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Author(s): Meir Dan-Cohen

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HARVARD LAW REVIEW

DECISION RULES AND CONDUCT RULES: ON ACOUSTIC SEPARATION IN CRIMINAL LAW

*Meir Dan-Cohen**

One strain in legal philosophy, tracing its roots to Bentham, suggests the possibility of distinguishing between two sorts of legal rules: conduct rules, which are addressed to the general public and are designed to guide its behavior, and decision rules, which are directed to the officials who apply conduct rules. In this Article, Professor Dan-Cohen employs the distinction to create an imaginary world in which only officials know the content of the decision rules and only the general public knows the content of the conduct rules — a condition he terms “acoustic separation.” Through “selective transmission” of legal rules, he contends, our legal system approximates this imaginary world. Professor Dan-Cohen then demonstrates that by relying on acoustic separation society accommodates competing values at stake in criminal law. Finally, Professor Dan-Cohen raises the issue of the legitimacy of selective transmission. He concludes that it is compatible with the requirements of the rule of law, but argues that this compatibility — far from establishing the legitimacy of selective transmission — only highlights some inescapable moral dilemmas that inhere in the law as much as in other spheres of public life.

IT is an old but neglected idea that a distinction can be drawn in the law between rules addressed to the general public and rules addressed to officials. The neglect of this idea results, I think, from a widely accepted but oversimplified conception of the relationship between the two kinds of rules. This common view tends to understate both the analytical soundness and the jurisprudential significance of the distinction. In what follows, I criticize the prevailing view and offer another one in its place. The proposed account takes seriously the distinction between the two kinds of rules and is intended to help us appreciate and investigate their relative independence and the complexity of their interrelations. This account also provides guidelines for apportioning rules of law between the two categories and demonstrates the ability of such a classification to illuminate some problem areas in the law.

* Professor of Law, Boalt Hall School of Law, University of California at Berkeley. I wish to acknowledge with gratitude many helpful comments from my friends and colleagues Bruce Ackerman, John Coons, Melvin Eisenberg, George Fletcher, Chaim Gans, Ruth Gavison, Miriam Gur-Arie, Paul Hoerber, Sanford Kadish, Albert Sacks, Yoram Shachar, and Jan Vetter; from the participants in a legal theory workshop hosted by George Fletcher and in a faculty seminar at the Tel-Aviv University Faculty of Law; and from the editors of this *Review*. I would also like to thank Martha Blomquist for her research assistance.

Although the distinction between the two types of rules is, I think, of general validity, I limit both my claims and my illustrations to the criminal law. My immediate purpose is to use the distinction to shed light upon a number of difficult issues and perplexing decisions in this area. If I succeed in doing so, my exercise will also have demonstrated the utility of the distinction and suggested its possible usefulness in other fields. The latter outcome, however, will have been an incidental benefit rather than the direct purpose of my enterprise.

I. THE SEPARATION BETWEEN DECISION RULES AND CONDUCT RULES

A. *The Prevailing Conception — A Critique*

The distinction between the two types of legal rules that I have in mind can be traced in modern times back to Bentham. As Bentham observed:

A law confining itself to the creation of an offence, and a law commanding a punishment to be administered in case of the commission of such an offence, are two distinct laws; not parts (as they seem to have been generally accounted hitherto) of one and the same law. The acts they command are altogether different; the persons they are addressed to are altogether different. Instance, *Let no man steal*; and, *Let the judge cause whoever is convicted of stealing to be hanged*.¹

Yet the relation between the two sets of laws is, according to Bentham, a close one. Bentham argued that

though a simply imperative law, and the punitory law attached to it, are so far distinct laws, that the former contains nothing of the latter, and the latter, in its direct tenor, contains nothing of the former; yet by *implication*, and that a necessary one, the punitory does involve and include the import of the simply imperative law to which it is appended. To say to the judge, *Cause to be hanged whoever in due form of law is convicted of stealing*, is, though not a direct, yet as intelligible a way of intimating to men in general that they must not steal, as to say to them directly, *Do not steal*: and one sees, how much more likely to be efficacious.²

The distinction Bentham drew between the two types of rules appears to be sound and, at least with respect to some laws, intuitively

¹ J. BENTHAM, A FRAGMENT ON GOVERNMENT AND AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 430 (W. Harrison ed. 1948). Bentham was not, however, the first to draw the distinction. According to Professor David Daube, "There came a period in Talmudic law when it was assumed that the Bible had two separate statutes for each crime, one to prohibit it and one to lay down the penalty." D. DAUBE, FORMS OF ROMAN LEGISLATION 24 (1956).

² J. BENTHAM, *supra* note 1, at 430.

obvious. Bentham's account of the distinction, however, supposes too simple a relation between the two kinds of rules. If we are to generalize from Bentham's example, we must conclude that the laws addressed to officials (which I shall call "decision rules") necessarily *imply* the laws addressed to the general public (which I shall call "conduct rules"). The view that decision rules imply conduct rules naturally leads to the widely accepted conclusion that a single set of rules is in principle sufficient to fulfill both the function of guiding official decisions and that of guiding the public's behavior. Such a reductionist position can assume either of two forms. One view deems the law to consist primarily of decision rules and relegates conduct rules to the status of mere implications. A second view, the converse of the first, focuses on conduct rules that are "applied" or "enforced" by the courts.

Hans Kelsen was a noted proponent of the first version; he attempted, rather counterintuitively, to collapse the distinction between decision and conduct rules by treating all laws only as directives to officials. Citing as an example the provision "One shall not steal; if somebody steals, he shall be punished," Kelsen stated:

If it is assumed that the first norm which forbids theft is valid only if the second norm attaches a sanction to theft, then the first norm is certainly superfluous in an exact exposition of law. If at all existent, the first norm is contained in the second, which is the only genuine legal norm.³

This position has been effectively criticized by H.L.A. Hart, who argued that it obscures "the specific character of law as a means of social control": by eliminating the independent function that the substantive rules of the criminal law have in guiding behavior, Kelsen's view fails to account for the difference between a fine and a tax.⁴ The difference, Hart pointed out, lies precisely in the fact "that the first involves, as the second does not, an offence or breach of duty in

³ H. KELSEN, *GENERAL THEORY OF LAW AND STATE* 61 (1945). Professor Alf Ross also holds this view:

Legal rules govern the structure and functioning of the legal machinery. . . . To know these rules is to know everything about the existence and content of the law. For example, if one knows that the courts are directed by these laws to imprison whoever is guilty of manslaughter, then, since imprisonment is a reaction of disapproval and, consequently, a sanction, one knows that it is forbidden to commit manslaughter. This last norm is implied in the first one directed to the courts; logically, therefore, it has no independent existence. The upshot is that, in describing a legal order, there is no need to employ a double set of norms, one demanding of citizens a certain type of behaviour (e.g., not to commit manslaughter), and the other prescribing for the agencies of the legal machinery under what conditions coercive sanctions are to be applied (e.g., if manslaughter has been committed).

A. ROSS, *DIRECTIVES AND NORMS* 91 (1968) [hereinafter cited as A. ROSS, *DIRECTIVES*]; *accord* A. ROSS, *ON LAW AND JUSTICE* 33 (1959).

⁴ H.L.A. HART, *THE CONCEPT OF LAW* 39 (1961).

the form of a violation of a rule set up to guide the conduct of ordinary citizens.”⁵

The opposite reductionist view — which focuses on conduct rules and portrays the role of courts (and other officials) as one of “applying” or “enforcing” those rules⁶ — is equally untenable. Norms are commonly understood to be both actor-specific and act-specific. A norm addresses itself to certain subjects or groups of subjects and guides them with respect to a certain type of action.⁷ For example, the law against theft, seen as a conduct rule, has the general public as its norm-subject and the (forbidden) act of stealing as its norm-act. Thus, when we loosely say that the judge, in imposing punishment on the thief, “applies” the rule forbidding stealing, we must realize that the judge is not guided or bound by that rule: he is not, in his capacity as judge, one of the rule’s norm-subjects, nor does his act (that of imposing punishment) correspond to the norm-act (that is, not stealing) specified by the rule. As long as our normative arsenal contains only conduct rules, we must deem the judge to be normatively unguided or uncontrolled in the act of passing judgment.⁸ We can successfully account for the normative constraints that the law imposes on judicial decisionmaking only if we impute to the legal system an additional relevant norm whose norm-subject is the judge and whose norm-act is the act of judging or imposing punishment.

Once we introduce such separate norms into our description of the legal system, we can give a more precise and satisfactory account of the normative situation involved in the preceding example. When we say that the judge “applies” (or “enforces”) the law of theft, we mean that he is guided by a decision rule that has among its conditions of application (1) the existence of a certain conduct rule (in our example,

⁵ *Id.*

⁶ This was essentially the position held by Austin, for whom “[e]very law or rule . . . is a command.” 1 J. AUSTIN, LECTURES ON JURISPRUDENCE 90 (3d ed. London 1869) (1st ed. London 1861). Although Austin distinguishes primary rights and duties that “do not arise from injuries or wrongs” from secondary (or sanctioning) rights and duties that “arise directly and exclusively from injuries or wrongs,” 2 *id.* at 791, he insists that such a scheme “do[es] not represent a logical distinction. For a primary right or duty is not of itself a right or duty, without the secondary right or duty by which it is sustained; and *e converso*.” *Id.* at 795. The role of courts with respect to both kinds of rules is that of enforcement: the distinction is between “law enforced directly by the Tribunals or Courts of Justice: and law which they only enforce indirectly or by consequence.” *Id.* at 791.

⁷ See J. RAZ, PRACTICAL REASON AND NORMS 50 (1975); A. ROSS, DIRECTIVES, *supra* note 3, at 107; G. VON WRIGHT, NORM AND ACTION 70–92 (1963).

⁸ Indeed, this conception of the judge’s role may be an extreme form of the legal realist’s view. See H.L.A. HART, *supra* note 4, at 135–37; *cf. id.* at 109–10 (arguing that it is inaccurate and uninformative to describe as obedience the relation of a judge to the rules he uses in the determination of disputes); J. RAZ, *supra* note 7, at 105 (arguing that clarity of discourse about norms will be served “if every norm is conceived as guiding one act,” and hence that legal theory should recognize “a distinct type of norm, power-conferring norms, guiding those acts which are the exercise of power”).

the rule against stealing), and (2) the violation of that conduct rule by the defendant.⁹

The inclusion of decision rules and conduct rules in the description of law draws attention to the potential independence of these two sets of rules and opens up for investigation the nature of their relationship. That relationship may, of course, accord with the one in the preceding paragraph's example: judges can indeed be guided exclusively by a decision rule that tells them to "apply" the conduct rules of the system in the sense I have described. But such a relationship, though possible, is not a necessary one, and it should not be taken for granted. Instead, the insistence on the conceptual separation of conduct rules and decision rules compels an explicit examination of the various normative considerations that should guide judicial and other official decisionmaking — an examination that allows for the possibility of decision rules that do not mandate the application of conduct rules.

In this way, the distinction between conduct rules and decision rules exposes an important ambiguity in the seemingly obvious proposition that the role of judges and other officials is to apply the law. The language of "law application" obscures the complexity that inheres in the operation of two different norms in each case of "application." That judges and other officials must (from a legal point of view) follow the law in rendering their decisions remains a truism, provided we understand the proposition to refer to the decision rules that are addressed to judges and are binding on them. The judges' task with regard to conduct rules is not, however, similarly obvious. The proper relationship between decision rules and their corresponding conduct rules is not a logical or analytical matter.¹⁰ Rather, it is a normative issue that must be decided in accordance with the relevant policies and values.

The distinction between conduct rules and decision rules cannot, accordingly, be abolished without loss. We therefore need an account

⁹ Cf. J. RAZ, *supra* note 7, at 105, 148 (similarly analyzing official decisions in terms of the joint operation of two sets of norms); A. ROSS, *DIRECTIVES*, *supra* note 3, at 113 (mentioning "a device of great importance, which is used in connecting norms in a systematic unity. . . . [It] consists in specifying the condition of application of one norm as the condition that another norm has been violated.").

¹⁰ Professor Alf Ross, for example, insists on the logical identity of the two sets of rules:

From a logical point of view . . . there exists only one set of rules, namely, the so called 'secondary' rules which prescribe how cases are to be decided For we have seen that primary norms, logically speaking, contain nothing not already implied in secondary norms, whereas the converse does not hold.

A. ROSS, *DIRECTIVES*, *supra* note 3, at 92. He goes on, however, to distinguish between the logical and the psychological point of view: "From the psychological point of view, however, there do exist two sets of norms. Rules addressed to citizens are felt psychologically to be independent entities which are grounds for the reactions of the authorities." *Id.* This is his response to Hart's criticism of Kelsen's position — a position that Ross shares. See *supra* pp. 627–28.

of the two kinds of rules that preserves the distinction between them and that depicts their interrelationship more accurately than does the prevailing view. I now propose such an alternative account.¹¹

B. *The Model of Acoustic Separation*

The distinction I intend to draw between conduct rules and decision rules can best be understood through a simple thought experiment. Imagine a universe consisting of two groups of people — the general public and officials. The general public engages in various kinds of conduct, while officials make decisions with respect to members of the general public. Imagine further that each of the two groups occupies a different, acoustically sealed chamber. This condition I shall call “acoustic separation.” Now think of the law as a set of normative messages directed to both groups. In such a universe, the law necessarily contains two sets of messages. One set is directed at the general public and provides guidelines for conduct. These guidelines are what I have called “conduct rules.” The other set of messages is directed at the officials and provides guidelines for their decisions. These are “decision rules.”¹²

The specific conduct rules that such a system would maintain would depend upon what conduct lawmakers deemed desirable — desirable, that is, in terms of the policies underlying the legal system. Similarly, the content of the decision rules of the system would be determined by the kinds of decisions that were deemed desirable in this sense.

The categories of conduct rules and decision rules, as defined in our imaginary universe, will help us to analyze real legal systems as well. In the real world, too, we may speak of messages that convey normative information regarding conduct to the general public, and we may distinguish such messages from ones aimed at guiding the

¹¹ Several typologies of rules of law draw distinctions analogous to the one between decision rules and conduct rules discussed in this Article. Relating the present distinction to the others would be, I fear, a tedious and unprofitable undertaking. Nonetheless, a brief comment on the most famous of these typologies, H.L.A. Hart's distinction between primary and secondary rules, may be in order. As Peter Hacker argues, Hart's distinction has occasioned much confusion because of the fact that “different dichotomous principles of classification are misguidedly assimilated, and wrongly thought to coincide extensionally.” Hacker, *Hart's Philosophy of Law*, in *LAW, MORALITY, AND SOCIETY* 19–20 (P. Hacker & J. Raz eds. 1977). Insofar as the distinction between conduct rules and decision rules comprises one of the dichotomies underlying Hart's typology, Hart's analysis, as Hacker notes, overlooks the fact that “secondary rules . . . guide behavior no less than do primary rules.” *Id.* at 20; see H.L.A. HART, *supra* note 4, at 77–120. I should also point out that of the typologies of rules with which I am familiar, Joseph Raz's comes closest to raising some of the issues addressed by the distinction between decision rules and conduct rules developed in the present Article. See J. RAZ, *THE CONCEPT OF A LEGAL SYSTEM* 154–56 (2d ed. 1980).

¹² *But cf.* H.L.A. HART, *supra* note 4, at 21–22 (noting the ambiguity of the statement that a law is “addressed” to someone).

decisions of officials.¹³ A fundamental difference exists, however, between the imagined universe and the real world: the condition of acoustic separation, which obtained in the former by definition, seems to be absent from the latter. In the real world, the public and officialdom are not in fact locked into acoustically sealed chambers, and consequently each group may "hear" the normative messages the law transmits to the other group.

This lack of acoustic separation has three obvious ramifications for the relationship between the two sets of rules. First, conduct rules and decision rules may often come tightly packaged in undifferentiated mixed pairs. Such packaging would not, of course, be possible in the imagined universe; there the law would necessarily consist of two separate sets of rules, each transmitted to one or the other of the two constituent bodies. This pattern of separation would prevail in the imaginary universe even if the rules in the two sets were identical in content. But such radical separation is unnecessary in the real world. As Bentham pointed out, a single statutory provision may simultaneously guide both conduct and decision and may thus function as both a conduct rule and a decision rule. A criminal statute, to use Bentham's example, conveys to the public a normative message that certain behavior should be avoided, coupled with a warning of the sanction that will be applied to those who engage in the prohibited conduct. The same statutory provision also speaks to judges: it instructs them that, upon ascertaining that an individual has engaged in the forbidden conduct, they should visit upon him the specified sanction.

The actual rules of a legal system are, accordingly, of three kinds. Any given rule may be a conduct rule, a decision rule, or both. The mere linguistic form in which a legal rule is cast does not determine the category to which it belongs. In order to classify a rule and discern the subject to whom its normative message is addressed, we must conceive of the rule in the imaginary universe characterized by acoustic separation, and then decide — in light of the policies underlying the legal system — whether the rule would in that universe be a directive to the general public, to officials, or to both.

