ON THE MENTAL STATE OF CONSCIOUSNESS OF WRONGDOING

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I
INTRODUCTION

In the adjudication of white collar crime, a conceptually challenging mental state is on the rise. The idea is that an actor's "consciousness of wrongdoing" (or awareness of guilt, or like formulations) is a determinative factor in imposing criminal liability. This facially broad standard turns out to hold promise for adjudicators and enforcers compelled to cope with a central problem of white collar offenses: how to identify specific behaviors meriting criminal punishment from within realms of social and economic activity that, viewed as a whole, are unobjectionable and often beneficial.

This mental state formulation cannot hope to deliver on that promise, however, without managing a central problem of evidence and adjudication: how to "find" a particular form of mental state within a system that is full of risks of error arising from the psychological and narrative processes that powerfully influence criminal inquiries and trials. There are reasons to think the concept of consciousness of wrongdoing is particularly fraught with error risks, but also grounds for concluding that its benefits as a liability-sorting device might prevail over its riskiness in the hands of adjudicators—if those risks are properly understood and managed.

The discussion here has the twin aims of explaining the concept and function of consciousness of wrongdoing as a mental state in white collar crime, and exploring how that concept might operate, to beneficial or harmful ends, in the American system of adjudication.

First, an explanation of how the idea of consciousness of wrongdoing fits within the basic framework of substantive criminal law is warranted. The problem of mistake of law as a defense to criminal liability is generally treated as two-sided. On one side is the maxim that "ignorance of the law is no excuse."

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This stands for the general rule, reflected in all Anglo-American law, that an actor's claim that she did not know her conduct was prohibited by the criminal law is irrelevant to her liability.[1]

On the other side are the limited exceptions to this rule. If the crime itself requires knowledge of the law as an element of the offense, lack of such knowledge of course negates liability.[2] If error about a legal matter—for example, whether one has lawful possession of property under her jurisdiction's contract law—negates a mental state required for liability—for example, specific intent to deprive another of property—then such error or ignorance prevents conviction.[3] If the law, directly or through official spokespersons, states that conduct is not criminal, liability for such conduct may not be imposed due to a principle of estoppel.[4] Finally, if criminalization of conduct comes so far out of left field as to be a truly alarming surprise to any responsible citizen, the Constitution (perhaps) prevents imposition of liability for that conduct.[5]

This standard framework for dealing with legal knowledge captures only two sides of a broader, four-sided problem. Stated more generally, the problem is not what to do with claims of "mistake of law," but what to do in general about an actor's mental state regarding the normative valence of her actions. That mental state can consist in an actor adverting to the normative significance of her actions, or in her failing to advert to such matters. The possibilities, and their respective doctrinal manifestations, are represented in the following rubric:

Table: Mental State as to Normative Status

	Inculpatory	**Exculpatory**
Actor does not believe normatively wrongful, or has no belief about normative status	(1) Ignorance of the law is not a defense.	(2) Limited mistake-of-law defenses recognized.
Actor believes normatively wrongful	(3) "Consciousness of wrongdoing" or "guilty knowledge" is a basis for imposing liability.	(4) Mistaken belief about illegality or wrongfulness does not support liability.

1. *E.g.*, MO. REV. STAT. § 562.031(1) (2010).
2. *E.g.*, Cheek v. United States, 498 U.S. 192, 609–10 (1991).
3. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 175–76 (5th ed. 2009).
4. *E.g.*, MO. REV. STAT. § 562.031(2) (2010).
5. Lambert v. California, 355 U.S. 225, 228–29 (1957).

Criminal law and theory have mostly worked through the problem of mistake of law—what to do with the actor who seeks to defend against liability on grounds that she did not advert, or adverted mistakenly, to the legal (and oftentimes moral) status of her conduct.[6] Usually she loses (area (1)). Occasionally, an exception applies and her argument prevails (area (2)). What has escaped sufficient analysis is that criminal law sometimes treats this same matter of mental state as an affirmative justification for imposing criminal responsibility—as something more like an element of liability, not just a ground for an occasionally available defense.

Returning to the Table above, area (3)—the inculpatory use of an actor having adverted to the significance of her conduct—is a lively one in the criminal law. It includes the increasingly common practice in the field of white collar crime of pointing to an actor's consciousness of wrongdoing as a justification for imposing liability under broad or vague statutes that carry risks of overdeterrence or punishment of blameless actors. Upon examination, the general principle represented by area (1) turns out to have two flip sides. One is the familiar point that sometimes mistake of law *is* a defense, represented by area (2). The other—and presently more interesting—flip side is that knowledge of wrongfulness sometimes inculpates. If you will, sometimes "knowledge of wrongdoing is an offense." This concept falls into area (3).

The idea that sometimes "knowledge of wrongdoing is an offense" may, like the ignorance of the law maxim, have an exception, represented in area (4) of the rubric above. One plausibly could maintain that a mistaken belief about the illegality or wrongfulness of one's conduct should not increase the probability of liability, or the degree of condemnation or punishment. Any aggravation of responsibility for such beliefs, the argument would go, should require an objective inquiry to determine whether the actor accurately perceived prevailing norms. The rule that "pure legal impossibility" is a bar to criminal liability rests on the belief that one who thinks she is committing a crime but is doing nothing unlawful (the famous Lady Eldon who lawfully imported English lace mistakenly thinking she had procured prohibited French lace[7]) should not be punished because of legality-related constraints on crime definition. A practice of criminalizing "believed offenses" would have neither visible boundaries at any given moment nor finite limits over time.

This project concerns more than situating the idea of consciousness of wrongdoing within the theory and doctrine of substantive criminal law. The attraction of this idea and its contemporary use in the field of white collar crime enforcement demand attention to real and serious problems of evidence and decisionmaking in the adjudication process. Recent descriptive work in social science reveals that facts are "found" in the courts not through a linear and

6. *See* DRESSLER, *supra* note 3, at 167–81; Dan M. Kahan, *Ignorance of Law Is an Excuse—But Only for the Virtuous*, 96 MICH. L. REV. 127 (1997).

7. *See* Peter Westen, *Impossibility Attempts: A Speculative Thesis*, 5 OHIO ST. J. CRIM. L. 523, 538–40 (2008).

entirely analytic process but through a holistic examination of competing narratives, open to subjective considerations and susceptible to biases. When it comes to mental state, adjudicators do not so much reconstruct it as construct it anew from preexisting paradigms of wrongdoing. Moreover, the most difficult white collar cases are those in which mental state alone marks the boundary between criminal and noncriminal conduct. Such cases require a rigorous evaluation of mental state but simultaneously invite a highly associative exercise in factfinding. And the consciousness of wrongdoing concept enacts templates for wrongful conduct and stories of moral failing that pose particular dangers to accuracy. Clarity about the content of a consciousness of wrongdoing element itself, together with attention to the mechanics of introducing and reviewing evidence of its existence, could mitigate these concerns.

Part II begins by explaining how the concept of consciousness of wrongdoing could work as a feature of substantive criminal law, at the levels of both theory and doctrine. A series of conceptual steps will be described and tentatively attempted, with the caveat that several of the normative considerations raised here are major ones, and merit the kind of deep exploration in punishment and political theory that would not fit in this preliminary discussion. Part III includes a discussion of the recent application of the concept of consciousness of wrongdoing in prosecution and adjudication of white collar offenses. Finally, Part IV takes up the considerable complications of proof and decisionmaking that anyone drawn to this emerging idea must confront and seek to manage.

II
CONSCIOUSNESS OF WRONGDOING AS INCULPATORY

Before addressing the conceptual questions this topic raises, the reader might be assisted by an example illustrating one version of the inculpatory use of an actor's mental state toward the normative significance of her conduct.

Lauren Stevens held an in-house position as an attorney for a major pharmaceutical corporation. The Department of Justice (DOJ) and the Food and Drug Administration (FDA) were investigating the company for possibly engaging in the criminal promotion of one of its antidepressant drugs as assisting in weight loss, a treatment for which the drug lacked FDA approval.[8] The FDA transmitted a request for relevant documents, and the company assigned Stevens to handle the response.[9] The government later concluded that Stevens withheld and altered documents responsive to the FDA's request, while representing to the government that the company's compliance with the document request had been complete.[10]

The DOJ obtained an indictment charging Stevens with violating a statute,

8. United States v. Stevens, 771 F. Supp. 2d 556, 559 (D. Md. 2011).
9. *Id*.
10. *Id*.

18 U.S.C. § 1519, making a felon of anyone who "knowingly alters, destroys, mutilates, conceals, covers up, falsifies or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States."[11] Stevens gained access to the minutes of the grand jury proceedings and then moved to dismiss the indictment on the ground that the prosecutor erroneously instructed the grand jury on the mens rea requirements of this statute.[12] Her specific claim was that she relied on the advice of outside counsel in deciding how to respond to the FDA's document request, and that the prosecutor failed to correctly explain how that reliance could negate the mens rea required for guilt under this obstruction of justice statute.

A federal district judge dismissed the indictment.[13] His reasoning went as follows: Good faith reliance on advice of counsel negates a mens rea element if that element is one of "specific intent," requiring "intentional or willful" conduct—as opposed, for example, to a mental state of mere knowledge or "general intent." The mens rea requirement of the above statute was just such an element because (in an arguably strained parsing of the text) the statute required that the actor proceed "knowingly . . . with intent to impede, obstruct, or influence." This language, according to the judge, "clearly require[s] consciousness of wrongdoing," a form of "evil intent." If the statute were not limited to those "conscious of the wrongfulness of their actions," he reasoned, it could "reach inherently innocent conduct, such as a lawyer's instruction to his client to withhold documents the lawyer in good faith believes are privileged." In-house counsel's good faith reliance on an outside lawyer's advice that the FDA's request was properly complied with would, of course, negate that mens rea.[14] The prosecutor's instruction to the grand jury failing to explain that was therefore erroneous.

This decision was, of course, a win for the defendant.[15] But she did not

11. 18 U.S.C. § 1519 (2006).

12. *Stevens*, 771 F. Supp. 2d at 564–65.

13. *Id*. at 568.

14. It is interesting that the district judge relied heavily on the Supreme Court's ruling in *Arthur Andersen LLP v. United States*, 544 U.S. 696 (2005), that a different obstruction statute carrying a mens rea term of "corruptly" required proof of "consciousness of wrongdoing" for a conviction. Not only does section 1519 of Title 18 lack the term "corruptly," but the legislative history of this relatively recent statute shows that Congress intentionally omitted that term from section 1519 in an effort to make proof of mens rea less difficult in document destruction cases than it had been under the statute employed in *Andersen*. *See* JULIE R. O'SULLIVAN, FEDERAL WHITE COLLAR CRIME: CASES AND MATERIALS 437–40 (2d ed. 2003) (comparing 18 U.S.C. § 1519 with 18 U.S.C. § 1512). This is suggestive evidence, at the least, for the proposition that, in the white collar context, adjudicators believe that the problem of separating justifiably criminal cases from the otherwise legitimate realms in which they take place transcends the particulars of statutory construction.

15. The dismissal of the indictment was without prejudice. Stevens was reindicted (presumably following more fulsome legal instructions in the grand jury). The case proceeded to trial, but the judge dismissed it upon close of the government's case-in-chief on ground of insufficient evidence, chastising the prosecutors for having brought a case that "should never have been prosecuted." *Judge Acquits In-*

prevail on the ground that mistake of law is a defense to obstruction of justice. Instead, she secured a dismissal because the court found that the statute only applies to an actor who is aware at the time that her conduct is wrongful, and that a person who relies "in good faith" on the advice of a lawyer would not have such a mental state.[16] Consciousness of wrongdoing, according to this court, is effectively an element of liability.

