

Culpability and Modern Crime

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Criminal law has developed to prohibit new and subtler forms of intrusion on the autonomy of others, including freedom of thought and decision. Examples include modern understandings of fraud, extortion, and bribery, which pivot on the concepts of deception, coercion, and improper influence. Sometimes core offenses develop to turn on similar concepts about autonomy, such as when reforms in the law of sexual assault make consent almost exclusively material. These projects can be laudable. But such progressive programs in substantive criminal law also raise difficult problems of culpability. Legal lines must be specified with reference to actors' mental states relative to each other and with reference to conduct that is embedded within socially welcome activities. The result is that legal institutions struggle in borderline cases to locate sufficient fault to satisfy the demands of justification for punishment. This Article demonstrates this problem through exploration of the modern law of each of these example offenses—fraud, extortion, bribery, and sexual assault.

To address the problem of borderline culpability, the Article turns to criminal law theory, finding a connection between culpability and the principle of notice in criminal law. Rather than its absence serving to exculpate, one can understand notice as serving to inculcate. To manage the problem of culpability in modern crime, the Article concludes, legal institutions should attend more explicitly—in both criminalization and adjudication—to the questions of whether the actor was aware of the normative wrongfulness of her conduct and, if not, whether punishment is justified on a negligence level of fault.

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INTRODUCTION

Substantive criminal law produces many more difficult problems of line drawing than it once did. The theoretical concern of this Article encompasses a diverse and practical group of modern problems. Did purchases and sales among financial institutions of complex mortgage-related derivatives products in the lead-up to the 2008 financial crisis constitute criminal fraud? In a system of privately financed politics, how can the law distinguish campaign contributions from criminal bribes? When should a threat to invoke legal process in a commercial dispute be treated as criminal extortion? If the law of sexual assault is to jettison, as it should, its old paradigm of violent force and resistance, how should it specify the nature and form of consent that render sex noncriminal?

These problems share a common theoretical structure. Two forces exert pressure on criminal law both to expand such offenses and to specify lines that are increasingly difficult to locate. Contemporary norms continue to grow more sensitive to questions of the scope of personal rights and criminal wrongs. And American politics and legal culture continue to demand a high level of generality and flexibility in crime definition.

The resulting challenges of line-drawing have several important features in common. They require deployment of concepts such as deception, coercion, influence, and consent, which have no universal or formal legal definition that is not grounded in the particular normative considerations that require law to use one of these concepts. They involve wrongful behaviors embedded within regions of socially acceptable or desirable conduct. They deal with problematic

interferences with the decision processes and autonomy of others, and thus the complexity of the offender's mental state as to the mental state of another person. Finally, such contextual social norms are often unstable and rapidly evolving.

This Article's central conclusion is that, for borderline—that is, disputable or uncertain—applications of modern offenses sharing certain characteristics, punishment is warranted, on standard accounts of justification, only if the actor decided to proceed in the face of some form of notice that her conduct was normatively wrongful. The alternative to this conclusion, the Article will argue, is one that substantive criminal law, apart from some programs to reform sexual assault law, has not addressed: that liability for the serious offenses of fraud, extortion, bribery, and rape should be imposed on negligent actors.

Situating this problem within punishment theory will explain how this Article arrives at its conclusions. The analytical starting point is the criminal law's polestar of individual fault—what criminal lawyers and scholars have variously called the law's general (and, many argue, defeasible) requirement of culpability, “general” mens rea, or guilty mind as a condition for justified punishment.¹ After all, the reason to worry about lack of clarity or complexity in the lines criminal law draws is the liberal goal of avoiding punishment of persons who are “innocent” in the sense of lacking anything resembling the “evil” or “wicked” state of mind that the Anglo-American common law long ago came to treat as essential to legal guilt.²

Punishment requires justification not just generally but all the way down, through the processes of legislative criminalization, prosecutorial discretion, conviction, and sentence. Most legal observers in the mainstream of the Anglo-American tradition will agree that, at the criminalization stage, serious crimes (those that are, *inter alia*, severely punished) require an account of moral desert, even if other types of justification might be welcome or necessary.

Such persons will further agree that, at the stage of individual punishment, legal actors engage in a process of ensuring fit between the case at hand (for example, the prosecution of Sally for the death of Harry) and the account of justification that supported the criminalization decision said to authorize the case (for example, the enactment of a homicide statute under which Sally is charged). As criminal cases progress from arrest to charge to judgment to sentence, doctrine and discretion control the process of satisfying this requirement of fit.

1. See JEROME HALL, *GENERAL PRINCIPLES OF CRIMINAL LAW* 133–34 (2d ed. 1960); GLANVILLE WILLIAMS, *CRIMINAL LAW: THE GENERAL PART* 30 (2d ed. 1961); Edwin R. Keedy, *Ignorance and Mistake in the Criminal Law*, 22 HARV. L. REV. 75, 81 (1908); Herbert L. Packer, *Mens Rea and the Supreme Court*, 1962 SUP. CT. REV. 107, 109; Francis Bowes Sayre, *Mens Rea*, 45 HARV. L. REV. 974, 974 (1932).

2. See 2 WILLIAM BLACKSTONE, *COMMENTARIES* *28–31; EDWARD COKE, *THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND* 107 (London, W. Clarke & Sons 1817); 3 WILLIAM HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 322 (6th ed. 1938); Paul H. Robinson, *A Brief History of Distinctions in Criminal Culpability*, 31 HASTINGS L.J. 815, 850 (1980).

As emphasized in the bulk of an introductory course in criminal law, the chief feature of doctrine that serves to guarantee fit, in the instance of serious crimes, is the criminal law's distinctive fault requirements. A common kind of defensive claim in criminal litigation is that the government cannot establish that the accused acted culpably—that is, that her mental processes at the time of offense make her morally deserving of punishment—as designated by the legislature in its establishment of a culpability floor for the relevant offense (for example, in a murder statute, intent or knowledge as to the result of death), as well as in any culpability floors in the “general part” of the jurisdiction's criminal law (for example, in statutes governing excuse defenses).

In modern criminal law, one common form of complaint that an accused person lacks sufficient culpability to justify punishment is that she had no (or at least insufficient) notice that her conduct was criminal, or, in other words, made her liable to be punished. This form of claim arises with particular frequency in borderline—in the sense of being contestable—applications of statutes covering the serious offenses of fraud, extortion, and bribery.³ The argument can be expected to arise more often in other contexts, such as in some types of sexual assault prosecutions, as statutory reform continues the laudable project of basing liability primarily or exclusively on the element of consent.

Criminal law theory has not adequately explored the normative content of such assertions of failure of notice. Standard accounts unpacking the conceptual content of notice claims, this Article will argue, are not fully satisfying. The role of notice in criminal law, it will be shown, can be better understood when more clearly connected to the imperative that legal actors ensure fit between any individual instance of punishment and the justifications for the project of criminalization that authorizes the case. The existence of notice justifies punishment in borderline cases of modern crime because it resolves uncertainty about whether the actor has sufficient individual culpability to guarantee fit between the particular case and the operative justifications for criminalizing the relevant category of behavior. Notice is and can be used as a culpability device. Put another way, notice is as profitably understood to inculpate as its absence is understood to exculpate.

Seeing notice this way will produce implications for the processes of criminalization, prosecution, and adjudication. Principles grounded in constitutional rights are famously underenforced in the area of notice. The contemporary Supreme Court almost always uses avoidance strategies to interpret criminal statutes in a manner that skirts constitutional notice defects.⁴ For the most part, the Court has struck down only wholly strange criminal statutes for unfair

3. Think of the prototypical white collar defendant who asserts surprise at the appearance of criminal law in a matter said to be one of ordinary commerce or politics.

4. *See, e.g., Skilling v. United States*, 561 U.S. 358, 412 (2010) (construing a federal fraud statute as applying only to cases involving proof of a bribe or a kickback in order to avoid ruling on the statute's constitutionality).

surprise.⁵ There are limited reasons, at best, to expect further constitutional enforcement. In any event, constitutional law is a poor candidate for leadership in policing the theoretical fidelity of criminal law. Thoughtful legislators can learn from this Article's insights when thinking about criminalization, although political economies may limit their capacity to act.

Prosecutors, jurors, and judges—those who exercise the bulk of the enormous discretion that American substantive criminal law creates—are the most important actors in the legal system for ensuring that modern criminal law moves along its normative frontiers with fairness and principle. In view of the discretion the American system affords those officers, it is reasonable to expect them to exercise it in accord with the same principles that justify having institutions of punishment in the first place. This Article offers guidance for how to do that job.

Part I first explains how modern crimes generate particularly difficult problems of culpability at their boundaries because they are constructed around concepts such as deception, coercion, corrupt influence, and consent that cause criminal prohibitions to have several common characteristics. It then illustrates and provides evidentiary support for the Article's claims through exploration of the crimes of fraud, extortion, bribery, and sexual assault (as defined in reform statutes). Part II develops in detail the argument from punishment theory that this Introduction has sketched. Part III discusses implications of the Article's conclusions for legislative criminalization, prosecutorial case selection, and adjudication by juries and judges.

I. MODERN CRIME

A. CAUSES OF CULPABILITY PROBLEMS IN MODERN CRIME

Fraud, extortion, bribery, and sexual assault frequently present among the most pressing issues of social, political, and economic policy in contemporary criminal law. Not coincidentally, these crimes rest on conceptual foundations that, because of their common features, inevitably produce difficult questions of individual culpability.

Doctrinal particulars aside, fraud is the crime of deceiving another person in order to induce a decision, knowing and intending that the victim be deceived.⁶ Extortion is the crime of coercing another person in order to induce a decision,

5. See, e.g., *Lambert v. California*, 355 U.S. 225, 229–30 (1957) (ruling that an ordinance that imposed criminal penalties for failing to register as a convicted felon remaining in the city of Los Angeles for more than five days was unconstitutional). The anti-loitering statute struck down in *Chicago v. Morales*, 527 U.S. 41, 64 (1999), although containing some distinct oddities, was less strange than the law in *Lambert*. But the reasoning in *Morales* rested more on the law's failure to control police discretion than on its capacity for unfair surprise. See *id.* at 60–64; see also *id.* at 64–69 (O'Connor, J., concurring in part and concurring in the judgment).

6. See, e.g., MODEL PENAL CODE § 223.3 (1962); see also Samuel W. Buell, *What Is Securities Fraud?*, 61 DUKE L.J. 511, 520–40 (2011).

knowing and intending that the victim be coerced.⁷ Bribery is the crime of conveying something of value to another person, intending that the person will understand the thing conveyed to be a quid pro quo related to official action.⁸ As defined in many contemporary law reform efforts, sexual assault includes, at least at a basic grade of the offense, the crime of penetration of another person without that person's consent, knowing of, or, in some proposals, being reckless or negligent as to, the victim's lack of consent.⁹

On four structural dimensions, these offenses differ from crimes like murder, assault, and arson, as well as from simply defined, albeit politically contestable, vice crimes such as drug dealing, gambling, and prostitution. First and most importantly, deception, coercion, corruption, and consent have little legal utility as formal concepts in the air.¹⁰ To bring these concepts to ground in criminal prohibitions, one needs to know what kinds and amounts of them, in what contexts, count as wrongful in ways that warrant criminalization. These are questions of social fact, with both positive and normative answers.

While some facets of homicide law, for example, have a fluid element that is socially contingent—the question of reasonableness in self-defense comes to mind—social norms do not vary according to “how much” killing constitutes murder, or at least they have not for a long time. By contrast, social inquiry is needed to determine when sharp dealing in commerce crosses over the line to fraud, using leverage to get someone to make a choice in one's favor counts as extortion, favors and payments to politicians are bribes rather than gifts or campaign contributions, and, in some instances, means used to obtain acquiescence make consent invalid so that sex is rape.

7. See, e.g., 18 U.S.C. § 1951 (2012); N.Y. PENAL LAW § 155.05(e) (McKinney, WestlawNext through L.2014); MODEL PENAL CODE § 223.4 (1962).

8. See 18 U.S.C. §§ 201, 666 (2012); *United States v. Sun-Diamond Growers of Cal.*, 526 U.S. 398, 404–05 (1999). Other offenses not explored here may also be amenable to the analysis that follows. Making a criminal threat is the offense of transmitting a communication that the victim will understand to be a genuine threat to do something violent. See 18 U.S.C. § 875 (2012); *United States v. Alkhabaz*, 104 F.3d 1492, 1495 (6th Cir. 1997). Stalking is the crime of engaging in a course of conduct that places another person in fear or harasses her. See, e.g., MICH. COMP. LAWS ANN. § 750.411h (West, WestlawNext through P.A. 2014, No. 282, of the 2014 Regular Sess., 97th Legis.). For a survey of statutory examples, see Ashley N. B. Beagle, Note, *Modern Stalking Laws: A Survey of State Anti-Stalking Statutes Considering Modern Mediums and Constitutional Challenges*, 14 CHAP. L. REV. 457, 467–79 (2011). For a detailed discussion of perhaps the broadest anti-stalking statute, see James C. Wickens, Comment, *Michigan's New Anti-Stalking Laws: Good Intentions Gone Awry*, 1994 DET. C.L. REV. 157, 158, 197. On the difficulty of “harass” as a criminal *actus reus*, see M. Katherine Boychuk, Comment, *Are Stalking Laws Unconstitutionally Vague or Overbroad?*, 88 NW. U. L. REV. 769, 781–92 (1994).

9. See, e.g., COLO. REV. STAT. ANN. § 18-3-402 (West, WestlawNext through Second Regular Sess., 69th Gen. Assembly); JOAN MCGREGOR, IS IT RAPE? ON ACQUAINTANCE RAPE AND TAKING WOMEN'S CONSENT SERIOUSLY 47 (2005); STEPHEN J. SCHULHOFER, UNWANTED SEX: THE CULTURE OF INTIMIDATION AND THE FAILURE OF LAW 93–94 (1998).

10. See Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 812, 820 (1935); Oliver Wendell Holmes, Justice of the Supreme Judicial Court of Mass., *The Path of the Law*, Address at the Boston University School of Law (Jan. 8, 1897), in 110 HARV. L. REV. 991, 993–97 (1997).

Second, these offenses present challenges of embeddedness. They take place in the midst of activities that are not only unobjectionable but are also socially welcome: sales, negotiation, politics, and sex. When compelled to proceed surgically rather than with blunt instruments, it is particularly tricky for law to specify lines of criminality correctly. Another way to put the point is that law must be more careful, if not necessarily more specific, lest it produce errors in the form of mismatch between justifications for punishing fraud, extortion, bribery, and sexual assault and the scope of legal authorization for arrest, prosecution, and punishment.

Third, these offenses concern issues of autonomy, psychology, and mental states that are even more difficult to pin down than the matters of the mind that the criminal law routinely encounters. Criminalizing fraud, extortion, bribery, and sex without valid consent are, in part, ways of policing distortions of, or interferences with, the decision processes of others. Consider the thorny problems of proof and risks of error that such inquiries into relative mental states can present: *A*'s intent to deceive *B*, *C*'s purpose to coerce *D*, *G*'s understanding that *H*'s favor is intended to procure an official action from *G*, *E*'s awareness that *F* does not really consent, and the like.¹¹ These are the forensic difficulties of what might be called relational mental states.¹²

Fourth, these crimes involve activities as to which social norms can evolve rapidly. To distinguish these offenses, for purposes of organization, from crimes that present fewer such difficulties, let them be designated loosely as modern crimes. The conceptual foundations of criminal law have expanded to include not just forcible violence and direct taking of property but also ideas like transparency in communication and interference with freedom of choice. With this modernization, the law has extended further into realms of social activity in which norms are less stable. What counts as fraud or extortion can depend on changing markets and shifting understandings in rapidly evolving economies. What counts as corruption can depend on norms of governance and politics that are continually in dispute. Though line-drawing problems are not difficult in most instances of sexual assault, what counts as a crime can depend on norms of interaction that are, thankfully, changing in social processes involving gender and sex sometimes described as revolutionary.

These four offense features—conceptual foundations that are defined according to social context, embeddedness, focus on matters of psychology and autonomy, and fast norm evolution—make the criminal law's standard task of

11. See Rebecca Dresser, *Culpability and Other Minds*, 2 S. CAL. INTERDISC. L.J. 41, 42 (1993); Kevin Jon Heller, *The Cognitive Psychology of Mens Rea*, 99 J. CRIM. L. & CRIMINOLOGY 317, 322 (2009).

12. See Meir Dan-Cohen, *Basic Values and the Victim's State of Mind*, 88 CALIF. L. REV. 759, 760 (2000). Dan-Cohen remarks that victim mental state is often described as an objective matter in ways that "downplay or hide the fact that there is more to the subjective aspect of crime than what goes on in the offender's mind." *Id.* He calls crimes that do not necessitate any inquiry into the victim's state of mind crimes of "strict victimhood." *Id.* at 766 (emphasis omitted).

examining culpability especially difficult. Historical inquiry, which is not the agenda of this Article, could undoubtedly generate examples in which legal lines have moved as social norms have shifted even with crimes like murder.¹³ But modern crimes like fraud, extortion, bribery, and sexual assault (as reformed) exhibit these features more often and more deeply. What follows, in the remainder of this Part, are explications of each of these offenses designed to demonstrate the culpability problem that arises along the leading edges of modern crimes.

B. ILLUSTRATIONS

1. Fraud and Deception

The central problem in the law of fraud is how to distinguish, in commercial relations, permissible behavior—even if sharp or misleading—from deception that is predatory and should be unlawful. Consider the somewhat related concept of consent, which has benefited from extensive treatment in legal theory.¹⁴ The literature has convincingly established that there are two kinds of consent: factual consent (to use Peter Westen's term) and normative consent (which Westen calls prescriptive consent).¹⁵ Factual consent is the subjective state of mind of acquiescence to another's conduct.¹⁶ Normative consent is acquiescing under conditions that make another person's conduct

13. Voluntary manslaughter and self-defense cases have been the most common places for shifting social norms to influence homicide prosecutions—sometimes, as with variation in self-defense rules, in doctrine, but more often in patterns of jury nullification. See Robert M. Ireland, *The Libertine Must Die: Sexual Dishonor and the Unwritten Law in the Nineteenth-Century United States*, 23 J. Soc. Hist. 27, 27–44 (1989); Dan M. Kahan & Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 COLUM. L. REV. 269, 327–33 (1996); Jeremy D. Weinstein, Note, *Adultery, Law, and the State: A History*, 38 HASTINGS L.J. 195, 227–38 (1986).

14. The most helpful works include DERYCK BEYLEVELD & ROGER BROWNSWORD, CONSENT IN THE LAW (2007); 3 JOEL FEINBERG, THE MORAL LIMITS OF THE CRIMINAL LAW: HARM TO SELF (1986); MCGREGOR, *supra* note 9; ALAN WERTHEIMER, CONSENT TO SEXUAL RELATIONS (2003); PETER WESTEN, THE LOGIC OF CONSENT: THE DIVERSITY AND DECEPTIVENESS OF CONSENT AS A DEFENSE TO CRIMINAL CONDUCT (2004); Larry Alexander, *The Moral Magic of Consent (II)*, 2 LEGAL THEORY 165 (1996); Vera Bergelson, *The Right to Be Hurt: Testing the Boundaries of Consent*, 75 GEO. WASH. L. REV. 165 (2007); Heidi M. Hurd, *The Moral Magic of Consent*, 2 LEGAL THEORY 121 (1996); Joseph Raz, *Authority and Consent*, 67 VA. L. REV. 103 (1981); Kenneth W. Simons, *The Conceptual Structure of Consent in Criminal Law*, 9 BUFF. CRIM. L. REV. 577 (2006) (reviewing WESTEN, *supra*). Scholars have been thinking about consent in the criminal law for a long time. See, e.g., J. H. Beale, Jr., *Consent in the Criminal Law*, 8 HARV. L. REV. 317 (1894).

15. See WERTHEIMER, *supra* note 14, at 122–43; WESTEN, *supra* note 14, at 4–7. For other helpful work on consent's normative features, see FEINBERG, *supra* note 14, at 172–88; Donald Dripps, *For a Negative, Normative Model of Consent, with a Comment on Preference-Skepticism*, 2 LEGAL THEORY 113, 116 (1996); Hurd, *supra* note 14, at 139–40; Douglas N. Husak & George C. Thomas III, *Date Rape, Social Convention, and Reasonable Mistakes*, 11 LAW & PHIL. 95, 101–04 (1992); Raz, *supra* note 14, at 122; Emily Sherwin, *Infelicitous Sex*, 2 LEGAL THEORY 209, 212–28 (1996).