The second difference between the real world and our imaginary universe is that, in the imaginary universe, acoustic separation ensures that conduct rules cannot, as such, affect decisions; similarly, decision rules cannot, as such, influence conduct. The two sets of rules are

¹³ The procedure suggested here for classifying legal rules as either conduct or decision rules should not be taken to imply the existence of a single identifiable source of legal norms, a source whose actual intentions determine the segregation of the norms into the two categories. Rather, the classification of legal rules is a scheme of interpretation based on the values and policies that the interpreter ascribes to the legal system. I do not, however, deal with the grounds for ascribing such values to the law. That a legislature in fact entertained certain intentions may, but need not, be reason to ascribe particular values to the legislation.

independent.¹⁴ Not so in the real world. Here, officials are aware of the system's conduct rules and may take them into account in making decisions. By the same token, because individuals are familiar with the decision rules, they may well consider those rules in shaping their own conduct. We may say, therefore, that reality differs from the imagined world in that real-world decision rules are likely to have conduct side effects, just as real-world conduct rules are likely to have decisional side effects.

To determine whether a given rule that affects conduct is merely a decision rule with a conduct side effect or instead an independent conduct rule, we can perform the same thought experiment that helped us to classify the rule in the first place: we can ask whether the rule would operate in the imagined universe as an independent conduct rule, deliberately and separately transmitted to the general public. The answer would again depend on the general policies that the legal system sought to promote. Needless to say, the same procedure would enable us to discover whether the effects of a rule on decisions are mere side effects or are instead the products of an independent decision rule that is "packed together" with a conduct rule.

Third, the possibility that conduct or decision rules may have such unintended side effects creates the potential for conflict between decision rules and conduct rules in the absence of acoustic separation. A decision rule conflicts with a conduct rule if the decision rule conveys, as a side effect, a normative message that opposes or detracts from the power of the conduct rule. Conversely, a conduct rule conflicts with a decision rule when the messages it sends decisionmakers contradict the decision rule. Such conflicting messages are impossible under conditions of acoustic separation. Because officials and the public each receive only the messages specifically directed to them and meant to guide their respective activities, neither group is in danger of receiving conflicting messages addressed to the other.¹⁵

A concrete example to clarify the foregoing remarks may at this point be overdue. For centuries criminal lawyers have been troubled

¹⁴ It is not utterly clear, nor is it of great importance, how complete the acoustic separation in the imaginary world could plausibly be made to be. Two main problems come to mind. First, would not the decisions themselves divulge to the public the decision rules? Although decisionmakers would not publicly give reasons for their decisions, could knowledge of the outcomes be avoided? If not, people would perhaps be able to guess decision rules from patterns of outcomes. Second, only in their capacity as officials could decisionmakers plausibly be said to be acoustically separated from the public. In other respects, they would be part of the public and subject to the same conduct rules. Furthermore, we would want (need) to allow for the possibility that people would undertake and resign official positions. Could we still maintain complete acoustic separation by making people "forget" the rules belonging to their other, or former, capacity? (Should we imagine a selective temporary-amnesia-inducing device in the entrance to each chamber?)

¹⁵ On practical conflict, see H. KELSEN, *PURE THEORY OF LAW* 25-26 (1967); G. VON WRIGHT, *supra* note 7, at 144-52.

by the question whether duress should operate as a defense to a criminal charge. Some have maintained that, even when external pressures impel an individual toward crime, the law should by no means relax its demand that the individual make the socially correct choice. If anything, the opposite is the case: "[I]t is at the moment when temptation to crime is strongest that the law should speak most clearly and emphatically to the contrary."¹⁶ Proponents of the defense, by contrast, have emphasized the unfairness of punishing a person for succumbing to pressures to which even his judges might have yielded.¹⁷ These conflicting arguments seem to impale the law on the horns of an inexorable dilemma. The law faces a hopeless trade-off between the competing values of deterrence and compassion (or fairness); whichever way it resolves the question of duress, it must sacrifice one value to the other.

The impasse dissolves, however, if we analyze the problem in terms of the distinction between conduct rules and decision rules and consider to which of the two categories the defense of duress properly belongs. To answer this question, we again resort to our mental experiment: we locate duress in the imaginary world of acoustic separation. When we do so, it becomes obvious that the policies advanced by the defense would lead to its use as a decision rule — an instruction to the judge that defendants who under duress committed acts that would otherwise amount to offenses should not be punished. Just as obviously, no comparable rule would be included among the conduct rules of the system: knowledge of the existence of the defense of duress would not be permitted to shape individual conduct; conduct would be guided exclusively by the relevant criminal proscriptions.

Viewed as a decision rule only, duress does not present the imaginary legal system with the dilemma described above. Under conditions of acoustic separation, the values at stake in the debate over duress do not clash. Eliminating the defense from the conduct rules addressed to the public allows the system to reap the benefits of maximum obedience to the law. At the same time, preserving duress as a decision rule ensures fairness and allows decisionmakers to express compassion in imposing punishment. The ability of acoustic separation to resolve the dilemma to which duress gives rise in the real world allows us to diagnose that dilemma as a case of conflict between conduct rules (the norms defining criminal offenses) and a decision rule (the defense of duress). According to our analysis, such a conflict occurs because of the behavioral side effects that the decision rule of duress is likely to have in the absence of acoustic separation:

¹⁶ 2 J. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 107 (1883).

¹⁷ See MODEL PENAL CODE § 2.09 comment (Tent. Draft No. 10, 1960) (citing sources); G. FLETCHER, RETHINKING CRIMINAL LAW § 10.3 (1978); W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW § 49 (1972).

it is likely to convey to people who know about it a normative message that points in the opposite direction from, and thus detracts from the force of, the proscriptions against various criminal offenses.

The example of duress demonstrates that, although the policies underlying an actual legal rule may require that the rule be only a decision rule or only a conduct rule, such a rule is likely in the real world to have both decisional and conduct effects and hence to defeat (at least in part) its underlying purposes. Perceived tensions in the law may in many cases be born of the law's inability to pursue the option, available in the imaginary universe characterized by acoustic separation, of having different decision and conduct rules.

I do not mean to deny that there are often good reasons for maintaining complete harmony between a conduct rule and its corresponding decision rule. One obvious reason for such harmony is that conduct rules often guide behavior by indicating the nature of future court decisions relative to that behavior. The expectations that such conduct rules raise may in most cases be reason enough for using a decision rule that accords with the conduct rule.

But we should notice two things. First, harmony between decision rules and conduct rules, even when it obtains, is not a logical matter, but rather a normative one. Second, although the reasons for maintaining such harmony may well hold in many cases, they do not hold in all. For instance, the argument that fairness requires the fulfillment of well-founded expectations is often inapplicable in the criminal law. When decision rules are more lenient than the relevant conduct rules, as in our duress example, no one is likely to complain about the frustration of an expectation of punishment.¹⁸

C. Strategies of Selective Transmission

Acoustic separation has functioned thus far as an heuristic device for distinguishing conduct rules from decision rules and for diagnosing possible tensions in the law that are caused by policies best served when decision rules differ from conduct rules. I would like now to challenge the assumption that acoustic separation is a totally imaginary construct and to suggest that it is not as alien to the real world as we have heretofore assumed.

Officials and the public are not in fact hermetically sealed off from each other, but neither are they completely intermingled. As soon as a society can be differentiated into a "public" and an "officialdom," it has probably reached a condition of partial acoustic separation. Partial acoustic separation obtains whenever certain normative messages are more likely to register with one of the two groups than with the other. Societies differ in their degree of acoustic separation. But

¹⁸ See *infra* pp. 671-72.

just as we would be hard pressed to locate a society displaying complete acoustic separation, we would find it equally difficult to identify a society in which such separation was wholly absent. We are also likely to discover that, within any given society, the degree of acoustic separation varies with respect to different groups of the population and different issues.¹⁹

If this empirical hypothesis is correct, actual legal systems may exhibit, to a greater extent than one might otherwise have expected, some features of the legal system of our imaginary universe. More specifically, actual legal systems may in fact avail themselves of the benefits of acoustic separation by engaging in "selective transmission" — that is, the transmission of different normative messages to officials and to the general public, respectively.²⁰ Furthermore, because the acoustic separation that actually obtains in any given society is likely to be only partial, the law may attempt to segregate its messages by employing special measures to increase the probability that a certain normative message will reach only the constituency for which it is intended.²¹ I shall refer to these techniques as strategies of selective transmission.²²

The term "strategies" calls for an explanation. My use of the term should not be understood to connote deliberate, purposeful human action. Imputing to the law strategies of selective transmission does not, therefore, imply a conspiracy view of lawmaking in which legislators, judges, and other decisionmakers plot strategies for segregating their normative communications more effectively. Instead, strategies of selective transmission may be the kinds of strategies without a strategist that Michel Foucault describes in his analysis of power.²³ Such strategies take the form of social phenomena, patterns, and practices that look like (that is, are amenable to an illuminating interpretation as) tactics for promoting certain human interests or

¹⁹ See *infra* pp. 640–45.

²⁰ Professor Niklas Luhmann believes that, in general, some mode of selective communication is essential to modern societies: "Under conditions [of size and complexity] that exclude the actual interaction between all members of the society, the communication system needs selective intensifiers." Luhmann, *Differentiation of Society*, 2 CAN. J. SOC. 29, 33 (1977).

²¹ Neither the notion of acoustic separation nor that of selective transmission is limited to the dichotomy between the public and officials, though that dichotomy is directly relevant to the distinction between conduct rules and decision rules on which the present Article focuses. One can certainly conceive of other acoustically separated groups that afford additional opportunities for practices of selective transmission. To consider an example from the criminal law, one can interpret as an instance of selective transmission the practice of withholding from the jury information concerning its power to nullify unjust laws. See M. KADISH & S. KADISH, *DISCRETION TO DISOBEY* 45–66 (1973) (giving an account of jury nullification that is closely related to the general approach taken in the present Article); Scheffin, *Jury Nullification: The Right to Say No*, 45 S. CAL. L. REV. 168 (1972).

²² For a discussion of specific strategies, see *infra* pp. 639–40, 645–48, 652–58.

²³ See M. FOUCAULT, *THE HISTORY OF SEXUALITY* (R. Hurley trans. 1978).

values; yet it may well be the case "that no one is there to have invented them, and few who can be said to have formulated them."²⁴ I am accordingly making no general claim regarding the level of self-consciousness or of intentionality at which lawmakers rely on acoustic separation and employ strategies of selective transmission. Nor shall I propose any causal explanation of the origins and evolution of acoustic separation or selective transmission.²⁵

II. APPLICATION OF THE MODEL TO CRIMINAL LAW

On the basis of the foregoing discussion, the following hypothesis may now be stated: we may expect the law to engage in selective transmission (1) under conditions of partial acoustic separation, and (2) in pursuit of policies that are best served by decision rules that differ from the corresponding conduct rules. In this Part, I undertake to illustrate this hypothesis by examining several doctrines and opinions in criminal law. Such an exercise has a triple purpose — to support the hypothesis, to clarify and elaborate the concepts of acoustic separation and selective transmission, and to demonstrate the ability of these concepts to cast new light on some troubling issues and decisions in the criminal law. Before I turn to the specific applications of the model, however, I must doubly qualify their role: they are meant neither to prove nor to endorse the law's attempt to segregate its normative messages through acoustic separation.

With regard to the first qualification, the thesis of this Article (like that of much other jurisprudential theorizing) is in part impervious to and in part incapable of empirical proof. The part that is impervious to empirical evidence is the analytical structure, which suggests, on the basis of the imaginary construct of an acoustically separated legal universe, the logical independence of decision rules and conduct rules

²⁴ *Id.* at 95. A fuller quotation is worthwhile:

[T]here is no power that is exercised without a series of aims and objectives. But this does not mean that it results from the choice or decision of an individual subject The rationality of power is characterized by . . . tactics which . . . end by forming comprehensive systems: the logic is perfectly clear, the aims decipherable, and yet it is often the case that no one is there to have invented them, and few who can be said to have formulated them: an implicit characteristic of the great anonymous, almost unspoken strategies which coordinate the loquacious tactics whose "inventors" or decisionmakers are often without hypocrisy.

Id.

²⁵ From the standpoint of functionalism, strategies of selective transmission can be seen as "latent functions," but this characterization does not bring us any closer to a theory of how they originate and evolve. See R. MERTON, *Manifest and Latent Functions*, in *SOCIAL THEORY AND SOCIAL STRUCTURE* 19, 60-82 (1957) (discussing the heuristic value of viewing objective consequences as "latent functions" of social behavior instead of focusing only on the conscious motivations for such behavior); Moore, *Functionalism*, in *A HISTORY OF SOCIOLOGICAL ANALYSIS* 321, 340-41 (T. Bottomore & R. Nisbet eds. 1978) (discussing distinction between "manifest" and "latent" functions).

and the *potential* utility of this independence. The other part of my thesis — that the law can be seen to exploit situations of partial acoustic separation and to resort to strategies of selective transmission — is incapable of empirical proof, because it claims not the status of a falsifiable causal theory, but only the more modest one of a plausible and occasionally illuminating *interpretation*.²⁶ Such an interpretation is illuminating insofar as it lends coherence to and makes sense of certain legal phenomena by placing them in a functionally rational pattern. The burden that the following illustrations must carry is not, therefore, the burden of proof. Rather, it is the lesser burden of demonstrating that the proffered interpretation is *sound* (that it is, in other words, illuminating in the cases to which it applies) and that it is *rewarding* (that it makes sense of a sufficient number of significant cases to justify the labors of elaborating and mastering a new analytical structure).

The second qualification regarding the role of the following applications is that the demonstration that certain legal practices, doctrines, and decisions may fruitfully be interpreted as instances of selective transmission is not meant to imply endorsement of such a strategy. Identifying such instances may serve as much to warn as to express approval and endorsement. In any event it is clear that, until we have revealed the possibility and potential uses of acoustic separation, we cannot reckon with them. For the time being, I wish to suspend any discussion of the desirability and legitimacy of the law's reliance on acoustic separation to segregate its normative messages; these issues are taken up in Part III.

A. Criminal Defenses

1. *Necessity and Duress*. — (a) *The Defense of Necessity as a Pure Decision Rule*. — The defense of duress, as we have already seen,²⁷ can be analyzed as a decision rule that would, in a world of acoustic separation, be conveyed only to officials; it would not be part of the conduct rules addressed to the general public. Unlike duress, which is commonly seen as a mere excuse, necessity is often thought of as a justification for otherwise criminal conduct: by violating a statute under circumstances of necessity, an actor is said to have chosen the lesser of two evils — he has done the right thing.²⁸ The law, it may

²⁶ For an excellent exposition of the view that radically distinguishes the methodology and expectations of the natural sciences from those of the human sciences, as well as for a discussion of the role of interpretation in the latter, see Taylor, *Interpretation and the Sciences of Man*, 25 REV. METAPHYSICS 3 (1971); Taylor, *Understanding in Human Science*, 34 REV. METAPHYSICS 25 (1980).

²⁷ See *supra* pp. 632–34.

²⁸ See generally Fletcher, *The Individualization of Excusing Conditions*, 47 S. CAL. L. REV. 1269 (1974) (discussing and citing sources on the distinction between justification and excuse).

be argued, should encourage rather than discourage such actions. It is possible, therefore, that in contrast with the defense of duress, the necessity norm would be included not only among the imaginary legal system's decision rules, but also among its conduct rules. But this would not necessarily be so. At least in some cases, the test of necessity should be the actor's willingness to face, as an alternative to the ill consequences of abiding by the law, the threat of criminal punishment unmitigated by the prospect of legal reprieve.

This test seems particularly pertinent when the source of the necessity is the actor's self-interest — when he breaks the law in order to avert an allegedly greater evil to himself. In such situations actors are prone, deliberately or in good faith, to exaggerate the danger to be averted and to underestimate the evil involved in disobeying the law. The prospect of a defense to a future criminal charge is likely to enhance the tendency to exaggerate the sense of necessity of protecting one's own interests. By contrast, the prospect of punishment (undiminished by the availability of a defense) can be seen here to place an objectively determined price tag on the option of violating the law. The willingness of the individual to pay the price of his transgression lends credence to the claim of necessity by helping to assure the judge that the evil averted by the transgression was compelling.

This reasoning suggests that the defense of necessity, when based on self-interest, may be allowed most confidently in situations in which the actor did not know of its availability at the time of his criminal conduct. Accordingly, necessity defenses arising out of situations of self-interest resemble the defense of duress in that they, too, should be governed by rules that in a world of acoustic separation would be conveyed solely to officials. The law's resistance to allowing or expanding the defense of necessity may thus be interpreted as the product of concern with the undesirable behavioral side effects that a decision rule allowing such a defense would likely have in the real world.²⁹

The conflicts between the conduct rules of the criminal law and a decision rule allowing the defense of duress or necessity need not, however, be as acute as I have indicated. Such conflicts may in fact be mitigated in the real world by partial acoustic separation, just as

²⁹ In deciding whether a particular defense would have undesirable behavioral side effects, one should take notice of the danger of overdeterrence: some people, ignorant of the defense and overly apprehensive of the legal sanction, may, in order to obey the law, succumb to hardships that they should have averted. The social benefit foregone in these cases must then be compared with the dangers of excessive reliance on the defense were its availability known. The law's traditional resistance to allowing the defenses considered here in any but the most extreme cases may be understood to imply a belief that the benefits foregone because of overdeterrence in this area are more than offset by the danger of reduced obedience to the law that allowing these defenses would bring about.

they would be eliminated in the imaginary world by complete acoustic separation. What I mean to suggest is simply that the arguments against recognizing duress, and those for constricting the scope of the necessity defense, may well exaggerate the extent to which the general public is likely to be familiar with the defenses and to be influenced by them in its conduct. The greater the degree of acoustic separation in a given society or area of conduct, the stronger is the case for allowing such defenses. These observations suggest a possible interpretation of two salient features of the defenses of duress and necessity — their notorious vagueness and their variable application.