A. The Function of Consciousness of Wrongdoing as a Mental State

Elements of criminal offenses perform sorting functions. Their purpose, ideally anyway, is to limit punishment to all and only those actors whose conduct corresponds with the justifications giving rise to the prohibition containing those elements. Consider a burglary definition that includes as an element the attendant circumstance that the structure the actor broke and entered was a "dwelling," defined as a person's habitation. The purpose of such an element might be to limit punishment for that burglary offense, on retributive or deterrent grounds, to those actors whose conduct presents the particular risks and harms associated with entry into structures either occupied by others or in which others have particular security and privacy interests. In keeping with the justifications for such a law, all burglars of dwellings and only burglars of dwellings should be punished for this particular offense.

Requiring, as an element of liability, proof of something like consciousness of wrongdoing means that all and only those actors who formed that mental state, and whose conduct satisfies other elements of the offense, are eligible for punishment. A judge like the one in Stevens' case confronts a problem of entanglement that is particularly challenging in the context of white collar crime, in contrast to most forms of "street" crime. How do laws and legal actors identify those who merit punishment from among a group of actors engaged in a class of activities, like marketing of financial products or production of industrial goods, that are quite welcome?

In the white collar context, conventional mental state tools often do not provide enough traction to handle the hard cases. For example, it is question-begging to say that the mens rea for obstruction of justice is "the specific intent to obstruct justice" or that the mens rea for fraud is "the specific intent to defraud." One can only have a purpose ("conscious object") to engage in particular actions or to cause particular results. If the accompanying action is described with a legal concept ("fraud," "obstruction of justice"), then a purpose requirement only leads back to the question of what is criminal—that is, what counts as "fraud" or "obstruction of justice."

Further specifying the operative legal concept in terms of actions will not

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House Corporate Counsel on Charges Arising out of FDA Investigation, 89 CRIM. L. REP. (BNA) 249 (May 25, 2011).

16. See Samuel W. Buell, *Good Faith and Law Evasion*, 58 UCLA L. REV. 611, 627–53 (2011), for in-depth treatment of the concept of good faith as a mental state and its relationship to consciousness of wrongdoing.

always suffice. Fraud might consist in deception, but not all deception is fraud—and certainly not all deception is criminal fraud. Obstruction of justice might consist in thwarting of legal process, but not all thwarting of legal process is obstruction of justice. Unless one were to eschew completely the project of defining white collar offenses, and rely instead on highly rule-based regimes that would be easily evaded,[17] only mens rea tools can effectively address this entanglement problem. The mental state of consciousness of wrongdoing has appeal, in part, as a tool that can help disentangle white collar offenses from their background settings.

B. Justifications for the Mental State of Consciousness of Wrongdoing

For a liability rule to have a logical function does not necessarily mean the rule is justified. The question of justification here can be put two ways: Why are actors aware of the wrongfulness of their actions blameworthy or good objects of punishment for instrumental reasons? Or, why are actors *not* aware of the wrongfulness of their actions not sufficiently blameworthy or not sufficiently good objects for punishment on instrumental grounds?

The question is when such a mental state might be an additional justification for punishment for a particular form of conduct carrying its own (sufficient or not) justifications for criminalization. In the example of the *Stevens* case, there is no contention that the in-house attorney should be treated as a criminal any time she does anything she knows is wrongful. There is a view, however, that she should be treated as a criminal for concealing evidence in a manner that obstructs justice when, and only when, she knows that it is wrongful to engage in such concealment.

1. Blameworthiness

Consciousness of wrongdoing may increase blameworthiness in part because it ensures that the violator received sufficient notice. This assertion might seem confusing at first. One view holds that the notice requirement—an essential part of any account of how a legal system comports with legality requirements—is an individual right grounded in a conception of what one is owed by the state in a liberal order. That right includes the ability to go about one's affairs free from fear of the unfairly surprising appearance of state coercion, or, as in Hart's formulation, the right to be respected as a "choosing being."[18] A second view points out that this account of notice lacks bite in practice—at least under existing Supreme Court precedent—and concludes that requirements of clarity and definiteness in law must be meant primarily to constrain enforcement discretion and prevent abuses.[19]

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17. See Samuel W. Buell, *The Upside of Overbreadth*, 83 N.Y.U. L. REV. 1491, 1541–53 (2008), for extended treatment of the problem of narrowness versus breadth in the definition of white collar offenses.

18. H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 22–23, 49 (1968).

19. *E.g.*, John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189, 206–12, 232, 245 (1985).

There is a third—perhaps inverted—way to see the notice requirement: as a necessary condition of blameworthiness and responsibility. If a person is not provided with adequate notice that her conduct is criminal, the problem is not so much that she deserved to receive such notice ex ante as that she does not deserve to be punished ex post for what she did. If she was aware of the normative significance of her conduct, however, she does deserve to be punished. The point of notice was the point at which she chose to cross a normative boundary and to exempt herself from general constraints.

The significant event is not the receipt of notice itself but, rather, the post-notice transgression. The existence of adequate notice goes at least some of the way to assuring us that a person did in fact make a decision to transgress. Thus, a person who is genuinely conscious of wrongdoing is someone whom legal actors can punish without fear that the criminal law is being brought down upon the innocent or undeserving—a particularly prevalent anxiety in the arena of white collar crime.[20]

The argument for desert just sketched, of course, must confront the claim of philosophical anarchists that the question whether to obey authority can add no normative force to a person's deliberations about the merits of any action she might contemplate.[21] Put in terms of the present discussion, a choice to do something wrongful is not made more or differently wrongful because another person or authority has designated it so after deliberating on its wrongfulness. It is either wrongful or it is not.

The analysis here does not purport to join the debate on the existence and significance of authority. In the face of skepticism about authority, two points suffice to maintain the provisional moral significance of a mental state like consciousness of wrongdoing. First, a prominent feature of this concept in the criminal law is that its connection to positive law (and therefore state authority) is only partial. To be aware that conduct is wrongful is not necessarily the same thing as to be aware that it is illegal. Indeed, the use of this mental state in the criminal law might have features congenial to the anarchist position: If a person's desert ought to turn on the moral wrongfulness of her conduct without reference to the particular edicts of the state, and if her desert is to be aggravated by her self-awareness of wrongfulness, then that mental state too should depend upon awareness of moral (rather than legal) wrongfulness.

Second, there is a compelling argument—at least limiting the anarchist

20. *See, e.g.*, United States v. Panarella, 277 F.3d 678, 698 (3d Cir. 2002) (concluding that defendant's efforts to enlist another to conceal prior misrepresentations undermined any claim of inadequate notice in prosecution under flexible mail-fraud statute); United States v. Dial 757 F.2d 163, 170 (7th Cir. 1985) (Posner, J.) (concluding in prosecution of commodities brokers for "trading ahead" of their clients that the defendants' "elaborate efforts at concealment" provided strong evidence of their "consciousness of wrongdoing," thereby eliminating any concern that the flexible mail-fraud statute was being extended beyond the boundaries of fair notice).

21. *See generally* Scott J. Shapiro, *Authority*, *in* THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW 382 (Jules Coleman & Scott J. Shapiro eds., 2002) (summarizing the anarchist arguments).

view—that if a state satisfies a set of necessary and sufficient conditions as an acceptable liberal democracy, then to disregard laws of the state is at least defeasibly wrongful simply because they are laws of the state.[22] The reason is that the socially necessary and fair power-sharing arrangement of a liberal democracy depends on mutual forbearance and obedience. For a citizen to take such an arrangement as imposing no obligating force of its own, the argument goes, is to arrogate power to herself. And that constitutes a dereliction of her prior commitments as a citizen in a system that has afforded her rights, privileges, and benefits, as well as a derogation of the equality and autonomy of others. In terms of the present topic, it is that much more blameworthy to have arrogated that power to oneself after having deliberated on the question whether the contemplated conduct is among those behaviors society has required one to forego, and after having concluded that one indeed is called upon to restrain oneself in the circumstances.[23]

2. Instrumentalism

Consciousness of wrongdoing finds support in an instrumentalist conception of the criminal law as well. As Scott Shapiro explains in his elegant new book, law would utterly fail to perform its function (as a "planning institution" in Shapiro's conception) were it understood to be non-compulsory and were noncompliance widespread.[24] The dominant "defensive" accounts of the rule of law, in Shapiro's terms, give short shrift to the rule of law's instrumental benefits. If the law did not comport itself with fundamental requirements of the rule of law (setting aside for the moment debate about the particulars of those requirements), the law would be useless in addressing the problems of morality and collective action that give rise to a society's need for law and other legal institutions.[25]

Shapiro, of course, stands on the shoulders of many—from H.L.A. Hart to contemporary game theorists—in his observations about the utility of the

22. *See id*. at 434–39; *see also* Dan Markel, *Retributive Justice and the Demands of Democratic Citizenship*, VA. J. CRIM. L. (forthcoming 2012) (manuscript at 37–39), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1930443 (summarizing arguments of Shapiro and others contra the anarchist position on authority).

23. *Cf.* Gideon Yaffe, *Excusing Mistakes of Law*, 9 PHILOSOPHERS' IMPRINT 1, 10–17 (2009). Yaffe advances a somewhat similar argument in his explanation of why mistakes about legal matters excuse so much less commonly in criminal law than do mistakes about factual matters. He grounds his analysis in the wrongfulness of the sort of deliberation involving faulty normative (as opposed to factual) beliefs that are characteristic of defendants who assert errors about matters of law. *Id.* Yaffe further contends that a person who has pursued a behavior after deliberating the very question of whether others constrain themselves in the face of a normative principle against that behavior is especially at fault for morally wrongful deliberation. This, he says, suggests the value in including proof of awareness of illegality as an element in certain malum-prohibitum offenses. *Id*. at 21. *But cf.* Alexander A. Guerrero, *Deliberation, Responsibility, and Excusing Mistakes of Law*, AM. PHIL. ASS'N NEWSL. ON PHIL. & LAW (forthcoming), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1911448 (criticizing Yaffe for being opaque about the concept of deliberation and arguing that the relevant question is the degree of fault in actors' epistemic efforts, whether they be directed at matters of law or fact).

24. SCOTT J. SHAPIRO, LEGALITY 212 (2011).

25. *Id*. at 396.

mutual forbearance and cooperation that characterize legal systems enjoying widespread compliance.[26] The question for an account of the mental state of consciousness of wrongdoing is not whether benefits flow from encouraging legal compliance and the belief that legal compliance is widespread. The question is whether it is especially beneficial to focus sanctioning, among all who do not comply with legal or social norms, on those who contemplate noncompliance before acting.

At a conceptual level, the answer does not seem difficult. Those who think about the normative significance of their conduct will tend to be persons who contemplate potential sanctions and will therefore be more amenable to deterrence. That is just an application of the general, though contestable, insight that mens rea inquiries have utility because persons who act intentionally are more likely to consider a deterrent message before acting. And there is a further benefit. Those whose voluntary compliance with legal and other norms is somewhat contingent on the belief that compliance is widespread—and that they therefore are not chumps who alone obey the law—will expect sanctioning authorities to deal especially seriously with those who do not comply in willful defiance of known norms. Focusing sanctioning on such actors will be especially important to maintaining the loyalty of those whose obedience is provisional.

Complications nonetheless arise in working out how reliance on a mental state like consciousness of wrongdoing is likely to play out behaviorally. It is not clear that attaching sanctions, or aggravating them, on this basis will communicate the desired deterrent messages. If one who is aware of wrongdoing is selected for criminal sanction on that basis, the message should be clear: Do not violate legal or moral norms when confronted with the choice whether to do so. But, at least when strategic actors are the law's audience—as often is the case in the field of white collar crime—the message might end up being different: Act like you are not doing anything wrong and you will not be sanctioned. (It has been said that the best way to rob a bank is to own one,[27] but maybe it suffices just to act like you own the place.) Thinking incorrectly that you are doing something wrong, and acting accordingly, makes it more likely that you will be found to have done something wrong. Being ruthless and remorseless—and acting like you have done nothing wrong—may ultimately make it easier to prove your innocence.

