CONVICTING WITH REASONABLE DOUBT: AN EVIDENTIARY THEORY OF CRIMINAL LAW

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This Article presents an evidentiary theory of substantive criminal law according to which sanctions are distributed in proportion to the strength of the evidence mounted against the defendant. It highlights the potential advantages associated with grading penalties in proportion to the probability of wrongdoing and situates this claim within both consequentialist and deontological theories of punishment. Building on this analysis, the Article reviews the doctrinal tools used to achieve the goal of evidentiary grading of sanctions and shows that key factors in criminal law are geared towards dealing with evidentiary uncertainty. Finally, the Article explores the underlying logic of the evidentiary structure of criminal law and argues that this structure can be justified on psychological, economic, and expressive grounds.

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INTRODUCTION

One of the greatest tenets of criminal law is that an individual should be held responsible if and only if his guilt is proven beyond a reasonable doubt. Whether this point is phrased in Blackstone's formulation that it is "better that ten guilty persons escape, than that one innocent suffer"[1] or Benjamin Franklin's more demanding one that "it is better a hundred guilty persons should escape than one innocent person should suffer"[2] or Maimonides's even tougher standard that "it is better and more satisfactory to acquit a thousand guilty persons than to put a single innocent man to death once in a way,"[3] the core idea is the same, which is that the legal system should strive to minimize the conviction of innocent defendants by taking all feasible precautions against false convictions.[4]

This Article argues that the legal system routinely relaxes the burden of proof in criminal adjudication by adjusting the substantive content of criminal law. More specifically, it suggests that legal prohibitions are designed, among other things, to create a correlation between the severity of the sanction and the degree of certainty that the defendant deserves to be punished. According to this framework, defendants whose guilt is proven to a high level of certainty receive the full penalty they deserve, while defendants whose guilt is proven to a lower degree of certainty are convicted of specially crafted offenses that de facto reduce the evidentiary threshold for a conviction. Given the elevated risk of error associated with these offenses, the punishments attached to them are discounted. The overall picture is one in which penalties are distributed among defendants in proportion to the probability that they deserve to be punished, even when their guilt has not been proven beyond a reasonable doubt.

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1 4 WILLIAM BLACKSTONE, COMMENTARIES *352.

2 Letter from Benjamin Franklin to Benjamin Vaughan (Mar. 14, 1785), *in* 11 THE WORKS OF BENJAMIN FRANKLIN 13 (John Bigelow ed., 1904).

3 2 MOSES MAIMONIDES, THE COMMANDMENTS 270 (Charles B. Chavel trans., Soncino Press 1967). For a review of the different ratios presented in the legal literature, see Alexander Volokh, *n Guilty Men*, 146 U. PA. L. REV. 173 (1997).

4 *See* ALEX STEIN, FOUNDATIONS OF EVIDENCE LAW 172, 177–78 (2005).

The bulk of the arguments presented in this Article are positive in nature. They delineate significant doctrinal domains within criminal law that are geared towards dealing with defendants whose culpability has been proven to a high degree of certainty but not beyond a reasonable doubt. More specifically, it will be shown that doctrines relating to both the objective and subjective elements of the crime align punishments with the adjudicator's confidence of wrongdoing. In this regard, the presented analytical framework sheds new light on core questions of criminal law. For example, legal analysis of inchoate crimes views liability in this realm as an all-or-nothing endeavor.[5] According to this line of thought, criminal responsibility moves in only when the defendant's conduct crosses the legal threshold that differentiates between preparatory acts (which are not crimes) and attempts (which are crimes).[6] The presented theory suggests that criminal liability for inchoate crimes calibrates punishments to the degree of proof presented at trial in a continuous and nuanced fashion.[7] Viewing the criminal framework in its entirety, the interaction between preparatory crimes, criminal attempts, and complete crimes suggests that as more inculpating evidence is mounted against the defendant, additional crimes with stiffer penalties come into play.

More generally, this Article challenges the perceived wisdom that the evidentiary threshold encapsulated by the burden of proof creates a dichotomous penal regime.[8] In this regime, those whose guilt is proven beyond a reasonable doubt are subject to harsh criminal sanctions, whereas those whose guilt is proven to a somewhat lower degree get to go home scot-free.[9] Professor Talia Fisher, for example, assumes that the "binary threshold model dictates that the manifold aspects of criminal culpability be ultimately translated into the legal lexicon's strict, one-dimensional terms of conviction or acquittal."[10] This Article argues that this common assumption does not adequately depict the manner in which the criminal justice system operates.

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5 *See* Rollin M. Perkins, *Criminal Attempt and Related Problems*, 2 UCLA L. REV. 319, 325 (1955) ("[A]s the common law is concerned there is no criminal attempt unless what was done went beyond the stage of preparation.").

6 *Id.*

7 *See infra* notes 169–204 and accompanying text.

8 This concept goes back to Blackstone who preferred to allow ten guilty men to "escape," 4 BLACKSTONE, *supra* note 1, yet is also embedded into the rhetoric of the Supreme Court. *See, e.g.*, *In re* Winship, 397 U.S. 358, 372 (1970) (Harlan, J., concurring) ("[I]t is far worse to convict an innocent man than to let a guilty man go free."). Casebooks teaching criminal law also follow suit and present the question as one entailing either a conviction or a complete acquittal. *See, e.g.*, SANFORD H. KADISH ET AL., CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS 33 (9th ed., 2012) (posing the question: "how can we really be sure that it is less 'costly' to release ten (or one hundred) suspected serial killers who are guilty than to convict one suspected serial killer who is innocent?").

9 *See* Adam J. Kolber, Essay, *The Bumpiness of Criminal Law*, 67 ALA. L. REV. 855, 874 (2016) (noting that if "the jury is almost certain a defendant slaughtered innocent people but has an iota of reasonable doubt, the defendant is supposed to go free").

10 Talia Fisher, *Conviction Without Conviction*, 96 MINN. L. REV. 833, 868 (2012); *see also* Adam J. Kolber, Essay, *Smooth and Bumpy Laws*, 102 CALIF. L. REV. 655, 671 (2014) (noting that "[e]ither each element is satisfied and the offender is liable for punishment under the

An appreciation of the evidentiary role of substantive criminal law suggests a much more refined penal regime that is attuned to both questions of culpability and proof.

Aside from its positive dimension, this Article will also examine the deeper question of why criminal law turned to substantive norms to relax the standard of proof rather than adjusting the standard itself. While this question has an apparent and straightforward doctrinal answer that stems from the enshrined constitutional status of the beyond reasonable doubt standard,[11] a close examination reveals that existing practices are also grounded on principled considerations external to constitutional constraints. More specifically, it will be shown that there are considerable advantages to incorporating evidentiary uncertainty into the definition of crimes that reflect psychological, expressive, and consequential concerns.

The thesis presented in this Article is part of a growing body of work that aims to unite the analysis of substantive legal norms with the analysis of procedural and evidentiary norms.[12] In traditional legal scholarship, there is a clear divide between substance and process.[13] While the former is vested with the responsibility for setting out the primary rules that guide the public regarding which types of behavior are permissible and which are not, the latter is charged with ascertaining the relevant facts of a particular case in a precise fashion. According to this line of thought, "procedure really is procedure, and substance really is substance, so that the one can never truly be the functional equivalent of the other."[14] However, as the legal literature acknowledged long ago, this clean divide does not always hold.[15] Procedural and evidentiary rules can play a role in the regulation of primary behavior,

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statute or at least one element is not satisfied and the offender receives no punishment at all").

11 *See infra* notes 48–51 and accompanying text.

12 For several recent examples of this body of work, see Richard A. Bierschbach & Alex Stein, *Mediating Rules in Criminal Law*, 93 VA. L. REV. 1197 (2007) (analyzing how rules of evidence can mediate different goals of criminal law); Ehud Guttel & Doron Teichman, *Criminal Sanctions in the Defense of the Innocent*, 110 MICH. L. REV. 597 (2012) (highlighting the influence of the burden of proof applied in practice on the design of substantive rules); Gideon Parchomovsky & Alex Stein, Essay, *The Distortionary Effect of Evidence on Primary Behavior*, 124 HARV. L. REV. 518 (2010) (examining how the need to accumulate evidence influences people's behavior regarding primary behavior). For an early contribution to this line of thought, see John Calvin Jeffries, Jr. & Paul B. Stephan III, *Defenses, Presumptions, and Burden of Proof in the Criminal Law*, 88 YALE L.J. 1325 (1979).

13 *See* Paul Roberts, *Strict Liability and the Presumption of Innocence: An Exposé of Functionalist Assumptions*, *in* APPRAISING STRICT LIABILITY 151, 154 (A.P. Simester ed., 2005) (noting that "substance and procedure are independent, incommensurable dimensions of penal law that cannot be reduced to interchangeable tokens and traded like currency").

14 *Id.* at 177.

15 For notable early expositions of this point, see I CHARLES FREDERIC CHAMBERLAYNE, A TREATISE ON THE MODERN LAW OF EVIDENCE § 171 (1911) ("The distinction between substantive and procedural law is artificial and illusory."); KARL N. LLEWELLYN, THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY 82–83 (1930) ("The differentiation between substantive law and adjective . . . law is an illusion . . . .").

and substantive rules can be used to influence the fact-finding process. Consequently, their analysis should be united into a single framework. This Article attempts to achieve this end in the context of the decision threshold applied in criminal cases and the structure of the substantive norms of criminal law.

The Article proceeds as follows. Part I consists of a literature review upon which the Article is built. As this review suggests, existing theories of punishment focus on the primary goals of punishment (e.g., just desert and deterrence) and neglect to account for the strength of the evidence as a distributing principal of punishment. At the same time, theories dealing with error tradeoffs in the criminal justice system tend to focus exclusively on the rules of procedure and evidence as the sole policy tools that influence such tradeoffs. Part II presents an evidentiary theory of punishment according to which sanctions are calibrated to the degree of certainty that wrongdoing has occurred. Part III surveys numerous concrete examples that demonstrate the operation of the theory in practice and establishes that significant parts of the criminal law can be viewed as tools to distribute sanctions in proportion to the probability of wrongdoing. Part IV discusses why the law evolved the way it did, rather than taking a more straightforward approach that would explicitly acknowledge that sanctions are calibrated to the quality of evidence presented. This discussion will shed new light on core issues of criminal law, such as the role of deontological constraints on setting penal policies and the importance of the expressive function of criminal law. Finally, the Conclusion consists of some final remarks and highlights potential paths for future research.

I. Background: Theories of Punishment and Error Tradeoffs

This Part briefly reviews the literature on which this paper builds. It opens with an overview of the literature on the theories of punishment and shows that this literature has focused on the primary justifications of punishment—just desert, deterrence, rehabilitation, etc.—when determining what the level of punishment should be. It then turns to examine the literature on error tradeoffs in criminal trials and demonstrates that this body of work has focused on the burden of proof as the sole tool through which errors can be traded off.

A. Theories of Punishment

As the introductory part of any criminal law course will probably demonstrate, the two core theoretical questions that jurists dealing with punishment address are: (1) what justifies the practice of punishing criminals (i.e., why do we punish?), and (2) given a justification, how should sanctions be distributed among offenders (i.e., how much should we punish?).[16] Interestingly,

16 Casebooks often deal with these questions in their introductory chapters. *See, e.g.*, Jonathan Herring, Criminal Law: Text, Cases, and Materials 8–61 (6th ed., 2014); Kad-

legal scholars routinely assume that the answers to these two questions are connected;[17] that is, that the distribution of sanctions between offenders should be based on the theory that justifies the application of those sanctions in the first place. This justification-distribution framework has led to a rather stable equilibrium within criminal law scholarship that focuses on a more-or-less fixed list of potential governing principles.[18]

One group of justifications and distributive principles are consequentialist and focus on minimizing the overall social cost of crime through efficient penal policies.[19] Deterrence theories focus on punishing to alter the incentives of the individual offender (i.e., specific deterrence) or the entire population (i.e., general deterrence).[20] Within a deterrence framework, the threat of punishment is intended to make people alter their choices and refrain from criminal activity that they would have engaged in without such a threat. Deterrence theory has highlighted the considerations that should influence the distribution of penalties, key of which are the magnitude of harm and the probability of detection.[21]

Additional influential consequentialist theories concentrate on rehabilitation and incapacitation as the touchstones of criminal punishment. Rehabilitation focuses on reforming offenders such that their values and beliefs will lead them to refrain from offending in the future.[22] Such theories examine the unique aspects of each offender (e.g., age, upbringing, substance abuse, etc.) in light of existing rehabilitation programs.[23] On the other hand, incapacitation focuses on the elimination of the risk created by the offender (usually through incarceration).[24] Within an incapacitative

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ISH ET AL., *supra* note 8, at 89–142; PAUL H. ROBINSON, CRIMINAL LAW: CASE STUDIES & CONTROVERSIES 73–127 (rev. ed. 2005).

17 *See, e.g.*, PAUL H. ROBINSON, DISTRIBUTIVE PRINCIPLES OF CRIMINAL LAW: WHO SHOULD BE PUNISHED HOW MUCH? 7 (2008) ("Each of the justifications for punishment, or 'purposes' as they are often called, might be used as a distributive principle for criminal liability and punishment."). *But see* H.L.A. HART, PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 1–27 (1968) (drawing a distinction between the principles governing justifying and distributing punishment).

18 *See* ROBINSON, *supra* note 17, at 17 ("Most criminal codes, and most criminal law courses, begin with the 'familiar litany' of the traditional alternative distributive principles").

19 *See id.* at 7–10 (reviewing different consequentialist principles).

20 For an early contribution to this literature, see Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169, 176–79 (1968) (presenting an analysis of the supply of criminal offenses given the probability of conviction, length of punishment, and other variables). For later review, see STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW 473–514 (2004).

21 ROBINSON, *supra* note 17, at 8–9.

22 For a review of the rehabilitation literature, see Francis T. Cullen & Paul Gendreau, *Assessing Correctional Rehabilitation: Policy, Practice, and Prospects*, 3 CRIM. JUST. 109 (2000).

23 *See id.* at 137–43.

24 *See, e.g.*, Steven Shavell, *A Model of Optimal Incapacitation*, 77 AM. ECON. REV. 107 (1987).

framework, attention is given to the risk of future offenses by the criminal and the costs of incapacitation.[25]

A second group of theories takes a deontological approach to punishment.[26] Within this framework, the role of punishment is not to further desirable outcomes but rather to treat criminals as they deserve.[27] Given the somewhat elusive meaning of the term "desert," retributivist theories often struggle with offering a definitive answer to the question of what the appropriate sanction should be. Nonetheless, retributivists emphasize that penalties should be proportional to the crime and offer measures that help rank offenders.[28] According to deontologists, the main criteria to evaluate punishment depends on the wrongfulness of the act committed by the offender and the degree of blame that can be attributed to him.[29] Greater wrongfulness (e.g., homicide versus theft) and greater blame (e.g., intentional killing versus reckless killing) merit a more severe penal reaction.

Numerous penal theories have explored potential interactions between the different primary goals of punishment described above. Many modern-day theorists take the position that the criminal justice system aims to further a utilitarian goal of crime reduction, but that this goal is limited by deontological constraints that forbid the punishment of the innocent and require that all punishments be proportional to the deed committed.[30] Others have advocated for the use of the public's perceptions of just desert (rather than the moral dictates of desert) as the guiding principle for the distribution of punishments on consequentialist grounds.[31] According to this line of thought, aligning public opinion with legal practices can help bolster the law's legitimacy and increase compliance.[32]

To be sure, criminal law scholars have certainly taken note of evidentiary considerations. In his seminal work on criminal codes, Jeremy Bentham explicitly alluded to "evidentiary offences,"[33] which he defined as "acts injurious or otherwise in themselves, but furnishing a presumption of an offence

25 *See id.* at 107–08.

26 *See* ROBINSON, *supra* note 17, at 11 (highlighting the role of deontological desert).

27 For a key contribution to this literature, see Michael S. Moore, *The Moral Worth of Retribution*, *in* RESPONSIBILITY, CHARACTER, AND THE EMOTIONS: NEW ESSAYS IN MORAL PSYCHOLOGY 179 (Ferdinand Schoeman ed., 1987). For a review of retributive theories, see Gerard V. Bradley, *Retribution: The Central Aim of Punishment*, 27 HARV. J.L. & PUB. POL'Y 19 (2003).

28 *See generally* Andrew von Hirsch, *Proportionality in the Philosophy of Punishment*, 16 CRIME & JUSTICE 55 (1992).

29 For a discussion of the two criteria, see GEORGE P. FLETCHER, RETHINKING CRIMINAL LAW §§ 6.6–6.7, at 454–504 (1978).

30 For an early iteration of this concept, see HART, *supra* note 17, at 8–13; *see also* Stephen P. Garvey, *Lifting the Veil on Punishment*, 7 BUFF. CRIM. L. REV. 443, 450 (2004).

31 *See generally* Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453 (1997).

32 *Id.* at 476.

33 JEREMY BENTHAM, THE THEORY OF LEGISLATION 425 (C.K. Ogden ed., Richard Hildreth trans., 1931) (emphasis omitted).

committed."[34] Using this framework, Bentham highlighted the role of crimes such as possession of stolen property (that can indicate theft) and concealment of the birth of an illegitimate child (that can indicate murder) in the overall picture of criminal offenses.[35] More recently, Professor Frederick Schauer elaborated on this point and argued that evidentiary crimes are common in modern criminal codes as well.[36] Thus, for example, he demonstrated how crimes that rest on thresholds such as the quantity of a drug possessed (that can indicate intention to deal) and the speed of driving (that can indicate unsafe driving) are geared toward evidentiary purposes.[37] Similarly, the literature on the mental state of crimes has also alluded to evidentiary considerations. The clearest example of such considerations driving the design of offenses is strict criminal liability. While strict liability is relatively rare in the criminal context, there are specific instances in which it is employed.[38] Criminal law scholars have long since recognized that the shift toward strict liability rests, among other things, on evidentiary considerations. As Professor Wayne LaFave notes, the strict liability crime is often "created in order to help the prosecution cope with a situation wherein intention, knowledge, recklessness or negligence is hard to prove."[39]

All these examples suggest that criminal law scholars are attuned to the evidentiary ramifications of the definition of the elements of a crime. Nonetheless, while their analysis acknowledges the evidentiary nature of criminal law, it does not examine the way in which evidentiary crimes should fit into the menu of punishment of a penal code. Bentham, for instance, takes as a given the legal framework according to which men who meet together armed and disguised are subject to capital punishment "because this is supposed to be a proof of a formed design to offer violent resistance to the officers of the customs."[40] In this regard, his analysis neglects to deal with the interaction between evidentiary uncertainty and punishment.