(b) *Vagueness as a Means of Selective Transmission.* — Courts and commentators have recognized the vague and open-ended quality of the defenses of duress and necessity.³⁰ Such vagueness makes a mockery of the standards of clarity and specificity that criminal statutes are generally required to meet.³¹ Yet as Professors Mortimer and Sanford Kadish point out, “no court would conceivably hold a penal code unconstitutionally vague because it recognized a lesser-evil defense”³² — nor, it may be confidently added, would any court strike down a penal code because it recognized a defense of duress.

Insofar as the characterization of these defenses as decision rules is sound, it suggests a simple explanation for judicial toleration of their vagueness. Far from being a defect, the failure of the rules to communicate to the public a clear and precise normative message is, in light of the policies underlying the defenses, a virtue. These policies do not require that the availability of the defenses be generally known; indeed, in many cases they require that the availability of the defenses *not* be known. In other words, vagueness can be interpreted as a strategy of selective transmission that helps approximate in the real world the conditions of acoustic separation that would obtain in the imaginary world.³³

³⁰ See, e.g., *State v. Toscano*, 74 N.J. 421, 443, 378 A.2d 755, 766 (1977) (referring to the “admittedly open-ended nature of [the person-of-reasonable-firmness] standard” of duress); G. FLETCHER, *supra* note 17, § 7.5.1; M. KADISH & S. KADISH, *supra* note 21, at 125; Fletcher, *The Right Deed for the Wrong Reason: A Reply to Mr. Robinson*, 23 UCLA L. REV. 293, 312-16 (1975); Newman & Weitzer, *Duress, Free Will and the Criminal Law*, 30 S. CAL. L. REV. 313, 314 (1957).

³¹ See *infra* pp. 658-64.

³² M. KADISH & S. KADISH, *supra* note 21, at 125.

³³ Cf. G. FLETCHER, *supra* note 17, § 7.5.1 (arguing that vagueness of justification and excuse defenses is acceptable on the ground that actors rarely plan the conduct that gives rise to such defenses); *id.* § 10.3.4 (arguing that the legal system should bring issues relating to excuses into the open for public discussion); M. KADISH & S. KADISH, *supra* note 21, at 125 (arguing that vagueness of necessity defense is acceptable because the defense should not be seen, as some believe, as part of the full description of the proscribed conduct, but rather as a separate principle that in certain cases justifies breaking the law); Schwartz, *Reform of the Federal Criminal Laws: Issues, Tactics and Prospects*, 1977 DUKE L.J. 171, 217 (arguing that giving judges a free hand to develop criminal defenses would render criminal law intolerably vague).

There are two ways in which the vagueness of standards such as those defining the defenses of necessity and duress can serve as a vehicle of selective transmission. First, the indeterminacy of the standards makes it less likely that ordinary citizens will be able to rely on them with any degree of confidence. Second, even if the standards were to attain a more definite meaning by spawning a body of decisional law, this law, because of its sheer volume and complexity, would probably elude the legally untutored citizen.³⁴ As long as the standard for a particular defense is sufficiently vague, and the body of decisions interpreting the standard sufficiently broad and varied, the danger that the defense will seriously modify individual behavior governed by the various conduct rules of the criminal law is reduced.³⁵

(c) *Variable Application.* — The second aspect of the defenses of necessity and duress for which we may now offer an explanation is their variable application. The preceding remarks would lead us to expect some correspondence between the willingness of a court to allow the defenses and the degree of acoustic separation that the court perceives to obtain in various situations: the higher the degree of acoustic separation, the more willing a court will probably be to adopt a decision rule allowing a defense. The factors that determine the degree of acoustic separation can be conveniently divided into two sets. In the first set are factors relating to the legal sophistication and other characteristics of the actors likely to engage in a given activity. The second set comprises factors concerning the circumstances under which the offense in question is normally committed. For example, the period of prolonged deliberation that commonly precedes certain offenses allows the actor to obtain through legal advice knowledge of

³⁴ This aspect of the strategy of selective transmission is most pronounced when the criminal code delegates the definition of defenses entirely to the courts. See, e.g., N.J. STAT. ANN. § 2C:3-2 (West 1982); 2 NEW JERSEY CRIMINAL LAW REVISION COMM., FINAL REPORT, THE NEW JERSEY PENAL CODE 80 (1971). On the possible role of previous judicial decisions in limiting discretion and responding to the power control concerns of vagueness doctrine, see *infra* pp. 658-62.

³⁵ What would amount to a more drastic strategy of selective transmission was suggested in this context by Macaulay in his proposed penal code for India. He was concerned that allowing defenses based on "the desire of self-preservation" would be widely abused and would lead people more readily into life-threatening situations. See INDIAN PEN. CODE 106 app. note B at 111 (T. Macaulay, J. MacLeod, G. Anderson & F. Millet eds. 1888). At the same time, he recognized the existence of circumstances of genuine necessity in which "it would be useless cruelty to punish acts done under the fear of death, or even of evils less than death." *Id.* at 113. His solution was to eliminate any defense of necessity (or duress) from the code, on the ground that permitting such defenses even in cases involving fear of instant death would be "in the highest degree pernicious," but at the same time to relegate to the government — "which, in the exercise of its clemency, will doubtless be guided in a great measure by the advice of the Courts" — the cases in which fairness demanded that no punishment be imposed. *Id.* at 111-13. I owe this point to my esteemed colleague Sanford Kadish. The famous case of *The Queen v. Dudley*, [1884] 14 Q.B.D. 273, 288, was similarly resolved: the court declined to allow a defense of necessity, but relegated the matter to the clemency of the Queen.

relevant decision rules; low emotional involvement in the forbidden conduct increases the effectiveness of that knowledge in shaping behavior and further reduces acoustic separation.

The typical situation that gives rise to a defense of duress or necessity involves an actor of no special legal sophistication caught in circumstances of emergency, high pressure, and emotion. The likelihood that the actor is aware of the defense or able to act on such awareness is in these circumstances at its lowest. Allowing the defense under such conditions of high acoustic separation (enhanced, as we observed, by the defenses' vague formulation) creates little risk of undesirable behavioral side effects. In some cases that might give rise to the defenses, however, special circumstances or the special characteristics of the individuals involved indicate a lower degree of acoustic separation. The law can be seen to respond to such situations by disallowing or curtailing the defenses.

(i) *Prison Escapes*. — Cases involving prison escapes exhibit a low degree of acoustic separation because of the nature of the actors involved. In a series of cases, courts have been faced with prison escapes prompted by threats of homosexual rape or death directed at the escapees. Courts have for many years virtually refused to allow such threats to serve as a defense to the charge of escape.³⁶ In recent cases in which courts have recognized in principle a defense of necessity (or duress) to prison escape, they have nevertheless tended to place unusually restrictive conditions on the use of the defense.³⁷ The concerns underlying the courts' grudging attitude toward defenses to escape are vividly conveyed by the leading decision of *People v. Lovercamp*:³⁸ "However, before *Lovercamp* becomes a household word in prison circles and we are exposed to the spectacle of hordes of prisoners leaping over the walls screaming 'rape,' we hasten to add that the defense of necessity to an escape charge is extremely limited in its application."³⁹ The necessity defense in prison escape cases is narrowly circumscribed, it seems, because of the courts' belief that

³⁶ See Note, *Intolerable Conditions as a Defense to Prison Escapes*, 26 UCLA L. REV. 1126, 1126-28 & nn.1-2 (1979) (citing cases).

³⁷ See, e.g., *People v. Lovercamp*, 43 Cal. App. 3d 823, 118 Cal. Rptr. 110 (1974); *Johnson v. State*, 379 A.2d 1129 (Del. 1977); *State v. Boleyn*, 328 So. 2d 95 (La. 1976); *People v. Hocquard*, 64 Mich. App. 331, 236 N.W.2d 72 (1975); *State v. Cross*, 58 Ohio St. 2d 482, 391 N.E.2d 319 (1979); *Commonwealth v. Stanley*, 265 Pa. Super. 194, 401 A.2d 1166 (1979), *aff'd*, 498 Pa. 326, 446 A.2d 583 (1982). See generally Note, *supra* note 36, at 1141-45 (arguing that artificiality of necessity-of-escape defense, as articulated in *Lovercamp*, renders defense useless in practice). On the unusual restrictiveness of these conditions, see *State v. Reese*, 272 N.W.2d 863, 868-70 (Iowa 1978) (McCormick, J., dissenting); see also Note, *A Reexamination of Justifiable Escape*, 2 NEW ENG. J. PRISON L. 205 (1976) (chronicling the expansion of the necessity-of-escape defense to provide "limited" relief in cases of "bona fide" duress or necessity).

³⁸ 43 Cal. App. 3d 823, 118 Cal. Rptr. 110 (1974).

³⁹ *Id.* at 831, 118 Cal. Rptr. at 115. The same concern is echoed in most other cases adopting a similarly restrictive approach to the defense. See sources cited *supra* note 37; see

the relevant constituency — that of prison inmates — is highly attuned to legal pronouncements affecting it; thus, any decision rule concerning prisoners is very likely to create significant behavioral side effects. The result is that the courts define their decision rule more narrowly than may be justified by the policies and values underlying it.

(ii) *The Duty to Testify*. — The case of *People v. Carradine*,⁴⁰ which dealt with the duty to testify, illustrates the legal effects of the second group of factors responsible for low acoustic separation — factors relating to the nature of the circumstances under which the defense (in this case, duress) is likely to be invoked. Georgia Carradine, the defendant, refused to testify in a homicide trial out of fear for her life and her children's lives. In rejecting this fear as an excuse, the court said: "[Fear] is not a valid reason for not testifying. If it's a valid reason then we might as well close the doors."⁴¹

Here, as in the situation of prison escape, the court's position is based on a special concern about the effect that allowing a defense will have on people's future conduct.⁴² It was certainly not the severity of the offense involved that gave pause to the *Carradine* court: duress has generally been allowed as a defense to much graver charges than the failure to testify.⁴³ Rather, the court's apocalyptic view of the likely results of allowing fear to excuse noncompliance with the law in such cases must rest on an assessment of the special circumstances under which the offense of failure to testify is typically committed. The decision about whether to testify is of a distinctively legal character: it is a decision about whether to participate in the legal

also *People v. Noble*, 18 Mich. App. 300, 170 N.W.2d 916 (1969) (holding that threat of homosexual rape cannot justify prison escape, because such an excuse is too easily abused); *State v. Green*, 470 S.W.2d 565 (Mo. 1971) (rejecting necessity-of-escape defense based on threatened homosexual attack because defendant had "several hours" to report threat to prison authorities, despite authorities' failure to respond to inmate's earlier requests for protection), cert. denied, 405 U.S. 1073 (1972). *Contra* *People v. Harmon*, 53 Mich. App. 482, 220 N.W.2d 212 (1974).

⁴⁰ 52 Ill. 2d 231, 287 N.E.2d 670 (1972).

⁴¹ *Id.* at 234, 287 N.E.2d at 672 (quoting *People v. Carradine*, No. A69-27 (Cook County, Ill., Cir. Ct. Oct. 1, 1969)).

⁴² This concern, in any event, is the only reason given by the court for its resolute refusal to take into consideration Ms. Carradine's fear of the notorious gang to which the accused, against whom she was expected to testify, belonged. The court did not rely, as it could have, on the fact that Ms. Carradine alleged no explicit threats against her. The reason for the court's failure to note the absence of such allegations may have been that Ms. Carradine did not technically raise the defense of duress, but rather relied on the alleged facts of duress (that is, her fear of reprisal by the gang) as extenuating circumstances that should have reduced the prison term imposed on her for contempt of court.

⁴³ See, e.g., *D'Aquino v. United States*, 192 F.2d 338, 357-65 (9th Cir. 1951) (treason); *Ross v. State*, 169 Ind. 388, 82 N.E. 781 (1907) (arson); *Nall v. Commonwealth*, 208 Ky. 700, 271 S.W. 1059 (1925) (burglary); *State v. St. Clair*, 262 S.W.2d 25 (Mo. 1953) (robbery); *State v. Ellis*, 232 Or. 70, 374 P.2d 461 (1962) (kidnapping).

process. It therefore focuses the individual's attention on the relevant legal duty in a way that most offenses do not. The decision about whether to testify is probably also the product of prolonged deliberation, in the course of which the individual may seek legal advice about the scope of her duty and the likely legal consequences of a failure to testify. Furthermore, because the duty to testify and the accompanying threats by defendants or their associates arise in fairly standard circumstances, courts' rulings in this area are easily generalizable.

These factors are apt to result in the failure of selective transmission. A court's decision to allow fear of reprisal to excuse witnesses from the duty to testify is likely to register with and shape the conduct of many potential witnesses. The *Carradine* court's position may accordingly be understood to reflect both the court's belief that a decision rule of duress is liable to generate considerable behavioral side effects, and its assessment that the cost to society of the subsequent corrosive effect on the duty to testify outweighs the considerations of fairness and compassion that support a decision rule allowing such a defense.⁴⁴

(iii) *Acting at One's Peril*. — A similar analysis can help rationalize the vagaries of the "act at your peril" rule that is followed in some situations of necessity. One such situation involves a citizen's use of deadly force to apprehend an escaping felon: "If the private citizen acts on suspicion that [a violent or otherwise serious] felony has been committed, he acts at his own peril. For the homicide to be justifiable, it must be established that his suspicion was correct."⁴⁵

Seen as a conduct rule, such a provision is extremely defective and is subject to the charge, raised by the Model Penal Code's commentary, that "it does not prescribe a workable standard of conduct; liability depends upon fortuitous results."⁴⁶ This charge loses its force, however, if the "act at your peril" formula is interpreted not as a conduct rule, but rather as a decision rule. Resorting once again to the idea of a universe of acoustic separation can help us uncover the considerations that might underlie such a decision rule.

In determining whether to allow citizens to use deadly force against escaping felons, lawmakers may conclude that the danger to innocent people of this unprofessional use of force outweighs its possible law enforcement benefits. Such an attitude would lead lawmakers in the imaginary world to devise a conduct rule flatly forbidding citizens to

⁴⁴ Duress was, however, allowed as a defense to perjury in, for example, *Hall v. State*, 136 Fla. 644, 679-84, 187 So. 392, 407-09 (1939), and more recently in the English case of *Regina v. Hudson*, [1971] 2 All E.R. 244 (C.A.).

⁴⁵ *Commonwealth v. Chermansky*, 430 Pa. 170, 174, 242 A.2d 237, 240 (1968). *But cf.* *Commonwealth v. Klein*, 372 Mass 823, 363 N.E.2d 1313 (1977) (declining to follow an act-at-your-peril rule).

⁴⁶ MODEL PENAL CODE § 3.06 comment 15 (Tent. Draft No. 8, 1958).

use deadly force against suspected criminals. But the lawmakers might at the same time feel that it is unfair to punish a citizen who has successfully apprehended a dangerous felon through the use of deadly force: not only has the citizen in fact avoided the perils giving rise to the conduct rule (she has not injured any innocent party), but she has also rendered society a service that is not merely tolerated in, but indeed expected of, its police force. This sentiment naturally leads to an "act at your peril" decision rule — one that instructs judges not to impose punishment when deadly force has been successfully used to apprehend an escaping felon.

The conduct rule that unequivocally proscribes the use of deadly force and the decision rule that allows a qualified defense predicated on the actual success of the use of force can coexist without conflict in the imaginary world. In the real world, however, decisionmakers must choose between the two rules. The Model Penal Code, which flatly denies a defense even for the successful user of deadly force against escaping felons,⁴⁷ may be understood to pursue the logic of the conduct rule. By contrast, the "act at your peril" approach taken by some courts may be understood as an adoption of the corresponding decision rule. Focusing in this way on the decision rule rather than on the conduct rule may not be unreasonable in light of the degree of acoustic separation likely to obtain in such situations: the typical case in which the defense is asserted involves neither the legally sophisticated actor nor the cool and prolonged reflection that would make the availability of a defense the source of considerable and undesirable behavioral side effects.⁴⁸

In contrast to some courts' application of the "act at your peril" rule regarding the use of deadly force against escaping felons is the resolute refusal by the Supreme Court of California to follow a similar rule in the case of *People v. Ceballos*.⁴⁹ That case dealt with an

⁴⁷ See *id.* § 3.07(2)(b); *id.* comment 3.

⁴⁸ It is possible, of course, to conceive of more lenient decision rules than "act at your peril" that might be adopted in the imaginary universe. For example, we might opt for a rule that commanded acquittal when the defendant acted under a genuine belief that her victim was a fleeing felon and that shooting him would not jeopardize the safety of others. The adoption of such a decision rule would be premised on the notion that such a defendant would be innocent of any wrongdoing even if she in fact shot the wrong person. Under this interpretation, the promulgation in the real world of an "act at your peril" rule should be understood as a compromise between the imaginary system's conduct rule and its decision rule, a compromise intended to reduce the likelihood of behavioral side effects that the more lenient rule might have. The interpretation described in the text, however, is somewhat more ambitious in that it attempts to explain the "act at your peril" rule not as a mere compromise, but as the product of a coherent substantive position. This position condemns as at least reckless any shooting by a citizen, no matter how well intentioned, but it is willing to acknowledge that the actual happy outcome of the defendant's misconduct may be relevant to her eventual legal treatment. For a general philosophical discussion of such a position, see B. WILLIAMS, *Moral Luck*, in *MORAL LUCK* 20 (1981).