16. See Hurd, *supra* note 14, at 125 (“To inquire into the behavior of a person whose consent is contested is . . . to seek evidence of that person's state of mind in the same way that we seek evidence of other morally and legally relevant subjective states such as premeditation, deliberation, and the possession of certain intentions and beliefs.”).

legally unproblematic.¹⁷

Social norms, and only social norms, can specify normative, and therefore legally operative, consent. For consent to have normative force, it cannot mean only the subjective state of mind of acquiescence. Otherwise, the bank teller who hands over the cash at gunpoint would not be the victim of a robbery. To determine when normative consent is lacking, one needs to know the conditions under which a victim's acquiescence has been impermissibly procured.¹⁸

In law, the concept of deception has the same structure as the concept of consent. Lots of cases of fraud are easy; they do not require much thought about either desert of punishment or the need for deterrence. For years, Bernard Madoff collected millions from fund participants clueless about the absence of real investments in Madoff's firm.¹⁹ Madoff badly deceived the investors, he plainly knew that and intended full well to deceive them, and their money vanished into his business. Although massively harmful, it was an easy case with no interesting criminal law question.

Fraud cases frequently present much harder questions, especially when they involve deceptive omissions or actions rather than explicit lies.²⁰ For example, in cases involving brokers or dealers trading ahead of their clients—sometimes called front-running—a facial story of deception is easy to construct: (1) Broker and Client are doing business; (2) Client expects Broker to follow a certain course of conduct; (3) Broker, when trading ahead of Client, does not follow that course of conduct and does not disclose that fact to Client, who has no other way of knowing that Broker has deviated from Client's expectations; and (4) Client is thus deceived, and the deception matters because Client acted on the basis of a misapprehension, the absence of which would, or at least might, have caused Client to refrain from acting.

Consider the case of specialists on the New York Stock Exchange (NYSE) who profited from "interpositioning" in securities orders.²¹ These people are the old-fashioned market makers in the blue coats who take buy and sell orders for particular listed securities assigned to them. According to NYSE regulations, specialists are not supposed to profit on the bid–ask spread (the difference between the sell price and the buy price) by moving securities through their own accounts, except when necessary to maintain liquidity because a counterparty

17. See Heidi M. Hurd, *Was the Frog Prince Sexually Molested?*, 103 MICH. L. REV. 1329, 1336 (2005) (reviewing WESTEN, *supra* note 14); see also Stuart P. Green, *Consent and the Grammar of Theft Law*, 28 CARDOZO L. REV. 2505, 2510 (2007) (arguing that "even if [whether an act is rape] comes down to consent, or if it comes down to consent being crucial, the analysis of what it means for V to consent to D will depend not on some identifiable mental state but on another host of contextual factors").

18. BEYLEVELD & BROWNSWORD, *supra* note 14, at 7; WESTEN, *supra* note 14, at 6–7.

19. See *Frontline: The Madoff Affair* (PBS television broadcast May 12, 2009).

20. For discussions that plumb the law of fraud exclusively and more deeply, see generally Samuel W. Buell, *Novel Criminal Fraud*, 81 N.Y.U. L. REV. 1971 (2006); John C. Coffee, Jr., *Modern Mail Fraud: The Restoration of the Public/Private Distinction*, 35 AM. CRIM. L. REV. 427 (1998).

21. See *United States v. Finnerty*, 533 F.3d 143, 145 (2d Cir. 2008).

buyer or seller is not at hand.²² Some of the specialists nonetheless did just that, making substantial profits for their firms and bigger bonuses for themselves.²³

David Finnerty, a specialist, was prosecuted for securities fraud on the theory that he deceived clients of his firm by engaging in interpositioning while the clients were led to believe that his profession refrained from such prohibited conduct.²⁴ The United States Court of Appeals for the Second Circuit affirmed the trial judge's decision to grant Finnerty a judgment of acquittal after a jury convicted him.²⁵ The court started with the well-established proposition that "non-verbal deceptive conduct" can constitute fraud.²⁶ The government argued that exchange practices and NYSE rules caused clients of the specialist firms to assume there was no interpositioning. Thus, when specialist firms used undisclosed interpositioning, they deceived their clients.²⁷ But the court said that the government produced no evidence that Finnerty or his firm had engaged in conduct that created the belief that interpositioning did not occur, nor did the government bring forward evidence of the actual expectations and beliefs of clients of Finnerty's firm about interpositioning.²⁸ Because the applicable normative context was not sufficiently established, no theory of deception through nondisclosure could succeed.

Consider a slightly different problem of trading ahead on the NYSE.²⁹ A small group of brokers employed by several of the major investment houses worked on trading floors that had "squawk boxes."³⁰ These are speakers that broadcast large block orders of the firm's clients to the trading floor to speed execution of trades. The brokers placed open phone receivers near the squawk boxes. The phones were connected to a confederate who worked at a day-trading firm on Wall Street, allowing this associate to profitably execute his own trades ahead of (that is, to front-run) the large block orders of the clients of the major brokerages.³¹

The government's theory was that the brokers who opened the phone lines to the day trader defrauded their employer brokerage houses of confidential client information belonging to the brokerages.³² The primary defense was that the brokerages did not treat the squawked information confidentially because the firms allowed it to be heard by and shared with others outside the brokerages, including visitors to the trading floors.³³ In reviewing convictions in the case,

22. *See id.* at 144–45.

23. *Id.* at 146.

24. *Id.* at 146–47.

25. *Id.* at 151.

26. *Id.* at 148.

27. *Id.* at 149.

28. *Id.* at 149–51.

29. *United States v. Mahaffy*, 693 F.3d 113 (2d Cir. 2012).

30. *Id.* at 120.

31. *Id.*

32. *Id.* at 120–24.

33. *Id.* at 121–22.

the Second Circuit again said that there can be fraud by mere conduct in such a scenario—it was sufficient for the government to establish that the brokers knew that the squawked orders were confidential and that their employer expected them not to disclose them in this manner.³⁴ However, the court reversed on the ground that the government violated its obligations to disclose exculpatory evidence by failing to turn over testimony of brokerage employees in a Securities and Exchange Commission proceeding that might have helped defense counsel establish that the employers had no such expectation of confidentiality about use of the squawks.³⁵ In other words, the crucial question of social context had not been fairly litigated.

Another such case occurred some years ago on the commodities exchange in Chicago.³⁶ Some brokers created a separate account within their firm that they used to trade ahead of large block orders for commodities they knew to be forthcoming from the firm's clients. Although the commodities exchange had no explicit rule against trading ahead of clients, the brokers were prosecuted for fraud on the theory that they deceived their own clients by not disclosing trading activities they knew could move market prices to the detriment of the clients.³⁷

In an opinion by Judge Richard Posner, the United States Court of Appeals for the Seventh Circuit affirmed their convictions. The court concluded that this was a case of fraud by conduct, stating, “[I]f someone asks you to break a \$10 bill, and you give him two \$1 bills instead of two \$5's because you know he cannot read and won't know the difference, that is fraud. Even more clearly is it fraud to fail to 'level' with one to whom one owes fiduciary duties.”³⁸ The commodities broker in this situation, the court said, “implicitly represented to [the clients] that he would try to get the best possible price.”³⁹ He did not do that, and did not tell them he would not be doing that. Thus, he deceived them.

If I tell my spouse that I am going to the park and, halfway there, I change my mind and go to the hardware store, my change of conduct, coupled with my nondisclosure, is not deception in a normatively meaningful sense. The law of fraud includes elements like materiality, reliance, and loss or risk of loss that are meant to screen out such trivial matters.⁴⁰ But the point is more fundamental than those features of doctrine. The relevant social norms do not make my undisclosed change of course deceptive in any sense of my bearing responsibility for it. All else equal, a spouse would not expect to be informed of such a change in plan. If I have a chronic problem of shoplifting, and several arrests for it, and have promised my spouse that I will never go to retail stores alone

34. *Id.* at 124–25.

35. *Id.* at 127–34.

36. *United States v. Dial*, 757 F.2d 163 (7th Cir. 1985).

37. *Id.* at 167–68.

38. *Id.* at 168.

39. *Id.*

40. *See* Buell, *supra* note 6, at 522–40.

again, that is a different matter. Now what I have done is wrong, even if it is not, for other reasons, fraud as a matter of law.

In the front-running cases, we can determine if the professionals have deceived the clients and employers only through inquiry into the expectations and beliefs of the clients and employers. Those expectations and beliefs are a function of their states of mind and the social context that produces those states of mind. Did the client or employer expect the specialist not to engage in interpositioning, the broker not to share squawked information outside the firm, or the commodities broker not to trade for himself in advance of his client's large purchase? No abstract, all-purpose account of the concept of deception can answer these questions.

Now add the question whether there should be criminal responsibility—that is, blameworthiness sufficient to deserve punishment, or sufficient social harm to warrant deterrence with the law's strongest sanctions. That question leads to the problem of culpability as to the mental processes of another. As will be fully argued in Part II, only the actor who appreciates that his conduct is deceptive because of the beliefs of the particular victim, and intends that it be so, is a good candidate for the kind of serious criminal punishment imposed in cases of fraud. Different markets produce different expectations and beliefs. The question of deception ultimately turns on social fact, not reasoning about the idea of deception.⁴¹

The contemporary law of fraud is full of situations like the front-running cases. Consider, for example, the controversy over whether traders of credit default obligations—derivative contracts tied to the value of mortgage-backed securities—committed criminal fraud by unloading long positions in those products during the late stages of the recent housing bubble. Many people think that at least some of those traders and their bosses ought to be in prison, or at least that it is mysterious why more have not been prosecuted.⁴²

41. See FEINBERG, *supra* note 14, at 274–77 (discussing how a fraud theory based on nondisclosure depends on what the seller can be expected to know about the buyer's expectations). Feinberg, in my view incorrectly as both a positive and a normative matter, suggests that criminal liability does not fit fraud based on nondisclosure. *Id.*

42. See, e.g., JEFF CONNAUGHTON, *THE PAYOFF: WHY WALL STREET ALWAYS WINS* 65–95 (2012); GOV'T ACCOUNTABILITY INST., *JUSTICE INACTION: THE DEPARTMENT OF JUSTICE'S UNPRECEDENTED FAILURE TO PROSECUTE BIG FINANCE* (2012), available at <http://www.g-a-i.org/wp-content/uploads/2012/08/DOJ-Report-8-61.pdf>; Charles Ferguson, *Obama and Corporate Crime*, CORP. CRIME REP., June 11, 2012, at 1, 12–14; Editorial, *Going Soft on Corporate Crime*, N.Y. TIMES, Apr. 10, 2008, <http://www.nytimes.com/2008/04/10/opinion/10thu2.html>; Joe Nocera, *Biggest Fish Face Little Risk of Being Caught*, N.Y. TIMES, Feb. 25, 2011, <http://www.nytimes.com/2011/02/26/business/economy/26nocera.html>; Jed S. Rakoff, *The Financial Crisis: Why Have No High-Level Executives Been Prosecuted?*, N.Y. REV. BOOKS, Jan. 9, 2014, <http://www.nybooks.com/articles/archives/2014/jan/09/financial-crisis-why-no-executive-prosecutions/>; Matt Taibbi, *Gangster Bankers: Too Big to Jail*, ROLLING STONE, Feb. 14, 2013, <http://www.rollingstone.com/politics/news/gangster-bankers-too-big-to-jail-20130214>; Matt Taibbi, *Why Isn't Wall Street in Jail?*, ROLLING STONE, Feb. 16, 2011, <http://www.rollingstone.com/politics/news/why-isnt-wall-street-in-jail-20110216>; Victoria Finkle, *Are Some Banks 'Too Big to Jail'?*, AM. BANKER (Jan. 22, 2013, 12:48 PM), http://www.americanbanker.com/issues/178_15/are-some-banks-too-big-to-jail-1056033-1.html; Arianna Huffington, *Send the Bastards to Jail!*, SALON (July 16, 2002, 2:36 PM),

Unless these bankers' fates are to be determined with reference to an outrage meter, the question must turn on matters of social fact, mens rea, and the relationship between the two. Specifically, did those traders and their managers know that counterparty traders, who were continuing to go long on mortgages, expected—because of the way that market worked—that the selling traders would disclose certain facts, like the overall exposure of the seller's own bank to the market in mortgage securities? Did they further expect and believe that, in the absence of disclosure, those facts did not exist? When one drills down on such dispositive questions in this particular market, one can see the potential obstacles to prosecution.⁴³

If one prefers a more classical context, take the old chestnut of the village antique dealer who visits the elderly woman for tea and notices a rare example of a valuable desk in her living room. If he offers her a scandalously low price for the desk and she says, "I'd pay you to get that thing out of my hair," not realizing its exceptional value, has he defrauded her when he walks off with the item for a pittance? Probably most people, and most courts, would say no. We do not expect a person making an offer for an antique to say what he really thinks the item might fetch, even if he is more knowledgeable than the rest of us. Thus, we conclude the woman was not deceived—normatively, that is; she *was* deceived formally.⁴⁴ And the dealer did not intend to deceive her by capitalizing on an expectation that a person in his shoes would disclose more. The case might look different if one tweaked the context—for example, if she were mentally disabled and he knew that, or he was also serving as trustee of her estate.

The offense of fraud has the four features that make culpability difficult at the leading edge: fraud is based on the concept of deception, which is not sufficient to define the crime without contextual inquiry into social norms; fraud often arises in contexts of deep embeddedness, such as the banking and securities industries; fraud involves problems of relational mental states, specifically whether the offender intends that the victim be deceived; and fraud occurs in contexts of rapid norm evolution, perhaps nowhere more than in the world of finance.

http://www.salon.com/2002/07/16/corporate_reform/; Peter Schweizer, *Obama's DOJ and Wall Street: Too Big for Jail?*, FORBES (May 7, 2012, 5:36 PM), <http://www.forbes.com/sites/realspin/2012/05/07/obamas-doj-and-wall-street-too-big-for-jail/>; *60 Minutes: Prosecuting Wall Street* (CBS television broadcast Dec. 4, 2011); *Frontline: The Untouchables* (PBS television broadcast Jan. 22, 2013).

43. For detailed discussion, see Samuel W. Buell, *Is the White Collar Offender Privileged?*, 63 DUKE L.J. 823, 846–54 (2014).

44. See Rebecca Williams, *Deception, Mistake and Vitiating of the Victim's Consent*, 124 L.Q. REV. 132, 132–33 (2008) (“[A]ny misapprehension undermines autonomy if consent would not have been given had the consentor known the truth On the other hand, the practical consequences of allowing all ‘but-for’ factual mistakes to have legal import may not be wholly desirable in policy terms.”).

2. Extortion and Coercion

A central problem for the crime of extortion is how to distinguish permissible pressure—which is an unavoidable circumstance of human affairs—from coercive threats that should be unlawful. The gist of the crime of extortion is the use of a threat to cause or attempt to cause another to transfer something of value, most often property, to the person making the threat—or do something that otherwise benefits that person. The victim, it is said, was coerced by the threat.⁴⁵ The offense of extortion, including related offenses such as blackmail and coercion, requires considerable narrowing of this conception.⁴⁶

Coercion, however, is at the center of all of these offenses. The word is meant to capture the idea of wrongfully induced choice. Coercion is more than the choices among unhappy alternatives that life routinely presents: to settle or sue, to pay less now or more later, to make good on the debt or suffer foreclosure, and so on. Coercion exists in situations in which choices, which are nearly always constrained by the preferences and behavior of others, have been constrained wrongfully such that there should be a public right to legal response that includes punishment.

As many have observed, the great difficulty is that coercion is not self-defining.⁴⁷ There is no such thing as a phenomenon of coercion that can be empirically discovered. Mitchell Berman has aptly said that claims that a person has been coerced—which can be advanced either to inculpate the coercer or to excuse the person coerced—serve normative functions.⁴⁸ Those functions vary with the purposes to which they are put and the systems in which they operate. There is no way to know what coercion is other than to launch the underlying

45. For discussions that plumb the law of extortion exclusively and more deeply, see generally Mitchell N. Berman, *Blackmail*, in *THE OXFORD HANDBOOK OF PHILOSOPHY OF CRIMINAL LAW* 37 (John Deigh & David Dolinko eds., 2011); James Lindgren, *The Elusive Distinction Between Bribery and Extortion: From the Common Law to the Hobbs Act*, 35 *UCLA L. REV.* 815 (1988) (bribery and extortion). See also James Lindgren, *The Theory, History, and Practice of the Bribery-Extortion Distinction*, 141 *U. PA. L. REV.* 1695, 1696 (1993) [hereinafter Lindgren, *Theory*] (“Coercive extortion is often called blackmail, particularly where hush money is involved, but few blackmail statutes remain on the books. Usually, blackmail behavior is covered under extortion, theft, or coercion statutes.”).

46. Anglo-American criminal law has progressively expanded its conception of criminal coercion. The crime was once limited to procurement of corrupt payments by persons holding public office, known as extortion “under color of official right.” It now includes a large array of threat-induced transactions in the private sphere—from the solicitation of a payment not to reveal another’s adultery, to the threat to kneecap the loan-shark customer who falls in arrears, to (perhaps) the threat to file a frivolous lawsuit if a commercial counterparty does not accept a proposed bargain. See *United States v. Nardello*, 393 U.S. 286, 288–96 & n.3 (1969); Lindgren, *Theory*, *supra* note 45, at 1696–97. The decisions on threats to sue are described in *Rendelman v. State*, 927 A.2d 468 (Md. Ct. Spec. App. 2007), in which the court reasoned that such threats, even when made in bad faith, cannot be wrongful under Maryland’s extortion statute because they are overtures to negotiation. *Id.* at 478–81.

47. See FEINBERG, *supra* note 14, at 189–203; Jeffrie G. Murphy, *Consent, Coercion, and Hard Choices*, 67 *VA. L. REV.* 79, 84–92 (1981); Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 *HARV. L. REV.* 1413, 1443 (1989); Scott Anderson, *Coercion*, *STANFORD ENCYCLOPEDIA PHIL.* (Oct. 27, 2011), <http://plato.stanford.edu/entries/coercion>.

48. Mitchell N. Berman, *The Normative Functions of Coercion Claims*, 8 *LEGAL THEORY* 45, 45 (2002).

inquiry that the concept stands for. One must ask whether an actor imposed a constraint on the choice of another person that was wrongful in a given context and therefore committed coercion rather than simply a forcing of choice. Though perhaps discoverable through theoretical moral inquiry, questions of wrongfulness are contingent on context. To know if there has been coercion, one must locate the proper account of wrongfulness that attends the social setting in which the constraint of choice occurred and in which something might be called for in response, such as blaming, punishing, cost shifting, shunning, or something else.⁴⁹

These features of the concept of coercion are transparent and accessible in the federal law of extortion, which is governed by the Hobbs Act.⁵⁰ The Hobbs Act makes a good study because it is a modal and relatively modern extortion statute, having been modeled after the law of the state of New York, which in turn was the model for many other states' extortion laws.⁵¹ The federal statute prohibits extortion, attempted extortion, and conspiracy to commit extortion, provided that there is some effect on interstate commerce. The Hobbs Act defines extortion as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right."⁵²

The statutory text recognizes the problem of social context by using the term "wrongful" and leaving it undefined. Without the word wrongful, the statute would be massively overbroad. Any statement that put another person in fear of economic loss would be extortion, shutting down commercial bargaining among many other benign social activities.⁵³ Alas, the word wrongful is no more self-defining than is the word coercion. Congress left to the courts the problem of determining wrongfulness in particular contexts.

The federal courts have said that a threat usually cannot be extortionate unless it is either a threat to do some action that would be wrongful (like break someone's legs) or a threat to do some action that is not itself wrongful (like

49. See generally Robert L. Hale, *Bargaining, Duress, and Economic Liberty*, 43 COLUM. L. REV. 603 (1943) (supplying an early recognition of this point and providing an example of this type of analysis in discussing the doctrine of duress in contract law).

50. 18 U.S.C. § 1951 (2012).

51. See *Sekhar v. United States*, 133 S. Ct. 2720, 2725 (2013); *United States v. Zappola*, 677 F.2d 264, 268 (2d Cir. 1982); *Rendelman*, 927 A.2d at 474–77.

52. 18 U.S.C. § 1951(b)(2) (2012).