In conclusion, the literature on crime and punishment has mostly taken the view that the structure of substantive criminal law should be driven by its primary goals, and not by the realities of trials and fact finding. In the words of Professor Tatjana Hörnle, "The relation of procedural law to substantive law is merely auxiliary. We do not invent substantive law to give content to trials—rather, the sequence works the other way: criminal procedure serves

34 *Id.*

35 *Id.* at 425–27.

36 FREDERICK SCHAUER, PROFILES, PROBABILITIES, AND STEREOTYPES 224–50 (2003).

37 *Id.* at 237–43.

38 *See* MODEL PENAL CODE § 2.05 editors' explanatory note (AM. LAW INST., Official Draft 1985).

39 1 WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 5.5, at 381 (2d ed. 2003). For an early argument highlighting the connection between the burden of proof and strict liability, see Arthur L. Goodhart, *Possession of Drugs and Absolute Liability*, 84 L.Q. REV. 382, 385–86 (1968).

40 BENTHAM, *supra* note 33, at 426.

to maintain the norms embodied in the substantive law."[41] Scholars who dealt with the evidentiary nature of substantive criminal law did so by simply acknowledging that the definition of the elements of a crime may rest on evidentiary concerns. These scholars have not incorporated this insight into a theory of distributing punishments.

B. Error Tradeoffs and the Criminal Process

A second body of work this Article builds upon is the literature on error tradeoffs in criminal trials. A criminal trial can lead to two types of errors. The first error, often referred to as a type 1 error or a false positive, alludes to wrongful convictions. In such cases, individuals who do not deserve to be punished are nonetheless punished because of a mistaken determination by the criminal justice system. The second error, often referred to as a type 2 error or a false negative, alludes to wrongful acquittals. In such cases, individuals who deserve to be punished are not punished because the criminal justice system determines that they are not guilty.

According to the prevailing view, the burden of proof is the main policy tool through which the legal system strikes a balance between type 1 and type 2 errors.[42] It reflects the minimal threshold the prosecution must meet to convince the trier of fact to determine that a conviction is merited. When the burden is elevated, it becomes more difficult to obtain a conviction because more evidence must be presented to cross the conviction threshold. As a result, the number of false convictions falls, while the number of wrongful acquittals rises. It is no surprise that the burden of proof has been described as the most important element of trial.[43]

The governing burden of proof in criminal cases in common law jurisdictions is the beyond a reasonable doubt standard.[44] Significant intellectual effort has been dedicated to the question of what the standard actually means.[45] Scholars have employed different methodologies to present a numeric quantification of the burden.[46] Ultimately, however, factfinders are still left with open-ended and broad definitions that attempt to reflect the

41 Tatjana Hörnle, *Social Expectations in the Criminal Law: The "Reasonable Person" in a Comparative Perspective*, 11 NEW CRIM. L. REV. 1, 17 (2008).

42 *See, e.g.*, V.C. Ball, *The Moment of Truth: Probability Theory and Standards of Proof*, 14 VAND. L. REV. 807, 816 (1961); John Kaplan, *Decision Theory and the Factfinding Process*, 20 STAN. L. REV. 1065, 1073–77 (1968).

43 Larry Laudan, *Is It Finally Time to Put "Proof Beyond a Reasonable Doubt" out to Pasture?*, *in* THE ROUTLEDGE COMPANION TO PHILOSOPHY OF LAW 317, 317 (Andrei Marmor ed., 2012).

44 2 KENNETH S. BROUN, MCCORMICK ON EVIDENCE § 341, at 669 (7th ed. 2014). To be sure, at times the state may apply sanctions based on a more lenient decision threshold by turning to administrative proceedings. *See* Steadman v. SEC, 450 U.S. 91, 96–97 (1981).

45 *See, e.g.*, STEIN, *supra* note 4, at 172–78. *See generally* Jon O. Newman, *Beyond "Reasonable Doubt,"* 68 N.Y.U. L. REV. 979 (1993).

46 *See, e.g.*, Rita James Simon, *"Beyond a Reasonable Doubt"—An Experimental Attempt at Quantification*, 6 J. APPLIED BEHAV. SCI. 203, 204–08 (1970) (experimental data); Rita James Simon & Linda Mahan, *Quantifying Burdens of Proof: A View from the Bench, the Jury, and the*

elevated burden associated with the standard. For instance, the Federal Pattern Criminal Jury Instructions state that "[p]roof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt."[47] Notwithstanding the vagueness of such definitions, it is clear that the standard sets a very high threshold for convictions.

While the specific contours of the reasonable doubt standard might be elusive, it is undisputed that it is enshrined as a core feature of criminal trials. In the United States, the standard is viewed as part of the constitutional framework that is geared toward protecting innocent defendants from erroneous convictions.[48] As the Supreme Court noted, it is "important in our free society that every individual going about his ordinary affairs have confidence that his government cannot adjudge him guilty of a criminal offense without convincing a proper factfinder of his guilt with utmost certainty."[49] Consequently, despite a clear trend of harshening in American criminal jurisprudence,[50] it is still routinely assumed that this trend has surpassed the burden of proof and that convictions are reserved only for those whose guilt has been proven beyond a reasonable doubt.[51]

Historically, one of the main justifications for the beyond reasonable doubt standard builds on the asymmetric costs associated with type 1 and type 2 errors.[52] More specifically, courts and legal scholars presume that given the high cost of false convictions that includes a significant deadweight loss in the form of stigma and loss of freedom, it is better to set the decision threshold such that the risk of type 1 errors will be reduced.[53] As the leading treatise on evidence law states, "Society has judged that it is significantly worse for an innocent person to be found guilty of a crime than for a guilty

Classroom, 5 LAW & SOC'Y REV. 319, 325–29 (1971) (surveying data from responses of judges, jurors, and students to questionnaire items about burden of proof standards).

47 FED. JUDICIAL CTR., JUDICIAL CONFERENCE OF THE U.S., PATTERN CRIMINAL JURY INSTRUCTIONS, Instruction 21, at 28 (1987).

48 In the United States the Federal Constitution requires that all criminal convictions will meet this standard. *See In re* Winship, 397 U.S. 358, 364 (1970). Generally, despite differences regarding the burden of proof between Anglo-American legal systems and civil legal systems, both apply a similar standard in criminal litigation. *See* Kevin M. Clermont & Emily Sherwin, *A Comparative View of Standards of Proof*, 50 AM. J. COMP. L. 243, 246 (2002) (noting that "[i]n actual practice . . . the civil-law and common-law standards for criminal cases are likely equivalent").

49 *Winship*, 397 U.S. at 364.

50 *See* JAMES Q. WHITMAN, HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE 3–4 (2003) (reviewing the harshening of American criminal sanctions).

51 *See, e.g.*, 1 LAFAVE, *supra* note 39, § 1.8(a), at 77 (noting that "[i]t is a basic policy of Anglo-American criminal law that . . . the prosecution has the burden of proving beyond a reasonable doubt all the facts necessary to establish the defendant's guilt").

52 For a discussion of the different foundations of the beyond reasonable standard, see 2 BROUN, *supra* note 44, § 341, at 669–75.

53 *See, e.g.*, *Winship*, 397 U.S. at 363–64; RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 845–46 (9th ed., 2014).

person to go free."[54] This result is often contrasted with the burden of proof in civil litigation, which requires that the plaintiff only prove her case by a preponderance of the evidence.[55] According to the error-cost minimization framework, when the only thing on the table is the transfer of money from one party to the other, adopting the preponderance rule will minimize the error costs associated with allocating money to the wrong party.[56] In the context of criminal trials, however, sanctions entail a deadweight loss, and therefore a higher decision threshold should be used.[57]

Legal philosophers have further elaborated on this point and highlighted the potential justification for the beyond a reasonable doubt standard that extends further than error cost minimization. Scholars such as Laurence Tribe, Ronald Dworkin, and Alex Stein have underscored the importance of limiting convictions to cases in which guilt is proven beyond a reasonable doubt to the protection of fairness, equality, and human dignity.[58] Relatedly, Professor Antony Duff and his colleagues have tied the standard to the expressive function of criminal law and the act of condemnation.[59] According to their argument, for a court to have the right to condemn the defendant it must know that the defendant is guilty and that the judgment is true. Employing the elevated beyond a reasonable doubt standard helps facilitate this condition.

Lately, however, this normative analysis has come under significant scrutiny.[60] Focusing on incapacitation, Professor Larry Laudan has forcefully advocated relaxing the burden of proof, at least in cases involving violent repeat offenders.[61] According to Laudan's analysis of the available empirical data, each false acquittal entails the cost of enabling more than thirty-six

54 2 BROUN, *supra* note 44, § 341, at 669.

55 *Winship*, 397 U.S. at 371 (Harlan, J., concurring); POSNER, *supra* note 53, at 844–45.

56 *See* Richard A. Posner, *An Economic Approach to the Law of Evidence*, 51 STAN. L. REV. 1477, 1504 (1999). For an early exposition of this point, see David Kaye, *The Limits of the Preponderance of the Evidence Standard: Justifiably Naked Statistical Evidence and Multiple Causation*, 1982 AM. B. FOUND. RES. J. 487, 496–500.

57 *See* POSNER, *supra* note 53, at 845.

58 *See* RONALD DWORKIN, A MATTER OF PRINCIPLE 80–89 (1985); STEIN, *supra* note 4, at 175; Laurence H. Tribe, *Trial by Mathematics: Precision and Ritual in the Legal Process*, 84 HARV. L. REV. 1329, 1372–75 (1971) (tying the standard to human dignity); *see also* Rinat Kitai, *Protecting the Guilty*, 6 BUFF. CRIM. L. REV. 1163, 1165 (2003) (tying the standard to the concept of a social contract); Alec Walen, *Proof Beyond a Reasonable Doubt: A Balanced Retributive Account*, 76 LA. L. REV. 355, 426–34 (2015) (presenting a retributive argument in favor of the standard).

59 3 ANTONY DUFF ET AL., THE TRIAL ON TRIAL: TOWARDS A NORMATIVE THEORY OF THE CRIMINAL TRIAL 89–90 (2007).

60 For some contributions to this body of work, see, for example, Daniel Epps, *The Consequences of Error in Criminal Justice*, 128 HARV. L. REV. 1065 (2015); Louis Kaplow, *Burden of Proof*, 121 YALE L.J. 738, 762–72 (2012); Laudan, *supra* note 43.

61 *See* Larry Laudan, *The Rules of Trial, Political Morality, and the Costs of Error: Or, Is Proof Beyond a Reasonable Doubt Doing More Harm than Good?*, *in* 1 OXFORD STUDIES IN PHILOSOPHY OF LAW 195 (Leslie Green & Brian Leiter eds., 2011).

crimes (seven of which are violent).[62] Based on this, Laudan concludes that "in terms of costs and benefits, it would be better acquitting fewer guilty defendants than we now do, even if that were to mean falsely convicting more defendants than we now do."[63]

Perhaps even more important from a consequentialist perspective is the way in which the burden of proof influences ex ante incentives. Recently, Professor Louis Kaplow addressed this point and presented a model of the burden of proof geared toward optimizing social welfare.[64] The model suggests that the decision threshold should be set in order to balance between the benefits associated with deterring harmful behavior on one hand and the risks associated with chilling benign behavior on the other.[65] Kaplow's nuanced analysis is attuned to different aspects of the legal system that might interact with the burden of proof. Thus, he incorporates into his model issues such as the enforcement level, the magnitude of sanctions, and the accuracy of adjudication.[66] While it is difficult to articulate based on Kaplow's model what the burden of proof should be in all cases, the model shows that given the parameters of social welfare "the optimal evidence threshold could be much more demanding or notably more lax" than existing practices, depending on the specific context.[67] In other words, a uniform application of the beyond reasonable doubt standard across all criminal cases is incompatible with social welfare maximization.

Those writing from a retributive perspective have also suggested that it might be time to lower the governing burden of proof in criminal trials, although a distinction should be drawn here between positive and negative retribution. Positive retribution means that justice requires both punishing the guilty and not punishing the innocent. According to Professor Michael Moore, the offender's desert "gives society more than merely a right to punish culpable offenders. . . . For a retributivist, the moral culpability of an offender also gives society the *duty* to punish."[68] In its positive form, retributivism can be relatively permissive with respect to the proper balance between type 1 and type 2 errors. As positive retributivism views both errors as a type of injustice, it cannot rule out the punishing of some innocent defendants if that furthers the goal of punishing many guilty defendants. It is precisely this point that led Moore to recognize that a preponderance of the evidence could serve as the decision threshold in criminal cases.[69]

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62 *Id.* at 202.

63 *Id.* at 206. For a careful examination of Laudan's analysis explaining why it might over- or undervalue the costs of wrongful acquittals, see Epps, *supra* note 60, at 1090–92. Epps nonetheless concludes that Laudan's analysis is a useful tool to think about the costs of false acquittals. *Id.* at 1092.

64 *See* Kaplow, *supra* note 60.

65 *See id.* at 752–72.

66 *See id.* at 814–29.

67 *Id.* at 748.

68 Moore, *supra* note 27, at 182.

69 *See* MICHAEL MOORE, PLACING BLAME: A GENERAL THEORY OF THE CRIMINAL LAW 157 (1997).

Negative retribution means that it is impermissible to punish the innocent, yet there is no duty to punish the guilty. That is, "the retributive principle of just deserts is a necessary condition of punishment."[70] Given the lack of a duty to punish the guilty, the beyond reasonable doubt standard is arguably easier to defend according to a framework that does not view type 2 errors as an injustice. At a minimum, it would seem like negative retributivism would allow for a relatively elevated burden of proof in light of its treatment of punishing the innocent. That said, however, negative retributivism does not necessarily dictate the adoption of the beyond a reasonable doubt standard as the only permissible standard of proof in criminal adjudication. As Professor van den Haag notes, retributivism "is mute on how high [the burden] of proof ought to be."[71]

Professor Daniel Epps recently elaborated on this point and showed that relaxing the burden of proof is permissible within a framework of negative retributivism.[72] In his analysis, negative retributivism only dictates that it is impermissible for the state to punish the innocent *intentionally*. However, this is not the relevant proposition in the debate surrounding the standard of proof. In this context, the relevant question is what the permissible risk of punishing the innocent is. As Epps demonstrates, if one accepts the two very modest assumptions that (1) the state has some type of obligation to protect citizens from crime and (2) any penal system entails a risk of convicting the innocent, then negative retributivism must delegate the determination of the permissible risk of error to a consequentialist analysis. As he puts it, "[s]o long as it is not merely permissible but indeed obligatory to have a criminal justice system to protect citizens from crime, deontological principles like negative retributivism cannot tell us what precise level of risk to innocents we should tolerate; instead, we have to resort to nondeontological considerations."[73]

Note, however, that just as criminal law scholars assume that substantive rules should be governed exclusively by the moral theories that underlie them,[74] evidence scholars for the most part assume that the way to tinker with the distribution of type 1 and type 2 errors is by reforming the rules that govern trials.[75] After presenting his forceful argument against the beyond a reasonable doubt standard, Laudan concludes that "many existing rules of evidence and procedure (including the criminal standard of proof itself) . . . will themselves need to be drastically reconsidered in order to reflect a more

70 Joshua Dressler, *Hating Criminals: How Can Something that Feels So Good Be Wrong?*, 88 MICH. L. REV. 1448, 1451 (1990).

71 Jeffrey Reiman & Ernest van den Haag, *On the Common Saying that It Is Better that Ten Guilty Persons Escape Than that One Innocent Suffer: Pro and Con*, 7 SOC. PHIL. & POL'Y 226, 242–43 (1990). To clarify, this article is a colloquium to which both authors contributed. The quote in the text is from a part written by van den Haag.

72 *See* Epps, *supra* note 60, at 1140–42.

73 *Id.* at 1142.

74 *See supra* Section I.A.

75 *But see* Ronald J. Allen & Alex Stein, *Evidence, Probability, and the Burden of Proof*, 55 ARIZ. L. REV. 557, 588–93 (2013).

realistic appraisal of the costs of the errors that can and will occur."[76] Similarly, when Kaplow presents his model of the burden of proof, he takes the decision threshold to be the sole policy variable on the table,[77] and, following the same cue, Epps limits the policy discussion in his article to questions relating to criminal procedure.[78]

* * *

This Section has demonstrated that the current legal debate over the proper error rate in criminal trials reflects the traditional view regarding the division of labor between substantive criminal law and the law of evidence and procedure.[79] Within this framework, the normative discussion surrounding prohibitions and penalties is conducted solely in the domain of the primary moral considerations underlying criminal law. The realities of fact finding and evidentiary uncertainty are delegated to the rules of procedure and evidence, which are vested with the task of assuring accurate decision-making. However, it is well established that procedure and substance are intertwined,[80] and the literature has eroded this clear distinction between substance and process in the realm of criminal law.[81] According to this line of thought, the criminal process should be viewed as one unit governed by a unified normative theory. Thus, the rules of evidence and procedure should not only focus on trials but also consider their influence on the behavior that the law is regulating.[82] For example, the rules of evidence might mediate between deterrence and retribution as the guiding principles of criminal law.[83] Similarly, this approach suggests that the substantive rules of criminal law be analyzed in light of their effect on the criminal process, as parties will routinely behave in light of those rules.[84] For instance, the rule locating the point at which criminal liability for attempts attaches will influence the decision of the police to intervene in a criminal plot.[85] Notwithstanding the

76 Laudan, *supra* note 61, at 197.

77 *See* Kaplow, *supra* note 60, at 752–72.