⁴⁹ 12 Cal. 3d 470, 526 P.2d 241, 116 Cal. Rptr. 233 (1974).

assault charge based on the injuries sustained by a would-be burglar who activated a trap gun installed by the defendant Ceballos. Invoking the "act at your peril" rule, Ceballos argued in his defense that his victim was in fact an intruder whom Ceballos could have shot with impunity.

The analogy between the installation of trap guns and the use of deadly force against escaping felons is clear. In both cases, the general policy disfavoring such practices is based on the notion that the dangers involved outweigh the possible benefits. The argument for a qualified defense is also similar in the two situations: the particular defendant has in fact avoided the dangers and successfully accomplished something that society considers beneficial.⁵⁰

Still, refusing to allow the defense in trap gun cases may be consistent with allowing it in cases involving the use of deadly force against escaping felons, because the respective degrees of acoustic separation in the two situations differ. Whereas people who shoot escaping felons typically do so on the spur of the moment, people who install trap guns presumably do so under circumstances that permit effective inquiry into the relevant legal ramifications. Consequently, the court's refusal to allow even a qualified defense in trap gun cases — a refusal based on the notion that "the use of such [deadly mechanical] devices should not be encouraged"⁵¹ — has a firmer basis than would a similar refusal in cases involving the use of force against escaping felons. It should not be surprising, then, that the considerations underlying the desirable conduct rule may prevail in trap gun cases while the considerations underlying the decision rule determine the outcome in situations involving use of deadly force against fleeing felons.

The common thread that links the prison escape, duty-to-testify, and trap gun situations is low acoustic separation. Judicial reluctance to allow a defense to criminal charges in these situations may accordingly be explained in part by the undesirable behavioral side effects that such a defense might have. Conversely, the greater latitude given to duress or necessity in other situations may reflect a tacit belief that adopting such decision rules will not send a significantly counterproductive message to the public. The degree of acoustic separation may thus be seen as a variable essential to a complete account of the shifting boundaries of those defenses.

2. *Ignorance of the Law.* — If one were to take a poll and ask about the legal significance of ignorance of law, most nonlawyers would answer, I believe, by citing the maxim that "ignorance of the

⁵⁰ That society considers such an outcome beneficial is attested to by the considerable latitude given police in the use of deadly force against escaping felons and by the defense that ex hypothesi would have been available to Ceballos had he shot at the burglar himself.

⁵¹ *Ceballos*, 12 Cal. 3d at 477, 526 P.2d at 244, 116 Cal. Rptr. at 236.

law is no excuse.”⁵² The results of the poll, if my guess is correct, might attest to a successful legal feat of selective transmission. By reciting the maxim, courts reinforce the popular belief that it accurately describes the law. But the maxim, far from being an exhaustive statement of the law, is in reality a mere starting point for a complex set of conflicting standards and considerations that allow courts to avoid many of the harsh results that strict adherence to the maxim would entail.⁵³ If one were to state the law on the question whether ignorance of law is ever a valid defense, one would have to consider the various distinctions set out in the following Table:*

<i>Factors that weigh against allowing the defense</i>	<i>Factors that favor allowing the defense</i>
1. The offense is malum in se	The offense is malum prohibitum ⁵⁴
2. The charge is based on a statutory provision	The charge is based on a regulation ⁵⁵
3. The subject matter is likely to be legally regulated	The subject matter is not likely to be legally regulated ⁵⁶
4. The statute in question serves an important purpose	The statute in question does not serve an important purpose ⁵⁷
5. Mens rea is not negated by the ignorance of law	Mens rea is negated by the ignorance of law ⁵⁸
6. The offense charged is a general-intent crime	The offense charged is a specific-intent crime ⁵⁹
7. The ignorance pertains to a criminal law	The ignorance pertains to a non-criminal law ⁶⁰
8. The defendant relied on a nonauthoritative source of law	The defendant relied on an authoritative source of law ⁶¹
9. The charge is based on an action	The charge is based on an omission ⁶²

⁵² “Almost the only knowledge of law possessed by many people is that ignorance of it is no excuse (*ignorantia juris non excusat*).” G. WILLIAMS, TEXTBOOK OF CRIMINAL LAW 405 (1978).

⁵³ “Examination shows that . . . from the earliest times, the numerous exceptions reduce the rule to a mere guideline for the courts. Nevertheless, *ignorantia juris* is usually cited out of its context as an irrefutable legal verity.” Bolgár, *The Present Function of the Maxim Ignorantia Iuris Neminem Excusat — A Comparative Study*, 52 IOWA L. REV. 626, 640 (1967). The writer attributes this tendency to a “recurring and inexplicable phenomenon of human thinking” — “persistent reliance on maxims in full ignorance of their truth.” *Id.* at 639.

* Footnotes accompanying the Table appear on the facing page.

The Table presents distinctions that courts rely upon as reasons for decisions allowing or disallowing a defense of ignorance of law. The presence of any of the circumstances listed in the left-hand column counts as a reason to deny the defense, whereas a circumstance from the right-hand column supports the defense. The list is not meant to be complete; other considerations may possibly be found in various decisions. Moreover, the several pairs of elements are related in numerous ways: some overlap partially, others may be mutually exclusive, and so on. The main point is that the law is not reducible to any simple rule. Rather, it consists of an entire array of decisional variables that give rise to almost endless permutations.

⁵⁴ The distinction between offenses that are *malum in se* and those that are *malum prohibitum* is significant in this context because of its influence on the interpretation courts give to the term "willfully" in the relevant statute. See, e.g., *United States v. Murdock*, 290 U.S. 389 (1933) (inferring requirement of bad faith or evil intent from statutory prohibition of "willful" failure to pay taxes); *Potter v. United States*, 155 U.S. 438, 445-48 (1894) (inferring necessity of both knowledge and "bad intent" from requirement of "willful" act or omission); *United States v. Ehrlichman*, 376 F. Supp. 29, 35 (D.D.C. 1974) (rejecting defense because acts were *malum in se*).

⁵⁵ Whether the difference between ignorance of a statute and ignorance of a regulation matters depends upon the interpretation of the language of the statute under which a regulation is promulgated: the statute is sometimes interpreted to require knowledge by defendants of the regulation, in which case ignorance of the regulation becomes a valid defense. The Third Circuit endorsed this reasoning in *United States v. Boyce Motor Lines*, 188 F.2d 889, 890-91 (3d Cir.), *aff'd*, 342 U.S. 337, 342 (1951), but the Supreme Court's affirmance left the point ambiguous. For other cases on the subject, see *United States v. Lizarraga-Lizarraga*, 541 F.2d 826, 828 (9th Cir. 1976); *United States v. Chicago Express*, 235 F.2d 785, 786 (7th Cir. 1956); *St. Johnsbury Trucking Co. v. United States*, 220 F.2d 393, 395 (1st Cir. 1955); *cf. United States v. International Minerals & Chem. Corp.*, 402 U.S. 558, 565 (1971) (holding that when dangerous products, devices, or substances are involved, the probability of regulation is so great that possessors of such products are thereby put on notice regarding the existence of regulations governing them).

⁵⁶ See *International Minerals*, 402 U.S. at 564-65; *United States v. Freed*, 401 U.S. 601, 609 (1970); *id.* at 616 (Brennan, J., concurring); *Lambert v. California*, 355 U.S. 225, 229 (1957); *Reyes v. United States*, 258 F.2d 774, 784 (9th Cir. 1958).

⁵⁷ See *Lambert*, 355 U.S. at 229; *Reyes*, 258 F.2d at 784-85.

⁵⁸ See *State v. Sawyer*, 95 Conn. 34, 110 A. 461 (1920); *Long v. State*, 44 Del. 262, 65 A.2d 489 (1949); *State v. Collins*, 15 Del. 536, 41 A. 144 (1894).

⁵⁹ See *Hargrove v. United States*, 67 F.2d 820 (5th Cir. 1933); *Long*, 44 Del. at 278-79, 65 A.2d at 497; *Collins*, 15 Del. at 539-40, 41 A. at 145.

⁶⁰ For a detailed discussion of this distinction, see G. WILLIAMS, *CRIMINAL LAW — THE GENERAL PART* §§ 106-117 (2d ed. 1961) (citing sources).

⁶¹ See *Cox v. Louisiana*, 379 U.S. 559, 568-75 (1965); *Raley v. Ohio*, 360 U.S. 423, 437-40 (1959). Compare *United States v. Ehrlichman*, 546 F.2d 910 (D.C. Cir. 1976) (holding that presidential assistant's good-faith belief in legality of unconstitutional search is no defense to prosecution for such search), *cert. denied*, 426 U.S. 1120 (1977), with *United States v. Barker*, 546 F.2d 940 (D.C. Cir. 1976) (allowing as a defense subordinate operatives' reasonable, good-faith reliance on apparent authority of presidential assistant).

⁶² See *Lambert v. California*, 355 U.S. 225, 228-29 (1957); *cf. Reyes v. United States*, 258 F.2d 774, 784 (9th Cir. 1958) (distinguishing *Lambert* on the ground, inter alia, that failure to register while crossing the border is not a mere omission).

The complexity of this set of decisional rules stands in sharp contrast to the simplicity and straightforwardness of the rule that "ignorance of the law is no excuse." I will suggest that we may understand this contrast to reflect the rift between conduct rules and decision rules. Such a suggestion is supported by both the content and the form of the respective rules.

Consider the question of ignorance of law in a world of acoustic separation. Plainly, the purpose of the relevant conduct rule would be to encourage people to be diligent in their efforts to know the law. At the same time, considerations of justice might motivate decision-makers to give great effect to the defense of ignorance of law and to acquit whenever a bona fide ignorance of the law negated the culpability that would otherwise have attached to an act.⁶³

Absent acoustic separation, these rules would be in conflict: the force of the duty to know the law would probably be severely compromised by public knowledge of the existence of a decision rule that excused offenses committed in ignorance of the law. In a world of partial acoustic separation, however, the law might try to serve the policies of both the conduct rule and the decision rule by approximating as closely as possible the imaginary world's complete acoustic separation. It would do so by attempting to convey to the general public a firm duty to know the law and by simultaneously instructing decisionmakers to excuse violations in ignorance of the law if fairness so required. It would also attempt to keep those two messages separate by employing a strategy of selective transmission.

The actual legal situation comports with this hypothesis both in content and in form. The clear behavioral implication of the rule that "ignorance of the law is no excuse" is that one had better know the law. The clarity and simplicity of this phrase make it a highly suitable form of communication to the legally untutored. On the other hand, the complexity of the set of decisional variables that actually guide courts in this area makes obscure to the public, but not to courts, the instruction that the demands of justice be served in cases in which ignorance of the law breeds innocence.

B. Criminal Offenses

1. The Dual Function of Laws Defining Criminal Offenses. — Our examples thus far all concern criminal defenses, which seem to belong

⁶³ Here, as is so often the case, Holmes provides a stark and often-cited formulation of the issue:

It is no doubt true that there are many cases in which the criminal could not have known that he was breaking the law, but to admit the excuse at all would be to encourage ignorance where the law-maker has determined to make men know and obey, and justice to the individual is rightly outweighed by the larger interests on the other side of the scales.

O.W. HOLMES, *THE COMMON LAW* 48 (1881).

quite naturally in the camp of decision rules. Laws defining criminal offenses, by contrast, would seem to be the paradigmatic examples of conduct rules: the obvious point of the various rules defining offenses, unlike that of rules creating defenses, is to convey to the public a normative message consisting of a description of some proscribed or prescribed mode of behavior coupled with a threatened sanction. It is also obvious, as Bentham pointed out,⁶⁴ that once the distinction between conduct rules and decision rules is introduced, statutes defining offenses turn out to be decision rules as well as conduct rules: they specify for the courts some of the preconditions to the imposition of punishment. What may be less evident, however, is that it is not logically necessary for the conduct rule and the decision rule, normally conjoined in a single law, to overlap fully. Reverting to our imaginary universe helps us to conceive of that possibility: under conditions of complete acoustic separation, the conduct prohibited and the punishment threatened may differ from the conduct actually punished and the punishment actually imposed.

Are there any reasons for the law to avail itself of the possibility of using different decision and conduct rules in defining criminal offenses? The following considerations suggest an affirmative answer.⁶⁵ The criminal law, one might argue, is (in part) an embodiment of (part of) the community's morality. One of the functions of criminal laws is to reinforce that morality by encouraging behavior in accordance with specific moral precepts. To the extent that criminal laws merely embody extant moral norms,⁶⁶ the possibility of conflict between moral and legal duties is eliminated.⁶⁷ Correspondence between moral and legal duties would also take the sting out of Holmes' "bad

⁶⁴ See J. BENTHAM, *supra* note 1, at 430.

⁶⁵ The more common view holds such a possibility to be inconceivable:

The official evaluation of behaviour by the primary organs [that is, courts] must of course coincide with the guidance given by the system to ordinary individuals. If the system judges an individual to be doing what he ought not to do this entails that its norms guide him not to do that act, and *vice versa*.

J. RAZ, *supra* note 7, at 142 (emphasis added).

⁶⁶ Professor David Daube depicts such a relation between certain criminal provisions and their underlying moral norms and shows how this relation is reflected in the form of some ancient criminal statutes:

It would, then, be absurd for a lawgiver to say: "Murder is forbidden: if anyone violates this decree, he shall be put to death." The sensible form in this case is the other, which, so to speak, takes the prohibition of murder for granted and concentrates on making clear what will happen if you disregard it: "If a man murders another man, he shall be put to death."

D. DAUBE, *supra* note 1, at 24. This view of the relation between the "core" criminal offenses and their moral counterparts is typical of natural law thinkers and was most clearly stated by Richard Hooker. See R. HOOKER, *OF THE LAWS OF ECCLESIASTICAL POLITY* ch. 10, § 10 (Folger Library ed. 1977) (1st ed. London 1593). Hooker's position is cited and critically discussed in J. FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 281-83 (1980).

⁶⁷ The possibility of conflict is eliminated, of course, only with respect to conventional morality or to whatever other moral system the law embodies.

man" theory of criminal law⁶⁸ — the theory that criminal law should be understood to address those who generally seek to escape their social obligations and who are motivated to abide by such obligations only insofar as the obligations are backed by the threat of legal sanction. When the "bad man" consulted a law embodying such a correspondence, he would find himself confronted with the full-fledged moral precepts he had hoped to evade.

But concerns other than reinforcement of community morality motivate decision rules. Primary among such concerns is the need to shape, control, and constrain the power wielded by decisionmakers. To attain this aim, the rules governing official decisionmaking must be characterized by a greater degree of precision and determinacy than can normally be expected of the community's moral precepts. Accordingly, whereas a conduct rule may be fully coextensive with the relevant moral precept, the corresponding decision rule need not be. Instead, the decision rule should define, as clearly and precisely as possible, a range of punishable conduct that is unquestionably within the bounds of the community's relevant moral norm.⁶⁹

Another, though related, argument for having different decision and conduct rules address the same criminal offense starts from the assumption that the good person is one who would want to make sure that her conduct did not violate any moral precept. In case of doubt, she would therefore tend to interpret broadly her duties and the moral constraints they imposed upon her. I call this metaprinciple about the proper interpretation of moral duties the "safe-side principle," because it requires that we always try to be on the safe side (morally speaking) in discharging our moral duties.⁷⁰

Adopting the safe-side principle would lead to different decision and conduct rules based on the same moral duty. Imagine that *P* wants to do *X* but suspects that *X* might be prohibited by the moral precept *M*. The safe-side principle will lead *P* to decide against doing *X*. But assume that *P* does do *X*, and that *J* (a judge) is called upon to decide whether to punish *P* for *X*-ing. As is everyone else, *J* is bound by the safe-side principle. This principle requires *J* to be quite sure that *P* well deserves any suffering that he, *J*, proposes to inflict upon her. In other words, *J* must be fully satisfied that *P* has in fact

⁶⁸ See O.W. HOLMES, *The Path of the Law*, in COLLECTED LEGAL PAPERS 167, 169-79 (1920).

⁶⁹ This analysis presupposes the view that the normativity of law does not depend on its coerciveness. For an example of this view, see J. RAZ, *supra* note 7, at 157-61; cf. J. FINNIS, *supra* note 66, at 346-47 (discussing and citing sources for the controversy that evolved in the 15th through 17th centuries around the "purely penal law theory" of the nature of the obligation imposed by criminal law).

⁷⁰ The safe-side principle makes sense only when the agent is confronted with a single moral duty that constrains the pursuit of her self-interest. It is obviously of no help in resolving a conflict between competing moral duties. The criminal law, however, typically deals with the former situation.

violated *M*, and he must resolve any doubts on the matter by deciding against punishment. It follows, therefore, that the safe-side principle will lead *J* to adopt a decision rule different from the conduct rule that the principle should have led *P* to adopt. More specifically, *P* should act on a *broad* version of *M*, whereas *J* should base his decision on a *narrow* version thereof.

We may conclude that in a world of perfect acoustic separation the law, while promulgating criminal conduct rules that were fully coextensive with the relevant moral precepts, might at the same time apply decision rules that were more precisely defined and narrowly drawn than the corresponding conduct rules. The law would thus avoid the charge that it was directed at the "bad people" in the community but would neither risk unjust punishment nor give free reign to the personal and discretionary power of decisionmakers.⁷¹

In actual legal systems, in which complete acoustic separation is not the order of the day, laws defining criminal offenses serve to convey both conduct rules and decision rules. The discussion of the relation between these two sets of rules in our imaginary legal universe may nonetheless illuminate the tension inherent in actual criminal laws, a tension born of the fact that the same legal provisions must in actuality fulfill two different functions and satisfy the different and sometimes conflicting substantive and formal requirements associated with those functions. To be coextensive with our morality, the laws that define offenses must often be broadly drawn and open ended; to serve as decision rules that adequately constrain judges, the laws must be narrow and precise.