53. Though not a sufficient condition for extortion, fear is a necessary condition and is said to be the element that distinguishes extortion from bribery. See *United States v. Collins*, 78 F.3d 1021, 1029–31 (6th Cir. 1996); *United States v. Garcia*, 907 F.2d 380, 383–85 (2d Cir. 1990); *United States v. Capo*, 817 F.2d 947, 951–54 (2d Cir. 1987); see also Lindgren, *Theory*, *supra* note 45, at 1700–02. A crucial interpretation of the Hobbs Act has been that the requirement of fear can be satisfied by fear of economic loss. *Capo*, 817 F.2d at 950–54. Such a rule obviously expands enormously the potential reach of an extortion prohibition and attendant problems of drawing lines between extortion and hard bargaining. However, it is difficult to see how a rule holding that only threats of noneconomic loss count as extortion would work in practice. Among many other complications for such an approach is that the field of tort law is devoted in part to monetizing a myriad of injuries.

aggressively sue) in order to achieve a wrongful purpose (like acquire property to which a person has no legal right).⁵⁴ The courts' decisions have at least implied that one determines whether the threatened action or claim to property is wrongful by asking whether the action would be permitted or the claim recognized under a relevant body of law.⁵⁵

Examination of several important Hobbs Act decisions sheds light on how the courts have policed the line between extortion and acceptably tough bargaining. Start with the clearest move by the federal courts to employ considerations of social context to determine what counts as a wrongful threat. In the decades following passage of the Hobbs Act, the courts confronted dozens of cases in which persons participating in organized labor activities were charged with extortion for making threats against employers that put employers in fear of economic loss. Described this way—in terms of the statute's text—these cases could encompass everything from routine strike negotiations, to the demands of mob bosses who corruptly control unions, to demonstrations that spill over into minor violence or property damage. The courts faced the pressing and difficult task of shaping the statute so that it could be used to police “real” extortion in all contexts, including union activity, while preventing the statute from becoming a new labor law that could deter strikes or even collective bargaining.

This task could be accomplished only by making explicit choices about where the line does and should fall, in the context of organized labor activity, between hard bargaining and thuggish conduct. The Supreme Court's ultimate answer was to say that the Hobbs Act covers only the wrongful obtaining of property by wrongful means.⁵⁶ In other words, the defendant must use wrongful action to acquire property as to which the defendant also has no lawful claim. This means, the Court said, that the Hobbs Act does not reach even violence when used to obtain “legitimate union objectives, such as higher wages,” because, if secured in bargaining, the higher wages would be property to which workers are legally entitled.⁵⁷ (The case before the Court involved utility workers who, among other things, blew up a company transformer substation while striking!). The Court cited liberally to legislative history showing that Congress did not want the Hobbs Act used to regulate strikes.⁵⁸

54. See *Rennell v. Rowe*, 635 F.3d 1008, 1011–12 (7th Cir. 2011); *United States v. Kattar*, 840 F.2d 118, 123–24 (1st Cir. 1988).

55. See, e.g., *Kattar*, 840 F.2d at 124–25 (concluding that the defendant committed extortion in part because his claim to monies was not legitimate due to the legal infirmity of the supposed contract under which he asserted a claim of right); see also Stuart P. Green, *Theft by Coercion: Extortion, Blackmail, and Hard Bargaining*, 44 WASHBURN L.J. 553, 554–56, 572–73 (2005) (arguing that the Hobbs Act should be limited to threats to do things that are “unlawful under the relevant governing law,” in part to adhere to principles of legality).

56. *United States v. Enmons*, 410 U.S. 396, 399–400 (1973).

57. *Id.* at 400.

58. *Id.* at 404–06.

Not surprisingly, the lower courts have walked back this ruling by limiting it to labor cases.⁵⁹ Outside of the labor context, the appellate courts have held, the use of wrongful means is sufficient to establish extortion even if the defendant had a lawful claim to the property. Otherwise, you or I could threaten violence against the mechanic who refuses to return a car when we do not want to pay for unsatisfactory repairs.⁶⁰ “Wrongful” is a function of social fact: what kinds of demands and constraints on choice are acceptable (or necessary, must be tolerated, should not be criminalized, etc.) in the particular market or other context in which an allegation of extortion has been leveled.

The centrality of context and social fact is illustrated by several well-known cases of arguably hard bargaining prosecuted under the Hobbs Act. For example, the United States Court of Appeals for the Eleventh Circuit decided that a threat to bring a lawsuit based on perjured affidavits was not extortion under the Hobbs Act, even though one who brings a false suit has no lawful claim to damages.⁶¹ The court reasoned that calling threats to bring fabricated lawsuits extortionate would turn extortion into a perjury-like offense, which could overdeter testimony and discourage resort to judicial processes for dispute resolution.⁶²

The United States Court of Appeals for the First Circuit confronted a prosecution in which a defendant borrowed money from a bank to purchase an airplane that the bank repossessed after the defendant defaulted on his loan.⁶³ When the bank went to sell the plane, it discovered that the craft would fetch a much lower price on the market in the absence of its logbooks, which the bank had failed to repossess. The bank contacted the defendant to locate the logbooks and the defendant said he would provide access to them for a \$20,000 “finder’s fee.” Extortion, not clever bargaining, said the court—because a debtor has no legal right to charge a creditor a fee for locating collateral.⁶⁴

A somewhat similar prosecution was brought against a man who found boxes containing a large number of credit card invoices of the Shell Oil Company by the side of the road.⁶⁵ The defendant, using a fictitious name, contacted the corporation and stated that he represented a person who would provide the invoices in exchange for a \$25,000 finder’s fee. He also stated that the holder would destroy the invoices if the fee were not paid. The United States Court of Appeals for the Fifth Circuit ordered a new trial because the trial judge refused to instruct the jury that the theory of the defense was that he had simply been

59. See *Rennell*, 635 F.3d at 1011; *Kattar*, 840 F.2d at 123; *Viacom Int’l Inc. v. Icahn*, 747 F. Supp. 205, 210 (S.D.N.Y. 1990).

60. See *United States v. Zappola*, 677 F.2d 264, 268–70 (2d Cir. 1982) (stating that the threat to use violence is always “wrongful” under the Hobbs Act outside of the labor context and holding that threatening to assault a debtor in order to collect a debt is extortion).

61. *United States v. Pendergraft*, 297 F.3d 1198, 1206–08 (11th Cir. 2002).

62. *Id.* at 1206–07.

63. *United States v. Sturm*, 870 F.2d 769, 770 (1st Cir. 1989).

64. *Id.* at 773–74.

65. *United States v. Taglione*, 546 F.2d 194, 196 (5th Cir. 1977).

negotiating for a reward.⁶⁶ But the court also said that the trial judge was correct to inform the jury that a finder of lost property is not legally entitled to receive from the owner more than the cost of recovering the property.⁶⁷

In a civil suit between the corporate takeover specialist Carl Icahn and Viacom, a district court in New York ruled that “greenmail” is not extortion under the Hobbs Act.⁶⁸ The plaintiff’s theory was that Icahn committed extortion by acquiring an ownership position in the company and then threatening to make a tender offer to the company’s shareholders if he did not receive a buyout of his shares at a premium price. The court said that a “hard-bargaining” case, as opposed to a case of extortion, is one in which “the alleged victim has no pre-existing right to pursue his business interests free of the fear he is quelling by receiving value in return for transferring property to the defendant.”⁶⁹ Because corporate law does not insulate a company from takeover attempts, the court reasoned, greenmail stratagems such as Icahn’s are not extortion.⁷⁰

Consistent with the approach of federal courts administering the Hobbs Act, the most persuasive participants in the great debate over the “blackmail paradox” have recognized that the boundaries of criminalization must be set with reference to questions of wrongfulness that are complex and depend on context.⁷¹ To severely truncate a rich scholarly conversation, the paradox in the criminalization of blackmail is why it is lawful to request money and lawful to reveal damaging facts about another person (such as adultery), but unlawful to offer not to reveal damaging facts in exchange for money. Many treatments of this problem fail to develop persuasive accounts of why offers in this form are necessarily wrongful. More persuasive treatments have concluded that this form of offer is wrongful when, and only when, the offer and its context reveal the

66. *Id.* at 198.

67. *Id.* at 197–98.

68. *Viacom Int’l Inc. v. Icahn*, 747 F. Supp. 205, 213–14 (S.D.N.Y. 1990).

69. *Id.* at 213.

70. *Id.*; see also *United States v. Vigil*, 523 F.3d 1258, 1263 (10th Cir. 2008) (concluding that the defendant committed extortion in demanding that an associate be hired in exchange for granting a contract because the defendant had the right to evaluate contract proposals for adequacy but no right to direct disposition of income from the job or specify who should be hired to work on it).

71. See, e.g., Berman, *supra* note 45, at 52–55 (arguing that informational blackmail is justifiably criminalized because a threat to reveal information unless paid money is evidentiary as to whether the actor is threatening to proceed with an action on the basis of a morally blameworthy motivation); Leo Katz, *Blackmail and Other Forms of Arm-Twisting*, 141 U. PA. L. REV. 1567, 1597–98 (1993) (arguing that the wrong in blackmail is threatening to do a moral wrong to the victim, whether the victim prefers the wrong or not, provided that the wrong is not “so minor that it no longer counts”); see also Berman, *supra* note 45, at 54–55 (critiquing the theory of James Lindgren in *Unraveling the Paradox of Blackmail*, 84 COLUM. L. REV. 670, 703 (1984)—that blackmail is the wrongful appropriation of a third person’s (for example, the cuckolded spouse’s) claim for one’s personal benefit—for, among other flaws, failing to persuade that it is morally wrongful to capitalize on the claim of another); Green, *supra* note 55, at 558–64 (summarizing and critiquing some of the efforts to solve the blackmail puzzle, as applied to the problem of distinguishing hard bargaining from extortion). For a different form of argument, explaining blackmail prohibitions as designed to reduce unwanted resort to self-help by victims, see Henry E. Smith, *The Harm in Blackmail*, 92 Nw. U. L. REV. 861 (1998).

offeror to be acting in a morally blameworthy manner or for morally blameworthy reasons.

Now connect the kinds of extortion problems just discussed with this Article's concern with culpability and line drawing. The cases illustrate that extortion is not a particular physical act or statement, or list of such acts or statements, in the manner of a form of violence. Extortion is a crime not so much of action as of concept—namely, coercion. The concept of coercion can take virtually limitless form and arise in diverse social contexts. The offender's deployment of a threat (a compulsion of choice) is a necessary but not sufficient condition for the offense of extortion. It is a further element of extortion that the threat be wrongful, a matter that can be settled only on the basis of inquiry, whether empirical or theoretical, into what is and is not wrongful in the particular human activity in which the question of extortion arises (lawsuits, corporate takeovers, discovery of lost property, debtor–creditor relations, labor disputes, and so on).

Threats are criminal only when they are wrongful—as a matter of objective social fact, not simply subjective belief. Threats are usually benign; for example, you will be evicted from this apartment if you do not pay your rent. If culpability is required as to the gravamen of the offense then it cannot be sufficient to say, for example, that the defendant must intend or know that he is attempting to acquire property by means of a threat. As will be explored in Part II, a person for whom punishment is justified must also be culpable as to the fact that he has made a wrongful threat, rather than benignly forced a person to make an ordinary choice.

Maybe this requirement of subjective culpability can safely be skipped in the run-of-the-mill extortion case involving the loan shark who threatens to break legs. It is fair to assume that most everyone knows that it is not acceptable to break legs to settle commercial disputes. But the subjective requirement cannot be so comfortably skipped when the question of criminal liability includes the question whether it is wrongful to threaten a particular kind of legal action, request a finder's fee for property, or threaten to make a tender offer.

The federal courts have occasionally seemed to recognize this point, even if they have not addressed it directly. For example, in the case involving the airplane logbooks, the court ruled that the government had to prove that the defendant knew that he was not legally entitled to a finder's fee for helping the bank recover this part of its collateral.⁷² The court sensibly explained that, without this culpability requirement, an ordinary contract dispute could be treated as extortion.⁷³ If the rule were that one commits extortion by making threats to acquire property to which one is not legally entitled, the court said, then party *A* to a contract, who believed in good faith that counterparty *B* breached, would commit extortion if he threatened to sue *B* and it turned out in

72. *United States v. Sturm*, 870 F.2d 769, 774 (1st Cir. 1989).

73. *Id.*

later litigation that A's claim of breach was not viable.⁷⁴ In the end, there was sufficient evidence of culpability in the logbooks case, according to the court, because the defendant demonstrated his awareness of wrongfulness by remarking to someone that his proposed transaction was similar to kidnapping.⁷⁵

Like fraud, extortion has the four features that make the problem of culpability difficult in modern crime: extortion is based on the idea of coercion, which is legally useful not as a formal concept in the air but as a structure for contextual inquiry into social norms; extortion often arises in contexts of embeddedness, such as litigation and commercial negotiation; extortion involves problems of relational mental states, specifically whether the offender intends that the victim act because she feels coerced; and extortion occurs in contexts of relatively fast norm evolution, such as commercial negotiation.

3. Bribery and Corrupt Influence

The central problem in the law of bribery is how to distinguish corruption from ordinary politics and business.⁷⁶ These days, bribery and the broader cognate concept of corruption cannot be defined as the use of money to influence politicians. The apparatus of American campaign finance is structured to allow that, and the First Amendment protects it, ever more robustly.⁷⁷ Likewise, as prosecution of corruption overseas intensifies with the federal campaign to enforce the Foreign Corrupt Practices Act (FCPA),⁷⁸ American criminal law faces difficult problems of how to identify actors who warrant punishment in contexts in which norms of business–government relations can be opaque and diverse.

American legal theory has not found a good way to distinguish corruption from ordinary politics, perhaps because Americans lack stable or widely shared

74. *Id.*; cf. *Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 55–61 (1993) (holding that civil Sherman Act antitrust liability will not attach based on a claim of “sham” litigation unless the plaintiff can establish both that the lawsuit was “objectively baseless” and that the initiator of the suit brought the case with the purpose “to interfere *directly* with the business relationships of a competitor” (emphasis added) (quoting *E. R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 144 (1961))).

75. *Sturm*, 870 F.2d at 775; see also *United States v. Collins*, 78 F.3d 1021, 1033 (6th Cir. 1996) (implying that mens rea as to the wrongfulness of the threat is required for conviction under the Hobbs Act); *United States v. Clemente*, 640 F.2d 1069, 1078 (2d Cir. 1981) (finding evidence sufficient to support conviction under the Hobbs Act based on the defendant's arrangement of clandestine meetings and his direction to someone not to use his name on the telephone). Mitchell Berman, in his careful treatment of the blackmail problem, comes to the conclusion that his understanding that blackmail's wrongfulness has to do with the offender having blameworthy motives tends to support, even if only partially, the classical idea that mens rea requires moral blameworthiness. Berman, *supra* note 45, at 71–72.

76. For a discussion that plumbs the law of bribery exclusively and more deeply, see Lisa Kern Griffin, *The Federal Common Law Crime of Corruption*, 89 N.C. L. REV. 1815 (2011).

77. See *Citizens United v. FEC*, 558 U.S. 310, 371–72 (2010); Richard L. Hasen, *Citizens United and the Illusion of Coherence*, 109 MICH. L. REV. 581, 583–84 (2011).

78. See 15 U.S.C. §§ 78dd-1 to 78dd-3 (2012); Brandon L. Garrett, *Globalized Corporate Prosecutions*, 97 VA. L. REV. 1775, 1776–77 (2011).

social norms about the difference between the two.⁷⁹ The courts, meanwhile, have had to go about the business of drawing lines. The most common solution has been to say that a payment is not a bribe unless accompanied by a quid pro quo, meaning an understanding, explicit or implicit, between the parties to the payment that the payment is made in exchange for a specific official action.⁸⁰

Doctrine has not adequately acknowledged the culpability problem in bribery. The line can be fine between bribery and politics. One could argue that the quid pro quo rule, even if workable in many cases, does not capture much of normative significance.⁸¹ It is not obvious why it should be a crime to take a donation from a bank while promising to vote against the next banking reform legislation, but perfectly legal to take years of lavish donations from banks, election after election, while voting against every single such bill. Likewise, consider a recent criminal investigation involving J.P. Morgan in China.⁸² It is not easy to see why it might be a crime for an American bank to hire a Chinese railroad official's daughter in exchange for favorable consideration in the awarding of financing business, but perfectly legal to hire the same child merely in the reasonable belief that it might lead to the future awarding of business. These sorts of problems will only increase with developed nations' programs to carry anti-bribery enforcement programs around the globe, into diverse countries in which norms about corruption, at least at present, vary widely.

This line-drawing challenge is likely why the federal jurisprudence of criminal bribery has placed much emphasis on the common statutory mens rea requirement that the offender offer a bribe "corruptly." Congress has usually left this term undefined, and it lacks a standard definition in criminal law doctrine.⁸³ For purposes of both the FCPA and the principal statute governing bribery of federal officials, federal courts have said that to act corruptly means to act with

79. On the difficulty of specifying a theory of corruption for purposes of criminal laws regulating official conduct, see David Mills & Robert Weisberg, *Corrupting the Harm Requirement in White Collar Crime*, 60 STAN. L. REV. 1371, 1377–94 (2008); see also Griffin, *supra* note 76, at 1826–32; Samuel Issacharoff, *On Political Corruption*, 124 HARV. L. REV. 118, 121–26 (2010) (discussing the contestability of the concept of corruption). See generally Stephen E. Sachs, *Corruption, Clients, and Political Machines: A Response to Professor Issacharoff*, 124 HARV. L. REV. F. 62 (2011) (discussing the difficulty of defining corruption).

80. See *United States v. Sun-Diamond Growers of Cal.*, 526 U.S. 398, 404–05 (1999). Bribery can also be attempted, obviating the requirement of a successful meeting of the minds. See, e.g., *Mays v. United States*, 289 F. 486, 486–87 (4th Cir. 1923).

81. See Mills & Weisberg, *supra* note 79, at 1388–94.

82. See Jessica Silver-Greenberg, Ben Protess & David Barboza, *Hiring in China by JPMorgan Under Scrutiny*, N.Y. TIMES DEALBOOK (Aug. 17, 2013, 8:01 PM), <http://dealbook.nytimes.com/2013/08/17/hiring-in-china-by-jpmorgan-under-scrutiny/>.

83. See 15 U.S.C. §§ 78dd-1 to 78dd-3 (2012); 18 U.S.C. § 201 (2012); *United States v. Alfisi*, 308 F.3d 144, 149 (2d Cir. 2002). Courts have gone as far as to say that as long as "corrupt intent" is required, a criminal bribery statute need not be read as requiring even proof of a quid pro quo. See, e.g., *United States v. McNair*, 605 F.3d 1152, 1191 (11th Cir. 2010).

“a ‘bad purpose’ . . . and an intent to induce an official to misuse his position.”⁸⁴

This formulation, of course, raises the question of what state of mind includes both the intent to influence the recipient of a bribe *and* an additional bad or wrongful purpose. One might think it would be the state of mind of intending to break the law. But the courts have been careful to say that the government need not prove intent to break the law for a bribery conviction. In other words, ignorance of the law is no defense to bribery.⁸⁵ Thus, the federal law of bribery includes a mens rea requirement seemingly meant to ensure that the offender knew what she was doing was wrong—that she saw a normative stop sign of some sort, whether social or legal, and chose to proceed on past it.

Consider the related problem of criminalizing commercial bribery, which most states treat as a misdemeanor, a felony, or both.⁸⁶ Prosecutors can bootstrap commercial bribery into a serious federal offense by virtue of the Travel Act, which prohibits the use of the mail or a facility of interstate commerce (like a phone or the Internet) to further certain activities, including bribery, that are criminal under state law.⁸⁷ Many commercial bribery statutes require that the offender have acted “corruptly,” that is, with a corrupt state of mind.⁸⁸ The relative paucity of commercial-bribery prosecutions means there is little case law from the state courts on the meaning of this term. If the federal approach to the mens rea of “corruptly” applied to these state statutes, the crime would again appear to be limited by the idea that the person who offers a commercial bribe must understand the “badness” of her own conduct.⁸⁹

Indeed, such a limitation might be essential for the crime of commercial bribery, which exists at the very edge, if not squarely within, the realm of ordinary business dealings. Many state statutes do not include an explicit requirement of corrupt mental state or any similarly meaningful mens rea limitation.⁹⁰ For example, New York’s commercial-bribery statute makes a misdemeanor of anyone who “confers, or offers or agrees to confer, any benefit upon any employee, agent or fiduciary without the consent of the latter’s

84. *Stichting Ter Behartiging Van De Belangen Van Oudaandeelhouders In Het Kapitaal Van Saybolt Int'l B.V. v. Schreiber*, 327 F.3d 173, 182 (2d Cir. 2003); *see also* *United States v. McElroy*, 910 F.2d 1016, 1026 (2d Cir. 1990).

85. *See* *United States v. Nelson*, 712 F.3d 498, 508 (11th Cir. 2013).

86. *See* Ryan J. Rohlfen, *Recent Developments in Foreign and Domestic Criminal Commercial Bribery Laws*, 2012 U. CHI. LEGAL F. 151, 165–93 (providing a table summarizing a fifty-state survey of commercial bribery laws).

87. 18 U.S.C. § 1952 (2012). The Travel Act makes it a crime, among other things, to travel or use a facility in interstate commerce to commit “bribery . . . in violation of the laws of the State in which committed.” *Id.* § 1952(b)(2). The term “laws” in this statute includes commercial bribery statutes. *Perrin v. United States*, 444 U.S. 37, 50 (1979).

88. *See* Rohlfen, *supra* note 86, at 165–93.