78 Epps, *supra* note 60, at 1143–50.

79 *See, e.g.*, Guttel & Teichman, *supra* note 12, at 609–10 (highlighting the perceived division of labor within law).

80 *See* CHAMBERLAYNE, *supra* note 15, § 171; LLEWELLYN, *supra* note 15, at 82–83.

81 For a review, see Eyal Zamir, Ilana Ritov & Doron Teichman, *Seeing Is Believing: The Anti-Inference Bias*, 89 IND. L.J. 195, 225 (2014). Recent contributions to this body of work include: Bierschbach & Stein, *supra* note 12; Guttel & Teichman, *supra* note 12; Parchomovsky & Stein, *supra* note 12.

82 *See, e.g.*, Kaplow, *supra* note 60 (analyzing, inter alia, the effect of burden of proof on primary activities); Chris William Sanchirico, *A Primary-Activity Approach to Proof Burdens*, 37 J. LEGAL STUD. 273, 280–86 (2008) (same).

83 *See* Bierschbach & Stein, *supra* note 12.

84 *See* Parchomovsky & Stein, *supra* note 12, at 521 ("[R]ational actors will always interpret the dictates of our substantive law through an evidentiary gloss.").

85 *Id.* at 520–21. Additionally, sanctions can be calibrated in order to influence the decisions of factfinders and reduce the probability of wrongful convictions. *See* Guttel & Teichman, *supra* note 12, at 607–10.

growing body of work in this area, criminal law scholars have yet to introduce an overall theory of criminal prohibitions and the distribution of punishments that highlights the evidentiary role of criminal law. The next Part addresses this void.

II. A Theory of Evidentiary Uncertainty and Criminal Liability

This Part outlines the main proposition of this Article—that criminal law is often structured to create a correlation between the degree of certainty that the defendant behaved wrongfully and the magnitude of the penalty levied against him. The Part opens by examining the advantages of a penal regime that calibrates sanctions in proportion to the degree of certainty of guilt, even when guilt is not proven beyond a reasonable doubt. That done, the Part argues that the law can create such a calibrated penal regime by designing criminal offenses that incorporate evidentiary considerations. Finally, the Part addresses the main moral problem that the proposed regime raises—the potential intentional infliction of punishment on the innocent—and shows that this concern does not pose an insurmountable obstacle.

A. Evidentiary Graded Criminal Sanctions

This Section examines how sanctions should be distributed in a penal system in which the epistemic space within which convictions are permissible is enlarged due to a reduction in the burden of proof. As the analysis shows, in such a regime it might be desirable to distribute sanctions in proportion to the amount of evidence presented at trial. Within such a framework, as the degree of confidence regarding the defendant's wrongdoing increases, so does the sanction applied to him.

Professor Henrik Lando laid down the case for evidentiary graded sanctions using a simple model.[86] The gist of Lando's argument is that there is a positive correlation between deterrence and the certainty of guilt (i.e., punishing those with a higher probability of having committed the crime will generate greater deterrence).[87] The intuition underlying this argument is that as punishing those whose guilt is more certain will generate more deterrence, it is prudent to target more sanctioning resources towards individuals whose guilt has been proven to a higher degree.[88] As was later highlighted

86 Henrik Lando, *The Size of the Sanction Should Depend on the Weight of the Evidence*, 1 Rev. L. & Econ. 277, 279–81 (2005).

87 *See id.* at 282 (noting that sanctions may deter more when applied to defendants who are very likely guilty).

88 A simple numeric might help clarify the point. Assume that there are two types of defendants with respect to the degree of certainty associated with their case—Type *A* for whom guilt is proven to a degree of 95% and Type *B* for whom guilt is only proven to a degree of 90%—and that each defendant is equally likely to be one of these types. Assuming the total amount of sanctions is ten years of incarceration, then the expected sanction generated by distributing punishment equally between two defendants is 4.625 (0.5 x 5 x 0.95 + 0.5 x 5 x 0.90), while distributing in a 7:3 ratio towards Type *A* defendants can increase the expected sanction to 4.675 at no cost (0.5 x 7 x 0.95 + 0.5 x 3 x 0.90).

by the literature, the problem with this argument is that it assumes sanctions should be distributed among all defendants and ignores the possibility of concentrating sanctioning resources only on those whose guilt has been proven at the highest level.[89] In fact, it can be shown that such a sanctioning regime, which in effect mirrors the practice of punishing only defendants whose guilt has been proven beyond a reasonable doubt, can elevate expected sanctions.[90]

Building on Lando's initial point, Fisher elaborated on the deterrence advantages associated with evidentiary graded punishments.[91] Her key point relates to offenders' risk preferences. As she states, given the fact that the last year of a prison term generally causes less disutility than the first year because offenders slowly adapt to the harsh living environment, potential offenders are expected to exhibit risk-seeking behavior.[92] This suggests that, holding expected sanctions constant, a sanctioning regime based on lower sanctions applied with a higher probability will generate greater deterrence.[93] Therefore, Fisher argues, an evidentiary graded penal regime that entails lower sanctions coupled with a higher probability of punishment will generate more deterrence.[94]

One should notice, however, that this argument only holds with respect to incarceration. Once the analysis attempts to incorporate milder sanctions such as fines into the model (and incorporating such sanctions into the model is a necessity in the context of cases involving high evidentiary uncertainty), then the assumption of risk-seeking behavior no longer holds since this assumption builds on the unique way in which offenders experience prison time. When dealing with monetary sanctions, defendants are expected to exhibit risk aversion because the utility people derive from money tends to diminish at the margin.[95] If this is the case, then a high-sanction, low-probability regime might actually generate more deterrence, as potential criminals will be deterred by the risk created within this high-stakes gamble.[96] Thus, to support a general theory of evidentiary graded sanctions, one must tie the theory to considerations that go beyond the narrow point regarding the way in which people perceive prison.

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89 *See* Talia Fisher, *Constitutionalism and the Criminal Law: Rethinking Criminal Trial Bifurcation*, 61 U. TORONTO L.J. 811, 822 (2011).

90 In terms of the preceding example, this implies directing all sanctioning resources towards Type *A* defendants. Such a regime would further elevate the expected sanction to 4.75 (0.5 x 10 x 0.95 + 0.5 x 0 x 0.90). *See id.*

91 *See id.* at 819–30.

92 *See id.* at 823–27.

93 *See id.* at 814.

94 *See id.* The insight that criminals might exhibit risk-seeking behavior because of the unique way in which prison time is experienced and the policy implications stemming from it were previously explored in Alon Harel & Uzi Segal, *Criminal Law and Behavioral Law and Economics: Observations on the Neglected Role of Uncertainty in Deterring Crime*, 1 AM. L. & ECON. REV. 276 (1999).

95 *See* ANDREU MAS-COLELL ET AL., MICROECONOMIC THEORY 186 (1995).

96 *See* SHAVELL, *supra* note 20, at 480–81 (analyzing risk preferences and deterrence).

There are three distinct arguments that offer a general justification for the grading of all sanctions based on the amount of evidence presented. One explanation stems from the risk of chilling benign behavior. As noted above, the relationship between the burden of proof, deterring wrongful behavior, and chilling benign behavior has been discussed at length by Kaplow.[97] The key factor in Kaplow's analysis is that the burden of proof influences peoples' ex ante decisions regarding how to behave. More specifically, as the burden is reduced, wrongful behavior is deterred because the probability of legal liability is increased. At the same time, however, reducing the burden also entails more chilling of benign behavior for the same reason. The burden of proof is thus bestowed with the task of balancing between these competing policy goals.

Given this complex relationship, it is not possible to render a definitive answer regarding the optimal calibration between the burden of proof and the level of sanctions.[98] Nonetheless, assuming that (1) there is a positive relationship between lowering the burden of proof and chilling, and (2) there is a positive relationship between the level of sanctions and chilling, then lower sanctions might often be an effective way to offset the costs of reducing the burden of proof. To be sure, however, this reduction in sanctions will also lower deterrence, and therefore might not always be optimal. Yet at a minimum, the analysis does show that calibrating sanctions to the amount of evidence presented could sometimes be desirable.[99]

Another explanation stems from situations involving systematic proof problems.[100] In this regard, criminal law could learn from the insights of the literature examining the pros and cons of basing civil liability on a preponderance of the evidence. Scholars advocating the use of the preponderance standard have shown its ability to minimize the ex post costs of erroneous allocation of liability.[101] Researchers writing from an economic perspective later highlighted that, notwithstanding this important benefit, the rule also creates problematic incentives ex ante.[102] More specifically, this line of thought has shown that in situations in which the defendant's liability systematically cannot be proven by a preponderance of the evidence, the effective legal regime entails zero liability.[103] Consequently, the law will not deter defendants in such settings, and their behavior will deviate from optimality.

97 *See generally* Kaplow, *supra* note 60.

98 *Id.* at 819–24.

99 *Id.*

100 *See* Fisher, *supra* note 89, at 827–30.

101 *See* Kaye, *supra* note 56.

102 *See* Ariel Porat, *Misalignments in Tort Law*, 121 Yale L.J. 82, 108–15 (2011); Steven Shavell, *Uncertainty over Causation and the Determination of Civil Liability*, 28 J.L. & Econ. 587 (1985). For a comprehensive analysis of the topic, see Ariel Porat & Alex Stein, Tort Liability Under Uncertainty (2001).

103 The paradigmatic example of this issue in civil litigation is causation. *See* Shavell, *supra* note 102, at 587–88.

Based on this insight, Professor Steven Shavell has argued that a probabilistic regime is desirable in such settings.[104]

Similarly, there are situations in the criminal arena in which defendants know ex ante that the prosecution faces systematic proof problems. These situations can stem from numerous factors. One key issue is the substantive norm, which might inherently generate reasonable doubt. When the governing norm deals with behavior that is situated on the border of legitimate activity, such as bribery (versus gift giving or campaign contributions) or extortion (versus aggressive business practices), it might give rise to systematic underdeterrence. Sophisticated offenders who strategically plan behavior that is governed by such norms will often be able to generate sufficient evidentiary ambiguity to annul any prosecution. Another factor in this regard is the ex post behavior of the offender. Some offenders know they are capable of creating significant hurdles to the case mounted against them ex post. These hurdles can be both legitimate (by, for example, investing vast resources in legal defenses) and illegitimate (by, for example, eliminating a key witness). Either way, offenders capable of creating such hurdles will view the effective legal sanction as zero. Finally, different biases of the fact-finding process might also influence ex ante estimates of potential criminal liability. A member of a group who is systematically favored by jurors (e.g., a white offender) will know that by simply taking the stand he will be able to generate sufficient doubt and avoid a conviction.[105] Of course, when these factors work in conjunction, their force is significantly bolstered. A well-educated and wealthy banker working for a powerful financial institution who engages in borderline business activity might function under the assumption that personal criminal liability is simply not in play in her case.[106]

When offenders assume (even wrongfully) ex ante that there are insurmountable obstacles to proving their guilt beyond a reasonable doubt, they will view criminal liability as de facto absent and will not be deterred. This effect is an attribute of the all-or-nothing property of the threshold model and cannot be overcome by adjusting the size of the sanction given the fact that the offender assumes the probability of the application of the sanction under the beyond a reasonable doubt standard is zero. To overcome this problem, criminal law might wish to base convictions on a sliding scale of proof. By doing so, it will manage to generate at least some deterrence for offenders who are undeterrable within a framework that limits sanctions only to those whose guilt has been proven beyond a reasonable doubt.

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104 *Id.* at 589.

105 For a review on the way in which racial biases influence the entire criminal process, see Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1135–52 (2012).

106 The recent financial crisis and the lack of prosecutions after it might serve as a case in point. *See* Jed S. Rakoff, *The Financial Crisis: Why Have No High-Level Executives Been Prosecuted?*, N.Y. REV. BOOKS (Jan. 9, 2014), http://www.nybooks.com/articles/2014/01/09/financial-crisis-why-no-executive-prosecutions/ ("[N]ot a single high-level executive has been successfully prosecuted in connection with the recent financial crisis.").

While the two preceding explanations can illuminate many cases, their application is still not general. In some contexts, the risk of chilling benign behavior is not central to the law, as is the case with many violent crimes. Additionally, the concern over systematic proof problems does not always arise, as we are not all wealthy bankers or mob bosses. A more general way in which one can justify a probabilistic penal regime is to relax the assumption of rationality and incorporate behavioral insights into the framework. More specifically, decision-making theory draws a distinction between making decisions based on *description* and making decisions based on *experience*.[107] Whereas the former alludes to situations in which the decisionmaker makes a choice after certain risky prospects were introduced to her, the latter alludes to situations in which the decisionmaker learns of the underlying payoff structure by making active choices. In such a case, decisions are made based on a learning process, as people determine from their past choices what their future ones should be.

In the paradigmatic experience experiment, participants are asked to choose between two unmarked keys, and after making their decision they receive feedback regarding the payoff associated with the key they selected and the payoff associated with the other key.[108] This decision is then repeated, and people's choices over time can be documented. Importantly, while people are informed that each key reflects a distinct distribution of payoffs, they are not informed what this distribution actually is. The results of a wide body of research dealing with experience-based decisions suggest that when people face low probability events in a repeat setting they tend to underestimate those rare events. Generally, people behave as if they believe that "it won't happen to me."[109]

Criminal behavior usually does not reflect a one-shot decision in which the potential offender is informed beforehand of the risks and benefits associated with crime. When potential offenders decide to commit a crime, they often have little knowledge about the probability of detection (and perhaps even about the sanction). Rather, these offenders face an ongoing process in which both the costs and benefits of crime are slowly learned. Given this pattern of decisions, the finding that people will underestimate rare events has significant implications for the design of optimal criminal sanctions. It suggests that as a general matter—both with respect to nonmonetary *and* monetary sanctions—potential criminals will exhibit risk-seeking behavior and will tend to discount the probability of sanctioning even further when the probability of sanctions is low.

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107 *See* Ralph Hertwig et al., *Decisions from Experience and the Effect of Rare Events in Risky Choice*, 15 PSYCHOL. SCI. 534 (2004); Ralph Hertwig & Ido Erev, *The Description–Experience Gap in Risky Choice*, 13 TRENDS COGNITIVE SCI. 517 (2009); Ralph Hertwig & Timothy J. Pleskac, *Decisions from Experience: Why Small Samples?*, 115 COGNITION 225 (2010).

108 *See* Ido Erev & Ernan Haruvy, *Learning and the Economics of Small Decisions*, *in* THE HANDBOOK OF EXPERIMENTAL ECONOMICS (John H. Kagel & Alvin E. Roth eds., 2017).

109 *Id.*

The existing literature on offender behavior and the certainty of sanctions tends to revolve around the balance between enforcement efforts and the severity of sanctions.[110] The main policy recommendation derived from this literature is a need to shift budgets to policing to increase the probability of apprehension.[111] However, additional policing is not the only way through which the legal system can increase the probability of punishment. The evidentiary decision threshold can achieve the same goal.[112] By enacting evidentiary offenses, policymakers can create a penal regime in which moderate sanctions are applied with greater frequency.

Regarding the size of the sanction that ought to be employed, behavioral findings suggest that when enforcement is sufficiently frequent, low sanctions can suffice to properly incentivize individuals. Based on this insight, a review recently published in the Proceedings of the National Academy of Science concluded that "a gentle rule enforcement policy that employs low punishments with high probability can be very effective."[113] This conclusion is in line with the bulk of the criminology literature that suggests the certainty of sanctions has a greater effect on behavior than does their magnitude.[114]

In summary, policy considerations suggest that the law should strive to adopt a continuous penal regime that distributes penalties in proportion to evidentiary certainty and that this penal regime should transcend into the epistemic space that lies below the beyond a reasonable doubt threshold. The next Section explores how the substantive rules of criminal law can achieve this goal.

B. Evidentiary Grading Through the Substantive Rules of Criminal Law

As noted above, the current discussion of error tradeoffs in criminal adjudication tends to focus on procedure,[115] and takes prohibitions as exogenously given and not as a policy variable that influences the accuracy of the criminal justice system. By doing so, it overlooks the interaction between the content of substantive legal rules and the burden of proof. In reality, policymakers can adjust the balance between type 1 and type 2 errors through the design of substantive prohibitions. By adding or removing objective elements to a crime and by relaxing or enhancing the mental state associated with the crime, the state can make the prosecution's case harder or easier to prove. This, in turn, will influence the number of false acquittals and false convictions. Furthermore, the punishment attached to these evidentiary crimes can be set lower than the punishment attached to the primary crime

110 *See, e.g.*, Steven N. Durlauf & Daniel S. Nagin, *Imprisonment and Crime: Can Both Be Reduced?*, 10 CRIMINOLOGY & PUB. POL'Y 13 (2011).

111 *Id.* at 38.

112 *See* Fisher, *supra* note 89, at 824–25.

113 Ido Erev & Alvin E. Roth, *Maximization, Learning, and Economic Behavior*, 111 PNAS 10818, 10822 (2014).

114 *See, e.g.*, Daniel S. Nagin, *Deterrence: A Review of the Evidence by a Criminologist for Economists*, 5 ANN. REV. ECONOMICS 83, 101 (2013).

115 *See supra* Section I.B.

they aim to deal with to account for the added evidentiary uncertainty associated with them. The emerging picture is of a de facto evidentiary graded penal regime. Defendants whose guilt can be proven beyond a reasonable doubt are subject to the full punishment attached to the original crime, while defendants whose guilt is more difficult to prove are convicted of the lesser crime and are subject to a milder penalty.