What about possible acoustic separation in this area between conduct rules

26. *See* HART, *supra* note 18, at 50 (arguing that criminal sanctions against noncompliant actors assure compliant actors that their compliance is not foolish). *See generally* Dan M. Kahan, *The Logic of Reciprocity: Trust, Collective Action, and Law*, 102 MICH. L. REV. 71 (2003) (arguing that individuals are more likely to behave cooperatively when they perceive others to be doing so); Richard H. McAdams, *A Focal Point Theory of Expressive Law*, 86 VA. L. REV. 1649 (2000) (suggesting that the law solves coordination problems by providing a focal point around which individuals can shape their behavior).

27. WILLIAM K. BLACK, THE BEST WAY TO ROB A BANK IS TO OWN ONE: HOW CORPORATE EXECUTIVES AND POLITICIANS LOOTED THE S&L INDUSTRY (2005).

like "do not obstruct justice" and decision rules like "do not act with consciousness of wrongdoing"?[28] Primary actors in the white collar area tend to have well-informed lawyers, who might reduce acoustic separation. But the defense bar seems more apt to express the concern that clients may be held liable under vague rules than to advocate the strategy that clients can protect themselves by behaving as if they are not doing anything wrong.[29] One good solution to the vagueness concern is to design sanctioning regimes that apply in "fuzzy" areas of the law so that punishments fall only on those who had the opportunity to reflect upon the wrongfulness of their conduct yet chose to press forward in spite of such reservations. Sanctioning regimes that fall only on those who had the opportunity to reflect upon the wrongfulness of their conduct yet chose to press forward serve both an inculpatory and a protective function—at the same time and for the same reasons.

More serious instrumental difficulties might be, first, that one could allow people's *beliefs* about normative boundaries to dictate *where* those normative boundaries lie, even if such beliefs are idiosyncratic or mistaken; and, second, that this approach could be unacceptably underinclusive, leaving out actors who are obtuse to norms and who might merit sanction, in part because of what that obtuseness says about them and about their choice to engage in the relevant behaviors.

The first worry relates to area (4) in the Table supplied in the Introduction, covering the area in which an actor's adverting to the legal or moral significance of her actions might not be inculpatory. If one believes oneself to be crossing normative boundaries when one in fact is not, one may not be entirely free of moral fault. After all, one has decided to do something in spite of believing it to be wrong. But for the same reasons that a case of "pure legal impossibility" cannot be a crime, one would not want to sanction such a person.[30] Allowing criminal liability to float free from settled legal and social norms, tethered only to the idiosyncratic beliefs of a series of individual actors, vests too much discretion in the hands of enforcers and other actors in the legal system.

The answer to the instrumental worry about idiosyncratic beliefs, therefore, is to insist that any liability rule turning on proof of consciousness of wrongdoing include both subjective and objective elements. An analogue would be the doctrinal concept of "dishonesty" found in British theft and fraud law, under which a jury must find both that "according to the ordinary standards of reasonable and honest people what was done was dishonest" and that "the defendant himself must have realised that what he was doing was by those standards dishonest."[31]

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28. *See* Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625, 630–34 (1984).

29. *See, e.g.*, Anna Stolley Persky, *Aggressive Justice*, ABA J., May 2010, at 36.

30. *See* DRESSLER, *supra* note 3, at 407–08 (explaining that according to the legality principle, "we should not punish people—no matter how culpable or dangerous they may be—for conduct that does not constitute the charged offense at the time of the action").

31. R v. Ghosh, [1982] 2 All E.R. 689 (A.C.) at 696; *see also* R v. Feeley, [1973] 1 All E.R. 341

The second concern—about underinclusion with respect to obtuse or deluded actors—does not have a ready countermeasure. It is a cost of any legal regime that requires proof of a mental state like awareness of wrongdoing. But it should be remembered what led to analysis of this subject in the first place: an observable tendency of the legal system to look for evidence of consciousness of wrongdoing when struggling to draw lines between criminal and acceptable conduct. This happens because of a desire to avoid two other states of affairs: overinclusion in the form of punishment of undeserving actors engaged in socially welcome conduct, and massive underinclusion in the form of abandoning the project of criminal sanctions entirely in sectors of activity in which it is difficult to draw lines. Marginal underinclusion from leaving out actors who are obtuse or deluded with respect to norms is only one weight among several to be considered in measuring costs against benefits.

C. The Object of the Consciousness of Wrongdoing Mental State

In criminal law, mental states are not coherent unless directed at objects. If knowledge is required for liability, of exactly what must the actor be aware? If intent is required, what is it that the actor must have as her conscious object? If the crime is based on recklessness, just what risk must the actor appreciate and choose to disregard? And so on.

To be conscious of wrongdoing is, of course, to be aware of it. But much will turn on what precisely is meant by "wrongfulness," "wrongdoing," "guilt," or a similar formulation. The requirement of awareness of wrongfulness would become successively less demanding as one moved down a hierarchy of specificity that might be summarized as follows:

(a) Violates a specific provision of law giving rise to prosecution
(b) Violates some provision of criminal law
(c) Violates some provision of law imposing some form of sanction or liability
(d) Is wrongful under prevailing legal, professional, or other contextual norms
(e) Is wrongful under generally applicable moral norms

Levels (a) and (b) are not what the concept of consciousness of wrongdoing is driving at in the law of white collar crime. Those levels are familiar from the materials on exceptions to the "ignorance of the law" maxim. Levels (c), (d), and (e) on the hierarchy are of greater interest. The concept of consciousness of wrongdoing tends to be deployed in cases involving crimes such as fraud and obstruction of justice, for which it is settled that knowledge of illegality is not required for liability. The point is to extend analysis to the question whether the actor was on notice of wrongfulness in a broader sense. The question is just how much broader. Should any sense of immorality count, as under (e)? Or does the actor's thinking have to be about the conduct's status under a narrower set of

(A.C.) at 345.

criteria that include the law and perhaps similar normative structures governing the actor's conduct, as under (c) or (d)?

It could be enough for the actor to have known that the law had something to say about her conduct, even if she did not know of the specific law she is charged with violating, or perhaps that the matter was subject to criminal punishment or even a form of civil or regulatory liability. For example, a law might make it a crime intentionally to release a harmful substance into the public waterways, knowing that the substance is subject to legal regulation.

Or it could be sufficient for the actor to be aware that her behavior had the general status of "wrongful."[32] This could encompass both wrongfulness in the sense of illegality under positive law, and wrongfulness in the sense of violating some broader set of norms governing the actor's behavior and the context in which she acts. For example, a law might make it a crime, such as fraud, to engage in a particular form of deceptive conduct in a market in which such conduct is widely understood to be wrongful. One illustration would be failing to disclose a known hazardous condition beneath a property in a market for real estate, if it is customary to do so.

The most relaxed formulation, in the sense of being easiest to establish, would be one requiring only awareness that one's conduct is morally problematic. To act with consciousness of wrongdoing would simply be to act knowing that one is engaged in any sort of moral transgression. For example, the law might make it a crime to hurt another, or to lie to another, or to acquire another's property, knowing that it is wrong to do so in the way in which one has done it.

Obviously, the broader the law reaches in defining the object of the mental state, the less work a requirement of consciousness of wrongdoing will do in narrowing the class of persons eligible for punishment under a given regime. A criminal law covering a broad category of transgressions on the interests of others (or the state) that are "known to be morally wrong" would too closely resemble forms of common law crime long since dispatched as inconsistent with basic notions of due process.[33] Such laws might also tend to overcriminalize. Many forms of lying, for example, might be known to be morally wrong by the speaker but nonetheless completely lack justification as cases for criminalization.[34]

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32. *See* United States v. Cullen, 454 F.2d 386, 390–91 (7th Cir. 1971) (distinguishing intent to engage in conduct that constitutes the crime, from intent to engage in conduct that one knows is wrongful, from intent to further some ultimate goal by engaging in conduct that constitutes the crime). *But see* United States v. Freed, 401 U.S. 601, 612–16 (1971) (Brennan, J., dissenting) (rejecting discussion of "consciousness of wrongdoing" as likely to be confused with requiring knowledge of law, in contravention of the basic principle that ignorance of the law is no defense).

33. *See, e.g.*, Commonwealth v. Mochan, 110 A.2d 788 (Pa. Super. Ct. 1955) (reviewing conviction under a statute punishing "any offense . . . punishable either by statutes or the common law," in a jurisdiction in which common law prohibited, inter alia, "any act which directly injures or tends to injure the public to such an extent as to require the state to interfere and punish the wrongdoer").

34. *See* Bryan H. Druzin & Jessica Li, *The Criminalization of Lying: Under What Circumstances, if Any, Should Lies Be Made Criminal?*, 101 J. CRIM. L. & CRIMINOLOGY 529 (2011) (mounting an

On even brief analysis, then, level (e) on the hierarchy above appears to be a poor candidate for a mental state relevant to criminal liability. The interesting and open question lies in the region of levels (c) and (d). Is it possible, and in any event desirable, for the criminal law in some contexts to both relax and tighten requirements relating to awareness of illegality or wrongfulness? Can there be a useful mental state that consists of more than awareness of some form of censure but less than awareness of criminal illegality? That would appear to be the target at which the idea of consciousness of wrongdoing is aiming.

A full-throated theoretical defense of consciousness of wrongdoing as an element of criminal liability is beyond the ambitions of this particular project. What has been said to this point, it is hoped, is sufficient to suggest that the idea might fit with general principles of substantive criminal law. It remains to examine some evidence of the idea's use in recent white collar adjudication, and then turn to the problems adjudication presents.

III
CONSCIOUSNESS OF WRONGDOING AND WHITE COLLAR CRIME

Recall that in *Stevens*, the case of the pharmaceutical attorney charged with obstructing justice by withholding documents from the FDA, the judge decided that the prosecutor had to prove that she knew she was doing something wrongful—not just that she intentionally kept from the FDA documents she knew were responsive.[35] This was so in spite of statutory text that uses no such formulation and purports to cover anyone who "knowingly" withholds documents with intent to impede a matter within the government's jurisdiction.[36] The judge said "knowingly . . . with intent to [obstruct]" implies a requirement of consciousness of wrongdoing because otherwise a person who legitimately resisted an official legal adversary through lawful means would be treated as a criminal.

The court clearly did not intend to adopt a requirement that actors charged with obstructing justice be aware of violating any specific criminal law, and probably not the criminal law at all. In *Arthur Andersen LLP v. United States*,[37] the Supreme Court confronted the problem of how to draw a line between document destruction occurring routinely in the course of business that may in part be motivated by a desire to minimize damaging evidence in potential future litigation—seen as not blameworthy—and document destruction that is

admittedly contrarian argument that lies should be criminalized, but limiting criminalization claim to lies that are egregious and seriously harmful); *see also* Lisa Kern Griffin, *Criminal Lying, Prosecutorial Power, and Social Meaning*, 97 CAL. L. REV. 1515 (2009) (suggesting that liability for false statements in investigations should turn in part on the objective impact of the deception).

35. United States v. Stevens, 771 F. Supp. 2d 556, 561–62 (D. Md. 2011).

36. 18 U.S.C. § 1519 (2006).

