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

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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.

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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

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[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

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[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 rules[6] — 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,

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[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

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[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

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[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

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[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:

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[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

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[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

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[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); Scheflin, *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

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[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

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[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).