89. Comprehensive searches revealed virtually no cases discussing the meaning of the term “corruptly” in commercial-bribery statutes. Arizona does have a statutory definition, which reads: “‘Corruptly’ means a *wrongful* design to acquire or cause some pecuniary or other advantage to the person guilty of the act or omission referred to, or to some other person.” ARIZ. REV. STAT. ANN. § 1-215(8) (WestlawNext through Second Regular and Second Special Sess., 51st Legis.) (emphasis added).

90. *See* Rohlfen, *supra* note 86, at 165–93.

employer or principal, with intent to influence his conduct in relation to his employer's or principal's affairs."⁹¹ The line-drawing and culpability difficulties in this statute are apparent. The text makes it hard to see when an agent who executes a commercial contract without her principal's "consent" has not just misstepped, but has committed a crime. Surely rational criminal law would not authorize punishment for every agreement that exceeds the scope of an agency relationship.

This line-drawing problem was addressed at length in the case of bribery in Salt Lake City's effort to secure the 2002 Winter Olympic Games.⁹² The government alleged that organizers conveyed over \$1 million in bribes, including coverage of tuition, travel, and medical expenses for members of the International Olympic Committee (IOC) and their families, as well as cash payments.⁹³ The case was a Travel Act prosecution in federal court, predicated on violations of Utah's commercial bribery statute. The Utah statute prohibited any effort to confer a benefit on an agent without the consent of the agent's principal, "contrary to the interests of the . . . principal" and "with the purpose of influencing the conduct of the . . . agent."⁹⁴ The defendants leveled a vagueness and notice challenge to the charges, arguing that the statute did not inform those to whom it could be applied about the difference between criminal bribes and things like ordinary gifts or business dinners.⁹⁵

The circuit court rejected the defendants' challenge. The court's analysis of the facts was far more satisfying than its statement of the law. Unobjectionably, the opinion stresses the indictment's allegations about the egregiousness of the defendants' conduct and their extensive efforts to cover it up, evidencing awareness of wrongfulness.⁹⁶ The court also emphasized the curative power of the statute's mens rea requirement, relying on oft-cited Supreme Court dicta about how a mental-state requirement in a criminal statute makes a defendant's complaint about unfair surprise ring hollow.⁹⁷

But the point about culpability is persuasive only if the mens rea for commercial bribery includes something like awareness that the payment crossed the thin line between commerce and corruption. Proof that a person had the "intent to influence" someone who was in an agency relationship to exceed the

91. N.Y. PENAL LAW § 180.00 (McKinney, WestlawNext through L.2014). The offense is a felony if "the value of the benefit conferred or offered or agreed to be conferred exceeds one thousand dollars and causes economic harm to the employer or principal in an amount exceeding two hundred fifty dollars." *Id.* § 180.03.

92. *United States v. Welch*, 327 F.3d 1081, 1084 (10th Cir. 2003).

93. *Id.* at 1084–85.

94. *Id.* at 1093–94 (quoting UTAH CODE ANN. § 76-6-508).

95. *Id.* at 1094, 1096.

96. *Id.* at 1100. The defendants were charged with making hundreds of thousands of dollars in cash payments to members of the IOC, most of whom represented developing countries via disguised transfers from fictitious entities. *Id.* at 1086.

97. *Id.* at 1096 (citing *Colautti v. Franklin*, 439 U.S. 379, 395 (1979); *Screws v. United States*, 325 U.S. 91, 102 (1945)).

scope of agency hardly means that person can voice no sympathetic notice objection to the state's assertion that she deserves to be punished. These statutes would be more alarming if not for the apparent restraint of prosecutors in using them only when a case intuitively looks like core bribery, such as the big, secret cash payments to IOC members in the Salt Lake City affair.⁹⁸

In sum, the crime of bribery has the four features that make culpability difficult in modern crime: bribery is based on the idea of corruption, which is legally useful not as a formal concept in the air but as a structure for contextual inquiry into social norms; bribery often arises in contexts of embeddedness, such as political horse trading and commercial contracting; bribery involves problems of relational mental states, specifically whether the offender intends that the other party be "corrupted," not just influenced; and bribery occurs in contexts of relatively fast norm evolution, such as campaign finance, lobbying, and negotiation.

4. Reform of Sexual Assault Laws and Consent

Most modern efforts to reform sexual assault laws aim to move the focus of rape law away from the old paradigm of physical force, resistance, and injury to the problem of, in Stephen Schulhofer's formulation, "unwanted sex."⁹⁹ When the concepts of force and resistance controlled the law of rape, consent lingered offstage, rarely a significant player because of rape law's hugely underinclusive scope, both *de jure* and *de facto*.¹⁰⁰ Force and resistance requirements were so demanding they eclipsed inquiry into consent.

A challenge for the important project of reforming the law of sexual assault is to formulate doctrine that specifies the nature of invalid consent. One way to put the question is when, in the absence of force (at least as force historically was defined), acquiescence to a sexual act will not prevent a conviction for rape.

As others have observed, many crimes could be described as turning on consent.¹⁰¹ Theft is taking property without consent. Robbery is taking property through consent wrongfully induced by violence or threat of violence. Fraud is

98. Even then, the Salt Lake City defendants were acquitted by a judge at trial on remand, and some of the jurors said they would not have voted to convict had the judge allowed the trial to continue to jury verdict. Mills & Weisberg, *supra* note 79, at 1410–11.

99. SCHULHOFER, *supra* note 9, at 280.

100. See Donald Dripps, *After Rape Law: Will the Turn to Consent Normalize the Prosecution of Sexual Assault?*, 41 AKRON L. REV. 957, 961 (2008) ("The resistance requirement . . . stood in for *mens rea*. If the victim physically resisted, the defendant was put on notice of the absence of consent . . ."); Susan Estrich, *Rape*, 95 YALE L.J. 1087, 1100 (1986) ("[T]he resistance requirement is not only ill-conceived as a definition of nonconsent, but is an overbroad substitute for *mens rea* in any event." (footnote omitted)). For extended discussion of the concepts involved in traditional rape doctrine, see generally Anne M. Coughlin, *Sex and Guilt*, 84 VA. L. REV. 1 (1998).

101. See, e.g., FEINBERG, *supra* note 14, at 180; WESTEN, *supra* note 14, at 111–12; Green, *supra* note 17, at 2521; Hurd, *supra* note 14, at 127–31; see also Green, *supra* note 55, at 569 (asserting that society's greater tolerance for deception than coercion in the commercial sphere explains why obtaining property by deception is almost always fraudulent while obtaining property by coercion is only sometimes extortion).

taking property with consent wrongfully induced through deception. Extortion is the deprivation of rights through consent wrongfully procured by coercion. One might even argue that, because consent can negate liability for most crimes against the person (except those for which the law says it cannot, such as murder and some assault¹⁰²), criminality pivots on the concept of consent.

In many of these examples, however, normative consent, as opposed to factual consent, can be determined only by reference to another concept such as deception or coercion. One might as well proceed directly to those concepts. Also, the extent of a person's ability to consent to wrongs to herself—and thereby exculpate an otherwise criminal actor—is a related but analytically distinct problem that has received extensive treatment elsewhere.¹⁰³

Modern feminism revolutionized the discussion of rape and substantially reformed the law of rape, a project still in stream.¹⁰⁴ The chief legal development in this process has been the placement of consent at center stage of virtually all law reform discussions and some newer statutes and doctrine.¹⁰⁵ With progress comes new problems. Modern law and theory of sex offenses have had to confront directly the challenging concept of consent.¹⁰⁶

The objective here is to tie that discussion of consent to the structural phenomenon in modern crimes that is the subject of this Article. Please accept two prefatory points. First, there is debate about whether the law should treat different kinds or categories of sexual violations under the single umbrella of

102. See, e.g., MODEL PENAL CODE § 2.11 (1962).

103. See FEINBERG, *supra* note 14, at 172–88; Dennis J. Baker, *The Moral Limits of Consent as a Defense in the Criminal Law*, 12 NEW CRIM. L. REV. 93, 97–101 (2009); Bergelson, *supra* note 14, at 170, 210–11; Michelle Madden Dempsey, *Victimless Conduct and the Volenti Maxim: How Consent Works* (Villanova Univ. Sch. of Law Pub. Law & Legal Theory, Working Paper No. 2013–3038, 2013), available at <http://ssrn.com/abstract=2261213>. Bergelson points out that the role of consent in rape, theft, trespass, etc. is to inculcate in situations in which the relevant act does not violate a prohibitory norm, whereas the role of consent in cases of assault, violence, etc. is to exculpate in situations in which the relevant act violates a prohibitory norm. Bergelson, *supra* note 14, at 170, 210–11.

104. The American Law Institute (ALI) has begun a major project to overhaul the sex offense provisions of the Model Penal Code. See MODEL PENAL CODE: SEXUAL ASSAULT AND RELATED OFFENSES (Preliminary Draft No. 3, Oct. 30, 2013) (on file with author, an advisor to the project). The United States Uniform Code of Military Justice has recently undergone two extensive rounds of statutory reform in the area of sex offenses. See Lisa M. Schenck, *Sex Offenses Under Military Law: Will the Recent Changes in the Uniform Code of Military Justice Re-Traumatize Sexual Assault Survivors in the Courtroom?*, 11 OHIO ST. J. CRIM. L. 439, 439–43 (2014); Megan N. Schmid, Comment, *Combating A Different Enemy: Proposals to Change the Culture of Sexual Assault in the Military*, 55 VILL. L. REV. 475, 487–88 (2010); see also Jennifer Steinhauer, *Sexual Assaults in Military Raise Alarm in Washington*, N.Y. TIMES, May 7, 2013, <http://www.nytimes.com/2013/05/08/us/politics/pentagon-study-sees-sharp-rise-in-sexual-assaults.html>.

105. See, e.g., R v. Olugboja, [1982] Q.B. 320 (Eng.).

106. The current reform approach being pursued by the ALI's reporters, for example, would treat sex in the absence of "[a]ffirmative consent" (defined as "words or overt actions that expressly communicate positive agreement to engage in sexual intercourse or sexual contact") as a felony of the fourth degree. See MODEL PENAL CODE: SEXUAL ASSAULT AND RELATED OFFENSES, *supra* note 104, at 1–4. Sex in spite of expressed "unwillingness" would be treated as a third degree felony. *Id.* at 46.

the word rape.¹⁰⁷ The terminology matters a great deal but that important issue will not be addressed here.

Second, this is an Article about a structural and theoretical problem in substantive criminal law. It is not an Article about how to reform the law of rape. The most pressing legal issue with rape is not offense definition at the crime's boundaries. The most urgent problem is criminal justice, specifically insufficient enforcement and failure of deterrence. Despite decades of progress in law and political discourse, the domestic and international data on the incidence of rape and other sexual violations continues to be seriously alarming.¹⁰⁸ This is no less the case, and perhaps even more so, with acquaintance rape than generally. The crisis crosses class, culture, geography, gender, and social institutions. To highlight just one facet of the problem, a recent survey of over 5000 women found that one in five had been a victim of sexual assault while attending college.¹⁰⁹ The focus of this Article's analytical problem on questions about consent at the margins of the criminal law is not meant to suggest less than keen attention to the enormous criminal justice problem of all forms of sexual assault.¹¹⁰

To examine the modern doctrinal challenge, start with the case that most criminal law teachers and students who have covered this subject in the classroom will recognize as canonical for discussing acquaintance or date rape: *Commonwealth v. Berkowitz*, in which a court found the evidence of "forcible compulsion" under Pennsylvania law insufficient to support the defen-

107. See Randah Atassi, Comment, *Silencing Tory Bowen: The Legal Implications of Word Bans in Rape Trials*, 43 J. MARSHALL L. REV. 215, 219–22 (2009) (discussing judges' ability to constrain word choice at rape trials); see also, e.g., N.Y. PENAL LAW §§ 130.20–.70 (McKinney, WestlawNext through L.2014) (providing an example of an elaborate statutory grading scheme involving various degrees of "rape," "sexual misconduct," "criminal sexual act," "sexual abuse," and "aggravated sexual abuse").

108. See generally, e.g., DIV. OF VIOLENCE PREVENTION, CDC, NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY: 2010 SUMMARY REPORT (2011), available at <http://www.cdc.gov/violenceprevention/nisvs/report2010-2.pdf>; Rachel Jewkes et al., *Prevalence of and Factors Associated with Non-Partner Rape Perpetration: Findings from the UN Multi-Country Cross-Sectional Study on Men and Violence in Asia and the Pacific*, 1 LANCET GLOBAL HEALTH 208 (2013).

109. Christopher P. Krebs et al., *College Women's Experiences with Physically Forced, Alcohol- or Other Drug-Enabled, and Drug-Facilitated Sexual Assault Before and Since Entering College*, 57 J. AM. C. HEALTH 639, 642–43 (2009). The seriousness of the problem has prompted White House involvement. See THE WHITE HOUSE COUNCIL ON WOMEN & GIRLS, RAPE AND SEXUAL ASSAULT: A RENEWED CALL TO ACTION (2014).

110. The body of important work on the law of rape is, of course, voluminous and covers matters far beyond the limited ambitions of this Article. See generally, e.g., SUSAN ESTRICH, *REAL RAPE* (1987); MCGREGOR, *supra* note 9; SCHULHOFER, *supra* note 9; WERTHEIMER, *supra* note 14; Michelle J. Anderson, *Reviving Resistance in Rape Law*, 1998 U. ILL. L. REV. 953; Marcia Baron, *Gender Issues in the Criminal Law*, in THE OXFORD HANDBOOK OF PHILOSOPHY OF CRIMINAL LAW, *supra* note 45, at 335; Martha Chamallas, *Consent, Equality, and the Legal Control of Sexual Conduct*, 61 S. CAL. L. REV. 777 (1988); Donald A. Dripps, *Beyond Rape: An Essay on the Difference Between the Presence of Force and the Absence of Consent*, 92 COLUM. L. REV. 1780 (1992); Estrich, *supra* note 100; Husak & Thomas, *supra* note 15; Jed Rubenfeld, *The Riddle of Rape-by-Deception and the Myth of Sexual Autonomy*, 122 YALE L.J. 1372 (2013); Sherwin, *supra* note 15; Victor Tadros, *Rape Without Consent*, 26 OXFORD J. LEGAL STUD. 515 (2006); Andrew E. Taslitz, *Willfully Blinded: On Date Rape and Self-Deception*, 28 HARV. J.L. & GENDER 381 (2005).

dant's conviction.¹¹¹ The case is a valuable teaching tool because it shows a jurisdiction puzzling over the relationship between force and consent. But the case's greatest value is that an appellate court is forced to confront a fact pattern that every reform-minded person wants the law to address and get right.¹¹² Two college students who know each other have a sexual encounter in a dorm room, with alcohol involved but neither threats nor violence beyond the sexual conduct itself. Afterwards, they provide different reports of their understandings of consent.¹¹³

Pennsylvania's statute defined rape, fairly conventionally, as sexual intercourse "by forcible compulsion . . . [or] by threat of forcible compulsion that would prevent resistance by a person of reasonable resolution."¹¹⁴ Contrary to older doctrine, Pennsylvania law further provided that no showing of resistance by the victim was required and that forcible compulsion "includes not only physical force or violence but also moral, psychological or intellectual force used to compel a person to engage in sexual intercourse against that person's will."¹¹⁵ Though this formulation presents many interpretive questions, it is fair to say that Pennsylvania law at the time was located, at least on its face, at a midpoint along the reform trajectory from strict requirements of force and resistance to focus on lack of consent.

Despite the potential breadth of the statute, the Pennsylvania appellate court reversed the conviction in the case. The court based its ruling on its findings that there was no "mental coercion," given the students' equivalence in maturity and status; no coercive "atmosphere and physical setting," given that it was a dorm room they had voluntarily entered together at midday; "no record evidence . . . that the victim was under duress;" no testimony by the victim about any threat by the defendant; and no physical force beyond sexual penetration, other than the defendant lifting and placing down the victim and the defendant positioning his body on top of hers.¹¹⁶ Most controversially, the court went on to say that the victim's statements of "no" were insufficient for liability standing alone because the Pennsylvania legislature had defined rape not simply as nonconsensual intercourse but as requiring "forcible compulsion" (however broadly defined).¹¹⁷

In the first instance, *Berkowitz* is a dispute about how sexual assault statutes and case law ought to be formulated, and about how the actions of two particular students in a college dorm room should have been understood. But, as

111. 609 A.2d 1338, 1348 (Pa. Super. Ct. 1992). The Pennsylvania Supreme Court later affirmed the appellate decision as to the questions of the substantive criminal law of rape and vacated the reversal of an indecent assault charge, *Commonwealth v. Berkowitz*, 641 A.2d 1161, 1166 (Pa. 1994), but the higher court's opinion is shorter and less illuminating.

112. See Katharine K. Baker, *Sex, Rape, and Shame*, 79 B.U. L. REV. 663, 686 (1999).

113. *Berkowitz*, 609 A.2d at 1339–41.

114. *Id.* at 1343 (quoting PA. CONST. STAT. ANN. § 3121).

115. *Id.* (quoting *Commonwealth v. Rhodes*, 510 A.2d 1217, 1226 (Pa. 1986)).

116. *Id.* at 1344–47.

117. *Id.* at 1347–48.

importantly, *Berkowitz* is a contest over what norms are and should be about consent to sex, particularly for two young people who know each other socially at a school. In his interesting study using the facts of *Berkowitz* to test public attitudes toward this question, Dan Kahan demonstrated that views on the normative question vary a great deal.¹¹⁸ And they vary with the normative contexts in which the people being asked the questions were acculturated.¹¹⁹

The *Berkowitz* court speaks as if it is engaged in a simple forensic search for relevant sorts of facts that it does not find: those that distinguish rape from sex. Of course the court is also determining, without saying so, the normative question of what sorts of impositions of unwanted sex warrant criminal punishment as rape.¹²⁰ Even if the court had concluded that the legislature meant to treat all nonconsensual sex as rape, the court surely would have proceeded to consider whether this was a case of nonconsent given the nature and context of this victim's "no" utterances—or whether the law (and thus the norm) ought to be that *any* "no" establishes nonconsent and therefore rape.¹²¹ Moreover, the Pennsylvania legislature's formulation of "moral, psychological or intellectual force used to compel a person to engage in sexual intercourse against that person's will," with its pivot on the word "will," invites the question of the conditions under which acquiescence (that is, factual consent) is consent that is unlawfully procured and therefore punishable (that is, lack of normative consent).¹²²

Return to the ultimate question in *Berkowitz* or any case: Should this defendant be criminally punished? (*Berkowitz* had been sentenced to prison before his conviction was reversed.¹²³) The usual way of answering this question is to determine whether the defendant engaged in sufficient acts, with a sufficient

118. See Dan M. Kahan, *Culture, Cognition, and Consent: Who Perceives What, and Why, in Acquaintance-Rape Cases*, 158 U. PA. L. REV. 729, 774–77 (2010).

119. *Id.* at 781, 793.

120. See FEINBERG, *supra* note 14, at 174 ("Invalid consent is signified consent that fails to have its normal effect of transferring responsibility.").

121. See ESTRICH, *supra* note 110, at 102.

122. Commonwealth v. Rhodes, 510 A.2d 1217, 1226 (Pa. 1986); see also CAL. PENAL CODE § 261.6 (West, WestlawNext through 2014 Regular Sess.) (defining consent as "positive cooperation in act or attitude pursuant to an exercise of *free will*" (emphasis added)); WIS. STAT. ANN. § 940.225(4) (West, WestlawNext through 2013 Act 380) (defining consent as "words or overt actions by a person who is competent to give informed consent indicating a *freely given agreement* to have sexual intercourse or sexual contact" (emphasis added)). The same thing was going on in another famous teaching case about acquaintance rape, *State ex rel. M.T.S.*, 609 A.2d 1266 (N.J. 1992). In *M.T.S.*, the New Jersey Supreme Court interpreted that state's sexual assault statute as imposing liability in any situation lacking "affirmative and freely-given permission" for sex, in part by stating that the statute's requirement of "physical force or coercion" is met by the force inherent in sexual penetration. *Id.* at 1267, 1277. The *M.T.S.* court was explicit about its intent to further a legislative objective of reforming rape law to focus on the question of consent. But the court did not further define the circumstances of "affirmative and freely given permission" and, in a move that unsurprisingly has been criticized, stated that neither the victim nor the defendant's subjective mental state is relevant to the consent inquiry. See, e.g., SCHULHOFER, *supra* note 9, at 93–98.

123. Commonwealth v. Berkowitz, 609 A.2d 1338, 1341–42 (Pa. Super. Ct. 1992).

level of culpability, to justify punishment according to proper aims of the criminal law. If it has been determined according to those aims, as some would argue, that imprisonment for sexual penetration in the absence of consent is not justified on the basis of strict liability, then several questions must be answered. One needs to know what counts as lack of consent under the law in this kind of situation, whether this victim had that state of mind, whether the law requires that the state of mind be expressed, verbally or through conduct, and whether this defendant acted with whatever level of culpability the law requires with respect to the state of mind of the victim.