Overlooking the role of substantive rules is not a minor omission. In the realm of criminal adjudication, the substantive track is the main path through which type 1 errors and type 2 errors can be balanced. Given the entrenched constitutional status of the beyond a reasonable doubt standard,[116] abandoning it explicitly is not a viable policy option. Furthermore, the web of constitutional rights that govern other aspects of the criminal process makes it extremely difficult to achieve this goal by alternative procedural means. While allowing the retrial of defendants who were wrongfully acquitted will reduce the number of false negatives, for example, this tactic will also be deemed unconstitutional in light of the prohibition against double jeopardy.[117] The constitutional review of substantive rules, on the other hand, is relatively lax.[118] For several decades, the Supreme Court has consistently refused to strike down criminal legislation that bears no substantial relationship to injury to the public.[119] In light of the difficulty of relaxing the burden of proof directly and the liberal regulation of substantive legal rules, the latter is the main tool with which the accuracy of criminal trials can be adjusted.[120]

To be sure, the legal literature has documented several examples of evidentiary considerations playing a role in penal decisions.[121] Furthermore, these cases often reflect an attempt to grade penalties in accordance with the amount of evidence available against the defendant. One group of such examples can be found in the criminal process. For one, since plea bargains are negotiated in the shadow of the expected outcomes of trials, the deals that are struck between prosecutors and defendants will incorporate all evi-

116 *See supra* notes 48–51 and accompanying text.

117 *See* U.S. CONST. amend. V.

118 *See* Ariel L. Bendor & Hadar Dancig-Rosenberg, *Unconstitutional Criminalization*, 19 NEW CRIM. L. REV. 171, 172 (2016) ("[T]he Supreme Court has not constitutionalized substantive criminal law.").

119 *See* 1 LAFAVE, *supra* note 39, § 3.3(a), at 197–200. To be sure, some state courts have taken a more proactive stance on this point and invalidated such statutes. *Id.* at 200–07. A similar picture is true under European law. *See* Victor Tadros, *Rethinking the Presumption of Innocence*, 1 CRIM. L. & PHIL. 193, 193–94 (2006) (highlighting the different status of substantive and procedural challenges under the European Convention on Human Rights).

120 The current constitutional state of affairs is not necessarily desirable. For a critique of the distinction between procedure and substance on this point, see Jeffries & Stephan, *supra* note 12, at 1344–53.

121 *See, e.g.*, Fisher, *supra* note 10, at 838–54 (reviewing probabilistic policies under prevailing law).

dentiary uncertainty.[122] Holding everything else equal, a defendant facing a ninety-eight percent chance of conviction will agree to a higher penalty than a defendant facing a seventy-five percent chance of conviction, thus creating a correlation between degree of proof and the severity of the punishment.[123] Similarly, many of the adverse consequences of the criminal process are incurred based on a decision standard that is lower than the beyond a reasonable doubt standard. For example, arrests are governed by a far more lenient standard—probable cause—thus allowing more type 1 errors in the case of arrests.[124] Therefore, defendants with little evidence mounted against them might face a lenient sanction in the form of an arrest before the case against them is dismissed. Relatedly, nonlegal sanctions applied outside the realm of the law might employ a lower decision threshold. For instance, defendants who are acquitted (or even not put to trial) are still subject to an array of adverse actions by potential employers and landlords who use arrest records and not criminal records.[125] As a result, these individuals might face sanctions even if the evidence against them is insufficient to support a conviction.[126]

An additional example comes from the role that past convictions play in sentencing. Criminal history is a main factor in determining the severity of punishment.[127] All else being equal, repeat offenders are subject to harsher penalties than criminals who committed the identical crime for the first time.[128] "Despite the prevalence of escalating penalties for recidivists, legal scholarship—both deontological and consequentialist—has struggled to provide a normative theory that justifies this practice,"[129] and to date one of the leading explanations is evidentiary. As Ariel Rubinstein has shown, enhancing the sanctions of repeat offenders is a rational way to deal with evidentiary

122 For an early exposition of this idea, see Frank H. Easterbrook, *Criminal Procedure as a Market System*, 12 J. LEGAL STUD. 289, 309–17 (1983).

123 *Id.* at 314 tbl.1.

124 JOSHUA DRESSLER & GEORGE C. THOMAS III, CRIMINAL PROCEDURE: PRINCIPLES, POLICIES AND PERSPECTIVES 151 (5th ed. 2013).

125 *See* Samuel Bray, Comment, *Not Proven: Introducing a Third Verdict*, 72 U. CHI. L. REV. 1299, 1309–11 (2005); Epps, *supra* note 60, at 1101–02.

126 For a review of the adverse consequences endured by innocent defendants, see Andrew D. Leipold, *The Problem of the Innocent, Acquitted Defendant*, 94 NW. U. L. REV. 1297, 1304–11 (2000).

127 *See* BUREAU OF JUSTICE ASSISTANCE, U.S. DEP'T OF JUSTICE, NATIONAL ASSESSMENT OF STRUCTURED SENTENCING 67 (1996) ("[P]rior record, is the second major consideration in determining guideline sentences.").

128 From a legislative perspective this is often achieved through state guidelines, *see* MICHAEL TONRY, THE FUTURE OF IMPRISONMENT 97 (2004), or through specific statutory enhancements that target recidivists, *see* JOHN CLARK ET AL., U.S. DEP'T OF JUSTICE, "THREE STRIKES AND YOU'RE OUT": A REVIEW OF STATE LEGISLATION 1, 6 (1997).

129 Guttel & Teichman, *supra* note 12, at 634. For a critical review of the literature, see *id.* at 634–35.

uncertainty.[130] According to this framework, as the defendant accumulates a lengthier criminal record, factfinders can be more certain that he is truly guilty and can therefore apply the sanction the defendant truly deserves.

The informal realities that operate within the criminal justice system are another source of evidentiary gradation. More specifically, judicial behavior might inadvertently foster a connection between evidentiary uncertainty and the size of the sanctions defendants are subject to. As a large body of psychological literature has shown, despite the fact that adjudicators are required to apply the beyond a reasonable doubt standard in all criminal cases, in practice, decisionmakers tend to apply a higher decision threshold in cases involving more severe sanctions.[131] This finding, in turn, suggests that defendants facing low sanctions also face a diminished burden of proof and thus might be punished even when their guilt has not been proven beyond a reasonable doubt.

Finally, at times criminal law itself deals directly with evidentiary uncertainty. The two main tools through which it operates on this front are presumptions and affirmative defenses. Presumptions enable adjudicators to infer conclusions from a given set of facts but for the most part do not alter the decision threshold.[132] Affirmative defenses may alter the decision threshold and allow the prosecution to secure convictions when less convincing evidence is presented.[133] However, these tools are relatively rare and cannot be viewed as a systematic treatment of the burden of proof in criminal trials.[134] Furthermore, these tools do not grade sanctions in proportion to the evidence presented, as once the presumption is triggered it is assumed that proof beyond a reasonable doubt was presented. For example, a presumption that any gift given by a government contractor to a civil servant is corrupt will certainly lower the burden of proof,[135] but it will not distinguish between cases in which a corrupt intent was proven beyond a reasonable doubt and cases in which such an intent was proven to a lesser degree.

While all these mechanisms are in line with the evidentiary theory of criminal law presented in this Article and highlight the scope of the phenom-

130 *See* Ariel Rubinstein, *An Optimal Conviction Policy for Offenses that May Have Been Committed by Accident*, *in* APPLIED GAME THEORY 406 (S.J. Brams et al. eds., 1979); Ariel Rubinstein, *On an Anomaly of the Deterrent Effect of Punishment*, 6 ECON. LETTERS 89 (1980).

131 For a review of this literature, see Guttel & Teichman, *supra* note 12, at 601–07.

132 *See* 2 BROUN, *supra* note 44, § 342, at 675–81. Presumptions merely state that deducing a reasonable conclusion is permissible, an act that could arguably be done with or without them. That said, in practice, such presumptions are expected to be of importance given people's reluctance to infer liability from indirect evidence. *See* Zamir, Ritov & Teichman, *supra* note 81, at 224–25.

133 *See* 2 BROUN, *supra* note 44, § 337, at 648.

134 *See* Barton L. Ingraham, Essay, *The Right of Silence, the Presumption of Innocence, the Burden of Proof, and a Modest Proposal: A Reply to O'Reilly*, 86 J. CRIM. L. & CRIMINOLOGY 559, 563 n.7 (1996).

135 *See* R.A. Duff, *Strict Liability, Legal Presumptions, and the Presumption of Innocence*, *in* APPRAISING STRICT LIABILITY 125, 130 (A.P. Simester ed., 2005) (discussing the Prevention of Corruption Act of 1916).

enon that this Article deals with, the focus here is distinct. The evidentiary theory of punishment focuses on the *definition of crimes*—the legal borderline between permissible and impermissible behavior—and argues that this borderline is often drawn such that it will lower the number of false acquittals. By going down the substantive path, legislatures can effectively relax the beyond a reasonable doubt standard and convict people whose guilt has not been proven at such a high level.

While the proposition presented in this Section might seem radical, it is worth noting that in many instances the evidentiary theory of punishment and theories of punishment that focus on blameworthiness will lead to similar conclusions. Often, behavior that generates less evidence of guilt is associated with less blameworthiness, and therefore both theories will assign this behavior a relatively low sanction. The key point of contention between the two theories emerges with respect to the minimal threshold for criminalization. The evidentiary theory might justify the enactment of crimes that, when viewed in isolation, do not seem to entail sufficient blameworthiness to justify criminalization. However, if viewed in an evidentiary context—as a means to apply a discounted sanction to individuals who probably behaved in a blameworthy fashion, their enactment can be defended. Taking the path of designing evidentiary crime does entail a serious moral problem—the risk of intentionally punishing the innocent. The next Section will examine this issue more closely.

C. The Problem of Intentionally Punishing the Innocent

As we have seen, the substantive definition of crimes might serve to help balance between type 1 and type 2 errors and establish a penal regime that distributes punishments in proportion to the level of proof. Yet one thorn could raise a serious concern regarding the moral acceptability of this penal scheme—the possibility of intentionally punishing the innocent. This subsection will deal with this objection and demonstrate that evidentiary tailored crimes might be a permissible way to deal with evidentiary uncertainty.

Adjusting the accuracy of criminal trials directly via the decision threshold or indirectly via the array of tools reviewed above functions exclusively in the realm of the risk of error.[136] As a result, wrongful convictions that stem from such mechanisms are by definition *unintended* outcomes. An adjudicator convicting under a reduced burden of proof is aware of the elevated risk of a false positive, but when condemning the defendant she does not positively know that punishment is unwarranted. On the contrary, she believes that the evidentiary threshold has been met and that the defendant deserves to be punished. When the burden of proof is set by substantive rules, however, the adjudicator might find herself in a position where she is compelled to convict the defendant even though she knows the defendant is not culpable. An adjudicator who knows the probabilistic premise of the offense does not hold in a particular case and nonetheless chooses to convict the defen-

136 *See supra* notes 121–135 and accompanying text.

dant makes a conscious decision to punish someone who does not deserve it. Such a ruling would seem to violate the prohibition against knowingly punishing the innocent.[137]

As a practical matter, the legal system can often alleviate this problem by creating pathways that prevent convictions in cases in which guilt is absent. These pathways allow adjudicators to focus on the facts of the specific case and refrain from applying the evidentiary offense to defendants likely to be innocent. If a crime is premised on a correlation between an act and wrongful behavior and enables an acquittal if this correlation is shown not to hold, then the remaining wrongful convictions are unintentional because they continue to be premised on the assumed correlation. To the extent these doctrinal pathways can deal with all cases in which innocence is clear, they can eliminate the problem of knowingly punishing the innocent. Concrete examples of such doctrinal tools and the way in which they operate will be detailed in the next Part, which reviews the way in which the evidentiary theory functions in practice in greater detail.[138]

If the pathways created by the legal system to avoid knowingly punishing the innocent fail to achieve this goal, we are left with a deep normative dilemma, which will be described here. Within a utilitarian framework, knowingly punishing the innocent is generally undesirable.[139] A practice of framing an innocent person for the sake of general deterrence—a practice that has been suggested to be required by utilitarianism by its opponents[140]—probably violates the tenets of utilitarianism.[141] Such a practice could lead to corruption because of the wide discretion the enforcing official holds, and could also dilute the deterrent effect of the law as people learn that a conviction does not mean an actual finding of guilt.[142] Yet because within a utilitarian framework there is no principled prohibition against knowingly punishing the innocent, utilitarianism does not rule out a criminal offense that could promote social welfare at the cost of occasionally bringing about the conviction of a defendant known to be innocent. Such an offense does not prompt special concerns over corruption because its application is general, and the adjustment such an offense brings to the burden of proof could bolster deterrence rather than undermine it.[143]

From a retributive perspective, on the other hand, things are trickier. If the retributive prohibition against knowingly punishing the innocent is an absolute constraint that must be adhered to at any cost, then it is impermissible to include offenses that will lead adjudicators to knowingly convict inno-

137 *See* Larry Alexander, *Retributivism and the Inadvertent Punishment of the Innocent*, 2 LAW & PHIL. 233, 244–46 (1983).

138 *See, e.g.*, *infra* notes 215–217 and accompanying text (examining the role of the good faith defense in the context of strict liability offenses).

139 *See* Epps, *supra* note 60, at 1096.

140 E.F. CARRITT, ETHICAL AND POLITICAL THINKING 65 (1947).

141 *See* John Rawls, *Two Concepts of Rules*, 64 PHIL. REV. 3, 10–12 (1955).

142 *See id.*

143 *See supra* notes 86–114 and accompanying text.

cent defendants. However, if the retributive prohibition against knowingly punishing the innocent is an all-things-considered type of prohibition, then retributivists will need to examine it in light of the doctrinal reality that the burden of proof can only be adjusted via the substantive norms of criminal law.[144] The absolute option allows retributivists to hold on to the view that considerations of proof should not supersede substance in the realm of criminal law but at the cost of adopting the position that consequences do not matter. It is beyond the scope of this Article to highlight the pitfalls associated with this position, yet most modern philosophers agree it is untrue that it is better "the whole people should perish"[145] than that injustice be done.[146] The all-things-considered option requires retributivists to do something they have been reluctant to do thus far—to develop a theory of the burden of proof in criminal adjudication and to delineate the relationship between the burden of proof and the structure of substantive criminal law.[147]

An alternative for retributivists is to view behavior that creates significant evidentiary uncertainty with respect to criminal liability as an independent wrong. According to this line of thought, the state may rationally choose to prohibit behaviors that are correlated with criminal conduct as part of its effort to distinguish between culpable and nonculpable behaviors.[148] More specifically, such behaviors entail at least two distinct evils. First, they hinder the work of the criminal justice system because the system has to dedicate resources to ascertain their nature. A policeperson who detects an individual behaving in a manner that is highly indicative of a crime is forced to focus his attention on this individual to ascertain the nature of this behavior. This, in turn, impedes efforts of the criminal justice system to reduce crime. Second, as people come to respect evidentiary crimes and adhere to them, a separat-

144 *See supra* notes 116–120 and accompanying text.

145 *See* IMMANUEL KANT, THE METAPHYSICAL ELEMENTS OF JUSTICE 138 (J. Ladd trans., Hackett Publ'g Co., 2d ed. 1999) (1797).

146 *See, e.g.*, Eyal Zamir & Barak Medina, *Law, Morality, and Economics: Integrating Moral Constraints with Economic Analysis of Law*, 96 CALIF. L. REV. 323, 326 (2008) ("[P]revailing deontological theories are *moderate* rather than *absolutist*.").

147 Larry Alexander and Kimberly Kessler Ferzan's analysis can serve as case in point. After presenting their comprehensive theory of substantive criminal law, they dedicate one paragraph at the back end of their book to dealing with the burden of proof. In this brief discussion, they simply note that "one needs richer theory than we have developed here to account for how this trade-off [between type 1 and type 2 errors] can be made and thus to assess whether the reasonable doubt standard strikes the correct balance." LARRY ALEXANDER & KIMBERLY KESSLER FERZAN, CRIME AND CULPABILITY: A THEORY OF CRIMINAL LAW 323 (2009); *see also* Bierschbach & Stein, *supra* note 12, at 1207 (noting that retributivists have "little to say about the precise evidentiary rules that should govern the imposition of liability and punishment"); Epps, *supra* note 60, at 1137 (noting that Dworkin and other legal philosophers have not been "able to articulate precisely *how much* we're supposed to prefer errors of nonpunishment to errors of punishment").

148 Interestingly, tort law has long since recognized that evidentiary harm may generate a duty on behalf of the tortfeasor to compensate the victim. For an analysis of the concept of evidentiary harms in torts, see generally Ariel Porat & Alex Stein, *Liability for Uncertainty: Making Evidential Damage Actionable*, 18 CARDOZO L. REV. 1891 (1997).

ing equilibrium will slowly emerge. Those who do not have a culpable intent will refrain from violating the evidentiary crimes, and the remaining few that engage in suspicious behavior are highly likely to be truly culpable. Again, members of the community who violate laws that set out to create this separating equilibrium are blameworthy, as their behavior undermines a legitimate state effort to combat crime.

Two comments should be made with respect to the punishment deserved by those who violate evidentiary crimes. The evidentiary harm is by definition smaller than the actual harm it sets out to prevent. In this regard, the degree of wrongfulness that can be attributed to those who violate evidentiary crimes is relatively lower than the wrongfulness involved in core crimes such as murder, rape, and theft. Consequently, the sanctions attached to evidentiary prohibitions should be less severe than those attached to core crimes. However, as the separating equilibrium created by evidentiary crimes is strengthened, the ability to deduce actual culpable intent increases. Hence, in cases involving a well-established separating equilibrium, the sanctions that may be applied to evidentiary crimes might grow as the underlying theory of punishment shifts from evidentiary harm to the high probability of actual wrongdoing.

III. Evidentiary Gradation of Sanctions: Applications

After the previous Part laid out the theory of evidentiary graded crimes in the abstract, this Part highlights the role that evidentiary uncertainty plays in the design of numerous doctrines within criminal law. It opens by identifying how evidentiary concerns drive the design of the objective elements of crimes. It then shows that evidentiary considerations play a role in the design of mental states. Finally, this Part will delineate how the subjective and objective elements of the crime interact to create a matrix of crimes attuned to evidentiary concerns.

A. The Objective Elements of the Crime

The objective elements of a crime define the conduct, attendant circumstances, and results that constitute a criminal offense. The existing discussions on the objective elements of crime tend to focus on the question of whether a defined crime reflects an unreasonable risk to a legally protected interest.[149] As the offenses reviewed here demonstrate, evidentiary uncertainty can explain a wide range of criminal law.