But as in the case of criminal defenses, the reference to acoustic separation does not merely serve to aid us in diagnosing sources of tension in the law. It also sharpens our ability to perceive what may be seen as strategies employed by the law to resolve (or relax) the tension by drawing on the partial acoustic separation that obtains in reality.

In the next subsection, I argue that the use of ordinary language in the definitions of criminal offenses can be seen as such a strategy of selective transmission, and I show how this view may improve our understanding of the *mens rea* component of criminal liability. Then, in the following subsection, I apply the notion of partial acoustic separation to some nagging problems in the doctrine of vagueness.

⁷¹ A similar argument may apply to the part of the definition of the offense that specifies the punishment. On grounds of general deterrence, the conduct rule should issue a rather harsh threat, while the decision rule, on utilitarian or other humanitarian grounds, may specify a more lenient penalty. Under complete acoustic separation, considerations of general deterrence would not require that the decision rule impose any punishment at all. For the proposition that deterrence does not directly justify punishment, but only the threat of punishment, see Mabbott, *Punishment*, 48 *MIND* 152, 152 (1939).

2. *Mens Rea and the Use of Ordinary Language.* — (a) *Ordinary Language and Selective Transmission.* — Numerous offenses are defined in terms current in ordinary language. The legal order frequently employs statutory definitions or judicial interpretations to give these terms technical legal content that diverges from their ordinary signification.

This peculiar combination of ordinary language and technical definition is especially puzzling in a system of normative communication. If the law intends to convey its message through ordinary language, the employment of technical legal definitions that distort the meaning of that language does not make sense. If, on the other hand, the intended normative message is best expressed through technical definitions, the law may do better to coin a technical vocabulary (as in fact it frequently does) rather than use misleadingly familiar labels. The difficulty would be removed, however, if the law intended not one or the other, but both: the law may seek to convey both the normative message expressed by the common meaning of its terms *and* the message rendered by the technical legal definitions of the same terms.⁷²

I want to suggest that an interpretation that imputes to the law such a double meaning is, in some cases, quite plausible. The ordinary language of a law defining an offense frames the conduct rule that the law conveys to the general public; the technical legal definitions give content to the decision rule conveyed by the same law. Furthermore, the method by which these double messages are conveyed is well suited to the task of selective transmission. By framing its imperatives in familiar language, the law reinforces the lay person's ordinary moral beliefs without arousing his suspicion, as the use of esoteric terminology might do, that his legal duties do not coincide with what he takes his moral duties to be. At the same time, the technical legal definitions of the ordinary terms are familiar to the professional decisionmaker. The occasional complexity of the legal definitions, although an additional barrier for the lay person, creates no special problems for the lawyer, familiar as she is with a technical and esoteric professional language.⁷³

(b) *Ordinary Language and the Concept of Mens Rea.* — This view

⁷² On the broad implications of the distinction between ordinary and specialized language in the law, see B. ACKERMAN, *PRIVATE PROPERTY AND THE CONSTITUTION* 10-20 & *passim* (1977).

⁷³ Compare Professor Glanville Williams' comment on the phenomenon considered here: The lawyer has much the same need for a technical jargon as the scientist, but he is uncomfortable in trying to achieve it. This is because he believes that the law, which governs all men, should be intelligible to all men, and should therefore speak their language, with all its imperfections. . . . Our ancestors made use of bizarre legal words like *withernam*, *replevin* and *trover*, but this would now be frowned upon. The best we can do is to take common expressions and give them an extra sharpness for legal purposes. The word "reckless" is a good example.

G. WILLIAMS, *supra* note 52, at 68.

of the role of ordinary language in facilitating the operation of criminal laws as both conduct rules and decision rules derives support from the resolution it offers of a persistent problem concerning the nature of mens rea. The problem is most directly associated with and best illustrated by the famous English case of *Regina v. Prince*.⁷⁴ Prince was charged under a Victorian statute that provided that "[w]hosoever shall unlawfully take or cause to be taken any unmarried girl, being under the age of sixteen years, out of the possession and against the will of her father or mother, . . . shall be guilty of a misdemeanor."⁷⁵ Even though Prince had reasonably believed that the girl (who in fact was fourteen) was eighteen years old, the court disallowed the defense of mistake of fact and upheld Prince's conviction. Lord Bramwell's opinion deserves (and has received)⁷⁶ greatest attention, and it merits quotation at some length. Lord Bramwell argued:

Let us remember what is the case supposed by the statute. It supposes that there is a *girl* — it does not say a woman, but a girl — something between a child and a woman; it supposes she is in the *possession* of her father or mother, or other person having lawful *care or charge* of her; and it supposes there is a *taking*, and that that taking is *against the will* of the person in whose possession she is. It is, then, a *taking* of a *girl*, in the *possession* of some one, *against his will*. I say that done without lawful cause is wrong, and that the legislature meant it should be at the risk of the taker whether or no she was under sixteen. I do not say that taking a woman of fifty from her brother's or even father's house is wrong. She is at an age when she has a right to choose for herself; she is not a *girl*, nor of such tender age that she can be said to be in the *possession* of or under the *care or charge* of anyone. I am asked where I draw the line; I answer at when the female is no longer a girl in anyone's possession.

But what the statute contemplates, and what I say is wrong, is the taking of a female of such tender years that she is properly called a *girl*, can be said to be in another's *possession*, and in that other's *care or charge*. . . . This opinion gives full scope to the doctrine of the mens rea.⁷⁷

The most puzzling feature of this argument is its conclusion. How could Lord Bramwell possibly have believed that his denial of the relevance of Prince's mistake of fact concerning the girl's age was compatible with the requirement of mens rea? Had not Prince, reasonably and genuinely believing that the girl was eighteen years old, acted innocently and in accordance with the law's instructions?

⁷⁴ 2 L.R.-Cr. Cas. Res. 154 (1875).

⁷⁵ Offences Against the Person Act, 1861, 24 & 25 Vict., ch. 100, § 55.

⁷⁶ See, e.g., P. BRETT, AN INQUIRY INTO CRIMINAL GUILT 149 (1963); J. EDWARDS, *MENS REA IN STATUTORY OFFENCES* 58-63 (1955); G. Fletcher, *supra* note 17, § 9.3.3, at 723-27; G. WILLIAMS, *supra* note 60, § 69, at 185-99.

⁷⁷ 2. L.R.-Cr. Cas. Res. at 174-75.

Previous interpretations of the opinion attribute to Lord Bramwell a "spurious use of the expression *mens rea*,"⁷⁸ one that expands the term beyond its commonly accepted bounds. Lord Bramwell is commonly understood to have enunciated the so-called "moral wrong doctrine," according to which Prince's criminal liability rested on his moral culpability or on the wrongfulness of his conduct as measured by community standards.⁷⁹ The mere transgression of the community's moral standards is sufficient, under this interpretation of Lord Bramwell's opinion, to provide the element of culpability required for criminal liability. Yet such an interpretation fails to account for Lord Bramwell's insistent use of the technical term "*mens rea*." Moreover, because it substitutes moral culpability or wrongfulness of conduct for the more rigorous *mens rea* requirement, this view is also open to the charge, forcefully made by Professor Hughes,⁸⁰ that it would allow any immorality associated with the defendant's conduct, and not necessarily the immorality underlying the offense with which he is charged, to support a conviction.⁸¹ To Professor Hughes, "this appears as an appallingly dangerous position which comes close to giving the jury a discretion to create new crimes."⁸²

The failure of previous analyses to provide a satisfactory interpretation of Lord Bramwell's opinion is of no small consequence. *Prince* is a leading opinion in an area densely populated by numerous similar decisions dealing primarily with cases of statutory rape in which the defendant is mistaken about the victim's age. The absence of an account that reconciles the result in *Prince* with the principle of *mens rea*, as Lord Bramwell purported to do, has eroded the reach of the *mens rea* requirement by setting these decisions uneasily adrift on the "uncharted sea of strict responsibility."⁸³

⁷⁸ G. WILLIAMS, *supra* note 60, § 83, at 241.

⁷⁹ *Id.* § 69, at 188; accord sources cited *supra* note 76.

⁸⁰ See Hughes, *Criminal Responsibility* (Book Review), 16 STAN. L. REV. 470, 480-81 (1964).

⁸¹ See, e.g., *White v. State*, 44 Ohio App. 331, 185 N.E. 64 (1933) (upholding a conviction under a statute prohibiting a husband from abandoning his pregnant wife, despite the defendant's alleged ignorance of the pregnancy, on the grounds that abandoning a wife — pregnant or not — is a wrong and a violation of the defendant's civic duty).

⁸² Hughes, *supra* note 80, at 480. This criticism is specifically directed at Brett's interpretation. See P. BRET, *supra* note 76. To Professor Fletcher, Lord Bramwell's position exemplifies the view that "wrongdoers . . . must assume the risk that things will turn out worse than they expected." G. FLETCHER, *supra* note 17, § 9.3.3, at 727. Fletcher characterizes this view as "one of the more insidious arguments in criminal law." *Id.* Glanville Williams likewise criticizes Lord Bramwell's analysis. See G. WILLIAMS, *supra* note 60, § 69, at 189-90. Jerome Hall dismisses *Prince*, as well as the cases of statutory rape that follow its lead, as decisions in which "sexual morality has over-ridden established principles of the criminal law." Hall, *Interrelations of Criminal Law and Torts* (pt. 2), 43 COLUM. L. REV. 967, 995 (1943).

⁸³ G. WILLIAMS, *supra* note 60, § 69, at 197. For a sample of the decisions, see *Miller v. State*, 16 Ala. App. 534, 79 So. 314 (1918); *Anderson v. State*, 384 P.2d 669 (Alaska 1963); *State v. Superior Court*, 104 Ariz. 440, 454 P.2d 982 (1969); *Manship v. People*, 99 Colo. 1, 58

Yet an interpretation of *Prince* is possible that both takes seriously Lord Bramwell's use of the concept of mens rea and withstands criticisms such as those of Professor Hughes. The key to such an interpretation is Lord Bramwell's persistent emphasis on the statute's use of the term "girl." According to Lord Bramwell's reading of the statute, the abduction of a *girl* constitutes the subject matter of the legal prohibition. Now the word "girl" is not a legal term, but a term of ordinary language. And what Lord Bramwell argues, in effect, is that the conduct rule issued by the statute in question should be understood to conform to the ordinary signification of the statute's language; thus, the conduct rule fully coincides with a moral prohibition of the abduction of girls from their guardians. To make sense under this interpretation, Lord Bramwell's position must rest on two assumptions. One is that, at the time the opinion was written, the term "girl" referred as much to an eighteen-year-old as to a sixteen-year-old (and we must take Lord Bramwell's word for that). The second assumption is that the prohibition of the abduction of girls (including those who were above the statutory age) was a generally accepted moral norm in England at that time, a norm that the statute embodied but had not initiated. If these assumptions are accurate, it is not at all absurd to maintain, as Lord Bramwell did, that Prince had violated the relevant conduct rule by knowingly abducting a girl. It is, furthermore, quite reasonable to believe that at the time of the abduction Prince himself saw the matter in precisely this way — that he realized, in other words, that he was committing a moral and legal wrong.

Prince's guilt resided in his violation of the moral rule that was expressed through the ordinary meaning of the terms of the relevant statute. The statutory definition of "girl," which diverged from the ordinary usage, was no part of the conduct rule issued by the statute, but only an element of the decision rule conveyed by that statute. Whereas the ordinary citizen, who was guided exclusively by the conduct rule that embodied the relevant moral norm, was neither likely nor expected to know of or act on the statutory definition, the judge was required both to know of it and to give it effect in his decisions. And Lord Bramwell gave effect to the statutory definition by insisting that the defendant be punished only if the girl had, in fact, been under age.

It should not be difficult to discern the logic behind such a decision rule. Moral principles, as well as the terms of ordinary language in which they are couched, tend to have fuzzy edges. The applicability

P.2d 1215 (1936); *Brown v. State*, 23 Del. 159, 74 A. 836 (1909); *Simmons v. State*, 151 Fla. 778, 10 So. 2d 436 (1942); *Holton v. State*, 28 Fla. 303, 9 So. 716 (1891); *People v. Lewellyn*, 314 Ill. 106, 145 N.E. 289 (1924); *Heath v. State*, 173 Ind. 296, 90 N.E. 310 (1910); *People v. Doyle*, 16 Mich. App. 242, 167 N.W.2d 907 (1969).

of the moral prohibition of the abduction of "girls" may well be indeterminate once a victim has reached a certain age. Different judges may place different interpretations on the term "girl" or on the extent of the prohibition, and some may err by going beyond the generally accepted bounds. The legal definition of the age at which the prohibition no longer applies serves as a restriction on judges that ensures both a degree of uniformity and, quite possibly, a degree of leniency in the interpretation of conventional morality. Furthermore, by choosing a relatively low age limit, the legislature may provide for the possibility that defendants may make mistakes concerning a girl's age.

In any event, a decision rule that conditions the defendant's guilt on the victim's age need not presuppose knowledge by the defendant of this rather arbitrary limitation. A defendant's mistaken belief regarding the victim's actual age may, consistently with the principle of mens rea, be deemed irrelevant to his legal duties under the conduct rule in question. An understanding of mens rea that is thus informed by a recognition of the dual function of criminal offenses as conduct rules and decision rules can salvage from the "uncharted sea" of strict liability the decisions that follow *Prince* in refusing to allow defenses based on mistakes regarding such facts as the age of the victim in statutory rape cases. But just as the refusal to allow such a defense need not signify the abandonment pro tanto of the principle of mens rea, the more recent tendency toward allowing the defense need not be taken, as is commonly done, as a measure of increased commitment to mens rea. Instead, both the refusal and the willingness to recognize mistake as a defense to statutory rape can be seen as responses, based on essentially identical views of mens rea, to different social and moral circumstances.

This conclusion finds ample textual support in a leading decision, *People v. Hernandez*,⁸⁴ that signaled a new judicial willingness to recognize the defense of mistake in statutory rape cases. A careful reading of the opinion discloses that, although *Hernandez* does recognize mistake about the victim's age as a defense to statutory rape, the decision's underlying logic comports rather than conflicts with Lord Bramwell's reasoning in *Prince*. The decision implies that, had the statutory age of consent been considerably lower (for example, ten rather than eighteen), the defense of mistake would not have been available.⁸⁵ Furthermore, in distinguishing a prior statutory rape case in which a defense based on a mistake about the female's age had been rejected, the court pointed out that "[t]he age of consent at the time of the *Ratz* decision was 14 years, and it is noteworthy that the

⁸⁴ 61 Cal. 2d 529, 393 P.2d 673, 39 Cal. Rptr. 361 (1964).

⁸⁵ See *id.* at 534 n.3, 393 P.2d at 676 n.3, 39 Cal. Rptr. at 364 n.3.

purpose of the rule, as there announced, was to afford protection to young females therein described as 'infants.'"⁸⁶

If it is supposed that the statutory age limit conclusively determines the scope of the relevant conduct rule, this attempt to distinguish between an age limit of ten (or fourteen) and a limit of eighteen must fail. A defendant's belief that his partner is eleven years old when she is in fact just under ten may be as genuine and as reasonable as a similar mistake concerning the age of a seventeen-year-old. If the requirement of mens rea demands exculpation in the latter case, it should, on this supposition, demand the same in the former.

The distinction the court draws between the two age limits is sound only if we revert to the view that one age limit coincides with a viable norm of conventional morality, whereas the other does not. The reason a defendant who had intercourse with a ten-year-old cannot defend himself by claiming that he reasonably believed her to be eleven is not that his mistake could not have been reasonable, but rather that it is irrelevant: regardless of his belief about the victim's age, he still must have perceived himself to be having intercourse with an infant. In our culture, the prohibition of intercourse with children is a nearly indisputable moral norm that the laws defining the offense of statutory rape embody and seek to preserve from violation.⁸⁷ But when the statutory age is set at eighteen (the actual situation confronted by the *Hernandez* court), the criminal provision no longer corresponds to a viable moral prohibition. In such circumstances, the statutory age of consent conclusively determines the scope of the relevant conduct rule, and thus knowledge by the defendant that the female is below the age is indeed required by the principle of mens rea.

⁸⁶ *Id.* at 533, 393 P.2d at 675, 39 Cal. Rptr. at 363 (distinguishing *People v. Ratz*, 115 Cal. 132, 46 P. 915 (1896)).

⁸⁷ What about the defendant who, in a world of only partial acoustic separation, actually inquires about the statutory definition before engaging in sex and seeks to rely on the statutory age limit? The crux of the legal advice he should get is: you had better leave children alone! The lawyer can render this advice in more conventional form by telling the client that, although the statutory age limit is indeed 10 (in our hypothetical), the client acts at his peril and will be convicted notwithstanding his reasonable belief that the child was over 10 if the child turns out to be under that age. Alternatively, the lawyer can, in line with my present suggestion, tell the client that the law really forbids intercourse with infants altogether, even though it may sometimes fail to punish such intercourse (for example, when the infant turns out to be over 10 years of age). Under either version of the legal advice, the imaginary scrupulous law abider will have little ground for complaint if it turns out that he has made a mistake concerning his victim's age. He has either knowingly gambled and lost (under the first version), or with equal awareness he has transgressed the relevant legal (and moral) norm (under the second version). The main point, however, is that under the conditions of acoustic separation assumed by my argument in the text, such a scrupulous law abider is indeed an imaginary figure, or in any event an unlikely one: with regard to many "core" criminal offenses people are, by and large, familiar with and guided by the relevant moral norms rather than the details of their statutory elaborations.

