaps the real objective of these policies is in fact precisely what they *do* accomplish, which is to facilitate the exploitation of cheap labour so that consumers can afford inexpensive new clothes and fresh fruit without sacrificing the profits enjoyed by factory and plantation owners. It may well be that the laws against prostitution are actually aimed at protecting the interests of the pimps and abusive johns at the expense of the prostitutes

themselves. It is even possible that the *zina* laws of Pakistan are deliberately meant to encourage rape. If this is so, then the only further criticism I can offer is on moral grounds which ought not to need explication.

## ***Chapter VI***

### ***Limitations and Lessons***

The preceding chapters have dealt primarily with the virtues of the detection principle as a basis for effective law enforcement, and the dangers associated with its misapplication. It must be acknowledged, however, that there are limits to the usefulness of this principle, since the basic assumptions under which it operates do not always pertain to all situations. In particular, relying on the victim of an offence to provide the initial report that sets in motion the enforcement mechanisms only works if the victim is in fact aware of the offence in the first place.

One might ask why this should be considered a problem at all, on the grounds that any harm insignificant enough to escape the notice of even the victim is no harm at all. Or to adapt the philosophical cliché, if a tree falls in a forest and nobody notices, does it harm anyone? That is, there may be some truth to the old adage, what you don't know can't hurt you, in the sense that one cannot suffer harm without suffering, and since suffering is a matter of perceptive experience, it makes some sense to say that to be harmed is to know one is harmed, not necessarily how or why, but at least to be aware of the mere fact that one is worse off than one would prefer.

We may dispose of this objection in any case by allowing that while it may not be possible, strictly speaking, to *harm* a person without her

knowledge, it is nonetheless very easy to *endanger* an unwitting victim.<sup>66</sup> Thus, even if we might not secure agreement that a person who has, for example, been unknowingly exposed to dangerous radiation has actually been harmed if she never actually develops cancer as a result, we would certainly agree that she had been endangered. Moreover, we recognise a legal duty not to expose others to undue risk of harm, and this provides us with a justification for safety and traffic regulations, as well as laws against crimes like attempted murder. The difficulty, of course, is that it is not always possible to rely upon the victim to call the attention of the authorities to an instance of endangerment, since the victim himself may be unaware of the risk, especially if the harm to which he has been exposed never actually materialises. Further, even if the victim actually does eventually suffer harm as a result of the offence, it may be virtually impossible to trace the true cause with any certainty, and thus to know that an endangerment offence actually took place at all.<sup>67</sup>

There are many instances of this sort of offence. Some of the more obvious examples include safety and environmental regulations, and in fact these are for many reasons among the most difficult to implement from an enforcement perspective. However, the basic problem is perhaps better

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<sup>66</sup> Much has been said on the question of harm to unknowing victims, including whether or not dead people can be harmed, and the notion of symbolic harm to a class of victims (such as the harm that pornography is alleged to inflict on the class of women, a significant number of whom must surely be unaware of being so harmed). While I have my doubts about each of these arguments, it is in neither case crucial to the present work.

<sup>67</sup> This leads to an interesting theodical argument for the existence of natural evil. One might concede that an omnibenevolent God could allow moral evil to exist in order to preserve the greater good of Free Will, but why then would innocent people suffer from disease and disaster (Acts of God, as they are known!), things which usually have nothing to do with the exercise of Man's freedom? The detection principle lends us a possible answer: if people could only suffer as a result of moral evil and not natural evil, then no act of evil could ever go undetected. Every death would imply a murder, every loss would be a theft. Many perpetrators might evade punishment, of course, but it would be considerably more difficult in practice...

illustrated with a simpler case. Let us therefore consider fraudulent banking service charges and other forms of shortchanging practices.

For years, banks have been charging small fees for various sorts of transactions, or even in some cases simply to maintain an account. Most of us are therefore perhaps mildly annoyed but not surprised when the occasional small deduction appears on our monthly statement. Often, we don't even notice. Even if we do, we rarely invest the time and effort to determine exactly what the reason for the particular deduction might be, since the amount of money at stake is so small and we assume the charge is probably legitimate anyway.

What this means, of course, is that there is very little to prevent banks from imposing the occasional unwarranted charge in the hopes that it will escape the notice of the account holder. In the unlikely event the customer should ask any questions about the deduction, the bank can apologetically refund the token amount and blame some arcane computer mistake. Meanwhile, the fees imposed on other less vocal or less observant customers are kept by the bank.