The first and perhaps clearest example of the evidentiary theory in practice can be found in the context of proxy crimes. A proxy crime is a crime "that bars conduct that neither causes nor risks harm but is correlated with

149 Douglas Husak, The Philosophy of Criminal Law: Selected Essays 35–36 (2010). For a comprehensive analysis of the act requirement, see Michael S. Moore, Act and Crime: The Philosophy of Action and its Implications for Criminal Law (1993).

other conduct that is harmful or risky."[150] In some cases, the connection between a proxy crime and the underlying prohibited behavior is explicit and clear. For instance, take the crime of driving with an open container of alcohol in a vehicle.[151] While this behavior might seem harmless and might not merit criminal liability, it might also be easy to prove and highly correlated with drunk driving—a harmful behavior that merits punishment but is often difficult to prove.[152] By criminalizing driving with an open container of alcohol, policymakers can punish offenders who might have committed the wrongful act of driving under the influence of alcohol.[153] Similarly, many dimensions of corruption law can be seen as a framework of proxy crimes. Behaviors such as receiving gifts and making decisions when undisclosed private interests are involved constitute crimes.[154] However, these crimes often encompass nonculpable behavior.[155] Nonetheless, these crimes often correlate with core corrupt activities, such as bribery and extortion. In cases in which it is difficult to establish beyond a reasonable doubt certain hard-to-prove elements of the crime, such as the quid pro quo element of bribery,[156] these proxy crimes can come into play to punish individuals who engaged in suspicious behavior.[157]

While in the open alcohol container and corruption examples the connection between the proxy crime and the actual conduct being punished is direct, in other cases the connection between the underlying crime and its easy-to-prove counterpart might be more elusive. Money-laundering law can serve as a case in point. The act of entering the United States with a suitcase containing $20,000 without properly reporting it can be associated with very distinct factual backgrounds. In some cases, the act is not culpable and reflects an innocent transfer of cash into the country. In other cases, the transferred money might originate from illicit activities, and thus the act itself might be culpable. The decision to criminalize the act rests on the assumption that there is a sufficiently large correlation between wrongdoing

150 Richard H. McAdams, *The Political Economy of Entrapment*, 96 J. CRIM. L. & CRIMINOLOGY 107, 160 (2005).

151 *Id.* at 160–61.

152 *Id.*

153 *Id.*

154 *See* 18 U.S.C. § 201(c) (2012) (criminalizing gratuities); *id.* § 208(a) (criminalizing conflicts of interest).

155 George D. Brown, *Putting Watergate Behind Us*—Salinas, Sun-Diamond, *and Two Views of the Anticorruption Model*, 74 TUL. L. REV. 747, 770 (2000) ("Gifts are common in the private sector and may represent nothing more than an attempt by lobbyists to secure a healthy working relationship with policy makers." (footnote omitted)). *But see* Sarah N. Welling, *Reviving the Federal Crime of Gratuities*, 55 ARIZ. L. REV. 417, 431–45 (2013) (justifying the criminalization of gratuities due to concerns over reciprocity).

156 *See, e.g.*, McCormick v. United States, 500 U.S. 257, 269–74 (1991); United States v. Tomblin, 46 F.3d 1369, 1379 (5th Cir. 1995).

157 *See, e.g.*, George D. Brown, *The Gratuities Offense and the RICO Approach to Independent Counsel Jurisdiction*, 86 GEO. L.J. 2045, 2050 (1998) (suggesting that gratuities "may even represent bribery that cannot be proved").

and the act. Interestingly, this assumption does not necessarily require knowledge of the precise illicit nature of the act. Often, we might not be able to know what the money launderer actually did—was it human trafficking, selling illegal drugs, or perhaps racketeering? Nonetheless, we might still believe that the money launderer deserves to be punished, given the significant probability that he committed *some* type of underlying crime.

Proxy crimes are often criticized for being "over-inclusive,"[158] and "overbroad."[159] Moore has even suggested that such crimes "give[ ] liberty a strong kick in the teeth right at the start."[160] Consequently, calls for their reform are routinely made. These calls encompass both general arguments regarding the permissible scope of proxy crimes[161] and concrete proposals for modifications.[162] For example, a committee report of the American Bar Association on corruption legislation alluded to the federal criminalization of conflict of interest as "an indefensible 'Sword of Damocles'" and proposed to eliminate criminal sanctions from the relevant section of the U.S. Code.[163]

These proposals, however, overlook the role of proxy crimes in relaxing the burden of proof.[164] By enacting proxy crimes, the legislature substitutes hard-to-prove elements of the crime with new elements that are easier to prove. This shift, in turn, brings about a reduction in the effective burden of proof. It allows for the punishment of more guilty defendants given the dilution of the elements of the crime, but it also entails an increased risk of convicting people who do not deserve to be punished because it is premised on a correlation to blameworthy behavior. Furthermore, in a dynamic setting proxy crimes can bolster the creation of a separating equilibrium between culpable and nonculpable behaviors. Gradually, once the proxy crime is enacted, those who drive with an open container of alcohol or those who fail to report the transfer of large sums of cash across borders will mostly be those who commit this act for a culpable reason.

Generally speaking, proxy crimes entail a more moderate punishment than the crime they serve as a proxy for. In the context of drunk driving, the punishment for driving with an open container is notably lower than the

158 *See* Larry Alexander & Kimberly Kessler Ferzan, *Beyond the Special Part*, *in* PHILOSOPHICAL FOUNDATIONS OF CRIMINAL LAW 253, 269 (R.A. Duff & Stuart P. Green eds., 2011).

159 *See* Richard H. McAdams, *The Political Economy of Criminal Law and Procedure: The Pessimists' View*, *in* CRIMINAL LAW CONVERSATIONS 517, 521 (Paul H. Robinson et al. eds., 2009).

160 *See* MOORE, *supra* note 69, at 784.

161 *See* Alexander & Ferzan, *supra* note 158, at 275–77.

162 *See generally* Cynthia Farina, Comm. on Gov't Standards, ABA, *Keeping Faith: Government Ethics and Government Ethics Regulation*, 45 ADMIN. L. REV. 287 (1993).

163 *Id.* at 305.

164 In fact, Alexander and Ferzan acknowledge this point, and assert that justifying the punishment of the innocent who are convicted of proxy crimes faces "insurmountable" difficulties if the legal system employs the beyond a reasonable doubt standard as the decision threshold in criminal trials. *See* Alexander & Ferzan, *supra* note 158, at 271. Yet this analysis rests on the assumption that the criminal justice system employs the beyond a reasonable doubt standard, which is precisely the question at hand.

crime of driving under the influence of alcohol. In Texas, for example, the former is classified as a class C misdemeanor,[165] whereas the latter is classified as a class B misdemeanor with a minimum term of confinement of seventy-two hours.[166] Similarly, in the context of corruption law, the punishment attached to bribery (a maximum sentence of fifteen years),[167] is significantly longer than the sanction attached to crimes such as illegal gratuities and conflict of interest (a maximum sentence of two years and one year, respectively).[168] Thus, the structure of proxy crimes is aligned with the evidentiary theory of criminal law. While those who committed the underlying crime itself without a reasonable doubt are given the full penalty that they deserve, those whose guilt was proven to a lesser degree via the proxy crime are given a more lenient penalty.

A second example of evidentiary considerations influencing the definition of the objective elements of a crime can be found in the realm of inchoate crimes. Most penal systems include an array of primary offenses and, in conjunction with them, a general inchoate crime that criminalizes attempts to commit those offenses.[169] Attempts are divided into two categories: incomplete and complete.[170] The first category—incomplete attempts—includes situations in which the transgressor failed to take all the steps that constitute a crime.[171] Punishing incomplete attempts therefore requires defining the minimum behavior that qualifies as an attempt. Legal systems distinguish between acts of "preparation," which are viewed as legal, and behaviors that reached a more advanced stage and thus qualify as a criminal attempt.[172] The second category—complete attempts—includes situations in which the offender committed all the acts that constitute the crime, yet his plan did not succeed. In this regard, incompletion can stem from the fact that the offender did not succeed in bringing about the consequences that define the crime,[173] or it can stem from the fact that one of the circumstances essential for completing the crime did not exist.[174]

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165 *See* TEX. PENAL CODE ANN. § 49.031(d) (West 2017).

166 *See id.* § 49.04(b).

167 *See* 18 U.S.C. § 201(b) (2012).

168 *See id.* § 201(c) (setting the penalty for illegal gratuities); *id.* §§ 208, 216 (setting the penalty for conflict of interest).

169 R.A. DUFF, CRIMINAL ATTEMPTS 1 (1996).

170 *See* ANDREW ASHWORTH, PRINCIPLES OF CRIMINAL LAW 445–47 (5th ed. 2006) (reviewing the two types of attempts).

171 *See, e.g.*, MODEL PENAL CODE § 5.01(1)(c) (AM. LAW. INST. 1985) (criminalizing acts that constitute only a substantial step towards the commission of a crime).

172 For a review of Anglo-American caselaw on this point see DUFF, *supra* note 169, at 33–61; Hamish Stewart, *The Centrality of the Act Requirement for Criminal Attempts*, 51 U. TORONTO L.J. 399, 402–11 (2001).

173 *See, e.g.*, MODEL PENAL CODE § 5.01(1)(b) (AM. LAW INST. 1985).

174 *See, e.g.*, *id.* § 5.01(1)(a).

Criminalizing attempts promotes the core goals of punishment, such as retribution, deterrence, and incapacitation.[175] In addition, it enables the police to step in and interfere with the criminal plot at an early stage, rather than waiting for harm to materialize.[176] At the same time, however, it also generates considerable risk of wrongful convictions when compared to complete crimes. By design, criminal attempts always involve situations in which at least one of the objective elements of the crime is absent.[177] As a result, factfinders adjudicating cases involving such offenses need to speculate about the missing pieces in the criminal puzzle, which in turn increases the likelihood of erroneous determinations.[178] This analysis is especially true with respect to incomplete attempts in which there is uncertainty as to whether the defendant is actually committing a harmful act that merits punishment. Yet this insight also holds true with respect to complete attempts, as the lack of harm might raise doubts as to the defendant's true intentions. The drafters of the Model Penal Code alluded to this aspect of criminal attempts, noting that criminalizing any act taken towards the completion of a crime "would allow prosecutions for acts that are externally equivocal and thus create a risk that innocent persons would be convicted."[179]

For present purposes, the key factor of attempt law relates to the penalties assigned to incomplete crimes. Many legal systems apply a reduced sanction to such crimes.[180] This reduction is significant and routinely reaches the level of fifty percent.[181] At times, the attempt discount is formal and legislated into the criminal code.[182] At other times, it is applied informally at sentencing based on judicial discretion.[183] Either way, as Professor Sanford Kadish noted, the attempt discount holds "near universal acceptance in West-

175 *See* 2 WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 11.2(a), at 208–10 (2d ed. 2003).

176 *Id.* at 209.

177 *See* Arnold N. Enker, *Impossibility in Criminal Attempts—Legality and the Legal Process*, 53 MINN. L. REV. 665, 670 (1969).

178 *Id.*

179 MODEL PENAL CODE § 5.01 cmt. 5(f), at 326 (AM. LAW INST. 1985); *see also* 2 LAFAVE, *supra* note 175, § 11.1(b), at 193 (noting that a risk of false convictions is inherent in the punishment of almost all inchoate crimes).

180 *See* KADISH ET AL., *supra* note 8, at 607 ("[T]he usual punishment for attempt is a reduced factor of the punishment for the completed crime.").

181 *See, e.g.*, CAL. PENAL CODE § 664(a) (West 2017) (determining—subject to a few qualifications—that a person convicted of attempt "shall be punished by imprisonment in the state prison or in a county jail, respectively, for one-half the term of imprisonment prescribed upon a conviction of the offense attempted"); Canada Criminal Code, R.S.C. 1985, c C-46, § 463(b) (providing that the punishment for attempt is "one-half of the longest term to which a person who is guilty of [the complete] offence is liable").

182 *See, e.g.*, CAL. PENAL CODE § 664 (West 2017); COLO. REV. STAT. ANN. § 18-2-101 (West 2017) (lowering the class of felony by one for most attempted crimes); GA. CODE ANN. § 16-4-6 (2017) (punishment for attempts prescribed at half the maximum sentence for the complete crime).

183 *See* Andrew Ashworth, *Criminal Attempts and the Role of Resulting Harm Under the Code, and in the Common Law*, 19 RUTGERS L.J. 725, 739–40 (1988).

ern law, the support of many jurists and philosophers,"[184] and is at "resonance with the intuitions of lawyers and lay people alike."[185]

Despite its wide acceptance, contemporary legal theorists have highlighted the tenuous normative foundation of the practice.[186] A consequentialist perspective focusing on general deterrence aims to alter criminals' ex ante choices and therefore should not take into account ex post events that occurred after those choices were made.[187] Similarly, modern deontological theories focus on the moral agent's decision and discount the relevance of factors that lie beyond the control of that agent when judging her behavior.[188] On this backdrop, the evidentiary argument emerged as a potential justification for the practice. According to the argument, which was endorsed by both consequentialists and deontologists, mitigated sanctions for attempts can be defended as a way in which the legal system deals with the elevated risk of error.[189] As Judge Richard Posner argues, attempts should be punished less severely "since there is a higher probability that an attempter really is harmless."[190] Thus, it would seem like the penal policies surrounding criminal attempts are geared towards grading penalties in proportion to the strength of the evidence.

Interestingly, however, while legal scholars have dedicated a significant amount of attention to the punishment of attempts, they have dedicated far less attention to a potentially far greater question—the punishment of preparatory acts that lie clearly outside the scope of criminal attempts. In addition to the general doctrine of attempt, legal systems also criminalize preparatory acts as independent crimes.[191] These crimes are to some extent a close cousin of proxy crimes just discussed. While proxy crimes identify behaviors that correlate with offenses that were likely to have been committed, preparatory crimes identify behaviors that correlate with offenses that are likely to be committed.[192]

By enacting preparatory crimes, legislatures significantly widen the domain of criminal liability and extend it beyond the attempt/preparation

184 Sanford H. Kadish, *Foreword: The Criminal Law and the Luck of the Draw*, 84 J. CRIM. L. & CRIMINOLOGY 679, 679 (1994).

185 *Id.*

186 *See generally id.*

187 *See* Steven Shavell, *Deterrence and the Punishment of Attempts*, 19 J. LEGAL STUD. 435, 441, 456 (1990).

188 *See* Kimberly D. Kessler, Comment, *The Role of Luck in the Criminal Law*, 142 U. PA. L. REV. 2183, 2211–23 (1994).

189 *See* David Enoch & Andrei Marmor, *The Case Against Moral Luck*, 26 L. & PHIL. 405, 415–16 (2007) (integrating the intensified potential for error into a deontological framework); Shavell, *supra* note 187, at 452–55 (arguing that punishment of incomplete crimes should be mitigated as means to reduce error costs).

190 Richard A. Posner, *An Economic Theory of the Criminal Law*, 85 COLUM. L. REV. 1193, 1217–18 (1985).

191 For numerous examples, see 2 LAFAVE, *supra* note 175, § 11.2(a), at 206–08.

192 *See* Michael T. Cahill, *Inchoate Crimes*, *in* THE OXFORD HANDBOOK OF CRIMINAL LAW 512, 514 (Markus D. Dubber & Tatjana Hörnle eds., 2015).

border. Often, these offenses criminalize the possession of things that are likely to be used in crimes. For example, the possession of burglary tools, explosives, and incendiary devices constitutes the objective element of a crime in numerous jurisdictions.[193] In other cases, these offenses rest on assumptions relating to the criminality that can be deduced from being in a certain place. Criminal trespass, for instance, is geared (among other things) to capture acts that are the early stage of a burglary.[194]

Furthermore, while in order to secure an attempt conviction the prosecution needs to prove a *concrete* criminal plot,[195] preparatory offenses usually require that the prosecution only show that the defendant intended to commit *a* crime.[196] On one hand, this relaxed standard enables the law to capture suspect behaviors without the need to fill in all the missing pieces of the criminal puzzle, as in attempt cases. On the other hand, it rules out criminal liability in cases involving purely innocent behavior and thus eliminates the possibility of knowingly punishing the innocent. Walking around with a crowbar is a crime only in situations that trigger the trier of fact's suspicion that culpable behavior is in play.[197]

Legal scholarship has often viewed preparatory crimes critically and has suggested that they might contribute to the phenomenon of overcriminalization.[198] According to Professor Ferzan, when the state criminalizes the possession of burglary tools, it in effect tells the defendant, "[w]e don't trust you with crowbars because of what you might choose to do later."[199] Given this interpretation of the offense, Ferzan views such an offense as one that does not respect autonomy and individual choice.[200]

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193 *See* ALASKA STAT. § 11.46.315 (2017); DEL. CODE ANN. tit. 11, § 828 (West 2017); FLA. STAT. ANN. § 590.29 (West 2017); 720 ILL. COMP. STAT. ANN. 5/16-1 (West 2017); MONT. CODE ANN. § 45-6-205 (2017) (possession of burglary tools); N.M. STAT. ANN. § 30-16-5 (2017); OR. REV. STAT. ANN. § 164.235 (West 2017); WASH. REV. CODE ANN. § 9.40.120 (West 2017) (incendiary devices).

194 *See* Ira P. Robbins, *Double Inchoate Crimes*, 26 HARV. J. ON LEGIS. 1, 97–98 (1989).

195 *See* 2 LAFAVE, *supra* note 175, § 11.3(a), at 213 ("It is not enough to show that the defendant intended to do some unspecified criminal act.").

196 *Id.* § 11.2(a), at 207 (reviewing different preparatory crimes that require a showing of intent to commit a crime). This final point relates to the mental state associated with preparatory crimes and will be further discussed in the text below. *See infra* Section III.C.

197 The criminalization of possession of burglary tools routinely hinges on the intent of the possessor. *See, e.g.*, ALASKA STAT. § 11.46.315 (2017); MONT. CODE ANN. § 45-6-205 (2017) (intent to commit some offense); N.M. STAT. ANN. § 30-16-5 (West 2017) (intent to commit burglary); OR. REV. STAT. ANN. § 164.235 (West 2017) (intent to commit forcible entry).