Stated more broadly and abstractly, the message implicit in the *Hernandez* decision pertains to the importance for statutory interpretation of viewing the definition of an offense within a specific cultural context and against the background of prevailing moral norms. A statutory provision may be the harbinger of a new standard of behavior, the embodiment of an existing one, or the mere ghost of an expired morality. In each of these capacities, the provision relates differently to common perceptions (by shaping, reflecting, or ignoring them) and is accordingly amenable to different legal analysis, especially with regard to the nature of the mens rea requirement. The clear implication in *Hernandez* that mistake of fact would have been of no avail to the defendant had the statutory age of consent been lower thus radically shifts the focal point of the opinion. Rather than a reaffirmation of the principle of mens rea, which it is commonly understood to be, *Hernandez* is a bold statement about the link between criminal conduct rules and substantive morality. Seen in this light, *Hernandez* is a justly celebrated case, but one that has so far been celebrated for the wrong reason.

3. *The Doctrine of Vagueness.* — The usefulness of the distinction between conduct and decision rules is further indicated by the distinction's ability to shed light on another problem related to defining criminal offenses: the void-for-vagueness doctrine. I do not here undertake a complete examination of this doctrine. Instead, I shall focus on some of its essential aspects and on the criticisms to which it has been most frequently subjected. I shall then suggest that vagueness doctrine withstands these criticisms more successfully when reinterpreted in light of the separation of conduct and decision rules.

(a) *Vagueness Doctrine and Its Alleged Deficiencies.* — Courts and commentators commonly identify two rationales for the constitutional requirement that criminal statutes meet some minimum standards of clarity and specificity.⁸⁸ One is the concern with fair warning: "No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids."⁸⁹ The other, which I shall call the "power control" rationale, is the concern with guiding and controlling judicial decisionmaking in order to avoid leaving "judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case."⁹⁰

To serve these goals, the Supreme Court has recognized two ways of curing an otherwise unconstitutionally vague statute. One is by judicial gloss: the various court decisions that interpret a statute may

⁸⁸ For a general analysis of vagueness doctrine, see W. LAFAVE & A. SCOTT, *supra* note 17, § 11; Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67 (1960).

⁸⁹ *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939).

⁹⁰ *Giaccio v. Pennsylvania*, 382 U.S. 399, 402-03 (1966).

clarify an otherwise vague provision and enable it to pass constitutional muster.⁹¹ The second remedy for vagueness is the requirement of scienter. Reading a statute to require scienter, the Court maintains, takes the sting out of a defendant's complaint of lack of fair warning: to be convicted, the defendant must in fact have appreciated the criminality of his conduct.⁹² Both measures, however, have been criticized for their inability to remedy vagueness and ensure fair warning.

We may best introduce the argument against the adequacy of judicial gloss as a remedy for vagueness by distinguishing two different ways in which a statute may be vague: indeterminacy and inaccessibility. A statute is indeterminate when a significant number of possible situations are neither excluded by it nor included in it — when there are too many borderline cases in which the question of how or whether the statute applies admits of no single answer.⁹³ In cases of inaccessibility, the question whether a given situation falls under the statute is believed to have a determinate answer; the defect in the statute lies in the great difficulty of discovering what this answer is. Such difficulty obtains, for example, when, in Justice Douglas' words, the statute refers the citizen "to a comprehensive law library in order to ascertain what acts [are] prohibited."⁹⁴ Clearly, indeterminacy and inaccessibility are equally fatal to a statute's ability to serve as a normative guide.

We can now diagnose with greater precision the disease for which judicial gloss provides a remedy: that disease is, quite obviously, indeterminacy. By providing an authoritative interpretation of the statute, the courts fix the statute's meaning and dispel its indeterminacy. The nature of the criticism of the remedial use of judicial gloss should also now be clear. This criticism points to the seeming paradox that judicial gloss often remedies indeterminacy only by increasing inaccessibility.⁹⁵ Consequently, judicial gloss may cripple a statute's

⁹¹ See *Winters v. New York*, 333 U.S. 507, 517-20 (1948); *Fox v. Washington*, 236 U.S. 273 (1915).

⁹² See *United States v. National Dairy Prods. Corp.*, 372 U.S. 29, 36-37 (1963); *Boyce Motor Lines v. United States*, 342 U.S. 337, 342 (1952).

⁹³ An example of indeterminacy is the statute declared unconstitutional in *United States v. Cohen Grocery Co.*, 255 U.S. 81 (1921), which purported to punish "any unjust or unreasonable rate or charge in handling or dealing in or with any necessities," *id.* at 89 (quoting Act of Aug. 10, 1917, ch. 53, § 4, 40 Stat. 276, 277, as amended by Act. of Oct. 22, 1919, ch. 80, § 2, 41 Stat. 297, 298). On the notion of indeterminacy generally, see Williams, *Language and the Law* (pt. 2), 61 LAW Q. REV. 179 (1945).

⁹⁴ *Screws v. United States*, 325 U.S. 91, 96 (1945). In another and very famous example of inaccessibility, the Emperor Caligula "post[ed] the regulations up, but in an awkwardly cramped spot and written so small that no one could take a copy." Suetonius, *THE TWELVE CAESARS* 170 (R. Graves trans. 1957), cited in *Screws*, 325 U.S. at 96.

⁹⁵ See *Rose v. Locke*, 423 U.S. 48, 54-55 (1975) (Brennan, J., dissenting); *Franklin v. State*, 257 So. 2d 21, 23 (Fla. 1971); Note, *supra* note 88, at 73-74.

ability to communicate to the public a "fair warning" no less than did the statute's earlier indeterminacy.

This criticism is vividly corroborated by the Supreme Court's decision in *Rose v. Locke*,⁹⁶ in which the Court upheld the constitutionality of a Tennessee statute prohibiting "crimes against nature" and affirmed the application of the statute to an act of cunnilingus.⁹⁷ The judicial gloss on which the majority based its conclusion that the challenged expression pertained to cunnilingus was the product of quite elaborate legal reasoning drawing analogies and inferences from old Tennessee opinions as well as from decisions in other jurisdictions.⁹⁸

Couched as it is in the rhetoric of "fair warning," the Court's reasoning has a surreal quality: it implies that the defendant could have been expected, before engaging in sexual activities, to canvass the law libraries of various jurisdictions in search of the relevant decisions and then to anticipate the convoluted process of legal reasoning that ultimately led even Supreme Court Justices to opposite conclusions.⁹⁹ When determining the meaning of a statute requires such refined legal skills, the notion of "fair warning" is distorted beyond recognition.

The reliance on mens rea to remedy vagueness has similarly been subjected to criticism. As Professors LaFave and Scott argue:

[S]cienter — at least as it has been traditionally defined — cannot cure vagueness in a statute or regulation. One "knowingly" commits an offense when he knows that his acts will bring about certain results (those defined in the statute in question), and whether he knows that deliberately causing such results is proscribed by statute is immaterial. Because it is knowledge of the consequences of one's actions and not knowledge of the existence or meaning of the criminal law which is relevant, it seems clear that uncertain language in a statute is not clarified by the addition of a scienter element.¹⁰⁰

The two-pronged attack on the use of both judicial gloss and scienter to remedy vagueness thus amounts to the charge that, despite persistent rhetoric to the contrary, the courts in fact give short shrift to the requirement of fair warning. Relying on the preceding analysis of criminal offenses and the concept of mens rea, I would now like

⁹⁶ 423 U.S. 48 (1975).

⁹⁷ *Id.* at 49.

⁹⁸ *Id.* at 50-53.

⁹⁹ On the basis of its interpretation of prior decisions, the dissent in *Locke* reached a conclusion opposed to the majority's — namely, that Tennessee law did not consider cunnilingus a crime against nature. See *id.* at 55-58 (Brennan, J., dissenting).

¹⁰⁰ W. LAFAVE & A. SCOTT, *supra* note 17, § 11, at 86 (footnotes omitted). For similar criticisms of the reliance on scienter to cure vagueness, see *Boyce Motor Lines v. United States*, 342 U.S. 337, 345 (1952) (Jackson, J., dissenting); Collings, *Unconstitutional Uncertainty — An Appraisal*, 40 CORNELL L.Q. 195, 227-31 (1955).

to offer an account that makes better sense of vagueness doctrine and relates it more successfully to its two underlying rationales (fair warning and power control) than these criticisms suggest is possible.

(b) *Judicial Gloss as a Remedy for the Vagueness of Decision Rules.* — We should first observe that the two rationales underlying vagueness doctrine, fair warning and power control, do not relate to the same kinds of rules. The fair warning rationale applies exclusively to conduct rules: only when vagueness affects rules addressed to the public and meant to guide public conduct does it raise the problem of absence of fair warning. Conversely, the power control rationale pertains to the clarity of decision rules alone: only decision rules are addressed to and acted upon by officials, and only decision rules must be clear and specific in order to constrain officials' discretion and contain their power. Vagueness, accordingly, must be examined with reference to the relevant audience. We cannot simply inquire whether a statute is vague, but instead we must always ask: vague for whom?

This restatement of the problem of vagueness removes the seeming trade-off between determinacy and accessibility on which the criticism of judicial gloss rests. To see the point more clearly, consider again the *Locke* decision. The Court's opinion can now be understood to focus primarily on the vagueness of the decision rule conveyed by the statute under consideration. By fixing in advance the meaning of the pertinent decision rule, judicial gloss may serve the interest in power control insofar as it reduces the danger that personal bias and animosity will intrude (or seem to intrude) on the court's decisionmaking — a danger that the existence of prior general decision rules is meant to mitigate. At the same time, it is clear that, when viewed as a remedy for the vagueness of decision rules, judicial gloss does not present any problem of inaccessibility. As we have already observed, legal decisionmakers — judges and lawyers alike — are not hampered by, but rather thrive in, "comprehensive law libraries" that would baffle the ordinary citizen. Therefore, decision rules, directed as they are to a professional audience, are no less effective or specific for being "buried" in the volumes contained in law libraries. Moreover, if decision rules not only are not necessarily meant to be known by the general public, but are sometimes actually meant not to be known by it, their inaccessibility may be, from the point of view of the policies underlying them, a virtue instead of a vice.¹⁰¹

Seen in this light, *Locke's* elaborate discussion of prior judicial interpretations of the expression "crimes against nature" no longer looks so out of place. By constraining the legal meaning of such an expression, judicial gloss can reduce the vagueness of the relevant decision rule and thus serve the power control policy that underlies vagueness doctrine in part. Judicial gloss does not, however, mitigate (and it may exacerbate) the vagueness of the conduct rule conveyed

¹⁰¹ See *supra* pp. 639-40.

by the same criminal statute; it thus leaves the need for fair warning unattended.¹⁰² We must now turn, therefore, to the other half of vagueness doctrine.

(c) *Mens Rea as a Remedy for the Vagueness of Conduct Rules.*

— The need for fair warning is served by the second of the courts' two remedies for vagueness: the requirement of scienter. Despite the critics' misgivings, a mens rea requirement can successfully correct the lack of warning created by the vagueness of a conduct rule. To appreciate how such a remedy works, we must return to the analysis of the concept of mens rea in the context of the *Prince* case.

It will be recalled that this analysis was based on the view that the statute conveyed a conduct rule against the abduction of girls from their guardians, a rule that used the ordinary meaning of the word "girl." The mens rea requirement was held satisfied because Prince, as an ordinary speaker of the English language and as a member of a certain moral community, realized that the person he was taking away from her father's custody was indeed a "girl." We may now generalize this illustration and say that the defendant's state of mind satisfies the mens rea requirement in a criminal statute if the defendant perceives the facts and the nature of his conduct in terms of the statute's ordinary-language description of them.¹⁰³

The objection that a scienter requirement cannot dispel vagueness rests on the view that mens rea calls for knowledge only of facts — not of the legal categories under which they fall. We can now appreciate the fallacy of this argument: it results from an exaggeration of the distinction between knowledge of facts and knowledge of law.¹⁰⁴ What such a distinction overlooks is that both knowledge of facts and knowledge of law depend on linguistic categories.

One is aware of a given fact only when one can provide some

¹⁰² "Common law definitions are of course resorted to when the forbidden conduct is not defined. This may supply the deficiency for a legal understanding of a vague statute, but it cannot meet the constitutional requirement that the language of the statute be understandable to the common man." *Franklin v. State*, 257 So. 2d 21, 23 (Fla. 1971) (footnote omitted) (invalidating on vagueness grounds a statute proscribing "crimes against nature"). That judicial gloss has little to do with fair warning is made abundantly clear by decisions that rely on judicial interpretations given to the statute after the defendant's alleged criminal act. See, e.g., *United States v. Vuitch*, 402 U.S. 62, 71-72 (1971); *Winters v. New York*, 333 U.S. 507, 514-15 (1948); see also Note, *supra* note 88, at 72-75 & nn.30-38 (citing cases).

¹⁰³ It must be emphasized that this statement pertains only to the part of the criminal law that addresses the general public and that codifies aspects of conventional morality. In the case of regulatory offenses, particularly those addressed to some professional subgroup of the population, the mens rea requirement may be met if the language of the regulation, understood in the sense in which that language is used by the professional subgroup, indicates to its audience the nature of the proscribed conduct. See W. LAFAVE & A. SCOTT, *supra* note 17, § 11, at 85 & n.26.

¹⁰⁴ See, e.g., *Boyce Motor Lines v. United States*, 342 U.S. 337, 345 (1952) (Jackson, J., dissenting) ("[T]he knowledge requisite to knowing violation of a statute is factual knowledge as distinguished from knowledge of the law.").

certain description of it. When we inquire into a defendant's state of mind and ask whether she was aware of the nature of her conduct, we must already possess a tentative (or hypothetical) description of a mode of conduct provided by the relevant criminal statute. It is only against such a description that we can ascertain and judge the defendant's state of mind: did her perception of the facts match the description in the statute? One can, for example, fully appreciate the fact that one's finger is pulling a small metal lever connected to a larger metal instrument and yet fail to know that one is "pulling the trigger of a gun" or that one is "shooting," let alone that one is about to "kill" someone. To say simply that mens rea requires knowledge only of facts obscures the crucial choice of the description against which the adequacy of that knowledge will be measured.

This is not to say that knowledge of the facts, as required by the principle of mens rea, calls for familiarity with technical legal categories. Many conduct rules issued by the criminal law set forth proscribed conduct in perfectly ordinary terms. To satisfy the mens rea requirement posed by such rules, the defendant must perceive only that his conduct falls within the ordinary meaning of the language employed in the legal description of the proscribed conduct. The defendant needs no special skill, but merely ordinary linguistic aptitude, to satisfy (with respect to such conduct rules) the mens rea requirement.

So interpreted, the requirement of mens rea can in fact serve the interest in fair warning by securing a correspondence between the defendant's own cognitions and the description of the proscribed conduct in the relevant conduct rule. In most cases, both the requirement of mens rea and that of fair warning are satisfied when the defendant has acted with the awareness normally possessed by an intelligent member of a moral and linguistic community. That in the great majority of cases such awareness is taken for granted may account for the scarcity of real concern with fair warning in court decisions dealing with issues of vagueness.

Applied to the *Locke* decision, this view of mens rea suggests that common usage tied up with conventional morality, and not legal technicalities, will determine people's understanding of the normative message conveyed by the legal proscription of "crimes against nature." Indeed, by pointing out that "[t]he phrase has been in use among English-speaking people for many centuries,"¹⁰⁵ the Court may have implied that, ambiguities and complexities of legal usage notwithstanding, the defendant himself surely perceived his own conduct in terms of this linguistic and moral category and thus enjoyed in fact the fair warning to which he was entitled.

¹⁰⁵ *Rose v. Locke*, 423 U.S. 48, 50 (1975).

The analysis of vagueness doctrine I have suggested can be summarized by the following Table:

<i>Kind of rule</i>	<i>The interest served by its clarity</i>	<i>The language in which it is conveyed</i>	<i>The cure for its vagueness</i>
Conduct rule	Fair warning	Ordinary language	Scienter (mens rea)
Decision rule	Power control	Legal language	Judicial gloss

Before I conclude this discussion of vagueness doctrine, a final word on the *Locke* decision may be in order. Even under the interpretation suggested here, *Locke* remains a highly unsatisfactory opinion, because the tacit assumption that the expression "crimes against nature" conveys a meaningful message to ordinary people may no longer be tenable. The Supreme Court completely overlooked the possibility that changes in moral outlook and their reflection in linguistic usage were relevant to the issue of fair warning. In fact, this point had earlier been squarely confronted by the Supreme Court of Florida.¹⁰⁶ In striking down a statute similar to the one upheld in *Locke*, the Florida court pointed to "the transition of language over the span of the past 100 years of this law's existence."¹⁰⁷ The court continued:

The change and upheaval of modern times are of drastic proportions. People's understandings of subjects, expressions and experiences are different than they were even a decade ago. The fact of these changes in the land must be taken into account and appraised. Their effect and the reasonable reaction and understanding of people today relate to statutory language.¹⁰⁸

The phrase "crimes against nature" today sounds quaint to many people (surely to many young people), just as the idea that oral sex is a sin (or a crime) may strike them as bizarre. We can therefore no longer assume with any confidence that, in engaging in oral sex, people will perceive themselves to be committing an "unnatural act" or a "crime against nature." Such expressions, whose linguistic vitality has expired and whose moral connotations are no longer valid, give no fair warning to the ordinary person.¹⁰⁹

¹⁰⁶ *Franklin v. State*, 257 So. 2d 21 (Fla. 1971).