This sort of ploy can occur in a variety of forms. Grocery stores, for example, may display an item on the shelf at an attractively low price, only to charge a few cents extra at the cash register. A customer with several bags of groceries is unlikely even to notice a small discrepancy, especially given the margin of error in calculating a total price including fresh produce which is sold by weight, and in a crowded market he is certainly not going to want to spend time poring over the itemised receipt trying to find which article cost more than advertised.

It must be admitted, of course, that shortchanging can cut both ways. Banks and grocery stores may on occasion make mistakes in favour of the

customer, and cannot expect the customer to be much help in spotting the error. Nonetheless, the banks and stores enjoy the home field advantage and the benefit of the economy of scale. A bank which does not institute vigilant policies against errors (at least those unfavourable to the bank) stands to lose significantly more money in the long run than a private citizen who has better things to do than scrutinise her monthly statement for relatively tiny discrepancies. Thus it is reasonable to assume that the bank will tend to devote more effort towards detecting errors than the customer. It is by no means evident that banks are in fact any less diligent in eradicating errors in their favour, but one can easily see how this would be to their advantage...

These and other variations on the theme of shortchanging depend for the most part on never being detected by the victim in the first place, and so are largely immune to the power of the detection principle. That they are rarely noticed, however, does not mean that they do no harm. The harm inflicted may be in most cases individually insignificant, or nearly so, since most of us can afford to lose sixty cents with little to no effect on our welfare. Nonetheless, these effects are cumulative, and losing sixty cents here and a dollar there may add up to a tangible amount of real economic harm to an individual, in the same way that while a single afternoon in the sunshine is unlikely to have much lasting effect, continued exposure may lead to skin cancer. For this reason, each individual instance must be considered at the very least as something to be avoided, and to this end, eternal vigilance on the part of potential victims is the only defense, both in identifying sources of risk (as, for example, uncovering the link between ultraviolet radiation and skin cancer, or recognising that service charges deprive one of money) and in taking the appropriate precautions against them (using sunscreen,

or politely asking tellers to explain questionable deductions).

Unfortunately, such vigilance will in general only work to stop the individual instances it uncovers; it has little if any value as a deterrent to other similar transgressions, since in practice there is rarely any additional penalty in the event of detection other than simply being required to refund the amount of the "error". In other words, the worst a shortchanger can do is break even, so it is always worthwhile to make the attempt, since there is always the chance that one will be able to keep the money if one is not caught.<sup>68</sup>

An apparent solution to this problem might be to impose such a penalty, so that if a party to a transaction detects an error in the other party's favour, she would be entitled to, say, twice the amount of the error. The problem with this solution is that it might violate commonsense notions of justice by imposing on people the same punishments for honest mistakes as for deliberate deception. Decent people are eager to forgive each other for minor mistakes, so long as there's no harm done. Indeed, there would likely be a social stigma attached to anyone who *did* insist upon exacting punishment for what is probably just an innocent miscalculation. Such a person would run the risk of being seen as petty, spiteful and greedy, and may prefer simply to say nothing at all, thus enabling the error to go uncorrected and defeating the purpose of the policy.

The reader will have noticed a similarity between this situation and the problem of Blaming the Victim described in the previous chapter. In both cases, the victim of the offence stands to suffer some form of hardship as a result of her reporting the wrong, and is therefore likely to be deterred

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<sup>68</sup> Of course, in the long run, the shortchanger will want to be careful not to gain a reputation for consistent errors, or he will begin to lose legitimate revenue to more reputable competitors.



from speaking out. The difference, however, lies in the source of that hardship. In the case of the victim-blaming policies of Chapter V, the law itself is self-defeating in that it provides its own disincentive to disclosure by in fact making the victim out to be the perpetrator, when it could conceivably be designed in such a way so as not to work directly against the interests of so valuable a potential informant. In the present example, on the other hand, the law offers no particular punishment of its own to the victim, and may well go some way towards protecting the victim's interests, so far as the law itself is concerned. The deterring hardship faced by the victim in this case is rather intrinsic to the particular circumstances of the victim, and quite independent of the law or lack thereof.

The most dramatic illustration of this sort of problem is probably to be found in the case of domestic violence, and particularly (but not exclusively) child abuse. To many, there can be no more despicable crime, precisely because a child is in no position to defend himself, especially against his own parents. Young children especially are without the means even to call for assistance, in part because the person to whom they would naturally call is the very one from whom they need to be delivered, but also because they may not realise that outside help is even available to them. Even when they are aware of the existence and function of legal authorities, fear of subjecting the abusive parent to legal punishment constitutes an enormous disincentive to call for help, since even most abused children still love their parents, and cannot imagine being separated from them. The child is therefore in what appears to be a lose-lose situation: remain silent and face continued abuse, or call the authorities and be separated from his parents who will then face punishment themselves.