198 *See* Andrew Ashworth, *Conceptions of Overcriminalization*, 5 OHIO ST. J. CRIM. L. 407, 414–15 (2008).

199 Kimberly Kessler Ferzan, *Prevention, Wrongdoing, and the Harm Principle's Breaking Point*, 10 OHIO ST. J. CRIM. L. 685, 697 (2013) (internal quotation marks omitted).

200 *Id.* at 696–98; *see also* Stuart P. Green, *Thieving and Receiving: Overcriminalizing the Possession of Stolen Property*, 14 NEW CRIM. L. REV. 35, 47 (2011) (describing the offense as overbroad since it criminalizes innocent conduct).

This analysis, however, overlooks the evidentiary function of preparatory crimes. Within this framework, preparatory crimes target behaviors that generate significant uncertainty as to the nature of the act. Viewed from this perspective, the message conveyed by an offense like possession of burglary tools should be read as saying, "we order you not to walk around at 3:00 a.m. in a distant neighborhood with crowbars since it will be very costly to distinguish you from criminals." This law respects individual autonomy, yet asks people to refrain from a suspicious behavior that inflicts a true harm on society in the shape of evidentiary uncertainty. Those who choose to ignore this limitation set by the law deserve to be punished.

The wider domain of preparatory crimes helps achieve all the goals associated with criminalizing attempts, yet it does so at the cost of increasing the probability of error even further. Once such crimes are enacted, individuals behaving suspiciously yet harmlessly could more easily be convicted. When viewed in context, however, one can see how these crimes fit into a general framework of criminal liability that aims to assign punishments based on evidentiary certainty. Preparatory crimes reflect the greatest degree of evidentiary uncertainty given their broad definition and are generally assigned relatively minor penalties. The possession of burglary tools, for instance, is classified as a misdemeanor in most jurisdictions;[201] while criminal trespass is usually viewed as a lesser offense included in the crime of burglary.[202] Criminal attempts reflect greater evidentiary clarity as they capture criminal behavior at a more advanced stage. Typically, an attempter has already taken more steps to further his criminal plot and has crossed the preparation border. As a result, attempts are usually penalized more severely than preparatory crimes. Finally, the most severe sanctions are reserved for complete crimes. Only when the offender has completed all the elements of the crime and evidentiary uncertainty is at a minimum does the law assign the sanction that the offender truly deserves. Thus, contrary to Kolber's assertion that the law of criminal attempts is bumpy because at one moment a defendant "has no criminal liability whatsoever, and just a moment later, he has sufficient criminal liability to receive several years' incarceration,"[203] viewed in its entirety, attempt law turns out to be rather smooth.[204]

201 *See* ALASKA STAT. § 11.46.315 (2017); OR. REV. STAT. ANN. § 164.235 (West 2017).

202 *See* 3 WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 21.2, at 224 (2d ed. 2003).

203 *See* Kolber, *supra* note 10, at 671.

204 To be sure, the law of preparatory crimes is certainly not a well-behaved, perfectly smooth function that calibrates evidentiary certainty and sanctions perfectly. For one, there are areas in which there are no preparatory crimes in play, thus dividing the evidentiary spectrum into only two domains. In addition, even if there are preparatory crimes in play, it is likely that shifts from one crime to the other will entail some bumpiness. Nonetheless, criminal law is significantly smoother than scholars perceive it.

B. States of Mind

Aside from their objective elements, crimes also include a subjective element—mens rea—that relates to the defendant's state of mind.[205] The subjective element of the crime examines both the defendant's awareness of the different objective elements of the crime and her attitude towards potential consequences (to the extent those consequences are an objective element of the crime). It incorporates into the law the long held view that "an act does not make one guilty unless his mind is guilty."[206]

Limiting criminal liability only to those who act with a bad mental state is desirable on many grounds. It reflects moral judgments and fits into a retributive framework of punishment.[207] In addition, it helps assign criminal liability only to acts that are truly socially harmful.[208] Yet conditioning criminal liability on the defendant's state of mind entails the acquittal of many individuals who deserve to be punished. Proving mental states is a thorny task because absent a confession it has to be deduced from the surrounding circumstances. At the end of the day, in many cases the defendant's state of mind might be very suspicious, but reasonable doubt might still remain. In such situations, policymakers cannot avoid dealing with the question of how sanctions should be distributed in the face of evidentiary uncertainty.

Legal systems that wish to alter the balance between wrongful convictions and wrongful acquittals may do so by easing the mental state requirement that is incorporated into the crime. By doing so, the legal system can convict and punish in cases where proving an elevated mens rea is difficult. Viewed from an evidentiary perspective, the point is that in such situations a lower mens rea does not reflect the actual mental state of the defendant. Rather, it reflects a probabilistic assessment of the defendant's state of mind and acknowledges the possibility that the higher mens rea exists but was not proven beyond a reasonable doubt. In other words, just as different acts can serve as proxies for culpable behavior, a lower mens rea can function as a proxy for the existence of an elevated mens rea.

A first example in this context is the use of strict liability in criminal law. As noted above, strict liability offenses are often justified on evidentiary grounds.[209] Notably for present purposes, the law usually attaches relatively low sanctions to strict liability offenses.[210] The Model Penal Code, for exam-

205 On mental states generally, see 1 LaFave, *supra* note 39, § 5.1, at 331–39.

206 *Id.* at 333 (alluding to the Latin maxim "*actus not facit reum nisi mens sit rea*").

207 From a retributive perspective, the offender's blameworthiness is a key aspect that punishment rests on. *See* Michael S. Moore, *Intention as a Marker of Moral Culpability and Legal Punishability*, *in* Philosophical Foundations of Criminal Law, *supra* note 158, at 179–81.

208 *See* Posner, *supra* note 190, at 1221–23 (analyzing mens rea from an economic perspective).

209 *See supra* notes 38–39 and accompanying text.

210 *See* 1 LaFave, *supra* note 39, § 5.5, at 381 ("Usually, but not always, the statutory crime-without-fault carries a relatively light penalty . . . .").

ple, views such offenses as "violations" that carry only light sanctions.[211] Along the same lines, when courts determine whether an offense is one for which liability is strict they often include in their analysis the penalty attached to the offense.[212] The greater the penalty, the larger the probability the court will find the offense to be fault-based and vice versa. Therefore, for example, a defendant who delivers adulterated or misbranded food is subject to a maximum penalty of one year even if the prosecution cannot prove his state of mind, yet will face a maximum penalty of three years if it can be shown beyond a reasonable doubt that the delivery was done with the intent to defraud.[213] This is consistent with the evidentiary theory of punishment. Strict liability offenses are an effective way to punish the guilty, yet they also entail a cost in the form of punishing some innocents along the way. As a result, the sanctions attached to such crimes are lower than those for fault-based crimes in which the culpability of the offender was proven beyond a reasonable doubt.

While strict liability may serve as an effective tool to adjust the burden of proof downward, it also raises the problem of intentionally punishing the innocent in those cases in which the presumptions that lie at the basis of the offense are rebutted. For instance, take the case of a butcher who sells meat unfit for consumption even though he takes all the necessary precautions.[214] While defining the offense of selling such meat as strict liability will eliminate the problems associated with proving states of mind beyond a reasonable doubt and wrongfully acquitting the guilty, it will do so at the cost of forcing courts to knowingly convict innocent butchers from time to time.

A potential way the law can deal with such situations is by incorporating a good faith defense into strict liability offenses.[215] Such a defense would sustain the presumption of criminality associated with the actus reus of strict liability offenses but would allow defendants to prove that their conduct was not truly wrongful.[216] Adopting this framework would probably not alter most criminal cases, as it would only come into play in a small subset of cases

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211 *See* MODEL PENAL CODE § 2.05(2)(a) (AM. LAW INST. 1985); *id.* § 1.04(6).

212 *See* 1 LAFAVE, *supra* note 39, § 5.5(a), at 384–85 n.12.

213 *See* 21 U.S.C. § 333(a) (2012).

214 Alluding to the famous case Hobbs v. Winchester Corp., 2 K.B. 471 (1910).

215 *See generally* Laurie L. Levenson, *Good Faith Defenses: Reshaping Strict Liability Crimes*, 78 CORNELL L. REV. 401 (1993). As a practical doctrinal matter this defense could function as an independent defense that is external to the offense, or could be integrated into the definition of strict liability. For an example of the former from English criminal law, see Food Safety Act 1990, c. 16, § 21 (Eng.) (creating a due diligence defense). For an example of the latter from Israeli criminal law, see Criminal Code (amendment 39) (preamble and general section) 1994-5754, SH No. 1481 p. 352 § 22 (Isr.) (substituting strict liability with "enhanced liability" and determining that liability will not be attached if the defendant "did everything possible to prevent the offense").

216 *See* Levenson, *supra* note 215, at 404–05. There are many doctrinal and procedural questions that stem from the adoption of a good faith defense, and resolving them is beyond the scope of this Article. For a review of the way in which the doctrine is applied in numerous jurisdictions, see *id.* at 435–49.

in which defendants hold truly unique exculpatory evidence. Thus, many innocent defendants will continue to be convicted under this rule. Nonetheless, adopting a good faith defense is important from a retributive perspective, as it targets the precise subset of cases in which strict liability requires adjudicators to knowingly punish the innocent. By allowing adjudicators to acquit defendants in such cases, the moral dilemma associated with knowingly punishing the innocent can be sidestepped.[217]

To be sure, not all legislative uses of strict liability correspond with the evidentiary theory of punishment. The clearest example of this point is the framework surrounding statutory rape in the United States. A large number of states continue to hold a strict liability regime for the crime of having sex with a minor who is younger than the age of consent.[218] This crime carries stiff penalties[219] and triggers a host of adverse consequences that stem from branding the accused a sex offender.[220] While this framework might be justified on evidentiary grounds, it does not fit into the evidentiary theory presented here. The evidentiary theory is not a blank check that justifies the turning of any crime into a strict liability crime. Rather, the evidentiary theory suggests a careful grading of offenses that corresponds to the degree of certainty of guilt. In the context of statutory rape, this would require drawing distinctions between cases in which knowledge of age was proven beyond a reasonable doubt and cases in which it was proven to a lesser degree. Cases falling on the latter side of this line should be governed by a distinct offense that carries a relatively light penalty.

Perhaps a less intuitive but more prevalent example of the way in which the burden of proof structures mental states is negligence liability. Criminal negligence alludes to situations in which the defendant was unaware of certain elements of the crime but should have been aware of their existence. As the Model Penal Code notes, "[a] person acts negligently with respect to a material element of an offense when he should be aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct."[221]

Imposing criminal liability for negligent conduct is highly controversial.[222] The linchpin of this controversy is the difficulty of justifying convict-

217 The defense could also be justified on utilitarian grounds since it enables the legal system to avoid wrongful convictions in cases in which doing so does not entail significant costs.

218 *See* 2 LAFAVE, *supra* note 175, § 17.4(c), at 650–51 (reviewing the legislative frameworks of different states); Catherine L. Carpenter, *The Constitutionality of Strict Liability in Sex Offender Registration Laws*, 86 B.U. L. REV. 295, 317 (2006) (same).

219 *See* Carpenter, *supra* note 218, at 315–16 (reviewing the stiff penalties associated with statutory rape).

220 These consequences include both the social stigma associated with the status and the strict legal regime that sex offenders are subject to. For a review of the latter, see *id.* at 324–38.

221 *See* MODEL PENAL CODE § 2.02(2)(d) (AM. LAW INST. 1985).

222 Reviewing this massive literature is beyond the scope of this Article. For a few recent contributions to the debate, see GEORGE SHER, WHO KNEW?: RESPONSIBILITY WITH-

ing individuals who are unaware of the nature of their conduct. According to the critics of negligence-based liability, the absence of awareness suggests lack of control, which is a necessary condition for viewing behavior as culpable. Therefore, these critics conclude that "[a] culpability-based criminal law will not include liability for negligence . . . ."[223] Proponents of negligence-based criminal liability acknowledge the difficulty associated with punishing people for inadvertent behavior but highlight numerous justifications for this practice. For example, if the defendant bears responsibility for his uninformed state of mind, then punishing him might be permissible.[224]

While the negligence debate is fierce, both sides tend to share the same assumption—that negligence reflects actual inadvertent behavior and that evidentiary uncertainty is not present.[225] As a result, this debate tends to focus on hypotheticals in which all the facts are certain, which highlight the challenges of negligence liability. For example, in their discussion on the matter, Professors Larry Alexander and Kimberly Kessler Ferzan present the hypothetical case of self-absorbed yuppie parents who leave their child unattended in the bathtub while going to greet their guests.[226] According to the hypothetical, once the parents greet the guests, they become preoccupied with making a good impression on them and forget about their child, who drowns to death in the bathtub.[227] Alexander and Ferzan carefully analyze this hypothetical and conclude that convicting these parents cannot be justified.[228] While doing so, they acknowledge that if the state will be able to prove that the couple "adverted to even the minuscule risk that they would forget about their child in the bath," then it might be able to obtain a conviction based on a theory of recklessness.[229] Yet they immediately turn back to the hypothetical, with its crisp and clear facts regarding the parents' state of mind. Only in a footnote do Alexander and Ferzan recognize that criminalizing negligence might deter reckless individuals who anticipate evidentiary problems at trial,[230] but they dismiss this point because it creates a "cost of

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OUT AWARENESS (2009); Michael S. Moore & Heidi M. Hurd, *Punishing the Awkward, the Stupid, the Weak, and the Selfish: The Culpability of Negligence*, 5 CRIM. L. & PHIL. 147 (2011); Joseph Raz, *Responsibility and the Negligence Standard*, 30 OXFORD J. LEGAL STUD. 1 (2010).

223 ALEXANDER & FERZAN, *supra* note 147, at 85.

224 *See, e.g.*, George P. Fletcher, *The Fault of Not Knowing*, 3 THEORETICAL INQUIRIES LAW 265, 273 (2002).

225 For an exception, see HART, *supra* note 17, at 33 ("[D]ifficulties of proof may cause a legal system to limit its inquiry into the agent's 'subjective condition' by asking what a 'reasonable man' would in the circumstances have known or foreseen.").

226 ALEXANDER & FERZAN, *supra* note 147, at 77.

227 *Id.*

228 *Id.* at 77–81. Moore and Hurd analyze a similar hypothetical and reach an opposite conclusion that justifies the punishment of the parent. The focal point of their analysis continues to be the awareness of the parent to the risk created by leaving an unattended child in a bathtub, yet they allow for a conviction since they assume that at a minimum the parent was in fact aware of a "general risk" that is associated with their behavior. *See* Moore & Hurd, *supra* note 222, at 193.

229 ALEXANDER & FERZAN, *supra* note 147, at 78 n.25.

230 *Id.* at 80 n.29.

punishing some who are known or believed to be nonculpable."[231] However, this final point ignores the fact that this is precisely the tradeoff that policymakers are required to make when dealing with evidentiary uncertainty. Legal rules that struggle with this issue are required to balance between type 1 and type 2 errors. Any rule that somewhat relaxes the burden of proof will, by design, entail the cost of convicting additional innocent defendants. That is exactly the balance standing at the core of the rule.

The reality of criminal adjudication is, of course, very different from the hypotheticals the literature has dealt with. Somehow, very rarely does a parent who brought about the death of his child take the stand to state that he knowingly risked his child's life. Rather, a compelling case that focuses on personal grief and the extreme nature of the situation is much more likely. As a result, distinguishing between advertent and inadvertent behavior is often close to impossible, and factfinders face grave uncertainty as to the nature of the defendant's state of mind. Negligence liability turns a dichotomous decision (advertent/guilty versus inadvertent/not guilty) into a more nuanced decision that can deal with evidentiary uncertainty. When proof beyond a reasonable doubt demonstrating that the defendant knowingly took a risk is available, a determination of (at least) recklessness is in order. In cases in which it seems like the defendant knowingly took a risk but proof beyond a reasonable doubt is not available, the negligence option comes into play.

Incorporating evidentiary uncertainty into the discussion on objective standards in criminal law sheds new light on numerous concrete legal debates. For example, take the ongoing discussion in Anglo-American jurisdictions about whether an objective standard should be applied to the defendant's state of mind regarding lack of consent in rape cases.[232] Regulating sex through criminal law is a tricky task. On the one hand, the protected interests at hand are of great importance, and as a result convicting those who are truly guilty of sex crimes is a necessity for any well-functioning criminal justice system. On the other hand, sex is a socially desirable activity, and drawing the line between permissible and impermissible acts entails a significant risk of punishing the innocent. Therefore, policymakers aim to both punish sex offenders and avoid the chilling effect created by punishing nonculpable sexual activity. The definition of rape and the grading of different types of rape can play an important role in this regard.

In many cases of alleged acquaintance rape, the defendant claims that he truly believed that sex was consensual and therefore should not be

231 *Id.*

232 Doctrinally this question could come into play in two ways. First, the law could define rape as a negligence crime by applying an objective standard to the element of consent directly. This is the case, for example, in English criminal law. *See* Sexual Offences Act 2003, c. 42, § 1(1)(c) (Eng.). Second, the law could allow for the use of the mistake of fact defense with respect to knowledge of lack of consent, and allow for the defense only in cases in which the mistake was reasonable. This is the case in some jurisdictions in the United States. *See* KADISH ET AL., *supra* note 8, at 396–97.

branded a rapist.[233] Jurists have been debating what the proper treatment of such defendants is. Some have argued that because criminal law focuses on the culpability of the offender, it is impermissible to punish someone who made an honest mistake as to consent, even if that mistake was unreasonable.[234] Others have stressed the need to focus on the victim's state of mind and on denying offenders the possibility of annulling criminal liability by simply ignoring victims.[235] For the most part, this debate has assumed factual clarity and presumed that the negligent rapist is truly unaware of lack of consent.[236] Inserting evidentiary uncertainty into the debate presents an additional powerful argument in favor of negligence-based rape.