37. 544 U.S. 696, 698–703 (2005).

wrongfully encouraged (as in *Andersen*[38] and in the similar case of *United States v. Quattrone*[39]) just as a firm learns of the existence of a regulatory inquiry and anticipates a subpoena for its records. In reversing the conviction, the Court ruled that the jury should have been instructed that the prosecutor had to prove not only that the firm's agents intended to interfere with a Securities and Exchange Commission investigation but also that they knew it was wrongful to do so.[40]

There is of course some fuzziness, if not circularity, in saying that document destruction with an eye on litigation moves from the routine to the criminal when those engaged in it know they are doing something wrongful. But the Court clearly meant to leave the consciousness of wrongdoing requirement somewhat open-ended and thus did not suggest that it amounted to a requirement that knowledge of the law be proved.[41] After all, the very issue before the Court was what the law *was* on destruction of documents in anticipation of a subpoena.[42]

A clear statement of this distinction comes from a decision of the Alaska Supreme Court reversing the conviction of a miner who had raised advance funds for future deliveries of gold.[43] He was charged with selling unregistered securities. The relevant statute could be violated only "willfully," which the court said could mean one of three things: (1) to "act intentionally in the sense that he is aware of what he is doing"; (2) to "be aware that what he is doing is illegal"; or (3) to "know that what he is doing is wrong."[44]

The court appeared to appreciate the greater need to parse mental state requirements that arise with white collar offenses. Some crimes, the court said,

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38. *Id.*

39. 441 F.3d 153 (2d Cir. 2006). In *Quattrone*, the defendant was charged with obstruction of justice for endorsing and forwarding to employees an e-mail urging routine but neglected purging of files, just after the defendant was informed of a grand jury investigation concerning his group's commercial activities. The court concluded that the evidence was sufficient to establish his wrongful intent in forwarding the e-mail, *id*. at 169–74, but that the trial court's instructions to the jury on the required element of a "nexus" between the defendant's conduct and an official legal proceeding were erroneous and required reversal, *id*. at 176–80.

40. *Andersen*, 544 U.S. at 705–08. The case was not retried so it is difficult to speculate about whether a jury might have found the requisite "consciousness of wrongdoing" in Andersen's destruction of large quantities of its Enron records in the midst of an SEC accounting inquiry and just before receiving a subpoena for those records.

41. *Id*. at 706.

42. *Id.* at 703–04; *see also* United States v. Doss, 630 F.3d 1181 (9th Cir. 2011) (in determining wrongfulness for purposes of an obstruction of justice statute, drawing a line between the defendant asking his co-conspirator wife to exercise her marital privilege not to testify against him (not wrongful) and the defendant suggesting to his co-conspirator–victim in a prostitution ring that "it would be bad for her" if she did not exercise her Fifth Amendment privilege to refuse to testify (wrongful)); United States v. Fakih, No. S1 05 CR.713(SHS), 2006 WL 1997479, at *2 (S.D.N.Y. July 18, 2006) (holding that a "consciousness of wrongdoing" requirement under an obstruction statute was satisfied where the defendant coached a witness in a manner that could be interpreted as encouraging the witness to lie and to pretend that a conversation had not occurred).

43. Hentzner v. State, 613 P.2d 821 (Alaska 1980).

44. *Id*. at 825.

are ones that "reasoning members of society regard as condemnable" (malum in se).[45] Those crimes always carry with them awareness of wrongdoing. Therefore, a requirement that the defendant have merely intended the actions he performed—possibility (1) above—would suffice to satisfy a defeasible requirement of conscious wrongdoing.[46]

Other crimes, however, are malum prohibitum, meaning that they arise in situations of ambiguity, complexity, and lack of clear social awareness and consensus about condemnation. With such crimes, "more than mere conscious action is needed to satisfy the criminal intent requirement," and "criminal intent in the sense of consciousness of wrongdoing should be regarded as a separate element of the offense."[47] The Alaska Supreme Court supported its analysis in the unregistered securities case with citation to some of the numerous federal cases in the area of securities crimes that have similarly found a requirement of consciousness of wrongdoing.[48]

The Supreme Court has long talked about awareness of wrongdoing as a foundational requirement of criminal responsibility, by explaining the defeasibility of that requirement in a limited category of low-penalty, strict liability offenses that the Court has unhelpfully called "public welfare" offenses.[49] The idea is that no one can be held (seriously) criminally responsible without knowing that they are doing something wrong. Most of the time, especially with a core of basic crimes, an adjudicator can easily infer this awareness of wrongfulness from an actor's mere awareness of her actions. With some kinds of crimes, however, the inference is not so easy. So the adjudication

45. *Id*. at 826.

46. *Id*. at 821. The Alaska courts have found this requirement to be more explicitly and definitively contained in the state's constitution than has the Supreme Court with respect to the federal Constitution. *Id*. at 826–29.

47. *Id*. at 826; *see also* Kinney v. State, 927 P.2d 1289 (Alaska Ct. App. 1996) (concluding in bootlegging prosecution that proof of the defendant's knowledge of the law was not required, even though the crime was malum prohibitum, because it is common knowledge that one needs a license to sell alcohol).

48. *Hentzner*, 613 P.2d at 827–28; *see also* United States v. Kaiser, 609 F.3d 556, 567–70 (2d Cir. 2010); United States v. Reyes, 577 F.3d 1069, 1079–80 (9th Cir. 2009); United States v. Charnay, 537 F.2d 341, 352 (9th Cir. 1976); United States v. Peltz, 433 F.2d 48, 54–55 (2d Cir. 1970). *But see* Mueller v. Sullivan, 141 F.3d 1232, 1235 (7th Cir. 1998) (stating that proof of consciousness of wrongdoing is not required in the context of securities crimes, at least as a matter of constitutional due process).

49. United States v. Park, 421 U.S. 658, 670–74 (1975); United States v. Freed, 401 U.S. 601, 607–10 (1971); Morissette v. United States, 342 U.S. 246, 250–63 (1952); United States v. Dotterweich, 320 U.S. 277, 284–85 (1943); United States v. Balint, 258 U.S. 250, 251–54 (1922); *see also* Fabritz v. Traurig, 583 F.2d 697, 700 (4th Cir. 1978) (reversing the conviction, on due process grounds, of a parent for causing a child's death through delayed medical attention because the evidence was "utterly bare of proof of a consciousness of criminality during her bedside vigil"); Perez v. State, 803 P.2d 249, 250–51 (N.M. 1990) (stating that strict liability crimes are exceptions to the fundamental principle that "evil intentions" or "consciousness of wrongdoing" are required for criminal liability); Commonealth v. Ewansik, 520 A.2d 1189, 1190 (Pa. Super. Ct. 1987) (stating that criminal-negligence liability is an exception to the general requirement of "subjective awareness of wrongdoing"); Commonwealth v. Heck, 491 A.2d 212, 233–24 (Pa. Super. Ct. 1985) (although "the harshness of criminal punishment is fitting only for . . . consciously inflicted wrongs, and so traditionally the criminal law has concerned itself exclusively with conscious wrongdoing," in cases of criminal negligence "the law presumes wantonness").

process must include an explicit, additional requirement that the prosecutor prove awareness of wrongdoing. A background feature of criminal responsibility is brought to the fore and made part of doctrine to ensure that it is not elided.

It is not helpful to refer to the situations in which this occurs as malum prohibitum offenses. The category is neither self-defining nor self-executing and lends itself to cases being included and excluded by fiat. It is more helpful to think about situations in which the requirement of consciousness of wrongdoing comes to the fore as involving behaviors that are neither uniformly wrongful nor uniformly not wrongful because they occur in contexts of entanglement.[50] Adversarial behavior is generally welcome; only some of it should be treated as unwelcome obstruction of justice. Sale of investment products is generally welcome; only some of it should be treated as unwelcome fraud. Industrial production that creates byproducts is generally welcome; only some of it should be treated as involving intolerable release of pollutants.

Criminalization in these kinds of areas necessarily involves some uncertainty and some postponement of precise line drawing from the legislating stage to the enforcement stage. A contestable factual inquiry into consciousness of wrongdoing serves two purposes. It helps draw the line itself: An actor's awareness of her own wrongdoing sends a strong feedback signal to the legal system that the conduct is on the undesirable side of the line. And this inquiry resolves the question whether the actor has a cognizable complaint that her punishment is unjust because line drawing was postponed until ex-post adjudication: The actor who is aware of her own wrongdoing necessarily "received" some notice, at least in the sense that she had occasion to consider the normative significance of her conduct and refrain from it had she wished.

It should likewise be apparent why the formulation used in these contexts is ordinarily not "knowledge of illegality." Because the nature of these offenses requires some precise line drawing, a requirement that the object of an actor's awareness be preexisting positive law would prevent flexibility and evolution in that line drawing process. "Wrongdoing" or "wrongfulness" or "wrong" describe broader categories that can accommodate illegality but need not be so limited.

One can see a similar line of thinking in how courts identify the relatively small subgroup of torts that merit quasi-criminal treatment in the form of punitive damages. Decisions frequently speak of "consciousness of wrongdoing" or "awareness of wrongdoing," often described as a deliberate decision to cause harm, as a necessary condition for affirming an award of

50. Nor can the problematic category always be designated according to the particular type of crime definition or statute involved. For example, some obstruction of justice cases do not present any difficulty of entanglement. *See, e.g.*, United States v. Aguilar, 242 F. App'x 239, 245 (5th Cir. 2007) (unpublished) (ruling that a "consciousness of wrongdoing" instruction was not required, under the decision in *Andersen*, in a case in which the defendant flatly instructed a witness to lie).

punitive damages on appeal.[51] This is true as well in the law governing the insanity defense in criminal law. Most formulations of the dominant *M'Naghten* test stand for the proposition that one is excused from criminal responsibility if, provided other elements of the defense are satisfied, one lacks the capacity to know (or, in some jurisdictions, to "appreciate") the wrongfulness (or, in many jurisdictions, the "criminality") of one's conduct.[52]

It would be an overstatement to say that modern American criminal law has entirely abandoned the old idea of "general mens rea"—standing for the proposition that a guilty (or, in older formulations, "evil" or "wicked") mind is necessary to ascription of criminal responsibility[53]—in favor of the Model Penal Code's tidy and more precise hierarchy of mental states.[54] It remains the case that the state hesitates to punish, even where relevant cognitive states like knowledge and intent might be present in strict terms, in the absence of a conclusion that the actor knew what he was doing was wrongful.

IV
CONSCIOUSNESS OF WRONGDOING AND ADJUDICATION

Consciousness of wrongdoing has normative appeal, in part, because it expands mens rea requirements in a class of cases where some argue they are insufficiently robust.[55] It could serve as an umbrella concept that gives content and coherence to many common law terms scattered throughout the federal criminal statutes that have no settled or clear meaning,[56] and could at the same

51. *See, e.g.*, Alleman v. YRC, 787 F. Supp. 2d 679, 684, 686 (N.D. Ohio 2011) (stating that punitive damages require "conscious wrongdoing," described as being "conscious of a high probability that substantial harm would occur"); Hoffman v. Stamper, 843 A.2d 153, 208–09 (Md. Ct. App. 2004) (stating that defendant must have acted with "consciousness of . . . wrongfulness" to establish the "actual malice" required for punitive damages for the tort of fraud); Darcar Motors of Silver Spring, Inc. v. Borzym, 841 A.2d 828, 838 (Md. Ct. App. 2004) ("Where the defendant converts property with a consciousness of wrongfulness of that conversion, he or she possesses the requisite improper motive to justify the imposition of punitive damages.").

52. *E.g.*, 18 U.S.C. § 17 (2010); MODEL PENAL CODE AND COMMENTARIES § 4.01 (1985); *see* DRESSLER, *supra* note 3, at 346–57. Many, of course, have criticized this doctrinal approach to the problem of how criminal law should deal with mental illness. A trenchant example is HERBERT FINGARETTE, THE MEANING OF CRIMINAL INSANITY 153–56 (1972); *see also* ROBERT F. SCHOPP, AUTOMATISM, INSANITY, AND THE PSYCHOLOGY OF CRIMINAL RESPONSIBILITY 27–51 (1991); NIGEL WALKER, CRIME AND INSANITY IN ENGLAND 99–115 (1968).