For Berkowitz and like persons to be punished, it must be true that, normatively speaking, a victim who says no to a peer in a dorm room but otherwise acquiesces to the peer's sexual conduct has not given consent, that this victim said no but otherwise acquiesced, and that this defendant had the required culpability as to the fact that proceeding to engage in sexual conduct with a peer who says no but otherwise acquiesces is engaging in sex without consent. All three of these propositions could easily be true. Some would argue that law in every jurisdiction in the United States should follow this approach.¹²⁴

It is not this Article's purpose to take up the discussion about what the legal norms governing sexual consent should be.¹²⁵ The object is to stress that one cannot get to the result of punishment, at least in difficult cases, by inquiring into an individual's culpability as to consent while treating consent as if it were only a general concept about human cognitive processes. The law and legal actors must confront the question of culpability towards social norms, whatever those norms might be.¹²⁶

Missing this point, or perhaps not treating it seriously enough, explains the result that Jed Rubenfeld reaches in his new piece on rape in the *Yale Law Journal*, a result he concedes to be troubling and others have severely criti-

124. See, e.g., Michelle J. Anderson, *Rape Law Reform Based on Negotiation: Beyond the No and Yes Models*, in *CRIMINAL LAW CONVERSATIONS* 295, 295–97 (Paul H. Robinson, Stephen P. Garvey & Kimberly Kessler Ferzan eds., 2009).

125. See Robin Charlow, *Bad Acts in Search of a Mens Rea: Anatomy of a Rape*, 71 *FORDHAM L. REV.* 263, 272–78 (2002) (summarizing the wide variation in approaches to culpability in the rape laws of American jurisdictions).

126. See WERTHEIMER, *supra* note 14, at 119 (“The question as to when we should regard it as morally or legally impermissible to engage in sexual relations will be settled by moral argument informed by empirical investigation, not metaphysical inquiries into the meaning of consent.”); Alexander, *supra* note 14, at 169 (“Because consent is of interest because of its normative force—that is, insofar as it can change a morally impermissible boundary crossing into a morally permissible one—its lack of normative force is tantamount to its nonexistence.”); Husak & Thomas, *supra* note 15, at 102–03 (“No philosophical analyses of the nature of belief, consent, or reasonableness will suffice to answer [questions about the presence or absence of consent]. . . . [T]he answers to these questions are dependent on empirical data [about social conventions].”); see also Mark Kelman, *Interpretive Construction in the Substantive Criminal Law*, 33 *STAN. L. REV.* 591, 615–16 (1981) (arguing that the criminal law’s “[n]arrow time-framing” in its analysis of actors’ consent serves the function of “buttress[ing] the ideological argument for the beneficence of untrammelled markets”).

cized.¹²⁷ Rubinfeld says that rape law cannot really be about consent rather than force, as the reform movement has had it.¹²⁸ He reasons that agreements procured through deception are not consensual and the law does not, nor would most people want it to, call all or even most sex induced by lies rape.¹²⁹ In other words, if nonconsensual sex is rape, and deception-procured sex is nonconsensual, then all deception-procured sex must be rape. Since that is not true, and cannot be true, Rubinfeld concludes, rape does not reduce to the concept of nonconsensual sex. Rubinfeld goes on from there, ultimately finding the implication of his argument to be that protecting or promoting sexual autonomy through law is a chimera.¹³⁰

Rubinfeld's mistake is to attend to social fact in one part of his argument but not the other. He leverages society's refusal to treat most lies followed by sex as rape: "I really do love you;" "I am a billionaire;" etc. But he disregards society's treatment as rape, at least these days, of many cases of nonconsent in the absence of force: "Have sex with me or I will court martial you;" "Sleep with me or I won't be your psychiatrist anymore;" or the facts of a case like *Berkowitz*, especially if the victim's statements were meant as refusals.¹³¹ At the risk of repetition, when it comes to the law of rape, consent is a normative concept, not a metaphysical one. Yes, the law's turn to consent produces difficult line-drawing problems. But the existence of such problems does not delegitimize making consent to sexual acts a central concern of law.¹³²

127. Rubinfeld, *supra* note 110, at 1378–80; *see also* Patricia J. Falk, *Not Logic, But Experience: Drawing on Lessons from the Real World in Thinking About the Riddle of Rape-by-Fraud*, 123 *YALE L.J. ONLINE* 353, 353 (2013), <http://www.yalelawjournal.org/forum/not-logic-but-experience-drawing-on-lessons-from-the-real-world-thinking-about-the-riddle-of-rape-by-fraud> (responding to Rubinfeld); Corey Rayburn Yung, *Rape Law Fundamentals*, 26 *YALE J.L. & FEMINISM* (forthcoming 2015) (same).

128. *See* Baron, *supra* note 110, at 368 ("Rape is essentially nonconsensual sex."); Chamallas, *supra* note 110, at 814 ("Under the refurbished version of consent, consent is not considered freely given if secured through physical force, economic pressure, or deception."); *see also* SCHULHOFER, *supra* note 9, at 99–113 (arguing that the problem for the intervention of criminal law is unwanted sex).

129. Rubinfeld, *supra* note 110, at 1378, 1395–1412. There have been some very narrow exceptions to this proposition, mostly involving impersonation of spouses and medical examinations, although Canada has broadened rape to include deception as to HIV-positive status. For a discussion of the issues, *see* R. v. Cuerrier, [1998] S.C.R. 371 (Can.).

130. Rubinfeld, *supra* note 110, at 1413–34.

131. Rubinfeld poses a serious question, that has real, albeit difficult, answers, as if it were a rhetorical question: "If the false meter reader cannot claim consent when he enters a person's home, why can a false bachelor or movie mogul claim consent when he enters a woman's body?" *Id.* at 1399 (footnote omitted). This sort of reasoning leads him to this sort of conclusion: "A man who only rapes models could claim to have been raped by his victim if she falsely told him she was a model." *Id.* at 1415.

132. *See* Chamallas, *supra* note 110, at 833 ("Perhaps the principal impediment to criminalizing rape by fraud is the desire to avoid the difficult task of choosing which lies will be treated as material and which will be dismissed as insignificant."); Sherwin, *supra* note 15, at 212 ("[W]e need to identify the set of intrusions on choice that, while they do not destroy autonomy, are nevertheless illegitimate in a way that alters the normal social consequences of consent."). Donald Dripps risks a similar error to Rubinfeld's when he says, "Under a pure-consent statute, *all* of the sexual harassers, *all* of the deceivers, and *many* of the abusers are facially guilty of rape. Yet these cases are not prosecuted. What explains the pattern of non-enforcement?" Dripps, *supra* note 100, at 975. Dripps, however, acknowl-

Rubinfeld's error is not unique. Reformers also must recognize that consent is not self-defining when used in law. Decades ago, Susan Estrich wrote her canonical work, *Rape*, which might belong among those few law review articles that have reformed a major area of law.¹³³ *Rape* is one of the most important and persuasive statements about why and how to move the law from force and resistance to nonconsent. But Estrich did not fully discuss the difficulties that follow from the turn to consent. A memorable move in her argument was to say that consent should not be seen as a special problem for rape law, just as it is not for other crimes: if surgery is battery but for consent, visiting a neighbor is trespass but for consent, and philanthropy is robbery but for consent, then sex is rape but for consent.¹³⁴

The problem is that the contextual norms around these different social activities are so varied that determining what counts as consent, and whether it is present, is not equally simple in each case—and not just because it might be true, as Estrich put it, that “we are willing to presume that men are entitled to access to women’s bodies.”¹³⁵

There is no avoiding the difficulty of the culpability problem in reformed versions of sexual assault laws. Consider the example of another oft-discussed Pennsylvania case, *Commonwealth v. Mlinarich*.¹³⁶ The victim, just old enough to fall outside the coverage of Pennsylvania’s statutory rape law, was born into a troubled family and her mother was institutionalized. A family member prompted the police to arrest the victim for theft of an item of jewelry. For a period, she was in custody of a juvenile detention facility. Upon release, it was agreed with the victim’s family that the victim would reside at the home of the defendant neighbor. The defendant then initiated repeated attempts at sexual contact with the victim, eventually telling her that he would “send her back” to the juvenile detention facility if she did not comply with his demands, which ultimately led to intercourse.¹³⁷

Normatively, many if not most people would look at the facts of *Mlinarich* and say, “that’s rape.” The reasoning might be that the defendant compelled the victim into nonconsensual sex by threatening to cause her serious harm (return to state custody) if she did not comply with his demands, and that is equivalent to using or threatening violence, which has always been the “core” case of rape.

edged in earlier work that the problem of drawing normative lines is unavoidable. See Dripps, *supra* note 110, at 1788 (“In the rape context, we must grade the pressures to have sex according to their legitimacy—from those pressures to have sex that are perfectly moral, to those that are immoral but not criminal, to those that are criminal, to those that constitute crimes of the most serious sort.”).

133. Estrich, *supra* note 100.

134. *Id.* at 1126; see also Patricia J. Falk, *Rape by Fraud and Rape by Coercion*, 64 BROOK. L. REV. 39, 141 (1998) (“[I]ncluding fraud and coercion in rape law may be more consonant with the legal system’s treatment of other criminal offenses, such as theft, which encompass both violent and nonviolent methods.”).

135. Estrich, *supra* note 100, at 1126.

136. 542 A.2d 1335 (Pa. 1988).

137. *Id.* at 1337.

The Pennsylvania Supreme Court said it was not rape because, in essence, the statute did not permit that form of analogical reasoning. In the statute's requirement of "forcible compulsion," the legislature did not intend to encompass "appeals to the intellect or the morals of the victim."¹³⁸ In weak reasoning, the court stated, "The critical distinction is where the compulsion overwhelms the will of the victim in contrast to a situation where the victim can make a deliberate choice to avoid the encounter even though the alternative may be an undesirable one."¹³⁹

Assuming the question here was, at least on these facts, one of first impression, *Mlinarich* was not an easy case to adjudicate. But not because it presented the court with a devilishly formalist task of divining the existence or nonexistence of "will" and "choice" in the mind of this young person. The problem is, at bottom, normative: is a threat to seek to cause another to be placed in state custody the kind of threat that, if used to procure sex, makes sex rape? The question starts as doctrinal: whether, when the legislature used the words "forcible compulsion" in the statute, it intended to make that kind of threat rape. But the problem is normative if it is clear the legislature meant to cover more than explicit threats of violence, though not clear how much more was intended. Arguably the *Mlinarich* court answered that question the wrong way. But, perhaps not by accident, the opinion does not even acknowledge that the case presents an important normative question about kinds of consent.¹⁴⁰

If the court *had* squarely addressed the normative and contextual question, and *had* concluded that a threat to cause return to custody made in this way and in these circumstances is the kind of procurement of consent to sex that should be treated as rape, the court then would have had a difficult issue of culpability on its hands. Suppose the defendant asserted that the statute was silent on the

138. *Id.* at 1338.

139. *Id.* at 1341 (stating further that "she was left with a choice and therefore the submission was a result of a deliberate choice and was not an involuntary act").

140. An English court seemed to recognize the problem when it observed that consent "covers a wide range of states of mind in the context of intercourse between a man and a woman, ranging from actual desire on the one hand to reluctant acquiescence on the other." *R v. Olugboja*, [1982] Q.B. 320 at 331 (Eng.). But the court then ducked the problem, stating that juries should be

reminded that in this context consent does comprehend the wide spectrum of states of mind to which we earlier referred, and that the dividing line in such circumstances between real consent on the one hand and mere submission on the other may not be easy to draw. Where it is to be drawn in a given case is for the jury to decide, applying their combined good sense, experience and knowledge of human nature and modern behaviour to all the relevant facts of that case.

Id. at 332. Another instructive factual example, squarely presenting a normative question as in *Mlinarich*, is an English case in which the defendant communicated with the victim as a fictitious person threatening her with potential violence, then offered, as himself, to protect her from dangers in return for sex. The court had to determine whether this case could be distinguished from the usual case of sex-through-lies that is not treated as rape. *See R v. Jheeta*, [2007] EWCA (Crim) 1699 (Eng.). The court ultimately avoided deciding the question by relying on the fact that the defendant had pled guilty. *Id.* [29].

matter of threats to cause return to penal custody, that no case had ruled that such a threat can constitute forcible compulsion, and that the defendant did not think that it was rape in Pennsylvania to say that serious legal problems might result for a person if she did not agree to sex. “Would it be rape,” the defendant might ask, “if I told a girlfriend without a job that she could not live at my place anymore if she did not have sex when I wanted it, and then she decided to comply rather than move? And if that is contemptible but not rape, then how am I supposed to know that the statement about juvenile custody *is* rape?”

The options for the court are clear but they must be confronted. To make the *Mlinarich* threat a case of rape, it is not sufficient to say that these facts amount to “forcible compulsion.” The court must also determine the question of culpability as to consent. The usual options are available. The law could state that rape is a crime of strict liability as to consent, in which case everything the defendant asserts is irrelevant. The law could state that rape is a crime of negligence as to consent, in which case everything the defendant asserts is relevant but so are many other considerations about reasonableness that might well defeat his argument. Or the law could state that rape requires awareness of nonconsent (or of a recklessness-level risk of nonconsent), in which case the defendant’s assertions are highly relevant and the matter turns largely on his credibility.

At this point, one could pursue the point about consent further by reference to the many actual cases and hypothetical examples commonly covered in illuminating discussions of acquaintance rape, rape in relationships of power imbalance, rape involving fraud or other forms of deception—in short, in rape law’s boundary problems. Plenty of good work has covered that ground.¹⁴¹

The contribution here is to point to the specific problem of culpability that arises once it is conceded that consent operates in the law of sexual assault in sometimes contestable form. Indeed, the problem would be present even if the law purported to eliminate consent as an element. Even archaic rape law—with its brutalizing jurisprudence of resistance—articulated a normative version of consent when it denied rape convictions except when women struggled and were overcome by physical force.¹⁴²

The mens rea problem is this: if consent to sex is normative and the defendant must be culpable with respect to consent, then arguably the defendant has to be culpable with respect to norms. When the law says, “He knew he did not have consent,” it means, “He knew this was not a situation that society recognizes as consensual sex.” When norms about sexual behavior are evolving, and the law is dealing with a crime that presents difficult evidentiary problems in general, the culpability analysis can be challenging in at least some cases.

One way to reduce the difficulty is to reduce culpability requirements. If rape is a crime of strict liability as to the victim’s lack of consent, the law still has to

141. See, e.g., WERTHEIMER, *supra* note 14; WESTEN, *supra* note 14.

142. See, e.g., *Rusk v. State*, 406 A.2d 624, 626 (Md. Ct. Spec. App. 1979); *Moss v. State*, 45 So. 2d 125, 126 (Miss. 1950); *Brown v. State*, 106 N.W. 536, 538 (Wis. 1906).

draw lines about what counts as legal consent.¹⁴³ But it does not need to concern itself with the defendant's knowledge of that geography. Indeed, reformers can intentionally use the law to move the normative line with regard to what counts as consent to sex, a project many have advocated.¹⁴⁴

If rape is a crime of negligence as to the victim's lack of consent, the law still has to draw lines about what counts as legal consent. And the law still has to determine whether the line was clear enough in any particular case that a reasonable person would know the geography.¹⁴⁵ But it does not need to concern itself with any account the defendant wishes to put forward about his own understanding of norms.¹⁴⁶

Maybe this discussion supplies good reason for culpability requirements for sexual assault that are less demanding than those past law has typically contained.¹⁴⁷ However, making that choice requires discussion of whether there is sufficient social support and sound argument in punishment theory for basing the kind of felony sex offense liability that carries a significant prison term and extensive collateral consequences on such culpability.¹⁴⁸ Again, this Article's intervention in that discussion is not to settle it but to clarify what is at stake.

As expressed in reformed prohibitions based on the concept of consent, the law of sexual assault can have the four features that make the problem of

143. See, e.g., N.Y. PENAL LAW § 130.20 (McKinney, WestlawNext through L.2014) (treating as a class A misdemeanor the crime of "sexual misconduct," defined in part as "sexual intercourse with another person without such person's consent"). New York law defines lack of consent for purposes of this statute as "any circumstances . . . in which the victim does not expressly or impliedly acquiesce in the actor's conduct." *Id.* § 130.05(2)(c).

144. See, e.g., Leslie Green, *Should Law Improve Morality?*, 7 CRIM. L. & PHIL. 473, 489–94 (2013).

145. See, e.g., NEB. REV. STAT. ANN. § 28-318(8) (West, WestlawNext through 2014 Regular Sess.) ("Without consent means . . . the victim expressed a lack of consent through words . . . [or] conduct . . . The victim need only resist, either verbally or physically, so as to make the victim's refusal to consent genuine and real and so as to reasonably make known to the actor the victim's refusal to consent."); N.Y. PENAL LAW § 130.05(2)(d) (McKinney, WestlawNext through L.2014) (defining lack of consent for purposes of rape and other sexual offenses as "circumstances under which . . . the victim clearly expressed that he or she did not consent to engage in such act, and a reasonable person in the actor's situation would have understood such person's words and acts as an expression of lack of consent to such act under all the circumstances"); see also SCHULHOFER, *supra* note 9, at 283–84 (proposing a grading scheme for sexual assault offenses that includes offenses involving sexual penetration where the actor is grossly negligent as to lack of consent).

146. See Estrich, *supra* note 100, at 1097 ("In *mens rea* terms, the question [in rape law] is whether negligence suffices, that is, whether the defendant should be convicted who claims that he thought the woman was consenting, or didn't think about it, in situations where a 'reasonable man' would have known there was not consent.").

147. See, e.g., Baron, *supra* note 110, at 377–80 (arguing for a negligence standard as to consent as a means of balancing, in the process of proof, the victim's interests against the defendant's).

148. For arguments in favor of negligence liability in rape on the element of consent, see generally Toni Pickard, *Culpable Mistakes and Rape: Relating Mens Rea to the Crime*, 30 U. TORONTO L.J. 75 (1980); Lucinda Vandervort, *Honest Beliefs, Credible Lies, and Culpable Awareness: Rhetoric, Inequality, and Mens Rea in Sexual Assault*, 42 OSGOODE HALL L.J. 625 (2004). For an illuminating discussion of the question of negligence liability for rape, see Anderson, *supra* note 124, and the responses to Anderson from Andrew E. Taslitz, Kimberly Kessler Ferzan, Robin Charlow, Sherry F. Colb, and Marianne Wesson in CRIMINAL LAW CONVERSATIONS, *supra* note 124.

culpability difficult in modern crime: newer statutes turn on consent, which is legally useful not as a formal concept in the air but as a structure for contextual inquiry into social norms; legal questions about sexual assault sometimes arise in contexts closely situated to socially welcome activity, specifically mutually willing sex; nonconsensual sex involves problems of relational mental states, specifically the victim's attitude and the offender's level of awareness, disregard, or carelessness toward that attitude; and, though to a far lesser extent than fraud, extortion, and bribery, questions about sexual assault can arise in relation to norms that have evolved, in this instance from long entrenched views about gender and sex.

II. JUSTIFICATION, CULPABILITY, AND NOTICE

Culpability for the offenses explored in Part I is not, at least in challenging cases, simply a matter of thin analysis of cognition. Oftentimes, it is not enough to say that a victim's thought processes included a misapprehension, a feeling of pressure, or a lack of willingness. Only some instances of those mental processes will be sufficient, together with other factors such as type and degree of relevant harm, to justify criminal punishment. The pressure must be "extortionate" or "unlawful," the deception "fraudulent," the consent "invalid," and so on.

One might find this observation unremarkable. This is just another group of problems requiring lines to be drawn, which is the law's business. That would be fair if these crimes required only objective determinations of social facts by courts, perhaps with the aid of juries on related matters of facts of the case. Law does that sort of thing all the time: What is the standard of care in a field of medical practice?¹⁴⁹ What is the custom of trade in a particular market?¹⁵⁰ What are evolving standards of decency in the punishment of criminal offenders across the states?¹⁵¹ Doctrine is full of such inquiries.

But that sort of norm discovery does not fit easily with application of substantive criminal law. If all criminal law cared about were such objective questions, it would not insistently repeat the necessity of proof that the individual before the court acted with a mental state such as the "intent to deceive," "purpose to coerce," or "corrupt purpose" to influence—and it would not speak as if individual mental state were so decisive to justifying punishment.