¹⁰⁷ *Id.* at 23.

¹⁰⁸ *Id.*

¹⁰⁹ In addition to the rather specific applications discussed in this Part, Professor Douglas Hay's fascinating account of the criminal law in 18th century England is noteworthy and

III. THE LEGITIMACY OF SELECTIVE TRANSMISSION

In numerous situations, as we have seen, the law can be understood to segregate its normative messages, either by relying on the existing degree of acoustic separation or by employing strategies of selective transmission. Such selective transmission, I have argued, may be functional insofar as it serves certain social policies and values. In the examples I have chosen, the use of selective transmission permits the law to maintain higher degrees of both deterrence and leniency than could otherwise coexist. I have delayed to this point consideration of the question of legitimacy raised by the very idea of selective transmission — the question that persists even when the goals of selective transmission are generally thought desirable.¹¹⁰ In-

relevant. See Hay, *Property, Authority and the Criminal Law*, in D. HAY, P. LINEBAUGH, J. RULE, E. THOMPSON & C. WINSLOW, *ALBION'S FATAL TREE* 17 (1975). According to Hay's account, the entire system of criminal justice placed critical reliance on what the present Article would characterize as the selective transmission of conduct rules and decision rules. In the absence of a police force, the criminal law depended on in *terrorem* legislation (mostly in the form of threats of capital punishment) coupled with *de facto* leniency. This reliance was made possible and partially disguised by "[t]he opacity of the law," *id.* at 52, and by a broad use of the low-visibility pardon power of the King, see *id.*

Professor P.S. Atiyah suggests an essentially similar account of the role played by equity in contract law:

[H]istorically [equity] may have been especially useful when its existence and extent was not widely known among the mass of the people. If equitable rules are applied on a regular and uniform basis so that they come to supplant the legal rules altogether, then the deterrent effect of the legal rules may be greatly weakened. Who will pay his debts punctually if everybody knows that the legal sanction for failing to do so is, as a matter of course, disregarded by Courts of Equity?

Atiyah, *Judges and Policy*, 15 *ISR. L. REV.* 346, 361 (1980). "It is, therefore, not surprising that attempts were made to conceal the likelihood of equitable relief or mercy being available, and rather to emphasize the threat itself." P. ATIYAH, *THE RISE AND FALL OF FREEDOM OF CONTRACT* 193 (1979). Professor Atiyah comments that

there was a strong elitist tradition in English law until relatively recent times. Saying one thing, and doing another, or keeping quiet about powers of mercy or Equity, was an important contribution to the mystique of the law. The process helped to reconcile the relatively free political condition of Englishmen with the fact that they had no political power.

Atiyah, *supra*, at 361.

¹¹⁰ Selective transmission can be used for clearly illegitimate purposes. For example, a decision rule may impose punishment (most likely out of a desire for vengeance or moral retribution) for conduct not prohibited by a corresponding conduct rule. The courts' treatment of intoxication can be interpreted in this way. Such an interpretation rests on the following propositions (which are true in many jurisdictions): (1) getting intoxicated, no matter how heavily, is not a criminal offense; (2) the law regarding the role of intoxication in decisions about criminal responsibility is rendered in relevant part by the formula that "intoxication is not a defense to criminal liability" (or by some equivalent of this formula); (3) proposition (2) is often interpreted to mean that intoxication cannot be relied upon to negate general intent or even, in some jurisdictions, specific intent; (4) as a result of proposition (3), a defendant can be convicted for an offense even though one of the elements of the offense (intent) has not been established and even though the defendant's state of mind (when getting drunk) with respect to the offense was only that of negligence or recklessness; (5) proposition (4) signifies an *expansion* of liability when intoxication is involved; (6) this fact is obscured by the formulation recited in proposition (2);

deed, the practice of selective transmission may seem to be such a blatant violation of the ideal of the rule of law — an ideal deeply ingrained in our political and legal culture — that its illegitimacy may well be viewed as a matter beyond dispute.

Notice, however, that we would probably not be similarly surprised (though we would perhaps be no less disturbed) by the disclosure of analogous practices in politics. Although candor and openness must be highly valued in political life as well as in the law, the prevailing ethos of politics acknowledges their occasional infringement. Moral philosophers often depict the politician as a person faced, more regularly and intensely than are persons from other walks of life, with the moral predicament described as the problem of dirty hands¹¹¹ — the confrontation with moral dilemmas whose resolution calls for actions that remain morally distasteful even when they are the right thing to do in the service of the greater good.¹¹²

and (7) proposition (5) is equivalent to saying that the punishment imposed on the defendant is, in whole or in part, attributable to his intoxication.

If these propositions are sound, one can reasonably conclude that courts impose low-visibility punishment for intoxication in the absence of an explicit criminal prohibition of it.

Two leading cases dealing with intoxication are illustrative of all the propositions listed above. See *People v. Hood*, 1 Cal. 3d 444, 462 P.2d 370, 82 Cal. Rptr. 618 (1969) (refusing to consider evidence of intoxication in determining criminal liability for assault with a deadly weapon on a police officer); *State v. Stasio*, 78 N.J. 467, 396 A.2d 1129 (1979) (holding that evidence of intoxication is generally not a defense to assault unless the evidence suggests physical incapacitation). The courts' references to the social danger of excessive drinking, e.g., *id.* at 478-79, 396 A.2d at 1134, and to the "vice" of drunkenness, e.g., *Hood*, 1 Cal. 3d at 451 n.3, 462 P.2d at 374 n.3, 82 Cal. Rptr. at 622 n.3 (citing with disapproval the trial court's jury instruction on intoxication), betray punitive sentiments based on a view of intoxication as a social evil deserving of punishment. At the same time, the absence of an explicit conduct rule that forbids intoxication can be easily understood in light of the country's experience with prohibition.

Finally, the grounds that are frequently adduced for the refusal to allow intoxication to play any exculpatory role (for example, that intoxication is common and particularly hard to disprove) have the kind of surface plausibility that helps perpetuate an utterly unacceptable state of affairs but does not diminish the validity of my account.

No interesting question of legitimacy is even raised by instances of selective transmission that conceal hidden punishments — these are clearly illegitimate. The question of legitimacy arises in an interesting way only with respect to cases, such as those discussed in Part II, in which the goals served by selective transmission seem desirable or at least permissible.

¹¹¹ See T. NAGEL, *Ruthlessness in Public Life*, in MORTAL QUESTIONS 75 (1979); B. WILLIAMS, *Politics and Moral Character*, in MORAL LUCK, *supra* note 48, at 547; Walzer, *Political Action: The Problem of Dirty Hands*, in WAR AND MORAL RESPONSIBILITY 62 (M. Cohen, T. Nagel & T. Scanlon eds. 1974); see also Arendt, *Truth and Politics*, in PHILOSOPHY, POLITICS AND SOCIETY 104 (P. Laslett & W. Runciman eds. 3d ser. 1967) (addressing essentially the same issue without using the expression); Weber, *Politics as a Vocation*, in FROM MAX WEBER: ESSAYS IN SOCIOLOGY 77 (H. Gerth & C. Mills eds. & trans. 1946) (same). *Dirty Hands* is also the title of Sartre's play that deals with this moral issue. See J. SARTRE, *Dirty Hands*, in NO EXIT AND THREE OTHER PLAYS 224 (L. Abel trans. 1959).

¹¹² In one form or another, the problem of dirty hands appears in all regimes — democracies included. In a well-functioning democracy, however, duly elected officials who are answerable to the electorate or to some representative body are perhaps less likely than are officials in other

In contrast to the political ethos embodied in the metaphor of dirty hands, the ideal of the rule of law expresses an ethos of law as an area of public life particularly committed to the values of openness and candor. Central to the rule of law is the requirement that the laws be clearly stated and publicly proclaimed. The alarm likely to follow the realization that selective transmission may circumvent these requirements accordingly seems well founded. It is thus surprising to discover that, as I seek to demonstrate in the next Section, the standard arguments in support of the rule of law do not in fact rule out selective transmission. Later, generalizing from the illustrations in Part II, I observe that the law's own violence and brutality may suggest a general rationale for selective transmission: in some circumstances selective transmission can mitigate or serve as a substitute for the violent means that the law frequently employs.

These two points — that selective transmission is not inconsistent with the rule of law and that selective transmission can reduce the law's brutality — do not add up to an endorsement of selective transmission. They only clear the way for evaluating competing substantive moral considerations — an endeavor that I do not undertake. But by clearing the way for such a project, these two arguments suggest that the law faces (and cannot easily escape) moral dilemmas similar to those found elsewhere in political and social life. The desirability of candor is, on some occasions, no less an issue for the law than it is for the politician. In this respect, I conclude, law and politics resemble each other more than their contrasting ethoses — embodied respectively in the ideal of the rule of law and in the metaphor of dirty hands — might lead one to expect.¹¹³

A. *Acoustic Separation and the Rule of Law*¹¹⁴

As it is commonly understood, the ideal of the rule of law requires, among other things, that "[t]he law . . . be open and adequately publicized"¹¹⁵ as well as clearly stated. Selective transmission bent

regimes to conceal or deceive for illicit purposes. Sissela Bok proposes public debate on the parameters of permissible political deception in S. BOK, *LYING* 98–99 (1978). On the general problem of secrecy in democracies, see *GOVERNMENT SECRECY IN DEMOCRACIES* (I. Galnoor ed. 1977).

¹¹³ Cf. M. SHAPIRO, *LAW AND POLITICS IN THE SUPREME COURT* 26–27 (1964) (drawing an analogy between law and politics in arguing for the Supreme Court's need to uphold "[t]he judicial myth of impartiality and nondiscriminatory application of 'correct' legal maxims" on which the Court's political power rests).

¹¹⁴ In the following discussion, I rely primarily on the excellent analysis of the rule of law in J. RAZ, *The Rule of Law and Its Virtue*, in *THE AUTHORITY OF LAW* 210 (1979). Other valuable philosophical treatments of the rule of law can be found in J. FINNIS, *supra* note 66, at 270–76; L. FULLER, *THE MORALITY OF LAW* 33–94 (1964); J. LUCAS, *THE PRINCIPLES OF POLITICS* 106–17 (1966); J. RAWLS, *A THEORY OF JUSTICE* 235–43 (1971).

¹¹⁵ J. RAZ, *supra* note 114, at 214.

on hiding parts of the law from the public flies in the face of this requirement and therefore seems to violate the rule of law. Selective transmission, however, does not impede and may sometimes even advance the values associated with the rule of law. To demonstrate this point, I briefly examine four clusters of arguments that are commonly adduced in defense of the rule of law in general and the publicity and clarity of law in particular.

First, by insisting on the specificity and clarity of law, the rule of law is said to limit officials' discretion and thereby to curb their potential arbitrariness. The rule of law reduces the danger that officials may indulge their self-interest or give vent in their decisions to personal animosities or prejudices. Thus, the availability of clear, generally applicable, and binding guidelines secures for individuals a measure of formal justice — primarily a degree of equality before the law — and ensures that the substantive goals the law is supposed to pursue will not be thwarted by the whim, caprice, or ineptitude of individual decisionmakers. But as the discussion of vagueness doctrine demonstrated in some detail,¹¹⁶ this concern with power control is utterly compatible with selective transmission. The ability of decision rules to guide decisions effectively and thus to limit official discretion and arbitrariness does not depend on broad dissemination or easy accessibility of those rules to the general public. If anything, the opposite is true: the clarity and specificity of decision rules, and hence their effectiveness as guidelines, may be enhanced by the use of a technical, esoteric terminology that is incomprehensible to the public at large.¹¹⁷

The second cluster of arguments for the rule of law is even more strictly formal and instrumental. Like the sharpness of a knife, to use Raz's metaphor, conformity to the rule of law is said to be of sheer instrumental value: it endows the law with a measure of efficacy in pursuing whatever goals are assigned to it.¹¹⁸ The most far-reaching version of this argument was made by Lon Fuller, whose famous allegory about King Rex was meant to demonstrate that the principles of the rule of law — which include publicity and clarity — are necessary conditions for the successful operation, and indeed for the very existence, of a legal system.¹¹⁹

¹¹⁶ See *supra* pp. 661–62.

¹¹⁷ Fuller was aware of this point. But because he treated law as a uniform substance, undifferentiated into decision rules and conduct rules, he considered the point to be an argument for limiting the clarity of *all* laws. Recounting the legislative experience of the early communist regime in Poland, Fuller said: "It was discovered . . . that making the laws readily understandable to the citizen carried a hidden cost in that it rendered their application by the courts more capricious and less predictable. Some retreat to a more balanced view therefore became unavoidable." L. FULLER, *supra* note 114, at 45.

¹¹⁸ See J. RAZ, *supra* note 114, at 226.

¹¹⁹ See L. FULLER, *supra* note 114, at 33–41; see also *id.* at 49–51 (on promulgation); *id.* at 63–65 (on clarity).

But such arguments do not apply to the kinds of decision rules that rely on the practices of selective transmission discussed in this Article. Subjecting these decision rules to the imperatives of the rule of law, and in particular to the requirements of publicity and clarity, would tend to undermine rather than enhance the rules' efficiency in achieving their goals. Raz's view and Fuller's story of King Rex are compelling only insofar as one overlooks the possibility that some decision rules may best serve the purposes of the law by remaining concealed from public view. Thus, from the strictly instrumental perspective of the second cluster of arguments for the rule of law, publicity and clarity of decision rules are undesirable when these attributes would dull the knife and impede its usefulness.

Closely related to the instrumental arguments, but with a greater substantive component, is the third cluster of arguments for the rule of law: the utilitarian arguments. Bentham was particularly insistent on the importance of the law's publicity and clarity, and it is therefore worthwhile to focus on his views. Bentham's argument about the form that laws should take may be expressed in terms of the following syllogism.

First premise: "In the arrangement of the laws, that which is best adapted for the generality of the people ought to be regarded."¹²⁰

Second premise: "The multitude have not leisure for profoundly studying the laws: they do not possess the capacity for connecting together distant regulations — they do not understand the technical terms of arbitrary and artificial methods."¹²¹

Conclusion: "It is proper, as much as possible, not to put into a code of law any other legal terms than such as are familiar to the people."¹²²

Bentham presents the first premise of this argument as if it were self-evident. Perhaps he has in mind only paradigmatic conduct rules. But as I have already suggested, it is not at all obvious that decision rules that are neither intended for nor addressed to "the generality of the people" should be "adapted" to the cognitive needs of the public. In a different context, however, Bentham comes closer to offering an argument that, if valid, would make the first premise equally applicable to *all* laws, including decision rules. Dealing with what he terms "preappointed evidence," Bentham argues: "Not judicature only, but all human action, depends upon evidence for its conduciveness to its end: evidence, knowledge of the most proper means, being itself among the means necessary to the attainment of the end."¹²³

¹²⁰ J. BENTHAM, *A General View of a Complete Code of Laws*, in 3 *THE WORKS OF JEREMY BENTHAM* 155, 161 (J. Bowring ed. Edinburgh 1843).

¹²¹ *Id.*

¹²² *Id.* at 209.

¹²³ J. BENTHAM, *Rationale of Judicial Evidence*, in 6 *id.* at 191, 508.

According to this view, the requirement that the law be made known to the public is simply an instance of the broader truth that knowledge (that is, all attainable knowledge) is needed for rational human action. As Bentham would be among the first to agree, however, human action can be rational from a personal point of view and yet suboptimal in terms of social utility. Bentham's own assumptions about human motivation plainly indicate the possibility of cases in which an individual's possession of certain knowledge would indeed serve the individual's goals but diminish rather than promote social utility. The instances of selective transmission that I have identified deal with precisely this category of cases. Widespread knowledge of the availability of the defense of duress, for example, might move people to succumb to threats under circumstances in which such a decision, though personally rational, would be socially undesirable.¹²⁴

Insofar as the law pursued utilitarian goals, utilitarian considerations such as those raised by Bentham would indeed be invoked within a model of acoustic separation for the purpose of determining whether selective transmission would be at all appropriate in a particular instance — that is, whether a particular decision rule should have a similar conduct rule as its publicly known counterpart. As the example of duress suggests, however, such utilitarian considerations would be incapable of generating a sweeping conclusion — in the form of a generally applicable principle of the rule of law — that *all* decision rules must be communicated to the public.

The final and perhaps most important cluster of rationales for the rule of law includes arguments that defend the rule of law as an imperative of liberty or autonomy. Common to these arguments is the insistence that the rule of law is necessary to ensure the "[p]redictability in one's environment"¹²⁵ and security in one's expectations that are essential to one's capacity to make and carry out life plans. By enhancing the individual's life-planning capacity, the rule of law expands freedom of action, secures a measure of individual liberty, and expresses respect for individual autonomy.¹²⁶

Like the utilitarian arguments, the arguments based on autonomy have already been encountered elsewhere in our scheme:¹²⁷ autonomy arguments, too, are among the substantive normative considerations

¹²⁴ In addition to insisting on the clarity and simplicity of all laws, Bentham argued for the publicity of legislative proceedings, see J. BENTHAM, *An Essay on Political Tactics*, in 2 *id.* at 299, 310–17, and of judicial proceedings, see J. BENTHAM, *Bentham's Draught for the Organization of Judicial Establishments*, in 4 *id.* at 305, 316–18.