53. *See* DRESSLER, *supra* note 3, at 117–20; United States v. Cordoba-Hincapie, 825 F. Supp. 485, 489–504 (E.D.N.Y. 1993) (discussing at length the history and purposes of the mens rea requirement in criminal law).

54. MODEL PENAL CODE AND COMMENTARIES § 2.02 (1985).

55. *See generally* MICHAEL S. MOORE, PLACING BLAME: A GENERAL THEORY OF THE CRIMINAL LAW 548–92 (1997) (arguing that the choice to violate prohibitions separates those who merit punishment from those who do not); John Shepard Wiley, Jr., *Not Guilty by Reason of Blamelessness: Culpability in Federal Criminal Interpretation*, 85 VA. L. REV. 1021 (1999) (describing the Supreme Court's practice in interpreting criminal statutes of imputing additional mens rea requirements to statutes that could otherwise be violated by a morally blameless person).

56. *See, e.g.*, Arthur Andersen LLP v. United States, 544 U.S. 696 (2005) (importing consciousness of wrongdoing into the term "corruptly" in the obstruction of justice statute, where that term had done little work before); *see also* Eric J. Tamashasky, *The Lewis Carroll Offense: The Ever-Changing*

time make headway on the central problem of disentangling criminal behaviors in financial and market settings from their often benign background settings. Those benefits can be realized, however, only if the adjudication process has the capacity to correctly identify the defendants who acted with the requisite awareness of wrongful conduct. And if inculpatory cognition is viewed as tantamount to a statutory offense element—as the foregoing analysis suggests it has been and perhaps should be—"finding" or "proving" that mental state takes on even greater significance.

A. Reaching Decisions by Reading Narratives

Adjudication of mental state is never a question of what an actor was actually thinking at the time of the offense but rather of what the actor did that then allows for imputation of a legal construct called mens rea. When required to determine whether a defendant has culpable awareness, adjudicators cannot look into the defendant's mind; they look instead at the factual context, and then beyond that context at external constructs predating the facts at issue. In the absence of the proverbial red hands, they read the signals that familiar narratives send. These often come from what Steven Winter calls "observed prototype effects," or "frames, scripts, schemas, scenarios, stock stories, and idealized cognitive models."[57] Recognizing prototypical stories helps factfinders whenever they must answer questions such as when defendants knew what, whether they acted with predisposition or premeditation, and how aware they were of risk and wrongfulness. When it comes to factual interpretation, both the questions and the answers often "depend largely upon one's choice (considered or unconsidered) of some overall narrative as best describing what happened or how the world works."[58]

Although the rules of evidence themselves presume the rationalist tradition of deductive proof and logical relevance,[59] and evidence scholarship largely focuses on probability theories and the objectivist account,[60] recent social science on adjudication reveals more subjective processes at work. It is increasingly common to describe the adversarial process of trial as a set of competing narratives that "become suitors for the jury's imagination."[61] According to a descriptive theory developed by empirical psychologists, jurors use a story model to reach decisions rather than engaging in linear, probabilistic

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Meaning of "Corruptly" Within the Federal Criminal Law, 31 J. LEGIS. 129 (2004).

57. STEVEN L. WINTER, A CLEARING IN THE FOREST: LAW, LIFE, AND MIND 87 (2001).

58. ANTHONY G. AMSTERDAM & JEROME BRUNER, MINDING THE LAW 111 (2000) (emphasis omitted).

59. *See* FED. R. EVID. 401 (defining relevance as "tending to make a material fact more or less probable than it would be without the evidence").

60. *See, e.g.*, Kenworthey Bilz, *We Don't Want To Hear It: Psychology, Literature and the Narrative Model of Judging*, 2010 U. ILL. L. REV. 101, 101 (2010) (noting that the "dominant view of how people process evidence and draw conclusions is linear and Bayesian").

61. ROBERT P. BURNS, A THEORY OF THE TRIAL 164 (1999); *cf.* AMSTERDAM & BRUNER, *supra* note 58, at 12 (identifying mens rea determinations such as "willful ignorance" and "malice aforethought" as categories "extracted from narrative").

reasoning. The idea that trials rehearse conflicting narratives, and that jurors necessarily draw on their own values in processing those narratives, was first advanced by Lance Bennett and Martha Feldman.[62] It gained quick acceptance and the "story model" label after Nancy Pennington and Reid Hastie's jury simulations. Those studies revealed that jurors develop stories using the trial evidence, their own background knowledge of "what typically happens in the world," and "generic expectations about what makes a complete story."[63] They then reach a verdict in light of the "fit" between the narrative presented and the verdict categories described.[64] More recent iterations of the story model include Michael Pardo and Ronald Allen's "explanation-based account," according to which jurors identify the most coherent theory of the case and then use an "abductive reasoning process of inference to the best explanation" to reach a decision.[65] Dan Simon's work on coherence-based reasoning also complicates the idea that factfinders identify elements of an offense through a purely objective or linear process.[66] He explains the "dual-process theory of persuasion"[67] and describes decisionmaking as "the product of a cognitive mechanism that operates bidirectionally."[68] Inferences flow not just from "individual pieces of evidence toward a computed judgment" but in the reverse direction as well. They form part of a "global comparative assessment" that produces a verdict consistent with "the relative plausibility of the vying explanations."[69]

These concepts are familiar to empirical social scientists and increasingly discussed in scholarship on the process of decisionmaking in the adversary system. For the most part, however, they have not influenced questions of evidentiary procedure, let alone crime definition. But stories alone may not offer the level of precision that adjudicating a guilty mind requires, and it is worth considering whether articulating a more distinct factual predicate for liability, and then designing adjudication to privilege an analytic approach to identifying that predicate, could produce more accurate results.

B. Finding Mens Rea

Mens rea determinations are particularly well-suited to a narrative approach

62. W. LANCE BENNETT & MARTHA S. FELDMAN, RECONSTRUCTING REALITY IN THE COURTROOM: JUSTICE AND JUDGMENT IN AMERICAN CULTURE (1981).

63. Nancy Pennington & Reid Hastie, *A Cognitive Theory of Juror Decision Making: The Story Model*, 13 CARDOZO L. REV. 519, 522, 528 (1991).

64. *Id.* at 521.

65. Michael S. Pardo & Ronald J. Allen, *Juridical Proof and the Best Explanation*, 27 LAW & PHIL. 223, 226 (2008).

66. Dan Simon, *A Third View of the Black Box: Cognitive Coherence in Legal Decision Making*, 71 U. CHI. L. REV. 511, 513–16 (2004); *see also* Keith J. Holyoak & Dan Simon, *Bidirectional Reasoning in Decision Making by Constraint Satisfaction*, 128 J. EXPERIMENTAL PSYCH.: GEN. 3, 24 (1999).

67. Dan Simon, *The Limited Diagnosticity of Criminal Trials*, 64 VAND. L. REV. 143, 186 (2011).

68. Simon, *supra* note 66, at 516.

69. *Id.* at 560.

and at the same time highly susceptible to its shortcomings.[70] The story model illuminates how mens rea emerges through a decisionmaking process that is not, and cannot be, entirely analytic. Indeed, the model underscores an old concern that mental state is never more than a label, has no correspondence to objective reality, and merely serves to organize facts within a certain archetype. Is it even possible, as an evidentiary matter, to ascertain whether a perpetrator appreciated wrongfulness? Occasionally, there is direct evidence of this state of mind in the form of a damaging confession or a particularly telling round of correspondence. And testimony from intimate associates can, at times, shed light on the beliefs, attitudes, and intentions of the defendant. In almost every case, however, adjudicators must sift through the surface level of conduct for signals about internal mental processes. The important thing with respect to mens rea may be the decision rule only. It may be a normative assessment of guiltiness, and a doctrinal marker, but not necessarily an empirical fact.

The idea of "finding" mens rea itself—and the cases and commentary speak in terms of "finding" it—suggests that it does not stem directly from the facts of the case but, rather, is imposed on cases according to preexisting models. And this assessment may be peculiarly susceptible to erroneous interpretation because factfinders must "infer the past mental state of a defendant they do not know as he acted in a way they did not see."[71] In order to do so, they import preexisting paradigms, supplement the given information in a case with assumed facts and structures, and factor their own personal experiences and emotional responses into the judgment.

Because the source material for narrative-based assessments of culpability includes these reference points, processing circumstantial evidence of intent may also inspire heuristic thinking. Heuristics are often described as mental shortcuts that simplify judgments under uncertainty.[72] The dependence on familiar stories, for example, aggravates the natural inclination to interpret evidence in a fashion that supports existing preferences, beliefs, and theories. Factfinders are more likely to doubt evidence that conflicts with a preexisting paradigm (for a narrative like a cover-up story) and to interpret what is ambiguous as consistent with it. Similarly, investigators, courts, and jurors may make coarse judgments relying on the representativeness heuristic—the similarity between the directly observable conduct and schemes or prototypes that fit the category of knowing wrongdoing.[73] A cover-up story triggers other, memorable incidents of avoidance by guilty parties. Those memories are more vivid than background causes for the conduct—and thus tend to hold more

70. *See* CHRISTOPHER SLOBOGIN, PROVING THE UNPROVABLE: THE ROLE OF LAW, SCIENCE AND SPECULATION IN ADJUDICATING CULPABILITY AND DANGEROUSNESS 44 (2007) (observing that the assembly of narratives "dominates attempts to reconstruct mental state").

71. Francis X. Shen et al., *Sorting Guilty Minds*, 86 N.Y.U. L. REV. 1306, 1307 (2011).

72. *See* Amos Tversky & Daniel Kahneman, *Availability: A Heuristic for Judging Frequency and Probability*, 5 COGNITIVE PSYCHOL. 207 (1973).

73. *See generally* DANIEL KAHNEMANN, PAUL SLOVIC & AMOS TVERSKY, JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES (1982).

sway—according to the availability heuristic.[74] Attribution errors pose another danger.[75] It is always easier, for example, "to see order and structure in the lives of others at a remove than it is to be certain of meaning and purpose when confronted first hand with the uncontrollable contingencies of one's own life."[76] And the salience of attitudes and characteristics tends to dominate factors like circumstances and environment when decisionmakers evaluate intent. The dispositional information can be processed spontaneously rather than through effortful deliberation and therefore takes precedence.

While awareness of the difficulties of accurately perceiving mental state has increased, so too has its central importance in the adjudication of certain white collar cases. Suppose, for example, that a court finds that an actor "clearly had the intent to obstruct justice" because her removal of documents from the office for shredding at home, safe from the eyes of those at work, showed that she "knew she was wrongfully destroying evidence." One way to describe this case would be to say there were two forms of cognition in this actor's mind: an "intent to obstruct justice" (consisting of her thinking about and her attitude toward what the shredding would accomplish), and an "awareness of wrongdoing" (consisting of her thinking about how others, narrowly or broadly, would assess her actions in the circumstances). Another way to describe this case would be to say that there is only the actor's conduct and its context (taking the documents home and shredding them under the circumstances), and then the adjudicatory process's conclusion that a rational actor engaging in that conduct in that context would be someone who deserves blame for a wrongful choice or who could be deterred by the prospect of sanction.

George Fletcher's famous theory of the law's migration from concepts of "manifest criminality" to concepts of "subjective criminality" likely has bearing here.[77] Actions that alone speak to the actor's blameworthiness used to hold a lot more weight in the criminal law than they do now. Contemporary crime definition focuses more closely on state-of-mind inquiries that are said to differentiate between blameworthy instances of particular conduct and instances of the same conduct that do not deserve punishment. This development is nowhere more pronounced than in the area of white collar offenses, as evidenced by Fletcher's examination of the development of the law of property crimes.