The objective of this Part is to develop a more satisfying account of culpability analysis for these modern offenses, particularly in their borderline applications. Criminal law's doctrinal culpability requirements are instantiations of justifications for punishment. They are a tool for ensuring fit between reasoned justifications and particular cases. This Part's account, therefore, must begin in punishment theory. The argument will then show how, for the modern offenses

149. See STEVEN E. PEGALIS, *Physician and Surgeon Liability*, in 1 AMERICAN LAW OF MEDICAL MALPRACTICE 3D § 3:3 (2014).

150. See *Great N. Ins. Co. v. ADT Sec. Servs., Inc.*, 517 F. Supp. 2d 723, 737 (W.D. Pa. 2007).

151. See *Roper v. Simmons*, 543 U.S. 551, 560–75 (2005).

that are this Article's subject, theoretical justifications for punishment travel down to the criminal law's culpability requirements through the concept of notice.

A. JUSTIFYING PUNISHMENT GENERALLY

Most punishment theory is preoccupied with the problem of how to justify the existence of a practice of state punishment—what H.L.A. Hart called the question of punishment's “[g]eneral [j]ustifying [a]im.”¹⁵² It is not this Article's purpose to contribute to that discussion. General justification of punishment is nonetheless a necessary and prior demand for nearly all argument from theory in the field of criminal justice—at whatever stage of the process and to whatever corner of law such argument extends.¹⁵³

Accordingly, to set the table for the arguments that unfold in the remainder of this Part, this Article makes several assumptions regarding general justifying aim, with regard to both retributivist and consequentialist forms of argument. These assumptions are richly debatable in normative punishment theory, as the enormous and highly developed literature in that realm demonstrates.¹⁵⁴ It will be sufficient for purposes of this Article that the assumptions fairly (if roughly) represent the justification structure supporting much of the core of American criminal law—to the extent that American criminal law can be explained with theory and not just politics, a matter concededly of some doubt.

Retributive argument is necessary to justify punishment, at least above a threshold of severity (such as the felony–misdemeanor distinction) that need not be fixed for purposes of the argument that follows.¹⁵⁵ Arguments sounding in desert typically rest on morally blameworthy mental processes of the actor or

152. H. L. A. HART, PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 9 (1968).

153. And, as Mitchell Berman has shown, the question of general aim demands (and benefits from) consideration of even the prior questions of why punishment requires justification and what it means to justify a practice. Mitchell N. Berman, *Punishment and Justification*, 118 ETHICS 258, 259–60 (2008).

154. For debate about the most persuasive structure of retributive justifications for punishment, see generally R. A. DUFF, ANSWERING FOR CRIME: RESPONSIBILITY AND LIABILITY IN THE CRIMINAL LAW 19–147 (2007); MICHAEL MOORE, PLACING BLAME: A GENERAL THEORY OF THE CRIMINAL LAW 153–88 (1997); VICTOR TADROS, THE ENDS OF HARM: THE MORAL FOUNDATIONS OF CRIMINAL LAW 26–29 (2011); Hugo Adam Bedau, *Retribution and the Theory of Punishment*, 75 J. PHIL. 601 (1978); Mitchell N. Berman, *Two Kinds of Retributivism*, in PHILOSOPHICAL FOUNDATIONS OF CRIMINAL LAW 433 (R.A. Duff & Stuart Green eds., 2011); David Dolinko, *Retributivism, Consequentialism, and the Intrinsic Goodness of Punishment*, 16 LAW & PHIL. 507 (1997); Douglas N. Husak, *Retribution in Criminal Theory*, 37 SAN DIEGO L. REV. 959 (2000); Dan Markel, *What Might Retributive Justice Be? An Argument for the Confrontational Conception of Retributivism*, in RETIBUTIVISM: ESSAYS ON THEORY AND POLICY 49 (Mark D. White ed., 2011).

155. Though this generalization should not be controversial, it is difficult to know what to cite for it, other than the entirety of the usual introductory course in criminal law taught in American law schools. See generally SANFORD H. KADISH ET AL., CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS (9th ed. 2012). One might also look to basic organizing and interpretive principles in American criminal codes. See, e.g., 18 U.S.C. § 3553 (2012) (stating the objectives to be considered in imposing federal criminal sentences); N.Y. PENAL LAW § 1.05 (McKinney, WestlawNext through L.2014) (stating the general purposes of New York's Penal Law); MODEL PENAL CODE § 1.02 (1962) (stating the general purposes of the Model Penal Code).

harm caused or risked by the actor—most often on a combination of the two.¹⁵⁶ Retributive argument is probably a sufficient justification for punishment only above a further unspecified threshold of severity—and only when not defeated by countervailing considerations of social cost.¹⁵⁷ In other words, something like the paradigm of Kantian retributivism—that the last offender in custody must be punished even if it be the final act before society disbands—likely represents the present criminal justice system only in its response to the gravest of wrongs, such as the kinds of aggravated murders that, in some jurisdictions, can receive death sentences.¹⁵⁸

Consequentialist justifications for punishment, primarily those sounding in crime control, support the bulk of the day-to-day workings of the American system of punishment.¹⁵⁹ Sometimes such arguments will be sufficient alone to

156. An example of one such argument is:

A person does wrong whenever his voluntary act causes a state of affairs to exist that instantiates a moral norm that prima facie prohibits such acting and such causing, and there is no moral justification for this prima facie wrong.

....

... To say that a person deserves punishment is to say that he has culpably done wrong (or, in some cases, that he is culpable even without wrongdoing).

MOORE, *supra* note 154, at 168; *see also* Husak, *supra* note 154, at 981 & n.97 (distinguishing non-utilitarian theories of punishment based in “legal moralism” from those based in “harm theory”).

157. *See* Mitchell N. Berman, *Rehabilitating Retributivism*, 32 *LAW & PHIL.* 83, 106 (2013) (reviewing TADROS, *supra* note 154) (arguing that retributivism seeks to justify punishment against the objection that it intentionally inflicts suffering or deprivation of liberty, and that the claim “can succeed on those terms even if it does not show that punishment is morally justified against *all* the objections that might be leveled against it, including its substantial cost in a modern incarcerative state”); *see also* Michael T. Cahill, *Retributive Justice in the Real World*, 85 *WASH. U. L. REV.* 815, 831, 865–66 (2007). Of course, questions about precisely what it might take in the way of cost to defeat any particular retributive claim are enormously challenging. *See* Douglas Husak, *Retributivism In Extremis*, 32 *LAW & PHIL.* 3, 6, 12–13 (2013). And it should be added that this makes the form of retributivism that characterizes American criminal justice “consequentialist retributivism” because pure retributive theory treats punishment not as a good to be maximized, alone or with other values, but as a moral imperative without regard to considerations of the good. *See, e.g.*, Dolinko, *supra* note 154, at 508–10.

158. *See* Kent Greenawalt, *Punishment*, 74 *J. CRIM. L. & CRIMINOLOGY* 343, 347 (1983); *see also* MOORE, *supra* note 154, at 88 (“The distinctive aspect of retributivism is that the moral desert of an offender is a *sufficient* reason to punish him or her . . .”); Husak, *supra* note 157, at 6 (“Immanuel Kant and Michael Moore are perhaps the only legal philosophers alleged to dismiss the significance of consequences in their respective defenses of state punishment . . .” (footnotes omitted)).

159. For leading and diverse arguments justifying punishment on consequentialist grounds, *see generally* CESARE BECCARIA, *ON CRIMES AND PUNISHMENTS* (David Young ed., 1986); 1 JEREMY BENTHAM, *Principles of Penal Law*, in *THE WORKS OF JEREMY BENTHAM* 365 (John Bowring ed., 1962); TADROS, *supra* note 154; Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 *J. POL. ECON.* 169 (1968); Kenneth G. Dau-Schmidt, *An Economic Analysis of the Criminal Law as a Preference-Shaping Policy*, 1990 *DUKE L.J.* 1; Richard A. Posner, *An Economic Theory of the Criminal Law*, 85 *COLUM. L. REV.* 1193 (1985); Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 *NW. U. L. REV.* 453 (1997). For sociological and political accounts of the American obsession with crime control, *see generally* DAVID GARLAND, *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY* (2001); NICOLA LACEY, *THE PRISONERS’ DILEMMA: POLITICAL ECONOMY AND PUNISHMENT IN CONTEMPORARY DEMOCRACIES* (2008); JONATHAN SIMON, *GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR* (2007); WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* (2011).

justify punishment practices, as in many regulatory matters of public health and safety. Indeed, when general commitments to projects of crime prevention appear at stake, the American system is notorious for intransigence in the face of arguments based in leniency and mercy.

Consequentialist programs are nonetheless constrained by the general necessity of retributive justification for serious punishment—what is sometimes called a “side constraint” of retributivism. Whatever else might be said about the monumental “carceral state,” American law retains some commitment to the idea that the government may not deprive an individual of substantial liberty for past acts unless she has done something that gives rise to an at least *prima facie* argument for moral desert.¹⁶⁰ The empirical support for this assertion is too voluminous and diverse to canvass here. One might be satisfied simply by noting the frequency with which the Supreme Court has used the term “innocent” to refer not just to legal innocence (failure of proof) and factual innocence (in the sense of the defendant not being the perpetrator of the wrong), but also in the sense of the defendant having done something that simply was not wrong, or at least not sufficiently wrongful to justify serious punishment.¹⁶¹

To repeat, all of this is normatively debatable and, even as a matter of rough description, requires a great deal of amplification.¹⁶² But the basic structure—which has sometimes been summarized, not entirely helpfully, with the term “negative” retributivism—will be sufficient to support the assertions that follow.¹⁶³ This Article does not seek to quarrel with those who would reject its arguments on the ground that an entirely different account of punishment justification is superior. The purpose of this project is to improve understanding and implementation of a group of existing punishment practices given the justificatory structure that characterizes the American system.

B. JUSTIFYING CRIMINALIZATION

Criminal law theory’s preoccupation with the question of a general justifying aim can obscure how extensive and important questions of justification are in

160. *But see* Husak, *supra* note 154, at 968 (arguing that current criminal law is not “especially concerned with wrongdoing” or “culpability” because many statutes lack culpability requirements and the Supreme Court has blessed strict criminal liability). Husak is right that Anglo-American principles of culpability are underenforced by American constitutional law and that strict liability is common in criminal codes, at least as measured by numbers of statutes. But, perhaps setting the crime of statutory rape aside, it is still characteristic of American criminal justice that lengthy sentences of imprisonment in the absence of any *mens rea* requirement are rare.

161. *See, e.g.*, *United States v. Park*, 421 U.S. 658, 668 (1975); *Morrisette v. United States*, 342 U.S. 246, 249, 260 (1952); *United States v. Dotterweich*, 320 U.S. 277, 281, 285 (1943). *See generally* John Shepard Wiley Jr., *Not Guilty by Reason of Blamelessness: Culpability in Federal Criminal Interpretation*, 85 VA. L. REV. 1021 (1999).

162. For recent efforts to further refine retributive justifications, see, for example, Berman, *supra* note 157, and Husak, *supra* note 157.

163. *See* Husak, *supra* note 154, at 966 & n.26 (asserting in a critique of the “positive” or “pure” retributivism of Michael Moore that “[n]o theory . . . can remotely fit the data,” and that “[t]he hundreds of thousands of laws that subject violators to punishment are so diverse that they resist any unifying theory”).

the particular practices that follow from the idea of state punishment. Lawyers, judges, legislators, and the public are not hindered by this. They create, administer, and talk about the criminal law every day with questions of justification very much in mind, whether self-consciously or not. Punishment theorists could do more to lend them a hand. Theorists could spend more time on the requirement that punishment be justified not just generally but at each stage and all the way down—through legislation, policing, prosecution, adjudication, and individual sentencing.¹⁶⁴

The first place for greater effort might be, as Douglas Husak has argued, the process of criminalization.¹⁶⁵ Having worked out the general guidance of the justifying aim, of course, a state committed to the rule of law must construct a criminal code. Each decision in that process will have to satisfy some requirement of fit with the structure of general justifying aims.

The fit requirement applies not only to the question of whether a particular realm of behavior is properly subject to criminalization—for example, whether a state would have sufficient reason to impose criminal punishment on those whose industrial activities pollute waterways. The requirement further applies to the design of criminal prohibitions once a realm of behavior is chosen for criminalization—for example, statutory elements necessary to select those eligible for punishment among those whose industrial activities pollute waterways.

Thus, culpability requirements are central to criminal law. They are a tool for ensuring, as the law takes up individual cases, that there is fit between the case at hand and the general requirement of justification.¹⁶⁶ Suppose justifications for a statute that authorizes substantial imprisonment for industrial pollution of

164. Michael Cahill observes that utilitarian theory offers a program with at least the potential to justify all aspects of a criminal justice system, whereas retributive theory, with its backward-looking perspective, begins to run out of gas past the stage of general justification. See Cahill, *supra* note 157, at 817–18. But that could be a failing of the theorists as much as the theory, as Cahill's own progress on the matter demonstrates. See MOORE, *supra* note 154, at 155 (“Retributivism is . . . the view both that punishment institutions in general are justified by the giving of just deserts and that the punishment of each offender is justified by the fact that he or she deserves it.”); Husak, *supra* note 154, at 971 (“[R]etributivism provides as much a reason to create *new* crimes to proscribe culpable wrongdoing as to punish persons who commit crimes that already exist.”). See generally Cahill, *supra* note 157.

165. DOUGLAS HUSAK, *OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW* (2008). See generally, John C. Coffee, Jr., *Does “Unlawful” Mean “Criminal”?: Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. REV. 193 (1991); Claire Finkelstein, *Positivism and the Notion of an Offense*, 88 CALIF. L. REV. 335 (2000); Douglas Husak, *Is the Criminal Law Important?*, 1 OHIO ST. J. CRIM. L. 261 (2003); Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703 (2005); Paul H. Robinson & Michael T. Cahill, *The Accelerating Degradation of American Criminal Codes*, 56 HASTINGS L.J. 633 (2005); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505 (2001). Seminal contributions to this literature are Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401 (1958), Sanford H. Kadish, *The Crisis of Overcriminalization*, 7 AM. CRIM. L.Q. 17 (1968), and Sanford H. Kadish, *Some Observations on the Use of Criminal Sanctions in Enforcing Economic Regulations*, 30 U. CHI. L. REV. 423 (1963).

166. See HUSAK, *supra* note 165, at 78 (“Before legislators enact a criminal offense, they had better be confident that the state would be justified in punishing persons who breach it.”). For the history and doctrine of mens rea requirements, see Judge Jack Weinstein's extended treatment in *United States v. Cordoba-Hincapie*, 825 F. Supp. 485, 489–521 (E.D.N.Y. 1993), and the many sources cited therein.

waterways include the argument that it is seriously morally blameworthy to choose to make other people's drinking water toxic in order to get more money for oneself. That statute must include a mens rea requirement of intent or knowledge to ensure fit between that justification and any individual instance of punishment.

The present discussion is concerned principally with retributive arguments that place constraints on justified punishment. But the same result follows, it has often been argued (as well as disputed), if deterrence of pollution is the statute's goal; only the actor who deliberates on the question whether to pollute is in a position to refrain due to fear of sanction.¹⁶⁷ And increasing punishment according to "higher" levels of mens rea—as, for example, in a regime of robbery law that enhances penalties for intentional discharge of a firearm—may serve the objective of marginal deterrence, discouraging actors who cannot be persuaded to comply with the law from choosing to commit more serious crimes.

Apologies if this is tedious ground-clearing for those who have thought more than a bit about substantive criminal law. The analysis is important to rehearse because it points to how doctrine and techniques for locating culpability in criminal cases are simply tools for ensuring that justifications are present. Staying focused on that functional observation leads the way to a clearer understanding of how doctrine should deal with hard cases. In any event, barely anyone argues that criminalizing fraud, extortion, bribery, and sex without consent is not justified. How those offenses might be defined and applied to ensure fit with their justifications is the subject of the remainder of this Article.

C. JUSTIFYING PUNISHMENT INDIVIDUALLY

The purpose of focusing on subjective mental state—especially in the influential methodology of "elemental" mens rea taught by the drafters of the Model Penal Code¹⁶⁸—is to discipline the legal process so that it selects for punishment only the genuinely blameworthy.¹⁶⁹ Statutory mental-state requirements, while performing other functions, ensure that individual cases satisfy American criminal law's retributive "side constraint."

Sometimes a legislature chooses not to impose that constraint, as when a matter of regulatory concern is made eligible for strict criminal liability on deterrence justifications. Fraud, extortion, bribery, and sexual assault (with the

167. See JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 132–33 (5th ed. 2009).

168. See MODEL PENAL CODE §§ 2.01, 2.02 (1962).

169. See MOORE, *supra* note 154, at 404 (describing two aspects of culpability: first, "the mental states that allow one to say that one has *chosen* to do a wrongful act," and second, "the conditions (of excuse) that must not exist else the choice is sufficiently unfree that no (or a lessened) blameworthiness attaches to it"); John Deigh, *Responsibility*, in THE OXFORD HANDBOOK OF PHILOSOPHY OF CRIMINAL LAW, *supra* note 45, at 194, 197 ("When criminal responsibility is modeled on moral responsibility in accordance with [one] version of the traditional account of moral responsibility, mens rea is essential to an offender's being responsible for his or her offense.").

exception of so-called statutory rape) are not such offenses and never have been—at least as a matter of express doctrine. These offenses require heightened subjective mental states such as “intent to deceive,” “purposeful coercion,” “corrupt purpose,” or “knowledge of nonconsent.”¹⁷⁰

This Article’s central concern arises when legal institutions must apply these mental state requirements in individual cases to satisfy the requirement of fit with retributive justification for punishment. The doctrinal formulas, on their facial terms, run out of steam, especially in novel or borderline instances of these offenses. Given the characteristics of these offenses developed in Part I, prosecutors, judges, and jurors cannot simply and easily apply a requirement of knowledge or intent as one would with murder, assault, or an offense involving possession or distribution of contraband.

The form in which defendants frequently litigate culpability when contesting allegations of these kinds of wrongdoing highlights the mens rea challenge. It is rare for a murder defendant to assert that she lacked a blameworthy mental state because she did not act with the awareness that her conduct was normatively wrongful.¹⁷¹ Such claims are common in prosecutions for fraud, extortion, and bribery, and are frequently asserted in cases of acquaintance sexual assault turning on the question of consent.

Recall what the exploration of these modern offenses in Part I revealed. With crimes involving fraud, extortion, bribery, and nonconsensual sex—at least in cases at or near the moving boundaries of those concepts—the factor that supports a persuasive argument for an actor’s blameworthiness is the actor’s attitude toward the *socially relevant* matter: that the deception was *wrongful*, that the type or amount of coercion was *excessive* and *unacceptable*, that the understanding about political influence constituted a *corrupt* quid pro quo, or that the consent was *not valid*. An actor who was merely aware that there was some form of deception, some amount of pressure, some potential for influence, or some factual nonconsent (as, for example, in cases of sex through deception) is not an actor for whom an account of blameworthiness sufficient to justify imprisonment can easily be constructed.

The challenge of culpability in modern crimes—and of how the requirement of fit with general justification is to be satisfied for such offenses—thus leads directly to what has been called the criminal law’s general requirement of

170. See, e.g., NEB. REV. STAT. ANN. § 28-318(8) (West, WestlawNext through 2014 Regular Sess.) (rape); *United States v. Rosen*, 716 F.3d 691, 699–700 (2d Cir. 2013) (bribery); *United States v. Thomas*, 377 F.3d 232, 242–43 (2d Cir. 2004) (fraud); *Rendelman v. State*, 927 A.2d 468, 474–79 (Md. Ct. Spec. App. 2007) (extortion).

171. The famous example is *Keeler v. Superior Court*, 470 P.2d 617 (Cal. 1970), in which the defendant complained of lack of notice when prosecuted for murder after causing the termination of a late term pregnancy in a violent assault on the mother (who survived). The divided *Keeler* court, unsurprisingly, disagreed over the question of legislative versus judicial roles in defining the term “human being,” not over whether the defendant had a sympathetic claim of surprise. *Id.* at 628–30.

fair notice.¹⁷²

D. CULPABILITY AND NOTICE

1. Notice Unpacked

Consider, more deeply than is common, the principle of notice in American criminal law. It might be clear why the state has an interest in giving notice: making clear law and broadcasting that law ought to increase legal compliance. It is not obvious, however, just why the state, in order to be permitted to punish a person, *owes* her some advance warning before she engages in an arguably criminal act. Judicial statements on the subject have tended to be conclusory.¹⁷³ If a person's act is properly viewed as having seriously harmed another, or as seriously immoral because of such harm, the potential for such harm, or some other well-articulated justification for punishment, arguably the state has no reason to hesitate to punish just because she says she did not expect it.¹⁷⁴

One response—a common explanation for the requirement of notice—is to say that, even in cases in which punishment could be justified absent notice, a requirement of notice advances other values. Specifically, requiring that the law be public and accessible in advance of punishment, both practically and conceptually, means the law also will be so in advance of arrest. And that ensures that authorities are constrained in exercising, and potentially abusing, their power to curtail the liberty of citizens.¹⁷⁵ Notice is directed to officials, on this account, even though the law enforces the rule by asking whether the person charged with the crime received notice.¹⁷⁶

172. *See, e.g.,* *Kolender v. Lawson*, 461 U.S. 352, 357 (1983) (“[T]he void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.”). The tenet is sometimes called the legality principle, though the requirement of notice is only one part of what legality entails. *See Reynolds v. United States*, 132 S. Ct. 975, 982 (2012); *United States v. Lanier*, 520 U.S. 259, 266 (1997); Greenawalt, *supra* note 158, at 345 (“Punishment ordinarily follows some breach of established rules of behavior; the notion that people should have fair warning as to what behavior is punishable, and to what degree, is now an established principle of most legal systems.”).