It is extremely easy to present a mistake of fact defense in virtually all nonviolent acquaintance rape cases. Such a defense does not even require the defendant to enter the dangerous realm of he-said-she-said adjudication, as it accepts the victim's version as true and only adds another dimension to the event in dispute that only the defendant can attest to. As a result, this defense could easily raise reasonable doubt with respect to the defendant's guilt and bring about the release of many guilty individuals. Lowering the mens rea of rape to negligence enables the criminal justice system to bypass the need to ascertain the defendant's precise mental state beyond a reasonable doubt and thus allows it to convict more guilty individuals. When the evidence is sufficiently suspicious to suggest that the defendant probably knew (or at least suspected) that consent was absent, a finding of negligence with respect to consent can capture the evidentiary picture.

To be sure, unlike the case of homicide in which jurisdictions enact a graded scale of offenses that enables the calibration of penalties with the amount of inculpating evidence that is presented, jurisdictions do not grade rape in the same manner. Rather, jurisdictions routinely establish a minimal threshold to the offense (usually recklessness *or* negligence) and apply it to *all* rape cases.[237] Viewed from an evidentiary perspective, grading rape and using different mental states to distinguish between distinct levels of certainty could help improve the accuracy of the criminal process. Whereas the elevated crime that entails a subjective mens rea will be reserved for those whose guilt has been proved beyond a reasonable doubt, negligence rape will be used in cases in which some doubt remains.[238]

That said, the concept of evidentiary grading is not alien to rape law. Past codifications of the offense were sensitive to evidentiary considerations through the objective elements of the crime and graded punishment in

233 *See* Ian Ayres & Katharine K. Baker, *A Separate Crime of Reckless Sex*, 72 U. CHI. L. REV. 599, 599–601 (2005) (reviewing proof problems in acquaintance rape cases).

234 *See* Dir. of Pub. Prosecutions v. Morgan [1975] 2 All ER 347 (HL) 347 (Eng.).

235 *See* Toni Pickard, *Culpable Mistakes and Rape: Relating Mens Rea to the Crime*, 30 U. TORONTO L.J. 75, 76–77 (1980).

236 *Id.* (analyzing a factually clear hypothetical rape case).

237 *See supra* note 232.

238 For a proposal to grade rape according to mental states based on considerations of blame and incentives, see Susan Estrich, *Rape*, 95 YALE L.J. 1087, 1102–05 (1986).

accordance with the level of certainty. The marital exemption illustrates this point, as the perceived heightened risk of error led to more lenient policies towards husbands who raped their wives.[239] As time passed and the empirical assertion at the base of this exemption eroded (along with other normative premises it depended on),[240] the legal terrain in the area of rape law shifted. Given the relatively unstable state of rape law and the tremendous reforms this body of law has recently undergone,[241] the possibility of graded rape offenses based on different states of mind seems like a plausible way in which the law might evolve in the coming years.[242]

The evidentiary theory of negligence also sheds light on the ongoing debate regarding the individualization of the negligence standard in criminal law. This debate has focused on whether negligence should be defined objectively as a uniform standard applicable to all or subjectively as an individual standard attuned to the unique characteristics of the parties at hand. In other words, should the law account for attributes such as the defendant's intelligence, physical capabilities, sex, and age when determining whether they violated their obligation to behave reasonably. On one side of this debate stand those who argue that negligence is a purely objective standard

239 *See* MODEL PENAL CODE § 213.1 (AM. LAW INST. 1985) (incorporating the requirement "a female not his wife" into the definition of rape and thus degrading marital rape to a simple assault under MPC § 211.1). In their study on people's penal intuitions, Robinson and Darley examine the way in which people rank different rape scenarios. Among other things, participants in the study were asked to evaluate numerous rape cases, which included a case of stranger rape and a marital rape case. The results suggest that people ranked stranger rape as worthy of a greater punishment than marital rape. While the study did not question participants directly on matters of proof, participants evaluated whether the victim in the different scenarios consented (though all scenarios explicitly stated that sex was nonconsensual). Interestingly, subjects presumed that consent was present significantly more in the marital case, suggesting that their penal ranking corresponded with their evidentiary assessment of the scenario. *See* PAUL H. ROBINSON & JOHN M. DARLEY, JUSTICE, LIABILITY AND BLAME: COMMUNITY VIEWS AND THE CRIMINAL LAW 160–69 (1995).

240 *See* Michael Gary Hilf, *Marital Privacy and Spousal Rape*, 16 NEW ENG. L. REV. 31, 41 (1980).

241 For a review of legal reforms in the area, see CASSIA SPOHN & JULIE HORNEY, RAPE LAW REFORM: A GRASSROOTS REVOLUTION AND ITS IMPACT 17–27 (1992); Stacy Futter & Walter R. Mebane, Jr., *The Effects of Rape Law Reform on Rape Case Processing*, 16 BERKELEY WOMEN'S L.J. 72, 77–80 (2001).

242 An alternative path legislatures might take is to enact new proxy crimes that include objective elements that correlate with rape. Ayres and Baker, for example, propose to criminalize the act of having sexual intercourse without a condom in a first-time sexual encounter. *See* Ayres & Baker, *supra* note 233, at 601. While this proposal aims to achieve numerous goals, it can also help alleviate some of the evidentiary problems associated with acquaintance rape cases. As Ayres and Baker note, "[r]easonable doubts can remain whether an alleged acquaintance rapist raped, but there is often no question that he engaged in an unprotected first-time sexual encounter. In such a case there could at least be a conviction, albeit for a much less serious offense." *Id.* at 603.

that defines the boundaries of permissible conduct in society.[243] On the other side of the debate stand those who focus on the defendant's culpability and therefore argue that criminal negligence should be judged in light of the defendant's capabilities.[244] In the United States, the Model Penal Code takes a somewhat ambiguous stand on this point,[245] and cases can be cited to support both propositions.[246]

If the negligence standard aims to capture situations in which subjective mens rea is likely to be present but is difficult to prove beyond a reasonable doubt, then individualizing it is desirable. An individualized negligence standard enables the factfinder to examine more accurately the probability of a subjective mens rea's existence. If the defendant is sharp and intelligent, he is far more likely to truly understand the nature of his actions. However, if the defendant is clumsy and foolish he is likely to have acted in a truly inadvertent fashion. By incorporating all the personal information into the determination of negligence, the court can better ascertain what the probability of a subjective mens rea is and whether this probability merits punishment.

Note that a comparison between individualized negligence and strict liability highlights the relative advantage of the former in preventing erroneous convictions. When liability is strict, courts might be compelled to convict blameless individuals in cases that do not involve evidentiary uncertainty (especially if a good faith defense is not incorporated into the crime). Attaching a subjective mens rea to the offense would allow the court to acquit all blameless individuals, but at the cost of acquitting many guilty defendants who would manage to generate reasonable doubt. Individualized negligence can serve as a convenient middle ground that allows courts to carefully examine the facts of each case and only punish defendants whose guilt has been established (although perhaps not beyond a reasonable doubt).

C. The Interaction Between the Objective and the Subjective Elements of the Crime

Thus far, the analysis has separately examined the role of the objective and subjective elements of the crime in creating a penal regime that correlates punishment with evidence. In reality, these two elements interact, creating a complex matrix of combinations. By simultaneously adjusting both elements, legislatures can define crimes that capture a wide spectrum of evidentiary uncertainty ranging from the very suspicious to the mostly benign.

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243 *See* GLANVILLE WILLIAMS, CRIMINAL LAW 100–01 (2d ed. 1961). For an early exposition of the thesis that the law should adopt objective liability standards, see OLIVER WENDELL HOLMES, JR., THE COMMON LAW 108 (1881).

244 *See* HART, *supra* note 17, at 153–56.

245 *See* MODEL PENAL CODE § 2.02 (AM LAW INST. 1985) (when determining what is reasonable the factfinder should consider "the nature and purpose of the [defendant's] conduct and the circumstances known to him").

246 *Compare* State v. Everhart, 231 S.E.2d 604, 607 (N.C. 1977) (defendant's low IQ was a sufficient reason to find her not negligent), *with* State v. Patterson, 27 A.3d 374, 381 (Conn. App. Ct. 2011) (defendant found negligent despite low IQ).

The intent requirement attached to preparatory crimes demonstrates this point. Usually, such crimes require the prosecution to prove that the defendant intended to engage in some type of unlawful behavior. It is a crime to buy a map or a railway timetable only if one does so with the intent to commit an act of terrorism.[247] While this requirement is relatively less restrictive than the mental state requirement attached to criminal attempt (because it does not require the showing of a concrete criminal plan), it still creates a significant hurdle for the prosecution. Creating this hurdle is important given the harmless nature of many of the acts covered by preparatory crimes and the imperfect correlation between those acts and actual wrongdoing. The added intent requirement aims to separate the culpable from the nonculpable by forcing the prosecution to prove the suspicious nature of the defendant's conduct.

However, the intent hurdle may sometimes prove difficult to surpass for the same reason it is important—the harmless nature of many of the acts that preparatory crimes deal with. For example, when the law criminalizes the possession of things that have dual uses—both criminal and legitimate—then a defendant, especially one who acts strategically and plans his crime prudently, might easily raise reasonable doubt as to whether he intended to behave illegally. To cope with this, legislatures can create a menu of preparatory crimes that differ with respect to their mental states. Cases in which the illicit intent can be proved beyond a reasonable doubt are captured by the elevated crime and punished relatively harshly, while cases in which the illicit intent cannot be proved beyond a reasonable doubt are relegated to a crime that does not require a showing of bad intent. Thus, for instance, jurisdictions differentiate between those who carry a "destructive device" with an intent to use that device wrongfully and those whose intent is unclear (and is therefore not an element of the crime), reserving harsher sanctions for the former.[248]

A second example of the type of offenses that lie within the policy matrix relates to the awareness requirement in proxy crimes and preparatory offenses. Generally speaking, criminal liability is attached only when the prosecution can prove beyond a reasonable doubt that the defendant was aware of the nature of his acts.[249] As noted above, this requirement generates a significant amount of false acquittals, given the evidentiary difficulties it entails.[250] These difficulties are further exacerbated in the context of proxy crimes and preparatory offenses given the equivocal nature of the acts they cover. As a result, proving beyond a reasonable doubt that the defen-

247 *See* Andrew Ashworth & Lucia Zedner, *Just Prevention: Preventive Rationales and the Limits of the Criminal Law*, *in* PHILOSOPHICAL FOUNDATIONS OF CRIMINAL LAW, *supra* note 158, at 285 (alluding to the prohibitions created by the Terrorism Act 2006 (UK)).

248 *Compare* CAL. PENAL CODE § 18710 (West 2017) (possession with no specific intent), *with* CAL. PENAL CODE § 18740 (West 2017) (possession with intent to injure, intimidate, or terrorize any person).

249 *See* Jeffrey S. Parker, *The Economics of Mens Rea*, 79 VA. L. REV. 741, 744–45 (1993).

250 *See supra* notes 207–208 and accompanying text.

dant was aware of the nature of his behavior might be an insurmountable task for the prosecution, and, as a result, the purpose of these crimes might be frustrated.

By enacting proxy crimes and preparatory offenses that do not include a subjective awareness requirement, legislatures can capture within the criminal law cases in which defendants engage in potentially harmful behavior with a state of mind that is difficult to prove. For instance, take an individual caught carrying a concealed weapon for which he holds a license through a security checkpoint at an airport. This individual might be very blameworthy; he may be doing this knowingly because he is on his way to hijack a plane. However, he might also be completely innocent; he may be carrying the gun inadvertently. Proving his precise state of mind is a thorny task because he could raise reasonable doubt about whether the situation is the result of an honest mistake (i.e., "oops, silly me, I must have got my bags mixed up when rushing to the airport at 5:00 a.m."). By creating an offense that criminalizes the negligent carrying of a gun through an airport security checkpoint, the legislature can tailor a sanctioning regime that is attuned to the strength of the evidence. While individuals caught with guns at airport security checkpoints can be punished even if it cannot be proved beyond a reasonable doubt that they were aware of the gun in their possession,[251] severe sanctions are reserved for cases in which the prosecution can establish beyond a reasonable doubt that the possession was part of a serious criminal plot.[252]

IV. Understanding the Evidentiary Structure of Criminal Law

The previous Part was mostly descriptive; it showed that substantive crimes are often structured such that penalties are distributed in accordance with the certainty of wrongdoing. This Part delves more deeply into theory and examines why the law chose to alter the burden of proof in criminal trials using the substantive rules that govern those trials. Arguably, directly altering the policy tool intended to strike the balance between type 1 and type 2 errors—namely, the burden of proof—could achieve this goal in a far more simple, precise, and transparent manner. As the analysis will show, the path on which the law traveled is not merely an artifact of constitutional constraints.[253] Rather, psychological, economic, and expressive considerations might be the driving force behind the structure of the law.

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251 *See* 49 U.S.C. § 46505(b) (2012) (criminalizing the carrying of a weapon on an aircraft and setting a maximum sentence of ten years). The required mens rea for this crime is negligence (defendant should have known he was carrying a weapon), and the checkpoint scenario was found to constitute an attempt to commit it. *See* United States v. Garrett, 984 F.2d 1402, 1412 (5th Cir. 1993).

252 *See* 49 U.S.C. § 46502 (criminalizing aircraft piracy and setting a minimum sentence of twenty years).

253 On the constitutional requirements regarding the burden of proof, see *supra* notes 48–51 and accompanying text.

A. *The Psychological Perspective: Relaxing the Burden of Proof While Adhering to a Rigid Moral Constraint*

The elevated standard of proof in criminal trials is often viewed as a rigid external constraint imposed on the legal system. Going back to the Bible, the prohibition against punishing the innocent was phrased in absolute terms: "the innocent and righteous slay thou not."[254] American caselaw followed this line of thought as well. One early case described the standard as a "Divine precept."[255] More recently, the leading Supreme Court case on the topic referred to the standard as a "bedrock 'axiomatic and elementary' principle whose 'enforcement lies at the foundation of the administration of our criminal law.'"[256] As Professor Epps notes, commentators and jurists have long taken this standard to be a type of "self-evident" truth.[257]

Furthermore, while by definition the standard entails some risk of convicting the innocent, courts have stubbornly refused to quantify this risk in an explicit manner.[258] When faced with a case in which the trial court put the standard at seventy-five percent, the Supreme Court of Nevada ruled that "The concept of reasonable doubt is inherently qualitative. Any attempt to quantify it may impermissibly lower the prosecution's burden of proof, and is likely to confuse rather than clarify."[259] Survey data also suggests that judges are opposed to quantifying the burden of proof. Professors Rita James Simon and Linda Mahan report that over ninety percent of the judges who participated in their study favored existing practices as opposed to practices that would require explicit quantification of proof.[260] One of the judges noted that "[p]ercentages or probabilities simply cannot encompass all the factors, tangible and intangible, in determining guilt—evidence cannot be evaluated in such terms."[261] This reluctance surprisingly remains, even in the face of empirical evidence suggesting that quantifying the burden could be useful.[262]

The common perception of the burden of proof in criminal trials as an unquantifiable and absolute principle that requires no reasoned justification suggests that it might reflect what social psychologists have termed protected

254 *Exodus* 23:7 (King James).

255 State v. Baldwin, 6 S.C.L. (1 Tread.) 289, 308 (1813) (opinion of Brevard, J.).

256 *In re* Winship, 397 U.S. 358, 363 (1970) (quoting Coffin v. United States, 156 U.S. 432, 453 (1895)).

257 Epps, *supra* note 60, at 1081.

258 *See, e.g.*, Peter Tillers & Jonathan Gottfried, *Case Comment*—United States v. Copeland, *369 F. Supp. 2d 275 (E.D.N.Y. 2005): A Collateral Attack on the Legal Maxim that Proof Beyond a Reasonable Doubt Is Unquantifiable?*, 5 LAW, PROBABILITY & RISK 135, 135–38 (2006) (reviewing judicial hostility towards quantification of the burden).

259 McCullough v. State, 657 P.2d 1157, 1159 (Nev. 1983).

260 *See* Simon & Mahan, *supra* note 46, at 329.

261 *Id.*

262 *See, e.g.*, *id.* at 329–30; Dorothy K. Kagehiro, *Defining the Standard of Proof in Jury Instructions*, 1 PSYCHOL. SCI. 194, 196 (1990).

(or sacred) values.[263] Protected values are instances in which people feel that absolute deontological rules prohibit certain actions no matter what the consequences of following those rules are.[264] People who hold such values tend to reject the need to conduct a cost-benefit analysis with respect to them and even deny that there are any costs entailed with adhering to the protected value.[265]

When shifting from abstract philosophical debates to setting public policy, protected values raise serious problems. Protected values undermine the unavoidable tradeoffs that the real world requires, as they are viewed in absolute terms.[266] Policymakers who need to decide whether to invest in public health programs, highway safety, saving an endangered species, or simply balancing the budget cannot escape the need to put such goals in a single policy metric. Yet when doing so, they need to be cautious, as treating a protected value like any other commensurable good is tantamount to "political suicide."[267] Consequently, the public discourse surrounding protected values tends to make use of rhetorical obfuscation.[268] Such tools enable people to "be portrayed as both unapologetic defenders of [sacred values] and at the same time as experts in finding ways to camouflage or overlook transgressions."[269]

Professor Philip Tetlock demonstrated this point in an elegantly designed experiment in which participants were asked to evaluate a governmental decision to cut the budget of a lifesaving program and shift the money to reducing the deficit, lowering taxes, and funding programs that will stimulate the economy.[270] Participants in one condition evaluated this question after being informed that it is was found that the shift in resources is the morally right thing to do. Participants in the second condition evaluated the very same question after being informed that the shift of resources is grounded in the high cost-per-life-saved of the program. As the results show, the use of deontic rhetoric brought about a significant increase in support of

263 For notable contributions to this literature, see Jonathan Baron & Mark Spranca, *Protected Values*, 70 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 1 (1997); Philip E. Tetlock et al., *Proscribed Forms of Social Cognition: Taboo Trade-Offs, Blocked Exchanges, Forbidden Base Rates, and Heretical Counterfactuals*, *in* RELATIONAL MODELS THEORY: A CONTEMPORARY OVERVIEW 469 (Nick Haslam ed., 2004). For a recent review of the findings, see Michael R. Waldmann et al., *Moral Judgments*, *in* THE OXFORD HANDBOOK OF THINKING AND REASONING 364, 382–84 (Keith J. Holyoak & Robert G. Morrison eds., 2012).