With crimes like fraud and obstruction of justice, the law is operating—probably not yet in stable equilibrium—somewhere between manifest

74. *See, e.g.*, Jennifer Groscup & Jennifer Tallon, *Theoretical Models of Jury Decision-Making, in* JURY PSYCHOLOGY: SOCIAL ASPECTS OF TRIAL PROCESSES 41, 55 (Joel D. Lieberman & Daniel A. Krauss eds., 2009); *see also* DANIEL KAHNEMAN, THINKING FAST AND SLOW 134–35 (2011).

75. *See generally* RICHARD E. NISBETT & LEE ROSS, HUMAN INFERENCE: STRATEGIES AND SHORTCOMINGS OF SOCIAL JUDGMENT (1980) (describing the fundamental attribution error as the tendency to overvalue dispositional explanations for the conduct of others and undervalue situational ones).

76. WINTER, *supra* note 57, at 120.

77. GEORGE P. FLETCHER, RETHINKING CRIMINAL LAW 115–22 (1978).

criminality and subjective criminality. It is mostly subjective. For example, only mental state inquiries can ultimately sort between fraud and ordinary aggressive salesmanship. But the subjective inquiry clings to a search for outwardly observable actions—those things like "badges of fraud" manifesting an actor's consciousness of wrongdoing—in deciding whether subjective guilt is present.

Of course mental states, as described in criminal law doctrine, are legal constructs designed to perform an important practical function in ex-post adjudication. Given their function, those constructs depend overwhelmingly on a process of imputation from conduct. But there is no reasonable alternative given the requirements of criminal adjudication.[78] Even if the present process for discovering mental state only dimly glimpses its truth or essence, it is a process that must be passed through on the way to establishing an individual's mental state in the legal system. With respect to white collar offenses, mens rea may be "evidentiary all the way down." But, in practice, the constitutive and evidentiary accounts relating to the idea of awareness of wrongfulness can accommodate each other.

How, then, do factfinders perceive this signal, or find mens rea, in a given case? Some recent white collar prosecutions suggest that they rely heavily on "tells" consistent with stock narratives to identify the requisite state of mind. At first, this may appear unobjectionable. After all, adjudication is widely understood to involve story-telling,[79] and knowledge of other plots helps factfinders process the circumstantial evidence providing the only possible showing of intent.[80] When adjudicators, or even investigators, attempt the intersubjective evaluation of a perpetrator's state of mind, the only question they can really ask is what would have been in their minds if faced with the same situation.[81] Answering that question depends entirely on inferences from the circumstances surrounding the offense conduct. Although direct and circumstantial evidence in theory have the same worth, and are equally subject to misinterpretation,[82] the additional inferential steps that circumstantial evidence requires can increase the possibility of error. Those steps are often visualized as a chain of inferences leading from a fact in the world to a judgment about what happened.

This is a familiar concept in evidence law: that probative value often

78. *Cf.* Stephen J. Morse, *Inevitable Mens Rea*, 27 HARV. J.L. & PUB. POL'Y 51 (2003).

79. *See* Robert P. Burns, *The Rule of Law in the Trial Court*, 56 DEPAUL L. REV. 307, 314 (2007) ("What do we actually do at trial? We tell different sorts of sharply constrained stories, then criticize them, and then partially reconstruct them.").

80. Devenpeck v. Alford, 543 U.S. 146, 154 (2004) (noting that intent must always be determined by external, objective means); R.A. DUFF, INTENTION, AGENCY AND CRIMINAL LIABILITY: PHILOSOPHY OF ACTION AND THE CRIMINAL LAW 28 (1990) (discussing the "dualist assumption" that "we must *always* infer an agent's mental states . . . from the 'external' evidence which is all that is available to us [because] we can have no *direct* knowledge of another's states of mind").

81. Shen et al., *supra* note 71, at 1314.

82. *See, e.g.*, Holland v. United States, 348 U.S. 121, 140 (1954) (noting that circumstantial evidence "may in some cases point to a wholly incorrect result," but that this is "equally true" of direct evidence).

depends on linking inferences about facts together.[83] Despite an old debate concerning whether inferences can be stacked,[84] the length of any particular chain is generally an issue of weight rather than admissibility. As Wigmore explained: "All departments of reasoning, all scientific work, every day's life and every day's trials proceed upon such data."[85] And the problem of inferential reasoning is not limited to circumstantial evidence; relevance can emerge over multiple steps with regard to any evidentiary proposition.[86] Even an ex-post confession or an ex-ante statement of intent depends on inferences of the speaker's honesty and sincerity.

C. Proving Consciousness of Wrongdoing

As an evidentiary matter, chains of inference that lead to awareness of guilt, or include a link consisting of consciousness of wrongdoing, have long been thought relevant in a variety of contexts. Possession of a guilty mind, for example, sometimes plays a role when there is a dispute as to the identity of a perpetrator. In Wigmore's words, "[A] criminal act leaves usually on the mind a deep trace, in the shape of a consciousness of guilt, and from this consciousness of guilt we may argue to the doing of the deed by the bearer of the trace."[87] This assertion—once described as having "almost irresistible appeal"[88]—has supported admission of, and argument from, many and varied types of evidence in criminal prosecutions, such as use of an alias,[89] threats to a witness,[90] lies about whereabouts,[91] threats to a prosecutor,[92] and flight from law

83. George F. James, *Relevancy, Probability and the Law*, 29 CAL. L. REV. 689, 690 (1941) (noting that evidence has probative value if it tends to "prove or disprove any proposition" that "forms a further link in a chain of proof the final proposition of which is provable in the case at bar").

84. EDMUND M. MORGAN, BASIC PROBLEMS OF EVIDENCE 188 (1962) ("[T]he inference-upon-inference rule] is usually taken to mean that if the existence of one fact is found by inference from the existence of another, the inferred fact cannot be used as a basis for inferring still another fact.").

85. 1A JOHN HENRY WIGMORE, EVIDENCE § 41 (Peter Tillers ed., 1983).

86. *See* Ronald J. Allen, *The Myth of Conditional Relevancy*, 25 LOY. L.A. L. REV. 871, 879 (1992) ("[A]ll cases of relevancy are cases of conditional relevancy.").

87. WIGMORE, *supra* note 85, at 544.

88. Robert M. Hutchins, *Some Observations on the Law of Evidence—Consciousness of Guilt*, 77 U. PA. L. REV. 725, 727 (1929).

89. Newman v. United States, 28 F.2d 681, 683 (9th Cir. 1928) (noting that evidence of use of an alias may be relevant in a criminal prosecution "as importing a consciousness of wrongdoing which [the defendant] desired to conceal").

90. Ortiz-Sandoval v. Gomez, 81 F.3d 891, 897–98 (9th Cir. 1996) (holding that a defendant's threats to witnesses were relevant to show a consciousness of guilt that would negate his claim that he acted without premeditation and with an honest belief in the necessity of acting in self-defense).

91. State v. Jones, 474 So. 2d 919, 929–30 (La. 1985) (holding defendant's conflicting statements about his whereabouts on the night of the crime were admissible to show his "awareness of wrongdoing" and "guilty mind").

92. United States v. Copeland, 321 F.3d 582, 598–99 (6th Cir. 2003) (holding that defendants' pretrial threats against a prosecutor had "some probative value" with respect to defendants' consciousness of wrongdoing and guilt, although such threats supported only a "weak inference" due to several possible motives for the threats).

enforcement.[93] As with many longstanding ideas in the law of evidence, this one depends upon empirical assumptions that may be fallible.[94]

All evidence, and all adjudication, requires some act of interpretation, and this is particularly true with regard to intent. There is an even larger problem of remove, however, with respect to consciousness of wrongdoing in a white collar case. Faced with the question whether a killing is intentional, factfinders can fall back on the idea that defendants are "presumed to intend the natural and probable consequences of their acts."[95] A violent act typically bespeaks a desire or intent to harm, or at least the understanding that harm is likely to result. But white collar offenses do not always have "natural" consequences. There may be fraudulent financial transactions in which gain to the ultimate victim was, ex ante, at least as probable as loss. That makes the line between desired or intended harm, and what is merely a harmful side effect of an otherwise well-intended act, a very difficult one to draw.[96] Although it may be possible to determine with some confidence whether a defendant acted knowingly, secondary questions of what a defendant anticipated or desired when she acted are much harder. The entanglement problem in white collar crime looms large again here—at the evidentiary rather than crime definition level. It is plainly empirically true, and well known to any factfinder, that most violent deaths caused by other human beings are wrongful, and therefore inferences of criminality in such cases are strong, easily accessible, and often unyielding to alternative inferences. Not so at all with business deals that go awry.

Picture again an inferential chain, with consciousness of wrongdoing at the end of a series of links. In the case of violent crime, the chain may be quite short. The actus reus of physically harming someone will, in the great majority of cases, imply the intent to do so. The actus reus of defrauding someone, or of hindering an investigation, involves a more intricate series of connections. Each of those connections may or may not be a valid inference, and the additional steps invite misinterpretation. Document destruction, for example, often appears to lead in a straight line to consciousness of wrongdoing when obstruction is at issue. But it is routine in many businesses, and it is ordinarily done without any intent to obstruct. It signals a culpable state of mind only if certain inferences are accurate. The *Stevens* case[97] again provides a useful

93. *See, e.g.*, United States v. Ballard, 423 F.2d 127, 133 (5th Cir. 1970) ("[Flight is] admissible as evidence of consciousness of guilt, and thus of guilt itself.") (quoting WIGMORE, *supra* note 85, § 276 (3d ed. 1940) (internal quotation marks omitted)).

94. *See, e.g.*, Illinois v. Wardlow, 528 U.S. 119, 126–40 (2000) (Stevens, J., concurring in part, dissenting in part) (explaining that considerations other than concern about the exposure of wrongdoing often inspire flight from police).

95. Giles v. California, 554 U.S. 353, 386–87 (2008) (citing United States v. Falstaff Brewing Corp., 410 U.S. 526, 570 n.22 (1973)).

96. This task is not made easier by the Court's own inconsistency about white collar standards of intent, as discussed in Part I. *See, e.g.*, Holloway v. United States, 526 U.S. 1 (1999) (stating that no firm purpose is required); Farmer v. Brennan, 511 U.S. 825 (1994) (finding that objective blameworthiness derived from the facts suffices).

97. *See supra* text accompanying notes 8–16.

illustration. There, the court concluded that consciousness of wrongdoing was an element of liability. In order to correctly identify that element, the factfinder had to reason from Stevens's act of withholding documents through several inferential steps, including that Stevens intentionally withheld the documents, that she recognized them as responsive to the request, that she believed herself under an obligation to turn them over, and that she concealed their contents in order to hinder the investigation. While her conduct, on the surface, appears obstructive, many background details could break links in this chain. What if Stevens inadvertently left the documents out of her response? What if she in fact believed that the documents were irrelevant? What if Stevens received advice from counsel—as she did in the actual case—that led her to believe she could legitimately withhold the documents? Any of those possibilities would render a necessary inferential link to culpability a misstep.

Inferential reasoning via familiar stories about guilty minds is most concerning where consciousness of wrongdoing serves as the determining liability factor or marks the line between civil and criminal sanction. In many cases, it serves not just as circumstantial evidence that the defendant committed the offense conduct but as the element that renders the defendant's (often otherwise undisputed) conduct a crime. And jurors' basic competence at determining "what happened"[98] is tested in close cases with ambiguous evidence and amorphous legal standards—as fraud and obstruction cases tend to be. A coherent narrative in these cases is not necessarily a correct one. What makes it coherent is that it accords with expectations about how people usually act. Criminal cases, however, often require factfinders to confront behavior that is out of the ordinary. Shortcuts enable adjudicators to make the up or down choice that a verdict requires, but they also take three-dimensional events and render them in two dimensions.