173. *See City of Chicago v. Morales*, 527 U.S. 41, 56 (1999); *Papachristou v. City of Jacksonville*, 405 U.S. 156, 165–69 (1972); *see also United States v. Reese*, 92 U.S. 214, 221 (1875) (“It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large.”).

174. On the question of why punishment requires justification—and how understanding that requirement helps illuminate the persuasiveness of various justifications for punishment—see Berman, *supra* note 153.

175. *See* WAYNE R. LAFAVE, *CRIMINAL LAW* 113–14 (5th ed. 2010).

176. This is the now familiar mode of analysis by which a criminal prohibition can function, in various ways, as both a rule of conduct for citizens and a rule of decision for legal actors. *See generally* Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625 (1984). Another and somewhat similar argument in favor of a notice requirement is, as Dan Markel pointed out to me, that clear, accessible law makes it possible for citizens to hold the officials who make the laws politically accountable for the laws they make.

Although this explanation has satisfied some,¹⁷⁷ intuition says there must be more to the story. In all probability it would seem wrongful for the state to punish someone without notice even if it were beyond dispute that all police and prosecutors have only the best of intentions. The elimination of agency costs in law enforcement would not mean that society no longer desired prior notice from the state of criminalization.

H.L.A. Hart said that telling citizens what the criminal law is, as well as providing traditional criminal law excuses, is how the state respects its constituents as “*choosing being[s]*,” that is, expresses fealty to liberty and autonomy by providing the choice of whether or not to transgress.¹⁷⁸ But the right to choose to offend is not like the rights to select a life partner or decide where to live. And punishment would be an odd vehicle for affirming the liberty of citizens since deprivation of liberty is its signature feature.

One can argue that if an actor’s conduct really warrants punishment, then the justifications for such punishment, whatever they might be, override (or cause forfeiture of) her claim that her liberty interests entitle her to notice. The general question in punishment is always whether the state has sufficient justification to take liberty, regardless of what types of justification are believed valid. Since liberty includes the greater right of freedom from physical coercion by the state, it might well be said to include the lesser right to notice from the state. If one were to respond by saying that the lesser right has standing independent of the greater right because it furthers something else—like accuracy or equal treatment in legal process—then one would arrive back at the somewhat unsatisfying conclusion that the notice requirement is for controlling state actors and nothing else.

A more complete explanation for the notice requirement lies in the initial and general question in the criminal process: whether punishment is justified. Yes, notice ensures that the offender is a chooser, as Hart said. But the offender’s choice does not serve to affirm society’s commitment to her autonomy as a value independent of reasons supporting the institution of punishment. Her choice marks her as a justified object of punishment.¹⁷⁹

177. See, e.g., John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189, 205–12 (1985); A. G. A., Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67, 89–96 (1960).

178. HART, *supra* note 152, at 44–50.

179. There would be a number of avenues for elaboration on this argument were this Article concerned principally with the theory of punishment justification. Mitchell Berman puts the retributive claim this way: the “good” that satisfies the requirement that punishment be justified in general is “that people’s wrongful choices don’t avail them and, to the contrary, make them worse off.” Berman, *supra* note 157, at 103. Kent Greenawalt summarizes “fairness” accounts of punishment for crimes such as tax evasion as holding that “[b]ecause the ordinary law-abiding person has forgone some possible gain, the criminal may . . . be perceived as having attained an unfair advantage that should be offset by punishment.” Greenawalt, *supra* note 158, at 350. R.A. Duff, using the example of traffic laws to illustrate how it can be wrongful to commit an offense that is *malum prohibitum*, explains that such laws give

A retributivist could plausibly argue that the chooser at least presumptively deserves criminal sanction because she chose to transgress a serious social norm. She saw the official sign that said, “Stop, society treats what you are about to do as among its most serious transgressions,” and she traveled on by it.¹⁸⁰ The matter is presumptive, of course, because any moral imperative to obey the law is defeasible. Sometimes, including situations outside the scope of the conventional necessity defense, overriding considerations will compel or justify breaking the law.¹⁸¹

The retributivist might take the position that punishment is deserved only if the offender has made such a choice. Or that such a choice is required to justify punishment for some kinds of offenses but not necessarily for the gravest ones.¹⁸² And it is worth remembering an overriding rule of criminal responsibility: the prevailing doctrine of the insanity defense in American and English law provides that *no one* should be punished who lacks the capacity to appreciate the wrongfulness, or at least illegality, of her act.¹⁸³

drivers the assurance that, if they start down the street in the right direction, they will not meet an oncoming car. . . . [D]rivers surely have a general responsibility to consider the convenience and the safety of other road users: a driver who flouts this regulation fails to discharge that responsibility, and thus acts wrongly.

DUFF, *supra* note 154, at 92; *see also id.* at 172–74 (expanding upon the point with regard to offenses involving such matters such as forgery, perjury, and insurance fraud). *But see* HUSAK, *supra* note 165, at 86 (pointing to the limits of coordination-problem rationales by observing that criminalization of those harboring fugitive slaves would not have been justified on the ground that they had renounced a collective burden of self-restraint).

180. *See, e.g.*, MOORE, *supra* note 154, at 186 (“Even acts that are morally neutral become wrong when the criminal law prohibits them, if the law’s prohibition solves either a co-ordination problem or a prisoners’ dilemma that we each have an obligation to solve.”).

181. “An unjust law is no law at all.” Martin Luther King, Jr., *Letter from Birmingham Jail*, reprinted in THE ATLANTIC, Apr. 16, 2013, at 78 (quoting St. Augustine). For a recent summary, with ample citations, of the debate regarding moral obligations to obey law, as well as an argument in favor of a presumptive such obligation, see Dan Markel, *Retributive Justice and the Demands of Democratic Citizenship*, 1 VA. J. CRIM. L. 1, 44–55 (2012). Markel argues for such an obligation if the law issues from a state that meets basic conditions of liberal democracy and the law in question is not illiberal or “spectacularly dumb.” *Id.* at 10–16, 25–55; *see also* Mark Greenberg, *The Moral Impact Theory of Law*, 123 YALE L.J. 1288, 1310–19 (2014) (explaining how making agreements to solve collective-action problems or resolve disputes can alter people’s moral obligations by supplying a reason to be bound by a new rule or arrangement); Scott J. Shapiro, *Authority*, in THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW 382 (Jules Coleman & Scott J. Shapiro eds., 2002) (summarizing the arguments of the position often called philosophical anarchism).

182. One version of such an argument, although far from the only one, would be this:

When someone flouts a legitimate law, he elects to untether himself from the common enterprise of living together peaceably under a common law. He is not merely flouting a particular law with which he may disagree, but rather he is also defecting from an agreement about the basic structures of liberal democracy that he (would have) made as a reasonable person in concert with other reasonable people.

Markel, *supra* note 154, at 53.

183. *See* 18 U.S.C. § 17 (2012); MODEL PENAL CODE § 4.01 (1962); DRESSLER, *supra* note 167, at 346–57.

Although this discussion has concentrated on how criminal doctrine satisfies retributive justifications, the account potentially fits with consequentialism too. An instrumental thinker is likely to attend principally to the question whether punishment of the offender will, at tolerable expense, discourage others from committing the same or other crimes, thereby reducing the total amount of crime suffered by the polity. She also might want to punish only, or mostly, those who have chosen to violate the state's edicts against criminal acts. A deterrent message will be more effective and more targeted, she might argue, if directed at those who deliberate, however briefly, on the question whether to cross normative lines.

Of course, a consequentialist could think that punishing even those who do not receive notice generates deterrence—because sanctions teach the wisdom of steering amply clear of any risk of law violation. Put differently, she might argue in a particular context that costs of overdeterrence are outweighed by the benefits of additional deterrence that such an approach yields. This is a familiar argument from debates about whether punishment of negligent actors can be justified.¹⁸⁴ (And it is a form of argument that produces some of the pathologies in the American system, which, in the name of general deterrence, habitually over-punishes individual actors relative to the demands of both desert and specific deterrence.) For present purposes, the point is that the prevailing theories of punishment provide the most sensible and straightforward accounts of why an individual right to notice might be an important component of a system of criminalization—as it undeniably is in ours.

2. Satisfying the Notice Imperative

Now turn to the mechanics of notice. As anyone who has studied basic criminal law knows, the notice requirement is far more “constructive” than actual. A requirement of full actual notice would mean proof in every case that the offender knew of and thought about the law. It is widely understood that there is no such requirement, as principally manifest in the mantra that “ignorance of the law is no defense.”¹⁸⁵

Constructive notice has some limits. Most jurisdictions follow the rule that an offense has to be stated in a statute, that the statute has to be published, and that it is a valid defense to say that an official mouthpiece of the law (a statute book, a higher court judge, an attorney general, etc.) told the defendant something about the law both that she relied on and that turned out to be wrong.¹⁸⁶ But

184. See LARRY ALEXANDER & KIMBERLY KESSLER FERZAN, *CRIME AND CULPABILITY: A THEORY OF CRIMINAL LAW* 69–85 (2009) (arguing against criminal liability for negligence). For a variety of responses, see Larry Alexander & Kimberly Kessler Ferzan, *Against Negligence Liability*, in *CRIMINAL LAW CONVERSATIONS*, *supra* note 124, at 273, 281–94.

185. *United States v. Int'l Minerals & Chem. Corp.*, 402 U.S. 558, 563–65 (1971).

186. See, e.g., N.Y. PENAL LAW § 15.20(2) (McKinney, WestlawNext through L.2014).

prosecutions implicating these limitations are highly uncommon.¹⁸⁷

Most of the time the law assumes the defendant knows (“charges” her with knowledge of) all of the criminal law that is statutory and published. This presents a complication for the present argument. If notice is a way of identifying individuals for whom punishment is justified, this kind of fiat (or fiction, as it is sometimes called)—which is fanciful given the scope and complexity of modern criminal law—would not seem to do the trick.

Suppose an extortion defendant says she is not sufficiently culpable for punishment, arguing that she made no deliberate choice to do wrong because she did not know that making a particular kind of demand in commercial negotiations would be viewed as not just aggressive but also criminal. It would be a weak answer to say that she, like everyone else, is charged with knowledge that extortion is a crime, that anyone with the intent to coerce is culpable for the offense, and that many forms of purposeful coercion have been found to constitute extortion. “Very well,” she could say, “but you have not said anything about how someone in my shoes can be described as having chosen to do wrong.” It is hard to argue that criminal prohibitions raise no special worries when they are “ambulatory,” as one concerned federal judge put the matter.¹⁸⁸ After all, American criminal law is supposed to have left the regime of common law crimes behind.

The criminal law has two standard ways of dealing with this form of complaint, neither of which is satisfying in this Article’s context. The first is to require adjudication of individual notice. Some offenses depart from the ignorance maxim. The most familiar example is the federal law of criminal tax evasion, which requires actual awareness and understanding of the applicable tax law and the specific intent to violate that law.¹⁸⁹ The offenses discussed in this Article—fraud, extortion, bribery, and sexual assault—have never been said to be among the few exceptions to the ignorance rule. Mistake of law is no defense to these crimes. At the category level, the argument goes, everyone knows that fraud, extortion, bribery, and sexual assault are wrong.

The second approach is to assume, or perhaps fairly expect, that members of society know when a behavior contravenes basic moral conventions or widely settled law. This is why the law says that legal ignorance ordinarily does not excuse.¹⁹⁰ The assumption that mistake-of-law claims can be barred without punishing large numbers of blameless people works for a great many of the

187. For the oft-taught example of a defendant’s narrow loss on this argument, see *People v. Marrero*, 507 N.E.2d 1068 (N.Y. 1987).

188. *United States v. Thompson*, 484 F.3d 877, 884 (7th Cir. 2007) (Easterbrook, J.).

189. *See Cheek v. United States*, 498 U.S. 192, 199–200 (1991).

190. *See, e.g.*, N.Y. PENAL LAW § 15.20(2) (McKinney, WestlawNext through L.2014) (“A person is not relieved of criminal liability for conduct because he engages in such conduct under a mistaken belief that it does not, as a matter of law, constitute an offense . . .”).

most commonly enforced criminal laws.¹⁹¹ Almost all homicides, assaults, arsons, drug deals, alien smugglings, and the like are understood by almost everyone to be immoral, criminal, or both.¹⁹² If you do one of those things, you have chosen to pass the stop sign, and punishment is at least presumptively justified.

For that portion of the criminal law, one can think of the notice requirement as having been satisfied in the legislative process. American legislators do not literally think this way when making criminal statutes. But one can justify their enactment of a standard murder statute, for example, by saying that although the existence of notice is always a question of social fact, a state can assume or fairly expect awareness that murder is seriously wrong. Individual adjudication of the question is not necessary.

If one is to rely on notice as a condition or reason for punishment, however, the offender is arguably entitled to not just category notice but also within-category notice. To take a silly example, suppose a physician were prosecuted out of the blue for homicide after a heroic but failed surgery. It would be no answer to her objection of lack of notice to say, “What are you complaining about? Everyone knows homicide is a crime.”

The jurisprudence of modern offenses speaks as if those crimes merely require “knowledge of nonconsent,” “intent to deceive,” “purposeful coercion,” and the like.¹⁹³ As guarantees of adequate notice, such culpability formulations are arguably vacuous. A reasonable argument might hold that within-category notice is required: this transaction you have planned, it is the crime of fraud; if you go ahead with it, you ought to be punished.¹⁹⁴ Yet this position is neither consistent with positive law nor normatively attractive. Imagine a criminal justice system in which each prosecution in a slightly novel instance of fraud, extortion, bribery, or sexual assault could be defeated with the objection that prior notice was not provided.

At this juncture, three moves are available. One is to say that the requirement of notice is defeasible and that it is overridden in these cases by other considerations, like deterrence or vindication of harm to victims. Ordinarily, notice is required. Like it or not, here we supply only category-level constructive notice: “Fraud is a crime and everyone knows that.” A criminal defendant is strictly liable as to whether his conduct counted as fraud, extortion, bribery, or sex

191. See generally Dan M. Kahan, *Ignorance of the Law Is an Excuse—but Only for the Virtuous*, 96 MICH. L. REV. 127 (1997).

192. See John Mikhail, *Is the Prohibition of Homicide Universal? Evidence from Comparative Criminal Law*, 75 BROOK. L. REV. 497, 505–08 (2009).

193. See, e.g., NEB. REV. STAT. ANN. § 28-318(8) (West, WestlawNext through 2014 Regular Sess.) (rape); *United States v. Rosen*, 716 F.3d 691, 699–700 (2d Cir. 2013) (bribery); *United States v. Thomas*, 377 F.3d 232, 242–43 (2d Cir. 2004) (fraud); *Rendelman v. State*, 927 A.2d 468, 474–79 (Md. Ct. Spec. App. 2007) (extortion).

194. Cf. Baron, *supra* note 110, at 379 (“A proper instruction on mistakes [as to consent in rape cases] should point out that it is mistakes about what the complainant said, not generally about whether what the person said counts as consent, that may be grounds for acquittal.”).

without consent. Or, put more palatably, the criminal law requires everyone engaged in commerce, politics, and sex to take care, at pain of imprisonment, to avoid activities that have some potential to be treated as criminal *ex post*.

Still, these crimes typically carry heavy punishments. And it is a fact in the United States that crimes like fraud, extortion, bribery, and sexual assault are not strict liability offenses in any meaningful sense of the term.¹⁹⁵ American substantive criminal law—at least as a positive matter, if not also as a normative and partially constitutional matter—has the definite feature of increasing distaste for strict liability in proportion to the severity of punishment authorized for an offense.¹⁹⁶

Even basing imprisonment sanctions on negligence is the exception, not the rule, in American criminal law.¹⁹⁷ Some scholars believe it is never justified.¹⁹⁸ In any event, it is far easier to describe the blameworthiness of a person who is obtuse to (or uninterested in) norms that are simple and longstanding than of a person who fails to be adequately sensitive to new norms in rapidly changing social settings.

A second move might be to go back to the drawing board and question the justification for making *any* of these matters subject to criminal punishment. If one does not know one is crossing the criminal boundary and one cannot be expected to know where that boundary lies, then one does not deserve sanction. Such punishment violates basic rights including freedom from state coercion in the absence of adequate official notice about precisely when and how punishment may be imposed.¹⁹⁹ That principle underwrites the general requirement that liberty not be taken away in the absence of justification.²⁰⁰

This response has the virtue of cleanliness. But it is distasteful. It would mean that the law of fraud cannot develop to respond to novel schemes of deception in complex economies, that the law of extortion cannot recognize new forms of impermissible coercion, that the law of bribery cannot respond to changes in the practices of politics and government, and that the law of sexual assault cannot change to encompass new conceptions of consent that are sensitive to better understandings of autonomy.

Such hidebound law would leave victims of serious wrongs, and the public, without the redress they are entitled to expect in a society governed by the rule of law. To know that the American legal system does not accept this result, one only need look back and see how much the substantive criminal law has changed in the areas of fraud, extortion, bribery, and rape since common law

195. See DRESSLER, *supra* note 167, at 145–52.

196. See generally Joseph E. Kennedy, *Making the Crime Fit the Punishment*, 51 EMORY L.J. 753 (2002).

197. See LAFAYE, *supra* note 175, at 277–88.

198. See, e.g., ALEXANDER & FERZAN, *supra* note 184, at 70–71.

199. See *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999); *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972).

200. See U.S. CONST. amends. V, XIV.

days, even as the labels for these forms of wrongdoing, and many of their statutory terms, have remained the same.

A third answer is to say that actual within-category notice *is* required, but that the requirement can perhaps be satisfied, at least when practicable, by a flexible standard that requires something like consciousness of wrongdoing—that is, some evidence that the defendant knew that what she was doing was wrongful.²⁰¹ This is an account of notice that holds more substance and explanatory power than the oft-cited but opaque assertions of the Supreme Court, when confronted with notice complaints, that something like “a requirement of *mens rea*” in a criminal statute alleviates any worry about prior notice.²⁰² And it promises to help resolve at least some cases of uncertainty on the question of whether punishment is justified. The final Part of this Article explores the promises and limitations of such an approach to culpability in modern crime.

III. IMPLICATIONS

The book on criminal law does not include a chapter about the problem of *mens rea* toward social norms. If it is true that the route to a full account of responsibility for modern crimes must include consideration of that aspect of culpability, then the law has not been honest. Either it has been committing error in eliding the problem or it has been addressing an important and controversial set of questions on the sly. The objective of the final Part of this Article is to expose how criminal law has in fact dealt with the problem of culpability as to social norms and to make suggestions for how both substantive doctrine and institutions of adjudication might do so more effectively and transparently.

A. LEGISLATION AND CONSTITUTIONAL ADJUDICATION

The edict that in the United States, especially in federal court, criminal law is no longer a creature of common law²⁰³ is famously misleading. Judges do not create new categories of offense. But criminal prohibitions, like most statutes, need plenty of interpreting. In truth, legislatures and courts share the task of

201. Samuel W. Buell & Lisa Kern Griffin, *On the Mental State of Consciousness of Wrongdoing*, 75 LAW & CONTEMP. PROBS. 133, 138–39 (2012).

202. *Colautti v. Franklin*, 439 U.S. 379, 395 (1979) (“This Court has long recognized that the constitutionality of a vague statutory standard is closely related to whether that standard incorporates a requirement of *mens rea*.”); *Screws v. United States*, 325 U.S. 91, 102 (1945) (“The requirement that the act must be willful or purposeful may not render certain . . . a statutory definition of the crime which is in some respects uncertain. But it does relieve the statute of the objection that it punishes without warning an offense of which the accused was unaware.”); *see also Morissette v. United States*, 342 U.S. 246, 250 (1952) (“The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil.”).

203. *See, e.g., United States v. Berrigan*, 482 F.2d 171, 185–90 (3d Cir. 1973).

crime definition.²⁰⁴ Both institutions therefore have the potential, when making law, to deal with questions of mens rea as to social norms.