It is difficult to imagine how to design a law to overcome such a

powerful force for silence. Neither the victim nor the abuser, the only two parties who will necessarily be aware of the offence, can be trusted to come forward. Yet, this is not simply a matter of the victim feeling his interests are not being violated and so voluntarily acquiescing, as might be the case if I decide not to press assault charges against someone who bested me in a duel after a fair challenge, for instance. While it might be justifiable in most cases to leave adults to their own devices in deciding whether or not to pursue legal remedies, a more paternalistic intervention is certainly warranted for child victims.<sup>69</sup>

We are still left with the basic problem of detection, however. Much as we might be prepared to prosecute abusive parents without relying on a formal complaint filed by their victims, we still have no reliable means to determine when such abuse is occurring. Without unacceptably intrusive surveillance measures (which, as we have seen, are themselves highly susceptible to corruption and misuse), we are left to rely more or less on fortuitous third-party discoveries to call attention to abusive situations.

Some attempts have been made to enhance the effect of these third-party discoveries by introducing mandatory reporting laws that require, for instance, physicians who treat children for suspicious injuries to report it to the authorities for further investigation. This approach, while stemming from laudable motives, runs quickly afoul of the detection principle itself in two ways. Most obviously, the mandatory reporting law is itself difficult to enforce, since failure to report is almost by definition a complaintless crime; no one with knowledge of an occurrence is likely to be inclined to complain about it to the authorities, for if they were, the original failure to

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<sup>69</sup> There are persuasive arguments that it may also be necessary for many adult victims, as well. Battered wives, for instance, may be so thoroughly intimidated by their abusive husbands that they may not feel able to press charges.

report would probably never have happened in the first place!

Much worse, though, the detection principle operates all too well in deterring the wrong action on the part of the abusive parent, to the detriment of the child's interests. It is not, after all, the actual assault on the child which leads to discovery, arrest and punishment, but rather the act of taking the child to the hospital where any suspicious injuries will be exposed to scrutiny and probably reported. An abusive parent will thus be deterred from seeking medical assistance for an injured child (often even if the specific injury in question is not the result of abuse!) for fear of detection, in effect compounding the harm to the child. Mandatory reporting laws therefore are largely ineffective in uncovering child abuse, and in fact tend to make things worse for the very victims they are intended to protect by depriving them of what little help they might otherwise get.

Other examples of this sort of self-defeating detection policy are abundant. There is, for instance, a perennial cry to withdraw legal recognition from the sanctity of the confessional, in the hopes that the clergy will be able to help police catch violent offenders who are somehow expected to continue their practice of the sacrament. Similarly, the Reform Party has recently demanded that Revenue Canada cease sending tax refunds to people who report income from illegal sources on their returns, perhaps on the assumption that criminals would sooner give up a lucrative criminal enterprise than decline to file a perfectly accurate return.

Is there a solution? Alas, the world is full of evils that lie well within the legitimate scope of the liberal state's jurisdiction to abolish or regulate, not because they are moral evils (although they may very well be, as domestic violence certainly is) but because they do in fact pose a threat to the

autonomous interests of citizens (as domestic violence does), and yet which pose virtually insurmountable practical obstacles to the detection necessary for any legislation to be effective, since the victim is for whatever reason so often unable or unwilling to file a complaint. In the absence of constant and prohibitively intrusive and costly surveillance (which is often itself counterproductive, as we saw earlier), the complaint of the victim is usually the only way authorities can learn of offenses in order to act upon them. The dismal truth appears to be that policymakers are doomed to partial success at best in their efforts to combat these sorts of crimes.

But perhaps it is too much to expect that a successful society can be achieved through legislation alone. Live roleplaying enthusiasts have recognised almost from the beginning that no matter how flawless a rules system is used, no matter how inspired the scenario writing is, and no matter how brilliantly the actors perform, no quest can succeed without the active involvement of the players. Good enough roleplayers, on the other hand, can make an event worthwhile despite the efforts of all but the very worst game organisers. The measure of a gaming system is the proportion of poor roleplayers it can withstand, but no game can survive with *only* bad roleplayers.

In the same way, a society composed entirely of morally upright citizens would have little need for laws, and even the best laws are of little use in a morally bankrupt society. Thus, sensible legislation based on a sound understanding of the detection principle can only take us so far towards the promised land. However much closer than that we get depends on our faithfully playing our roles as good citizens.

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