1. Recurring Signals of Inculpatory Cognition

Consider some of the specific paradigms at work in cases where consciousness of wrongdoing may or may not exist as a matter of descriptive reality but clearly appears as a familiar narrative. In obstruction prosecutions, for example, decisionmakers must distinguish between anticipated and unintended consequences to identify the requisite inculpatory knowledge. Obstruction can encompass ordinary conduct like following document retention policies, attempting to mitigate exposure to liability when questioned by law enforcement, or withholding embarrassing information.[99] When there is no direct access to a defendant's level of consciousness of wrongdoing, factfinders work backwards from what the defendant did, and interpret her likely state of

98. *See, e.g.*, NEIL VIDMAR & VALERIE P. HANS, AMERICAN JURIES: THE VERDICT 346 (2007) (affirming the "basic soundness of the American jury").

99. John L. Diamond, *Reviving Lenity and Honest Belief at the Boundaries of Criminal Law*, 44 U. MICH. J.L. REFORM 1, 29 (2010); Julie R. O'Sullivan, *The Federal Criminal "Code" Is a Disgrace: Obstruction Statutes as Case Study*, 96 J. CRIM. L. & CRIMINOLOGY 643, 679 (2006).

mind in light of their own experiences and expectations. In the *Stevens* case,[100] the advice of counsel caused an unusually clean break in the chain of inference leading to a guilty mind. But many obstruction cases allow prosecutors to project very elastic theories of culpability onto the evidence. And some repeating patterns of mental state evidence have emerged. Courts have deemed sufficient, for example, behavior that could be labeled flagrant misconduct, a classic cover up, or conscious avoidance.

First, the blatant quality of a defendant's wrongdoing may provide the requisite link to consciousness of wrongdoing. A recent federal indictment in Chicago suggests that efforts to deceive government officials—such as falsifying lab reports, submitting fraudulent customs forms, and disguising transactions with coded language—can be so extensive that it is even possible to obstruct an imagined future investigation that may or may not come to pass.[101] Judge Posner's analysis in *United States v. Black* on remand from the Supreme Court likewise expresses this idea that conduct must be intentionally obstructive when there is something glaringly obvious about it.[102] The court found "compelling" Black's removal of thirteen boxes of documents from his office, at times and in a manner supposedly designed to avoid surveillance cameras, in part because those bare facts fit squarely within broader narratives about knowing misconduct.[103]

A subset of the cases concerning flagrant misconduct involves stark inconsistencies or unusual economic windfalls. Courts have been careful about accepting financial incentives as a proxy for mens rea and have rejected the idea that they are inherently probative of fraud. General income manipulation, such as selling an asset to book earnings by a certain date, does not provide sufficient evidence of criminal culpability, but financial gains that "go far beyond the usual arrangements of compensation based on the company's earnings" can.[104] Alex Stein discusses the related idea that the boundaries between criminal and non-criminal bribery might be drawn by characterizing the nature of the exchange. According to his analysis, factfinders attempting to discern intentional wrongdoing might also look for a pecuniary benefit not available on the open market, which would signal a gain that "cannot be accidental."[105]

Proxies for mens rea that relate to the overt nature of a defendant's actions again arise from Fletcher's distinction between "manifest" and "subjective"

100. United States v. Stevens, 771 F. Supp. 2d 556 (D. Md. 2011).

101. Indictment, United States v. Wolff, 08 CR 417 (2009), *available at* http://www.justice.gov/usao/iln/pr/chicago/2010/pr0901_01a.pdf; *see also* United States v. Hunt, 526 F.3d 730 (11th Cir. 2008) (involving a police officer's falsified "use of force" report).

102. United States v. Black, 625 F.3d 386 (7th Cir. 2010); *cf.* STEPHEN KING, THE COLORADO KID 46–47 (2005) (showing how stories tend to include an element of "musta-been," which is an obvious solution to an unknown piece of the puzzle that occurs to a reader who then "tell[s] himself a story").

103. *See Black*, 625 F.3d at 389–90.

104. Aldridge v. A.T. Cross Corp., 284 F.3d 72, 83 (1st Cir. 2002); *see also* United States v. Brown, 459 F.3d 509 (5th Cir. 2006).

105. Alex Stein, *Corrupt Intentions: Bribery, Unlawful Gratuity, and Honest-Services Fraud*, 75 LAW & CONTEMP. PROBS., no. 2, 2012 at 61, 67.

criminality.[106] Flagrancy cases, though arising in the white collar realm which typifies the modern movement of the criminal law to subjective fault inquiries, demonstrate legal actors' persistent uneasiness about subjective inquiries and the continued appeal of resting criminal convictions on "manifestly" wrongful conduct.

A second cluster of factual scenarios that gives rise to inferences of inculpatory cognition involves "cover ups." A cover up can simultaneously be the obstructive conduct and send a strong evidentiary signal that it was undertaken with awareness of a violation. Barry Bonds, for example, was found guilty of obstruction of justice based on a rambling response to a single question during his immunized testimony before the grand jury. The evasive quality of the response itself must have supplied the consciousness of wrongdoing, because there was no admissible evidence that even established his knowledge that he received human growth hormones and steroids.[107]

Other cover ups are not charged as the separate offense they could be—like a material false statement—but instead supply the mens rea for a different underlying charge. Destruction of records, fictitious accounts, and creative accounting such as retroactive reconciliation of receipts[108] often contribute to narratives of conscious wrongdoing. Sometimes detection avoidance really does help identify a guilty mind, as in the case of a local police chief who altered reports and sought the means to dispose of a gun.[109] In other situations, however, the evasive conduct is subject to conflicting interpretations, but the prototypical cover-up stories that factfinders can call to mind make the ambiguous scenarios appear clear. The image of a cover up that is "worse than the crime" comports with a powerful narrative woven through cases, scholarly commentary, the media, and popular culture. Law violators are often portrayed as actively obstructing the subsequent investigation of their crimes:

> Just as the state invests in detecting their violations, [violators] invest in avoiding that detection. They lie, they shred, they bribe. They refrain from taking notes. They go out of their way to communicate only orally, in person, in private. They wear gloves and masks. They work under cover of darkness. They open foreign bank accounts. They form offshore entities. They launder tainted money. They launder bloody socks.[110]

In many cases, of course, this is an accurate cognitive model, but in others it just

106. FLETCHER, *supra* note 77, at 115–16.

107. Bonds's trainer, Greg Anderson, refused to testify about what he told Bonds when injecting him. In contrast, consider the facts of Roger Clemens' case, in which the mental state with which he made false statements to Congress about his use of performance-enhancing drugs is arguably less opaque. Clemens's trainer, Brian McNamee, could offer more direct evidence of "awareness" in the form of testimony asserting that Clemens was told he was getting something more potent than B12 shots. *See* Michael S. Schmidt, *Clemens's Ex-Trainer to Meet with Prosecutors*, N.Y. TIMES, Jan. 13, 2009, at B16.

108. *See, e.g.*, United States v. Tampas, 493 F.3d 1291 (11th Cir. 2007); United States v. Quattrone, 441 F.3d 153 (2d Cir. 2006) (holding that a reminder of the document retention policy would have been sufficient evidence for the §1503/§1512 nexus because linked to a potential cover up, but that jury was not properly instructed on it).

109. United States v. Matthews, 505 F.3d 698 (7th Cir. 2007).

110. Chris William Sanchirico, *Detection Avoidance*, 81 N.Y.U. L. REV. 1331, 1350 (2006).

resonates with factfinders so strongly that the narrative overrides a more logical approach to the evidence.[111]

Taking cover prospectively, through conscious avoidance of guilty knowledge, also enacts a narrative consistent with a guilty mind. Defendants can signal mens rea by constructing excuses in advance of misconduct, by declining to keep certain records, or by consulting with lawyers or accountants. The idea of engineered ignorance surfaced in the *Black* case as well. Judge Posner commented on the implausibility of a large, sophisticated, public corporation failing to keep records of a transaction unless it was trying to hide something.[112] According such extensive evidentiary significance to the failure to confront incriminating facts focuses too narrowly on one story of culpability and may cause factfinders to overlook alternative explanations. Even when this conduct stems from a compliance effort, it can appear like the plan or desire to get away with malfeasance. Indifference to incriminating knowledge can have external causes—including institutional and structural ones like reporting hierarchies—and may not accurately signal intentional ignorance. Many lawyers, for example, avoid note-taking out of an abundance of caution, rather than in anticipation of wrongdoing. Again, there is an intricate chain of inference: from the defendant's failure to acquire knowledge to the defendant's deliberate avoidance of it, and from there to a fair chance to avoid culpability and a blameworthy decision not to take it.

Willful blindness has both formal legal significance and this factual function. When a crime requires proof of "knowledge" and there is no direct evidence of the defendant's knowledge, the jury is permitted to find the knowledge element if it concludes that a defendant was "deliberately ignorant."[113] In theory, establishing willful blindness requires more than a showing of recklessness.[114] But in practice, facts that would only be sufficient for reckless disregard may enact a paradigm of consciousness of wrongdoing and therefore satisfy the unstated (but ostensibly higher) mens rea requirement of inculpatory cognition.

Boot-strapping from facts supporting a lower mental state requirement to a narrative that justifies finding consciousness of wrongdoing points to the potentially misleading quality of these familiar patterns. In the flagrancy context, for example, objective blameworthiness suffices for liability, regardless of the defendant's subjective state of mind, because the conduct at issue implies

111. *See* Steven A. Sloman, *The Empirical Case for Two Systems of Reasoning*, 119 PSYCHOL. BULL. 3, 15 (1996) (explaining that the associative system of reasoning often intrudes on the rule-based one).

112. United States v. Black, 625 F.3d 386, 391–94 (7th Cir. 2010).

113. United States v. Black, 530 F.3d 596, 604 (7th Cir. 2008), *vacated on other grounds*, 130 S. Ct. 2963 (2010); United States v. Jewell, 532 F.2d 607, 700–01 (9th Cir. 1976).

114. Global-Tech Appliances, Inc. v. SEB S.A., 131 S. Ct. 2060, 2070–71 (2011) (holding that a willful blindness instruction is appropriate only if the government shows "deliberate action" on part of a defendant to avoid learning of the relevant facts); United States v. Skilling, 554 F.3d 529, 548–49 (5th Cir. 2009), *vacated on other grounds*, 130 S. Ct. 2896 (2010); *Black*, 530 F.3d at 604; United States v. Giovannetti, 919 F.2d 1223, 1228 (7th Cir. 1990).

mens rea. With respect to conscious avoidance, the failure (or refusal) to grasp the obvious, in light of the conduct occurring around a defendant, demonstrates that she should have known (objectively) but not that she did (subjectively). If consciousness of wrongdoing is to supply a level of mens rea that appropriately draws boundaries of blameworthiness—and, in doing so, is to place some limits on official discretion—this standard requires both subjective and objective elements. If instead it is applied in the absence of a clear statement as to its dual nature and according to legal-folk ideas about the sorts of acts that wrongdoers commit, then it may lead to liability inconsistently, and based on superficial associations between the facts and familiar stories.[115] A project aimed at disciplining the process of disentangling white collar offenses from their background settings could end up being more permissive and error-prone than the status quo ante.