264 Baron & Spranca, *supra* note 263, at 3.

265 *Id.* at 5.

266 *See* Daniel M. Bartels & Douglas L. Medin, *Are Morally Motivated Decision Makers Insensitive to the Consequences of Their Choices?*, 18 PSYCHOL. SCI. 24, 24 (2007) ("[B]y definition, [protected values] are associated with trade-off avoidance.").

267 Baron & Spranca, *supra* note 263, at 14.

268 Waldmann et al., *supra* note 263, at 383.

269 *Id.*

270 *See* Philip E. Tetlock, *Coping with Trade-Offs: Psychological Constraints and Political Implications*, *in* ELEMENTS OF REASON: COGNITION, CHOICE, AND THE BOUNDS OF RATIONALITY 239, 254–55 (Arthur Lupia et al. eds., 2000).

the budget shift. Whereas support was around thirty-five percent in the cost-benefit condition, support soared to seventy-two percent in the moral condition.[271]

Viewing the burden of proof as a protected value suggests that the political discussion surrounding it cannot be a simple cost-benefit analysis. True, people want to deter and incapacitate dangerous offenders, yet they are unwilling to conduct an explicitly quantifiable tradeoff between punishing the innocent and achieving those goals. Adjusting sanctions to the degree of certainty of guilt through the substantive norms of criminal law enables people "to have their non-utilitarian cake and eat it too."[272] While all criminals under this regime are punished if and only if their guilt has been established beyond a reasonable doubt, by relaxing the substantive demands for a conviction, the effective burden of proof is reduced and a different balance between type 1 and type 2 errors is struck.

To be sure, while categorizing the beyond a reasonable doubt standard as a protected value helps elucidate the unique path that the law took in this area, it does little to resolve the related normative questions. On one hand, one can view protected values and the rhetorical maneuvers conducted to circumvent them as a type of bias that stands in the way of a reasoned analysis of difficult policy questions.[273] On the other hand, one can view protected values as a subtle tool that helps prevent the subversion of meaningful cultural institutions.[274] The next two Sections, therefore, explore the benefits of dealing with evidentiary uncertainty through substantive norms from the perspective of two central normative theories of criminal law: consequentialist theories and expressivist theories.

B. The Consequentialist Perspective: Tailoring the Burden of Proof to Fit the Context

As the discussion above suggested, the concept of a one-size-fits-all burden of proof is difficult to defend within a framework that focuses on setting ex ante incentives properly because the benefits of deterrence and the risk of chilling differ between policy domains.[275] Furthermore, once incapacitation is inserted into the policy debate, the need to grade penalties between subject areas is only intensified. The incapacitation calculus requires accounting for the costs associated with incapacitating criminals and the benefits generated by removing offenders from society. Both sides of this equation are not constant across criminal contexts. The costs of incarceration vary significantly depending on the level of security required. Housing an inmate in a

271 *Id.* at 255.

272 Baron & Spranca, *supra* note 263, at 13.

273 *See* Jonathan Baron, *Moral Judgment*, *in* THE OXFORD HANDBOOK OF BEHAVIORAL ECONOMICS AND THE LAW 61, 70 (Eyal Zamir & Doron Teichman eds., 2014) (viewing protected values as a type of overgeneralization).

274 *See* Alan Page Fiske & Philip E. Tetlock, *Taboo Trade-Offs: Reactions to Transactions that Transgress the Spheres of Justice*, 18 POL. PSYCHOL. 255, 291–94 (1997).

275 *See supra* notes 64–67 and accompanying text.

maximum-security prison (or its more extreme version—a supermax prison) can cost two to three times more than housing an inmate in a regular prison.[276] Similarly, different crimes entail distinct social costs, and therefore the benefits generated by incarceration are context-dependent as well.

Calibrating sanctions in accordance with the strength of the evidence via the substantive rules of criminal law allows differentiating the burden of proof between distinct policy domains. In areas in which the need to deter wrongful behavior or incapacitate dangerous individuals dominates, a low threshold for a conviction can be adopted by broadening the scope of criminal law. In other cases in which the risk of chilling benign behavior is of greater concern, criminal liability can be defined narrowly. In addition, by calibrating the penalties in specific low-graded offenses, the legislature can further fine-tune the balance between deterrence, incapacitation, and chilling benign behavior.

The regulation of sex crimes that target children can serve as a case in point. Sex crimes against children are of significant concern to legislatures given the tremendous harm such crimes cause their victims.[277] Furthermore, in some cases criminalizing behavior related to having sex with children does not risk chilling socially desirable behavior. Society may judge that in instances in which an offender pursues sexual contact with an eight-year-old victim there is simply no concern that sanctions will inhibit legitimate behavior.

Against this backdrop, one can view the federal prohibitions against sexually predatory interactions with children as geared towards reducing the burden of proof in this narrow category of cases. More specifically, 18 U.S.C. § 2422(b) criminalizes internet and phone communications aimed at enticing children to engage in prostitution or sexual activities. According to one court, posting an advertisement on Craigslist seeking sexual contact with children is sufficient to convict the posting individual of a crime under § 2422(b).[278] Undoubtedly, § 2422(b) represents a significant redrawing of the preparation-attempt borderline that enlarges the scope of criminal liability.[279] One commentator has recently noted that the section "obliterates attempt doctrine's substantial step requirement."[280]

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276 *See* A. Mitchell Polinsky, *Deterrence and the Optimality of Rewarding Prisoners for Good Behavior*, 44 INT'L REV. L. & ECON. 1, 1 (2015).

277 *See, e.g.*, Joseph H. Beitchman et al., *A Review of the Long-Term Effects of Child Sexual Abuse*, 16 CHILD ABUSE & NEGLECT 101 (1992); David Finkelhor & Angela Browne, *The Traumatic Impact of Child Sexual Abuse: A Conceptualization,* 55 AM. J. ORTHOPSYCHIATRY 530, 530–38 (1985).

278 *See* United States v. Nestor, 574 F.3d 159, 161 (3d Cir. 2009). For a more restrictive interpretation of § 2422(b), see United States v. Gladish, 536 F.3d 646, 649 (7th Cir. 2008), in which the court held that a defendant must take some specific actions beyond speech in order to be convicted.

279 *See* Michal Buchhandler-Raphael, *Overcriminalizing Speech*, 36 CARDOZO L. REV. 1667, 1694 (2015).

280 *Id.*

Viewed from an evidentiary standpoint, § 2422(b) reflects a decision by the legislature to recalibrate the burden of proof in the context of sexual offenses committed against children in favor of more false positives. In all likelihood, the adoption of § 2422(b) brought about the conviction of innocent defendants—innocent in the sense that, despite taking preparatory steps towards having sex with a minor, the defendants did not have the resolve to go through with the plan. Nonetheless, § 2422(b) reduces the amount of false acquittals and enables the state to punish more people who intend to have sex with children. Thus, the section reflects a specific balance between the costs of chilling communications of a sexual nature between adults and children (and other speech that lies in the penumbra of this behavior) and deterring and incapacitating pedophiles.[281]

To be sure, the evidentiary theory of punishment does not offer an automatic justification for all broadening of criminal liability that rests on an alleged need to adjust the burden of proof in a concrete context. It is quite possible that upon closer examination (which is beyond the scope of this Article), one would discover that the balance struck in § 2422(b) can only be explained by the political economy of criminal legislation, which tends to systematically broaden the scope of prohibitions and ratchet up sanctions.[282] Thus, any evidentiary balance struck in a concrete criminal context should rest on sound empirical and normative grounds.

C. The Expressive Perspective: Sustaining the Social Meaning of a Conviction

Expressive theories of criminal law focus on the communicative function of punishment.[283] Within an expressive framework, punishment is not only about inflicting suffering on wrongdoers.[284] Rather, punishment is the way

281 An additional example of such a policy can be found in the context of city ordinances that forbid adults who are not accompanying a child from entering into designated play areas in public parks. *See, e.g.*, N.Y., DEP'T OF PARKS & RECREATION RULES & REGULATIONS §§ 1–05(s)(1). The nature of the act covered by these ordinances coupled with the lack of a mens rea requirement suggests that they might encompass nonculpable individuals. Nonetheless, legislatures have decided that such an individual should be subject to a relatively mild sanction given the specific risks associated with such conduct.

282 *See generally* William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505 (2001).

283 For an early contribution to this body of work, see Joel Feinberg, *The Expressive Function of Punishment*, 49 MONIST 397 (1965), *reprinted in* JOEL FEINBERG, DOING AND DESERVING 95 (1970). For a later discussion of the theory, see Dan M. Kahan, *The Secret Ambition of Deterrence*, 113 HARV. L. REV. 413, 419–25 (1999). Expressive theories of punishment are part of a general theory of the law. Prominent contributions to this body of work include Richard H. Pildes & Elizabeth S. Anderson, *Slinging Arrows at Democracy: Social Choice Theory, Value Pluralism, and Democratic Politics*, 90 COLUM. L. REV. 2121 (1990); Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021 (1996). For a critical view on expressive theories, see Matthew D. Adler, *Expressive Theories of Law: A Skeptical Overview*, 148 U. PA. L. REV. 1363 (2000).

284 Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591, 593 (1996).

in which society enunciates its condemnation of an offensive act.[285] By criminalizing certain acts and determining the appropriate sanction for engaging in such acts, criminal law can echo the values of the community.[286] For example, the creation of hate crimes or the use of specific types of sanctions (e.g., death, shaming) can be explained by the symbolic nature of these legal vessels.[287] In addition, the social meaning of criminal prohibitions can bolster the power of social norms and thus help promote the goals of a community enacting them.[288] For instance, sodomy laws can serve to convey a message of contempt to the gay community and perpetuate homophobic norms, even when they are unenforced.[289]

Legal scholars have stressed the importance of the beyond a reasonable doubt standard in sustaining the expressive function of criminal law. Professor Laurence Tribe has long argued that the standard is tied to the condemning function of criminal law.[290] According to this line of thought, acknowledging the existence of quantifiable doubt while simultaneously blaming the defendant undermines the communicative power of a conviction. A conviction needs to convey information that the defendant did something wrong, for example murder or rape; a complex message according to which the defendant with some probability killed or raped is one that cannot form the basis of the condemnation of the defendant.

When presenting the case for a penal regime that incorporates evidentiary uncertainty into sentencing, Professor Fisher attempts to rebut this expressive concern.[291] According to Fisher, a probabilistic penal regime is actually desirable from an expressive perspective because it allows the legal system to convey precise signals regarding culpability. As she notes, such a regime

> would allow for a more nuanced and sophisticated answer to the question of criminal responsibility. By creating multiple standards of criminal conviction, the probabilistic model would facilitate a more accurate reflection of the evidentiary gray areas that permeate criminal decision making, and would enable finer regulation of the accompanying social sanctions.[292]

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285 *Id.*; *see also* Dan M. Kahan & Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 COLUM. L. REV. 269, 351–52 (1996).

286 *Id.*

287 *See* Kahan, *supra* note 283, at 439 (expressive analysis of death penalty); Kahan, *supra* note 284, at 630–52 (expressive analysis of shaming).

288 *See* Sunstein, *supra* note 283, at 2029–33.

289 *See* Terry S. Kogan, *Legislative Violence Against Lesbians and Gay Men*, 1994 UTAH L. REV. 209, 232–34. Interestingly, laws that require dog owners to collect the poop of their pets have also captured the attention of numerous expressivist theorists. *See* Robert D. Cooter, *Decentralized Law for a Complex Economy: The Structural Approach to Adjudicating the New Law Merchant*, 144 U. PA. L. REV. 1643, 1675 (1996); Sunstein, *supra* note 283, at 2032–33.

290 *See* Tribe, *supra* note 58, at 1372–75; *see also* Carol S. Steiker, *Punishment and Procedure: Punishment Theory and the Criminal-Civil Procedural Divide*, 85 GEO. L.J. 775, 808 (1997).

291 Fisher, *supra* note 10, at 867–71.

292 *Id.* at 868.

While this argument nicely explains why graduated sanctions based on a probabilistic assessment of the evidence are warranted, it fails to deal with the expressive argument as such. For the expressive function of the law to operate with a probabilistic sentencing regime, the populace would have to be acutely attuned to the intricate details of legal decisions. The specifics of the factual reasoning and the estimated probability of guilt would have to be conveyed to the public, who will then have to comprehend this complex message. Fisher envisions a world in which "[t]he transparency as to the extent of epistemic doubt, incorporated into the verdict, would allow the public to calculate the gravity of condemnation of the given criminal conduct under the assumption of maximal certainty."[293]

The problem with this vision is that criminal law does not convey information in such a manner; it is not a "nuanced" form of communication. When the criminal law fulfills its expressive function, it communicates with all members of the community and not with a small subset of people attuned to the details of legal rulings. To this end, its messages need to be simple and clear and cannot incorporate a multitude of dimensions that are beyond the comprehension of many members of its audience. This is why criminal law does not adjust penalties downward to account for the adverse consequences of a conviction, even if such adjustments are required from a normative perspective.[294] Decreasing sanctions in such a manner would not only "dilute the expressive force of the criminal sanction in the particular case," but would also "work to undermine the criminal law's more general moralizing, educative, and norm-building function in the long term."[295]

The specific context of probabilistic guilt raises even greater difficulties from an expressive perspective. For one thing, people tend to vastly disagree over the meaning of probabilistic terms. When physicians were asked to put a numeric figure on the term "likely," their answers ranged between 25% and 75%.[296] Similarly, the meaning of the term "very likely" ranged between 30% and 90%.[297] This, of course, does not imply that the law could not try to construct the social meaning of probabilistic terms, just as it attempts to do with respect to "reasonable doubt," but one has to acknowledge at the outset the gravity of the task.

An additional problem in the probabilistic context that the law can do very little about stems from people's poor understanding of probabilistic terms. While the readers of this Article (certainly those who have made it this far) know how many times a coin will come up heads if flipped 1000 times, can figure out what 1% of 1000 is, and can turn a proportion such as

293 *Id.* at 870.

294 Richard A. Bierschbach & Alex Stein, *Overenforcement*, 93 GEO. L.J. 1743, 1749–56 (2005).

295 *Id.* at 1750.

296 Dianne C. Berry et al., *Patients' Understanding of Risk Associated with Medication Use: Impact of European Commission Guidelines and Other Risk Scales*, 26 DRUG SAFETY 1, 2 (2003).

297 *Id.*

1:1000 into a percentage, a significant part of the population cannot.[298] More specifically, one study found that 30% of people "had 0 correct answers, 28% had 1 correct answer, 26% had 2 correct answers, and 16% had 3 correct answers."[299] Given this level of comprehension, criminal law cannot be expected to communicate to the public the subtle nuances associated with probabilistic guilt.

By utilizing the substantive path, however, the legal system can overcome these problems and simultaneously adjust sanctions in accordance with the probability of guilt and sustain the expressive function of the law. The substantive path requires the legal system to define the precise crimes that will lower the decision threshold. These crimes then become part of the communicative structure of criminal law. They convey a social message as to the degree of evidentiary certainty and encompass a simple signal as to the level of condemnation a defendant deserves. They state: "It has been proved beyond a reasonable doubt that the defendant committed a crime that reflects a 70% probability of guilt and should be punished accordingly." Now, it is uncontested that this statement is awkward and that the Pulitzer Prize will probably not be awarded to the jurist who came up with it. Nevertheless, this legal construct can achieve the goal of grading penalties in accordance with the probability of guilt while sending a simple message to society.

To be sure, as the legal system shifts the treatment of evidentiary uncertainty into the substantive arena it runs a risk of eroding the expressive power of the law. If the criminal law encompasses conduct that is not sufficiently tied to blameworthy behavior, it might lose its moral authority and its blaming power.[300] The goal of this Article is not to draw a precise boundary between justifiable and unjustifiable prohibitions. Rather, it is to highlight the function of some prohibitions and to defend the conceptual framework that lies at their core.

CONCLUSION

This Article presented a theory of criminal punishment and evidentiary uncertainty. It argued that given the constitutional limitation on relaxing the burden of proof in criminal trials, legislatures have turned to substantive norms to structure the decision threshold. More specifically, legislatures have created a de facto evidentiary graded penal regime in which, as the strength of the evidence grows, so do the sanctions the offender is subject to. The Article reviewed numerous doctrines of criminal law relating both to the

298 *See* Lisa M. Schwartz et al., *The Role of Numeracy in Understanding the Benefit of Screening Mammography*, 127 ANNALS INTERNAL MED. 966, 969 (1997).

299 *Id.* For similar findings with a more educated pool of subjects, see Isaac M. Lipkus et al., *General Performance on a Numeracy Scale Among Highly Educated Samples*, 21 MED. DECISION MAKING 37, 39 (2001).

300 For an argument against the broad scope of criminal prohibitions along these lines, see Ronald L. Gainer, *Federal Criminal Code Reform: Past and Future*, 2 BUFF. CRIM. L. REV. 45, 78 (1998).

objective and subjective elements of the crime and showed how they fit within this theoretical framework.

Significant research remains to be done based on the insights provided in this Article. On the theoretical side, this Article sampled only a small subset of doctrines from the universe of criminal law. Future studies should turn from the broad analysis associated with a paper presenting a general theory to a detailed analysis focusing on the unique features of discrete legal contexts. Such an analysis could help map the scope of the explanatory force of the theory and delineate the domains in which other considerations trump. Additionally, this paper focused exclusively on the interaction between evidentiary crimes and the population subject to them. Further research is needed to examine the way in which evidentiary crimes influence the behavior of the enforcers of criminal law. Such research will need to delve into the black box of prosecutorial discretion and examine questions such as whether prosecutors aim for convictions that fully account for the accused's deeds, or whether they simply aim to maximize the number of convictions. On the empirical side, this Article opens the door to a wide body of potential future research. Such research could focus on experimental methods and measure the degree to which evidentiary confidence explains penal intuitions, or turn to field studies (both qualitative and quantitative) that will document evidentiary decision in the courtroom.