Taking legislatures first, suppose they were to squarely and transparently confront the culpability problem in modern crimes. In the most demanding approach, statutes would define crimes such as fraud, extortion, bribery, and sexual assault to make clear a culpability requirement as to the normative significance of the defendant's conduct.

Fraud might be something like *intentionally and wrongfully deceiving another person about a material matter, for the purpose of acquiring something of value, knowing that such deception is wrongful in the circumstances*. Fraud is currently defined as something like *pursuing a scheme or artifice to defraud another*, with the word "defraud" understood to be a placeholder for some but not all of the common law doctrine of fraud.²⁰⁵ In a less demanding approach, a legislature might modify the offense to *[reckless/negligent] as to whether such deception is wrongful in the circumstances*. Such a statute, while not a great deal more specific than existing fraud laws, would allow criminal defendants to argue something like nonnegligent mistake of wrongfulness.

Extortion might be something like *intentionally obtaining or attempting to obtain property of another by wrongful threat, knowing such threat to be wrongful*. Extortion is currently defined under federal law as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right,"²⁰⁶ in language that does not specify the statute's mens rea requirements. Less demandingly, negligence or recklessness as to the wrongfulness of the threat might also be workable approaches to culpability for extortion.

Bribery might be something like *making an offer to give something of value to another for the purpose of influencing that person's performance of an official or fiduciary function in a manner known to be wrongfully influenced*. Bribery is currently defined under the primary statute governing bribery of federal officials as, among other things, "corruptly giv[ing], offer[ing] or promis[ing] anything of value to any public official . . . with intent . . . to influence any official act."²⁰⁷ Or one might argue for a less demanding standard in bribery law of negligence or recklessness as to the wrongfulness of the type of influence.

Simple, non-aggravated sexual assault might be something like *sexual intercourse with another without that person's valid consent, knowing that valid consent was lacking*. The crime is currently defined in progressive formulations as something like *sexual intercourse with another without that person's*

204. An excellent example is the long and continuing story of legislation and interpretation in the federal crime of mail and wire fraud, as recounted in *Skilling v. United States*, 561 U.S. 358, 399–409 (2010).

205. See 15 U.S.C. §§ 78j, 78ff (2012); 18 U.S.C. §§ 1341, 1343, 1348 (2012); 17 C.F.R. § 240.10b-5 (2014); *Neder v. United States*, 527 U.S. 1, 23–25 (1999).

206. 18 U.S.C. § 1951(b)(2) (2012).

207. *Id.* § 201(b).

consent.²⁰⁸ Again, as has been extensively discussed in the literature on rape, a legislature might well conclude that sexual penetration should be seriously punished whenever an actor is reckless or negligent about whether another person validly—or meaningfully, or legally, or freely (in other words, normatively)—consented to such penetration.

Such statutory culpability formulations likely would strike criminal law experts as odd, in two ways. First, a requirement of knowledge of something like “wrongfulness” or “validity” would sound a lot like a requirement of knowledge of law. Such statutes could be read as upending substantive criminal law by affording a mistake-of-law defense to many serious crimes. (An alternative approach might be to deal with these culpability elements in the form of crime-specific exculpatory defenses, thereby shifting the burden of proof to the defendant.)

Second, even if these statutes were clear about not meaning to excuse ignorance of law, the formulations would confuse legal actors by referring to undefined matters of normative meaning for which the substantive criminal law lacks language or structure. No one would know how to litigate or adjudicate the question of culpability as to wrongfulness or validity. Criminal law would require new jurisprudence about how to instruct juries and determine admissibility of evidence on these matters.

Even if these difficulties could be managed, drafting and debate over enactment of such statutes would require resolving highly contested questions of social policy through the political process. Selection of culpability levels for these offenses ultimately presents questions that lack uncontroversial answers in theory. The choices implicate important questions that are both constitutive and evidentiary.

Consider sexual assault, for example—the offense for which arguments for a lower culpability level are strongest. A requirement of proof that the defendant was aware that consent to sex was normatively invalid sounds overly demanding and wrong. It is overly demanding because an offender who was well aware that any consent to sexual penetration that he obtained was not normatively meaningful could, when it came time for litigation in which he had no burden of proof, too easily deny that he deliberated on the matter. It is wrong because sexual penetration without deliberation on the nature and quality of the victim’s consent is blameworthy and arguably deserves criminal punishment. Although a recklessness level of culpability would require proof of less clear deliberation on the matter, it would still be subject to a defendant’s denial that he deliberated. A negligence rule overcomes that difficulty but requires debate about how much punishment, if any, may be imposed on negligent actors.

Of course, a point of this Article is that such debates are well worth having. More careful attention to the precise content of a requirement of notice will contribute to the clarity of such debates and the likelihood that they produce

208. See *State ex rel. M.T.S.*, 609 A.2d 1266 (N.J. 1992); MODEL PENAL CODE: SEXUAL ASSAULT AND RELATED OFFENSES, *supra* note 104, at 1–4.

stable and satisfying outcomes. American criminal codes are almost uniformly structured on grading schemes that distinguish felonies from misdemeanors, more aggravated forms of certain offenses from less aggravated ones, and more severely punished classes of felony from less severely punished classes. Legislatures do not necessarily face all-or-nothing choices when crafting culpability requirements for modern crimes. A code might, for example, punish the perpetrator of fraud, extortion, bribery, or sexual assault who deliberates on wrongfulness more severely than the one who is negligent as to the matter.²⁰⁹

By virtue of their interpretive responsibilities, judges are an alternative source for requirements of culpability as to wrongdoing in criminal statutes. One might expect an argument here for constitutionalizing more about substantive criminal law. After all, the principles underlying the fair-notice requirement have a significant constitutional dimension.²¹⁰ If notice is about culpability, then arguably due process requires culpability as to wrongfulness. Surely, the argument would go, the Supreme Court would not allow heavy punishment, on the basis of strict liability, for something no American would have reason to think was normatively problematic. That is at least in part what the Court meant when it ruled in *Lambert v. California* that Los Angeles could not criminalize a person's failure to comply with an ordinance requiring that all convicted felons remaining in the city for more than five days register themselves.²¹¹

The trouble is that constitutional law is not nearly coterminous with theories of criminal responsibility and justifications for punishment. The Court has frequently gestured towards the outer bounds of what a legislature can do (and it may have said the bounds were crossed, though perhaps only in *Lambert*), but the Court has greatly underenforced the principles that animate this area of constitutional law. The prospect of the Court taking up a new project of regulating substantive criminal law's relationship to sound punishment theory seems far-fetched, regardless of whether such a project could find a home in one or more theories of constitutional interpretation.

B. JUDGES, PROSECUTORS, AND JURIES

Echoes of punishment theory have had far more impact in statutory interpretation than they have in constitutional law. It is much easier for a judge to impute or assume a legislature's fealty to sound justification for punishment than to say the Constitution requires such obeisance.

Put in terms of this Article's analysis, judges might read statutory culpability requirements such as "intent to defraud," intent to use a "wrongful threat," "corruptly offering something of value," or "knowledge of nonconsent" as

209. One might wonder whether judges could handle such culpability distinctions more effectively in sentencing rather than in adjudication of liability. As a matter of constitutional law, judges are not permitted to do so if a legislature has mandated higher statutory punishments for higher levels of culpability. *United States v. Booker*, 543 U.S. 220, 241–43 (2005).

210. *See, e.g., City of Chicago v. Morales*, 527 U.S. 41, 55 (1999).

211. 355 U.S. 225, 229–30 (1957).

including a requirement of knowledge that the deception or coercion or influence or lack of consent is the kind or degree of deception or coercion or influence or lack of consent that counts as wrongful. If judges were to read statutes that way, their readings would tend to encourage prosecutors to select cases based on evidence of awareness of wrongdoing and juries to look for such evidence in determining whether to convict.

Retributive justifications for punishment are based in part on accounts of moral responsibility that spring from common intuition.²¹² To paraphrase Oliver Wendell Holmes, even a young child knows the difference between being scolded for something she knew she was not supposed to do and being reprimanded for making a mistake, however serious.²¹³ Law should authorize institutional actors tasked with determining who ought to be prosecuted, convicted, and punished to do what they are naturally inclined to do, at least if they are the sort who wish to limit criminal punishment to deserving defendants.

It turns out that judges, prosecutors, and jurors have a tendency to do just that in cases of white collar and similar offenses that present borderline or gray area questions. As explored in depth in prior work, the prosecution and adjudication of criminal fraud cases has long included a focus on consciousness of wrongdoing or awareness of wrongfulness, determined from the kinds of evidence that courts going back at least to the seventeenth century have viewed as “badges of fraud.”²¹⁴ Recall the Chicago commodities broker who traded ahead of his clients, discussed in Part I. The court rejected the argument that applying a criminal fraud statute to his conduct represented an overextension of criminal punishment by observing that the defendant’s use of a special account under a fictitious name and his direction to another person to delete computer records left no doubt that he knew what he was doing was wrong.²¹⁵

This kind of reasoning appears frequently in fraud cases, as well as in other criminal prosecutions presenting questions about the uncertain boundaries of modern crimes. Federal courts, in some of the Hobbs Act cases discussed in Part I, have said that the statute’s requirement that a threat be “wrongful” includes a requirement that the defendant have been aware that her threat was a wrongful one.²¹⁶ In obstruction-of-justice cases, which can present tricky questions about the line between adversarial or uncooperative behavior and obstruction of legal process, courts have pointed to the importance of evidence indicating that actors knew they were hiding evidence wrongfully.²¹⁷ As discussed with bribery in

212. Cf. John Mikhail, *Universal Moral Grammar: Theory, Evidence and the Future*, 11 TRENDS COGNITIVE SCI. 143 (2007) (describing a research program aimed at explaining the principles of intuitive and universal moral judgments).

213. OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 3 (Dover Publ’ns, Inc. 1991) (1881).

214. Buell, *supra* note 20, at 1996–2005.

215. See *United States v. Dial*, 757 F.2d 163, 168–70 (7th Cir. 1985).

216. See, e.g., *United States v. Collins*, 78 F.3d 1021, 1033 (6th Cir. 1996); *United States v. Sturm*, 870 F.2d 769, 774 (1st Cir. 1989).

217. See, e.g., *Arthur Andersen LLP v. United States*, 544 U.S. 696, 705–06 (2005); *United States v. Stevens*, 771 F. Supp. 2d 556, 560–61 (D. Md. 2011).

Part I, courts have tended, in applying a mens rea requirement like “corrupt” intent, to look for markers of prototypical corruption such as surreptitious cash payments.

In sexual assault cases, the relevance and feasibility of such reasoning is far less apparent. That may well mean that the argument is persuasive that some form of negligence liability is necessary if the law is to criminalize all sex in the absence of normatively meaningful consent.

Judges talk about notice as a matter of fairness. But remember the discussion in Part II about why it seems unfair when the criminal law’s appearance in a person’s path looks no different than being struck by lightning. Bad luck is unfair, to be sure, but bad luck also explains being the only one pulled over on a highway full of speeders. What is really unfair for the genuinely surprised person is that she does not deserve punishment because she did not mean to exempt herself from society’s rules of the road. If legal actors are uncertain about whether a case is an instantiation of such a rule, looking for evidence that the actor deliberated on the wrongfulness of her own conduct is a natural effort to deal with that uncertainty—especially if statutory law clearly says that negligence is not sufficient to make out the crime.

To be sure, rigor will be hard to come by in such inquiries. Perhaps courts have not wanted to be too explicit about culpability as to wrongfulness because judges sense that such a requirement poses more questions than it resolves.²¹⁸ One has to determine the relevant sort of wrongfulness—whether legal, moral, empirically observable from social practices, or something else. One has to consider whose idea of wrongfulness provides the relevant baseline—whether it be the defendant, even if she happens to be obtuse or overly sensitive to norms, members of the defendant’s relevant subcommunity (stock traders, loan sharks, students, etc.), society as a whole, or prosecutors, judges, and jurors. One has to think about what kind of evidence counts as establishing this state of mind—whether it be statements, furtive conduct even if ambiguous, furtive conduct only before the appearance of law enforcement, or concealment after the defendant thought she was in trouble.

Before any of those questions, one has to determine the threshold of the kinds of criminal cases that require inquiry into awareness of wrongfulness—whether it be all criminal cases, all cases as long as the defendant asks for a jury instruction on the matter, all cases charging certain kinds of crime, such as fraud, extortion, or bribery, or only those cases in which a judge (or perhaps a jury) makes a determination, according to some specified criteria, that the case presents a problem of borderline or novel application or extension of criminal law.

Translating moral intuitions into hard-edged doctrine is a stiff challenge. Perhaps the law should leave well enough alone. Still, the problem of culpability in modern crimes arises because rule of law commitments say there is real

218. See Buell & Griffin, *supra* note 201, at 146–65.

danger with these offenses of punishing those who do not deserve it—those who are actually, not just legally, innocent. Those very same rule-of-law commitments instruct that doctrinal rigor is the best insurance against error.

Consider an example of law that attempts to do this a little more systematically. English theft law has long included a mens rea concept called dishonesty.²¹⁹ Recently, England adopted a new fraud law to make its legal tools against financial crime more generally applicable, more open-textured, and more like American fraud law.²²⁰ The impetus for reform was a belief that Britain's theft statutes had been ineffective in dealing with the complexity and diversity of modern corporate wrongdoing.²²¹ The reformers inserted into the new fraud law the rule from theft law that the defendant must have acted "dishonestly" in order to be criminally liable.²²² Similarly, a defendant does not violate Britain's blackmail statute when making the prohibited "demand with menaces" if she believes "that the use of the menaces is a *proper* means of reinforcing the demand" and that she has "reasonable grounds for making the demand."²²³

Decisions under English theft statutes have defined the mens rea element of dishonesty as requiring two things: that the defendant's conduct was dishonest by the standards of ordinary people, and that the defendant knew her conduct was dishonest by the standards of ordinary people.²²⁴ That is the jury instruction. It is a subjective and objective requirement. And it is keyed to the concept of conduct that is "dishonest," which doctrine does not further define.²²⁵ Similarly, under the blackmail statute, the belief that a demand with menaces is "proper" has been ruled to be a question of subjective belief and has been described as an "unusual expression to find in a criminal statute" but "plainly a word of wide meaning, certainly wider than (for example) 'lawful.'"²²⁶

There is a bit of rigor in these English formulations. According to proper jury instructions, a defendant cannot be convicted of fraud or blackmail without some culpability toward social norms. That is more than American law requires, at least in its black letter. Admittedly, many of the questions raised above about

219. See, e.g., *R v. Ghosh*, (1982) 2 All E.R. 689 at 691–92 (A.C.).

220. See Fraud Act, 2006, c. 35 (U.K.).

221. See HOME OFFICE, FRAUD LAW REFORM: CONSULTATION ON PROPOSALS FOR LEGISLATION 5 (2004), available at http://webarchive.nationalarchives.gov.uk/20130128103514/http://www.homeoffice.gov.uk/documents/cons-fraud-law-reform/fraud_law_reform.pdf?view=Binary.

222. See Fraud Act, 2006, c. 35, §§ 2(1)(a), 3(a), 4(1)(b) (U.K.).

223. Theft Act, 1968, c. 60, § 21(1) (U.K.) (emphasis added).

224. See *R v. Ghosh*, (1982) 2 All E.R. 689 at 696 (A.C.).

225. Somewhat similarly, California has followed a combined subjective–objective approach in dealing with the issue of mens rea as to nonconsent in rape. See *People v. Williams*, 841 P.2d 961, 965 (Cal. 1992) (stating, as to the subjective element, that a mistake as to consent must be made in "good faith" and, as to the objective element, that a mistake "must be formed under circumstances society will tolerate as reasonable").

226. *R v. Harvey*, (1981) 72 Cr. App. R. 139 at 142; see also *R v. Harrison*, [2001] EWCA (Crim) 1314, [21] (Eng.) (stating that "proper" has a wider meaning than lawful but disapproving of an instruction that proper means "suitable or apt").

the nature and source of the norms, the types of evidence that might be sufficient, and the like, remain to be worked out in the black box of the English jury room. But the problem of how to fashion doctrine and practice that are more sensitive to the question of culpability as to social norms is, if nothing else, difficult. The English experience is thus worth watching.

CONCLUSION

Finding the most advisable law reform agenda is the hardest challenge posed by the culpability problem in modern crimes. Any reform project would have to deal, at the least, with two significant areas of decision. First is the matter of locating the relevant norms, in theory and practice. The task for theory is to locate the level or levels of knowing norm violation sufficient to justify punishment from among options that include at least: criminal law, law in general, relevant noncriminal law related to the defendant's activity, custom, general moral norms, and norms operable in the particular industry, market, or subcommunity in which the defendant acted.²²⁷ The critical question, it would seem, is the level or levels at which a person's knowing violation of norms renders her sufficiently blameworthy for criminal punishment. The perhaps more practical task, discussed in Part II, is to determine whether to relax culpability requirements as to norm violation, down to and including negligence.²²⁸

In taking up these questions, law reformers should appreciate, and perhaps take some comfort in, the relationship between what is constitutive and what is evidentiary. This relationship permeates the matter of culpable mental states in criminal law. As every course in criminal law teaches, the brain of the offender at the time of the offense is neither visible nor subject to monitoring. All adjudication of mens rea requires inferences about thinking drawn from observations of conduct. No matter the required culpability level, deciding cases inescapably involves an objective process of reasoning. The finder of fact has no alternative but to draw inferences with reference to a baseline or archetype of human reasoning. In other words, the reasonable person is never absent in criminal adjudication.

To say that legal process must determine, in cases of uncertainty, that the actor actually knew what she was doing was wrong before punishment is

227. An example of using relevant noncriminal law as a baseline is *Screws v. United States*, 325 U.S. 91 (1945), in which the Court said that the crime of depriving another of her constitutional rights under color of law was saved from problems of vagueness and notice because one can only be prosecuted under the statute for intentionally violating a right that has been settled in the relevant constitutional jurisprudence. *Id.* at 103–04.

228. The federal law of criminal threats has developed along these lines, with the courts holding that only “true threats” qualify for criminal sanctions, and that whether a threat is true is to be determined by whether a reasonable listener would have interpreted the defendant's statements as made in earnest. *See, e.g., United States v. Turner*, 720 F.3d 411, 420 (2d Cir. 2013) (stating that the federal criminal statute requires a “true threat,” measured objectively by “whether an ordinary, reasonable recipient who is familiar with the context of the [communication] would interpret it as a threat of injury” (alteration in original) (quoting *United States v. Davila*, 461 F.3d 298, 305 (2d Cir. 2006))).

justified may not impose a demanding new limitation in criminal law. De facto, if not de jure, wrongfulness may be a matter of negligence all the way down. If so, perhaps this Article's discussion is a case of old wine in new bottles. In the end, the original Blackstonian idea of "general" mens rea—the requirement for criminal responsibility of a "wicked" or "evil" mind—maintains a stubborn hold in the criminal law even after twentieth century efforts to replace it with forensically precise definitions of cognition. Modern concepts of criminalization might turn out not to fit so well with modern concepts of mens rea.

In any event, progressive development of substantive criminal law will continue to strain mechanisms for using culpability analysis to limit punishment to those who deserve it. The rule of law is a two-sided coin in the field of criminal law.²²⁹ One side is stamped with commitment to legality-related principles that restrain the state: notice, control of enforcement discretion, legislative primacy in crime definition, and so on. On the other side is stamped a commitment that the state will not require its citizens, as Hart put it, "to risk going to the wall."²³⁰ Serious intrusions upon one another will not be left unaddressed. They will be punished, even as conceptions of those intrusions change over time. Lively contemporary discussions around white collar and sex offenses are prime evidence of that feature of criminal law, which has been this Article's project to illuminate.²³¹

Soon legal institutions, including legislators, prosecutors, and judges, may find it difficult to avoid questions about individual culpability toward social norms that have been treated, at least in doctrine, as mostly off the boards in analysis of criminal responsibility. Further scholarship on these problems may produce insights that turn out to have value when the time arrives for law to confront the challenges of modern crimes more directly and openly. Or maybe such insights will be more interesting than necessary. Criminal prosecution and adjudication could keep muddling through in reliance on the basic and powerful intuition—shared by lawyers, judges, and laypersons as they confront borderline crime—that one can tell the truly bad actor by whether she knew what she was doing was wrong.

229. See Buell, *supra* note 20, at 2022–31; Buell & Griffin, *supra* note 201, at 139–41; Samuel W. Buell, *The Upside of Overbreadth*, 83 N.Y.U. L. REV. 1491, 1523–26 (2008).

230. H. L. A. HART, *THE CONCEPT OF LAW* 198 (2d ed. 1994).

231. See generally Buell, *supra* note 43; *Project to Revise MPC Article 213 on Sexual Offenses Begins*, 34 A.L.I. REP., no. 4, Summer 2012, available at http://www.ali.org/_news/reporter/summer2012/02-Project-Revise-MPC-Article-213.html.