¹²⁵ J. RAZ, *supra* note 114, at 220.

¹²⁶ For this group of arguments, see especially F. HAYEK, *THE ROAD TO SERFDOM* 72–87 (1944); J. RAWLS, *supra* note 114, at 235–36; J. RAZ, *supra* note 114, at 220–22.

¹²⁷ See *supra* pp. 630–34.

relevant to the initial determination regarding the proper relationship between particular conduct rules and specific decision rules. But as I earlier indicated,¹²⁸ and now further elaborate, considerations such as the protection of well-founded expectations — no matter how important they may be to individual autonomy — do not apply to all decision rules and therefore do not yield a *general* requirement that decision rules be made public.

The need for security of individual expectations is not a great obstacle to the use of selective transmission when decision rules are more lenient than conduct rules lead people to expect. I have already observed that in such cases no one is likely to feel “entrapped” by the law¹²⁹ or to complain of frustrated expectations.

True, some individuals may still complain of an infringement of their autonomy by the reduction in the predictability of their environment that selective transmission brings about. Had they known, for example, of the defense of duress, they would not have acted as they did (and should have done) in resisting strong pressure to commit a crime. There are two replies to this complaint. The first points to a peculiar feature of defenses such as duress: they melt away as soon as one relies upon them. An individual who would not have committed an offense but for his knowledge of the existence of such a defense cannot, in most cases, avail himself of the defense.¹³⁰ Hiding the existence of a defense such as duress misleads mainly those who would, if they knew of the defense, rely upon it with the intent to deny that reliance when they ultimately came to trial. It is doubtful that such expectations are worthy of protection.

There is a second, deeper and more general response to the complaint of the individual who is misled into obeying the law by an exaggerated fear of the legal threat. It applies not only to cases involving unknown defenses, but also, even more forcefully, to cases in which the decision rule defines an offense more narrowly than does the corresponding conduct rule.¹³¹ Such an individual, it can be pointed out, admits to being the Holmesian “bad man,” who acts out of fear of legal sanctions rather than out of deference to his duties. But essential to autonomy, at least in the Kantian sense,¹³² is action motivated by deference to duty (or “reverence” to duty, in Kantian terms)¹³³ rather than by physical fear. In other words, the entire

¹²⁸ See *supra* p. 634.

¹²⁹ Raz uses the image of entrapment in this context. See J. RAZ, *supra* note 114, at 222.

¹³⁰ See G. FLETCHER, *supra* note 17, § 10.3, at 811–12.

¹³¹ See *supra* pp. 648–58.

¹³² See I. KANT, *GROUNDWORK OF THE METAPHYSICS OF MORALS* 62–66, 93–95 (H. Paton trans. 1948) (1st ed. Riga 1785).

¹³³ These duties include the duty to obey the law, whenever such a duty exists.

enterprise, central to the criminal law, of regulating conduct through deterrence (that is, through the issuance of threats of deprivation and violence) is at odds with human dignity: it appeals to individual "inclinations" (to use Kantian language) instead of to the reason and good will of moral agents. The point at which a threat of punishment has its intended effect, according to this view, is the precise point at which autonomous behavior terminates. By obeying a law out of sheer fear of punishment rather than out of a sense of duty (when such a duty exists), an individual merely submits to a mode of regulation through intimidation; such submission is inconsistent with his claim to have acted as an autonomous moral agent. If the individual's actions fall outside the sphere of autonomy, he cannot complain of a deprivation of autonomy when he discovers that the fear that shaped his conduct was excessive and that, because of the leniency of some decision rule, he could have violated his duty with impunity.

But although he cannot rest his complaint on grounds of autonomy, an individual who has been misled by his ignorance of a lenient decision rule may still have available an argument based on the looser notion of freedom. This argument points out that "predictability in one's environment" has the beneficial effect of expanding the individual's freedom of action.

The ideal of "predictability in one's environment" falsely suggests, however, that the environment — to which the requirements of the rule of law might afford a measure of predictability — is not itself altered by those requirements. As some of the preceding illustrations demonstrate, quite the contrary is true: the alternative to selective transmission may sometimes be a change in the relevant legal "environment" that would diminish the degree of freedom secured by law. If, for example, the accommodation between deterrence and compassion (or fairness) offered by the possibility of selective transmission regarding the defense of duress were ruled out, the law would have to adopt one of two positions. The law could abandon the defense altogether and impose on some defendants a price in foregone liberty. Alternatively, the law could preserve the defense not only as a decision rule, but also as a conduct rule — that is, as a rule that people should consider in deciding whether to commit a criminal offense. But if we have been correct in assuming that revelation of the decision rule would diminish the deterrent effect of the criminal law, the second option would reduce the effectiveness of the law's protection against offensive invasions of individual freedom and unlawful curtailments of personal liberty.¹³⁴

The relationship between the rule of law and selective transmission can be briefly summarized by reference to a single "root idea" from

¹³⁴ Cf. J. RAWLS, *supra* note 114, at 242 (arguing that because the value of the rule of law is related to liberty, the rule of law can be curtailed, when necessary, on liberty's behalf).

which, according to Dr. Raz, the various arguments for the rule of law all spring. It is the basic intuition that "the law must be capable of being obeyed" and that hence "*it must be capable of guiding the behaviour of its subjects*. It must be such that they can find out what it is and act on it."¹³⁵ But this idea, with its seemingly unassailable logic, applies only to conduct rules: by definition, conduct rules are all one needs to know in order to obey the law. Decision rules, as such, cannot be obeyed (or disobeyed) by citizens; therefore, knowing them is not necessary (indeed, it is irrelevant) to one's ability to obey the law. More specifically, the first two lines of argument for the rule of law pertain to the more formal aspects of legal ordering: they invoke the importance of the rule of law to, respectively, the law's capacity to constrain official discretion and the law's value in guiding individual behavior. But neither argument requires that decision rules be known to and understandable by the lay public. The other two lines of argument link the rule of law to substantive values — social utility and individual autonomy and freedom — to which the law may be committed. The acoustic separation model stresses that these values must be consulted when specific decision rules and conduct rules are promulgated and separated. Moreover, these values will indeed often argue for a complete correspondence between conduct rules and decision rules. But the values of utility and autonomy do not always rule out the separation of decision rules from conduct rules.¹³⁶ And when the substantive values and policies underlying the law indicate the desirability of strategies of selective transmission, such strategies do not face yet another obstacle in the form of a seemingly compelling intuition, said to underlie the rule of law, that all law must be public and clear because it must be capable of being obeyed.

B. Acoustic Separation and the Internal Immorality of Law

The conclusion of the preceding Section is largely a negative one: the options opened up by acoustic separation cannot be ruled out by a commitment to the ideal of the rule of law. But the discovery that what has been called "the internal morality of law"¹³⁷ is compatible with patterns of selective transmission falls far short of justifying such strategies. The option of selective transmission is not an attractive one, and the sight of law tainted with duplicity and concealment is not pretty. Lest our lingering distaste lead us too easily to moral self-indulgence, however, we must place selective transmission in a broader context. Our assessment of the acoustic separation model as

¹³⁵ J. RAZ, *supra* note 114, at 213-14.

¹³⁶ Cf. *id.* at 228 ("Conflict between the rule of law and other values is just what is to be expected. . . . A lesser degree of conformity [to the rule of law] is often to be preferred precisely because it helps realization of other goals.")

¹³⁷ See L. FULLER, *supra* note 114, *passim*.

an analytical device and our attitude toward selective transmission as a normative option cannot be divorced from certain moral views we hold concerning the nature of criminal law or, indeed, from our general vision of law. But an adequate, let alone full, discussion of such issues would lead us far beyond the natural limits of a single article. The narrow confines of this concluding Section therefore provide both a happy opportunity and a welcome excuse for making some tentative remarks that are meant to be merely suggestive rather than persuasive. I wish to relate selective transmission first to the horrors of punishment, second to the view that punishment is a necessary evil, and third to a view that law is an enterprise unavoidably affected with the problem of dirty hands.

Initially, both the analytical merits of the acoustic separation model and the normative significance of selective transmission must be related to the view that law is a coercive system in which "coercion" is often a euphemism for the intimidation, violence,¹³⁸ and brutality carried out primarily (though not exclusively) in the form of criminal punishment. But this brutality — despite its visibility — does not seem fully to have permeated jurisprudential thinking. To get immediately to the point, consider Raz's endorsement of the conventional view of the relationship between conduct rules and decision rules: "[L]aw contains both norms guiding behaviour and institutions for evaluating and judging behaviour. The evaluation is based on the very same norms which guide behaviour."¹³⁹ Starkly missing from this statement is any recognition that the law does not merely evaluate behavior, but also (with some variation, depending on the society and historical period at issue) uses its evaluations to justify killing, maiming, beating, or locking up the evaluated individual. The suppression of this all-important factor leads to a certain understatement of the moral awesomeness of the legal decision and to an unduly placid and benign picture of law. More generally, the conventional view of the relationship between decision rules and conduct rules — expressed in the idiom of "law application"¹⁴⁰ — has as its psychological (though not necessarily logical) corollary the impression that, as soon as a court finds the defendant's conduct defective relative to some standard of conduct laid down for him, punishment must inexorably follow. This conventional model does not dwell on the independent decision to carry out the legal threat and actually to impose punishment. As

¹³⁸ "Violence" is used here in its ordinary sense to denote any intense physical force. There is also a narrower, *legal* sense in which violence signifies "unlawful exercise of physical force"; that definition obviously does not apply here. See, e.g., THE CONCISE OXFORD DICTIONARY OF CURRENT ENGLISH 1453 (5th ed. 1964). Robert Paul Wolff argues against the latter, narrower usage in Wolff, *Violence and the Law*, in THE RULE OF LAW 54, 59-62 (R. Wolff ed. 1971).

¹³⁹ J. RAZ, *The Institutional Nature of Law*, in THE AUTHORITY OF LAW, *supra* note 114, at 103, 112.

¹⁴⁰ See *supra* pp. 628-29.

a result, the moral significance of such a decision — a decision that sometimes, as in the case of the death penalty, assumes overwhelming proportions — recedes to the background. By contrast, the acoustic separation model brings into sharp focus the decision to impose punishment and is thus more conducive to an appreciation of the different considerations that may apply at the stage of conduct regulation (through the threat of sanctions) and at the time of the actual imposition of punishment.

By emphasizing the horror of punishment, I do not mean to deny that some system of criminal punishment is indispensable. Instead, this emphasis leads to my second point: that punishment is best described as a necessary evil.¹⁴¹ I cannot defend this view here. Nor does it urgently need such a defense. Only the most thoroughgoing Kantian retributivist, who considers punishment of the guilty an unqualified, affirmative good, is likely to quarrel with my characterization. And given the ever-present odds that a convicted defendant might in fact be innocent, even the retributivist can find only insecure satisfaction in the convict's punishment.¹⁴²

The description of punishment (and other forms of legal violence) as a necessary evil reveals the source of a fundamental tension that pervades the criminal law — the tension between the felt necessity and the perceived evil of the measures that the law brings to bear upon the task of suppressing crime. In its most general form, this tension is manifested in the rift between the threat of punishment and the decision to carry out that threat. The same tension appears in and gives a sharp moral edge to more specific conflicts, such as that between the imperatives of crime prevention and compassion to the individual defendant, or that between the desirability of using the criminal law to instill new, enlightened standards of behavior in the community and the unfairness of punishing persons whose conduct comports with existing community standards that have not yet been affected by the educational efforts of the criminal law.¹⁴³ As we have

¹⁴¹ I do not mean to suggest that any particular forms of punishment, least of all the more extreme and brutal ones, are necessary. Though the rhetorical force of the view I express is enhanced by the fact that fairly brutal punishments abound in all important legal systems, the logic of this view would not be impaired in a system that used much milder punishments.

¹⁴² Indeed, the thoroughgoing retributivist, more than anyone else, must be appalled by the knowledge that the criminal justice system, no matter how careful it may be, occasionally sacrifices innocent people in order to serve its goals (including the goal of retribution).

¹⁴³ This dilemma is clearly expressed in *State v. Abbott*, 36 N.J. 63, 174 A.2d 881 (1961), a case dealing with the question whether the law should require that a person under attack retreat, if he can do so safely, rather than use deadly force in self-defense. In opposition to the rule requiring retreat, the court noted, was the view that (1) "[t]he law of course should not denounce conduct as criminal when it accords with the behavior of reasonable men," and that (2) "the manly thing is to hold one's ground," whereas proponents of the rule, the court observed, maintained that (3) "right-thinking men agree" that "it is better that the assailed shall retreat than that the life of another be needlessly spent," and that (4) "a rule so requiring may well

seen, selective transmission may help mitigate, if not fully resolve, many acute dilemmas of this sort.

But even as it helps mitigate such dilemmas, selective transmission, because of its own unpalatableness, also compounds them. By so doing, it highlights an aspect of law reminiscent of the moral predicament of dirty hands that is commonly thought to be endemic in political life.¹⁴⁴

One should, of course, be wary of too readily applying notions such as "dirty hands" to new areas. In a certain sense, all life is permeated by problems akin to that of dirty hands; by extending the notion to new situations, we risk draining it of all philosophical interest and analytical power. To avert this danger, I need to justify the application of the notion of dirty hands to the law by indicating (though not now fully elaborating) the essential similarity between the problem as it arises in the law and the problem as it appears in politics. The briefest and safest way to make such a showing is to demonstrate that the same characteristics that have been said to make politicians particularly susceptible to the dirty hands syndrome can be found, with minor differences, in the law as well.

Michael Walzer lists three such characteristics: first, the politician presumes not "merely [to] cater to our interests," but to act "on our behalf, even in our name";¹⁴⁵ second, the politician rules over us;¹⁴⁶ and third, the politician "uses violence and the threat of violence — not only against foreign nations in our defense but also against us, and again ostensibly for our greater good."¹⁴⁷ Substitute "law" for "politician" in each of the three propositions, and they will be no less valid. (Such a result should surprise only those who believe in the radical separation between law and politics.) Insofar as the propositions correctly capture politicians' special susceptibility to the problem of dirty hands, we should be prepared to find symptoms of that susceptibility in the law as well. Selective transmission is such a symptom. But notice that I have advisedly substituted "law," not "lawyers," for "politician" in Walzer's list. We find it natural, in thinking about law, to refer impersonally to the normative system rather than to individual human beings. The wielding of power and even the administering of violence and brutality by law are character-

induce others to adhere to that worthy standard of behavior." *Id.* at 69, 174 A.2d at 884. The dilemma faces with full force someone who, together with other "right-thinking" people, subscribes to (3) and who also believes (consistently) in both (1) and (4) in a community in which belief in (2) is widespread.

¹⁴⁴ Another, somewhat milder idiom, used to describe a similar predicament in the context of allocating scarce resources, is that of "tragic choices." See G. CALABRESI & P. BOBBITT, *TRAGIC CHOICES* 24–26, 78–79, 95 (1978) (observing that the value of honesty competes against and sometimes loses to other values in "tragic" contexts).

¹⁴⁵ Walzer, *supra* note 111, at 64.

¹⁴⁶ See *id.* at 65.

¹⁴⁷ *Id.*

istically (probably even essentially) impersonal, stylized, and institutionalized. It is (as our examination of selective transmission tends to confirm) reasonable to expect that the manifestations of the problem of dirty hands in the law will assume the law's general features and be equally impersonal, stylized, and institutionalized. What, if any, moral significance these features have, and how, if at all, the legal version of the problem of dirty hands should affect our attitudes toward law, are important questions that in the present setting can be raised but not discussed.¹⁴⁸

None of the foregoing remarks settles the question of legitimacy raised at the beginning of this Part. Such a question is ultimately a matter of substantive moral choice that the analysis presented here can help clarify but cannot resolve. All that can safely be asserted is that in a world in which murder is rampant and executions are tolerated, law, like politics, is a power game with high stakes indeed. In such a game, strategic behavior, including bluffing and other forms of deceit, must always be expected. Furthermore, the option of selective transmission can sometimes be rejected only at the cost of increased human suffering, either in the form of preventable crimes or in the form of unnecessary punishment. When the values of publicity and honesty are victorious in such instances, their victory, even if justly deserved, should be no occasion for rejoicing.

IV. CONCLUSION

The analysis of selective transmission has led us from an emphasis on law's brutality, through the subsequent characterization of punishment as a necessary evil, to the diagnosis in law of the problem of dirty hands. But this is not the end of the trail. On yet a broader scale, the exposure of selective transmission is a reminder of two additional unpleasant truths, not the less distressing because platitudinous. One is that our values are in conflict and that in reconciling them we must compromise. The other is that even under the best of circumstances, in the freest of democracies and under the most enlightened of legal systems, we are still being ruled. The response to the concept of selective transmission is liable, therefore, to be such as sometimes befalls the bearer of bad tidings. Our irritation with the messenger may be in part a disguised expression of our unhappiness with the message.

¹⁴⁸ Obviously, many other pertinent and important issues are not even raised here. Prominent examples would be the complex and crucial role played by lawyers in regard to acoustic separation, and the relation of selective transmission to various theories of democracy.