2. Stories of Moral Failing

A further source of disquiet about a consciousness of wrongdoing standard is that the narrative it most likely enacts is a classic story of moral failing, which will commonly be presented through forms of evidence that, regardless of their doctrinal imprimatur, amount to the kind of proof of character that clear thinking about evidentiary processes strongly disfavors. It is impermissible to introduce a defendant's prior crimes or bad acts to show his propensity to act in conformance with those other acts.[116] Such evidence is admissible, however, when it fits within a theory other than propensity, such as "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."[117] Intent is the most permissive of these alternative purposes that elide the ban on propensity evidence, and an amorphous standard like general inculpatory cognition could make an even broader array of character evidence admissible. Once introduced into the case, character issues contribute to the other motivational processes that underlie psychological blame as well.[118]

Factfinders tend to overweigh character, and narrative expectations aggravate that tendency. Stories are compelling in part because characters act on identifiable motivations. Their "natures" are revealed in detail and to an extent never available in life.[119] The idea that trials are effective only if they tell a story that "correspond[s] to the jurors' image of what a story should be, an image drawn from the most numerous and vivid stories they read, hear, and

115. It is worth noting, however, that while a standard that is too supple provides insufficient notice and poorly sorts defendants, scholars have identified some virtues of a very general requirement of "a guilty mind" or "a vicious will" in terms of the freedom those common law terms once accorded jurors to account for moral considerations and to acquit in cases in which "criminal punishment seemed, on balance, unfair." WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE 30 (2011).

116. FED. R. EVID. 404(a).

117. *Id.* 404(b).

118. Janice Nadler, *Character, Blaming as a Social Process: The Influence of Character and Moral Emotion on Blame*, 75 LAW & CONTEMP. PROBS., no. 2, 2012 at 1.

119. Samuel R. Gross, *Make-Believe: The Rules Excluding Evidence of Character and Liability Insurance*, 49 HASTINGS L.J. 843, 853 (1998).

see" ignores this space between "fictional people" and "ordinary mortals."[120] And the most vivid stories are ones of moral failing. Although defedants can present some "positive" character evidence, it is rarely compelling. Most factfinders have their own redeeming qualities and index of good deeds, but few will have committed prior bad acts as salient as past crimes. Not many stock narratives are consistent with "consciousness of innocence."

Moreover, while character is a reliable predictor of conduct in stories, experimental work demonstrates that most character traits have nothing like the explanatory and predictive power they are traditionally accorded.[121] Opening the door to increased consideration of criminal history and moral failings likely means that more defendants will be convicted for the characteristics they possess, rather than what they actually did, or even what they really thought.[122] Factfinders may make hasty judgments based on incomplete information about character, and then apply those judgments to decisions about the significance of actions. And, in keeping with the fundamental attribution error, they may incorrectly conclude that a defendant is a wrongdoer acting with inculpatory cognition rather than reacting to situational pressures.[123]

D. Clarifying Standards of Liability and Proof

Thus, when the existence of a guilty mind is the dividing line between conviction and acquittal, stories are not precise enough. They are governed by convention rather than empirical verification; they are overinclusive with regard to the admissibility of evidence; they construct images of what happened rather than requiring factfinders to logically assess the raw unmediated facts; and they are overly emotional, which makes the guilty mind unduly easy to discern in an unattractive character. Consciousness of wrongdoing has the potential—if treated seriously as a genuine offense element—to clarify and revitalize mens rea standards in white collar cases. But fuzziness about the standard's content, and inviting forms of proof that cause associative processes to overwhelm rule-based thinking, mean that this standard might do little to address—and could do much to worsen—the harms of unjustified punishment.[124] Furthermore, if its

120. *Id.* at 852–53.

121. LEE ROSS & RICHARD E. NISBETT, THE PERSON AND THE SITUATION: PERSPECTIVES OF SOCIAL PSYCHOLOGY 90–91 (1991) ("[P]eople are inveterate dispositionalists. They account for past actions and outcomes, and make predictions about future actions and outcomes, in terms of the person—or more specifically, in terms of presumed personality traits or other distinctive and enduring personal dispositions."); *cf.* Michelson v. United States, 335 U.S. 469, 475–76 (1948) ("The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge.").

122. *See* Nadler, *supra* note 118, at 28 (finding that inferences about the "general virtuousness" of a person inform the level of blame one accords to that person for a particular pattern of conduct).

123. *See generally* ROSS & NISBETT, *supra* note 121 (discussing the fundamental attribution error).

124. *Cf.* Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401 (Summer 1958) (arguing that criminalizing regulatory violations diminishes respect for the law).

resolution of some difficult lingering questions about mens rea is more apparent than real, it could distract attention from developing doctrine in other potentially more fruitful directions.[125] A poorly articulated version of the standard could also heighten concerns about pretextual prosecutions because of the (still) high level of discretion in the concept and the unpredictability of results.[126]

A first step toward addressing some of these concerns is to be clear about the meaning of consciousness of wrongdoing in the sense of *how* conscious a defendant would have to be.[127] Consider the Supreme Court's reasoning in the *Fowler* case this past term.[128] The question before the Court was whether there was a sufficient federal nexus in a case involving the murder of a police officer who interrupted preparations for a bank robbery. Section 1512(a)(1)(C) makes it a federal crime to kill another person with the intent to "prevent the communication by any person to a law enforcement officer . . . of information relating to the commission or possible commission of a federal offense."[129] The Court debated whether conviction requires proof that information would have been transferred from the victim to a federal law enforcement officer. A key question was whether the existence of any "reasonably likely" scenario—or any plausible narrative—that would have involved transmission of the officer's observations to federal officials suffices for culpability.[130] The difficulty of pinpointing what inspired the killing, and of setting a proof standard for demonstrating the relevant motivation, underscores the difficulty of assessing what occurred to a defendant at a particular moment in any case.[131]

Substantively, consciousness of wrongdoing could do real sorting work if it is treated as an element, has subjective and objective dimensions, and requires a

125. *Cf.* David Mills & Robert Weisberg, *Corrupting the Harm Requirement in White Collar Crime*, 60 STAN. L. REV. 1371, 1385 (2008) (arguing that the concept of a "corruption" element has inhibited rational development of the law of obstruction of justice).

126. A.P. SIMESTER & ANDREAS VON HIRSCH, CRIMES, HARMS, AND WRONGS: ON THE PRINCIPLES OF CRIMINALISATION 199 (2011) ("Criminal convictions are not like birthday presents . . . [p]eople need reasonable opportunities to avoid them.").

127. *Cf.* Bryan v. United States, 524 U.S. 184, 203 (Scalia, J., dissenting) (querying, with regard to application of statutory "willfulness," whether there is any "principled way to determine *what* law the defendant must be conscious of violating").

128. Fowler v. United States, 131 S. Ct. 2045 (2011).

129. 18 U.S.C. § 1512(a)(1)(C) (2006).

130. *Fowler*, 131 S. Ct. at 2048.

131. A related problem arises in cases where conviction requires a "nexus" between obstructive conduct and a pending investigation, or the plus factor that documents were withheld "corruptly." In a few cases, the "corruptly" element has been interpreted to demand proof that a defendant had actual knowledge of an investigation, but it is often meaningless. *See* United States v. Ring, 628 F. Supp. 2d 195, 220 (D.D.C. 2009) (holding that the "possible existence of a federal crime" and a defendant's "intention to thwart an inquiry into that crime" suffice); United States v. Applewhaite, 195 F.3d 679, 687 (3d Cir. 1999) ("All that [the statute] requires is that the government establish that the defendants had the intent to influence an investigation that happened to be federal."). Some scholars have described this element as nothing but a "redundant moral gesture" or a "rhetorical flourish." Mills & Weisberg, *supra* note 125, at 1385. *But see* United States v. Stanfield, 101 F.3d 909, 918 (3d Cir. 1996) (requiring additional evidence of federal element).

meaningful level of awareness. *Fowler* ultimately set some limits on speculative mens rea standards, as the Court held that a showing of a possible or potential communication to federal authorities by the victim was not sufficient for a conviction under the witness tampering statute, and that at least a reasonable-likelihood standard must be met.[132] An analogous minimum standard (or maximum allowable inference) could give consciousness of wrongdoing more content.

Setting a mental state requirement that is both higher and clearer requires further attention to the permissible evidentiary inferences that satisfy it.[133] Procedurally, aspects of trial and appellate mechanics might contribute to factual accuracy with respect to mental states. To be sure, trials cannot "get at the total truth in all its mystery."[134] And particularly with respect to offenses that turn on state of mind, "being found guilty and being guilty are manifestly not the same thing."[135] But courts could do more to ensure the soundness of decisionmaking about mens rea. For example, abundant caution with character evidence can limit misleading narratives. Moreover, were courts to treat consciousness of wrongdoing as an element and thus require its proof beyond a reasonable doubt, they might also counteract the deceptive power of stories by instructing factfinders not to convict if they perceive a plausible story of innocence.[136] Closer attention to permitted evidentiary inferences could also raise the consistency of mental state findings. Courts have tended to find evidence sufficient as long as there is some plausible narrative of guilt, or as long as "the jury could have accepted a culpable explanation consistent with proof of defendant's conduct"[137] and have reversed convictions only where there is a total failure of proof. Reviewing courts in a position to consider a range of cases involving consciousness of wrongdoing might take a harder look at the adequacy of recurring fact patterns.

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132. *Fowler*, 131 S. Ct. at 2048.

133. *Cf.* United States v. Screws, 325 U.S. 91, 104–07 (1945) (concluding, in a case involving criminal prosecution for a civil rights violation, that the statute should be construed to require a "willful" violation *and* that the jury should have received instructions that the defendants' generally bad purpose would not rise to that level).

134. United States v. Jackson, 405 F. Supp. 938, 946 (E.D.N.Y. 1975); *see also* CLIFFORD GEERTZ, LOCAL KNOWLEDGE: FURTHER ESSAYS IN INTERPRETIVE ANTHROPOLOGY 173 (1983) ("Whatever law is after, it is not the whole story.").

135. LARRY LAUDAN, TRUTH, ERROR, AND CRIMINAL LAW: AN ESSAY IN LEGAL EPISTEMOLOGY 12 (2006); *see also* United States v. Havens, 446 U.S. 620, 626 (1980) (stressing "the importance of arriving at the truth in criminal trials"); Simon, *supra* note 67, at 147 (arguing for a "reassertion of the value of factual accuracy").

136. *See* Ronald J. Allen, *Factual Ambiguity and a Theory of Evidence*, 88 NW. U. L. REV. 604, 609 (1994). *But see* Dan Simon, *More Problems with Criminal Trials: The Limited Effectiveness of Legal Mechanisms*, 75 LAW & CONTEMP. PROBS., no. 2, 2012 at 165, 193 ("If, as the research suggests, the fact finder's perception of the defendant's guilt does not correspond closely to the actual guilt, the standard can do little to differentiate guilty from innocent defendants.").

137. United States v. Goyal, 629 F.3d 912, 919 (9th Cir. 2010) (finding insufficient evidence to support an inference of willful and knowing deception).

V
CONCLUSION

This is but the beginning of a close examination of two questions at the forefront of contemporary adjudication of white collar crimes. First, why might the criminal law treat a person's awareness of the normative wrongfulness of her behavior as a de jure or de facto element of liability? The tentative answers suggested are (1) that such an element narrows liability to persons deserving of punishment, on a particular account of blameworthiness grounded in obligations of forbearance in a functional liberal order, as well as generating potential instrumental benefits; and (2) that so narrowing liability provides a means for legal actors to deal with the difficult and fundamental problem of line drawing that plagues the definition and enforcement of many white collar offenses that are closely enmeshed in legitimate realms of social and economic activity.

Second, can this mental state as to the normative status of conduct reliably be identified in the process of adjudication? The use of stock narratives and the tendency to overweigh indicators of moral failing are risks that could render a consciousness of wrongdoing standard too error-prone to perform its potentially beneficial function. Substantive attention to the contours of this standard, and procedural rigor about the admissibility and sufficiency of the evidence used to prove it, could assist in the idea's successful performance as a tool for adjudicators to address the growing challenge of limiting the criminal law's application in the white collar realm to cases of well-justified punishment.