THE CRISIS IN THE IDEOLOGY OF CRIME

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INTRODUCTION

In a previous article,[1] I argue that contemporary criminal law can not be fairly characterized as a moral system which condemns blameworthy choices. Instead, to a substantial degree, criminal law punishes transgressions without reference to personal culpability.[2] While traditional strict liability crimes are obvious examples,[3] they are not, as is sometimes argued, merely isolated exceptions to a regime which otherwise requires a culpable mens rea.[4] More generally, the well-accepted principle that ignorance of the law is ordinarily not an excuse, no matter how reasonable, illustrates this proposition.[5] In addition, the prevalence of negligence incorporates references to what a reasonable person should perceive and do without any inquiry into the specific mens rea of the defendant.[6]

What then explains society's decision to condemn some wrongs criminally, while allowing only civil or private institutional sanctions for other wrongs? It is the contention of this article that criminal law is the primary institution for transmitting social ideology.[7] The procedures of criminal law, unlike civil litigation, provide rituals by which the values and boundaries of society are sanctioned.[8] The difference between civil wrongs, such as torts, and crimes is *not*, as has been argued, inadvertent versus intentional culpability; nor is it a system based on deterrence,[9] since the wrongdoer may not have knowingly

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1. John L. Diamond, *The Myth of Morality and Fault in Criminal Law*, 34 AM. CRIM. L. REV. 111 (1996).

2. *See infra* Parts I, II.

3. *See, e.g.*, Commonwealth v. Koczwara, 155 A.2d 825 (Pa. 1959) (legislature intended to eliminate mens rea requirement and apply strict liability to tavern owner in sale of alcohol to minors). *See* STEPHEN A. SALTZBURG, JOHN L. DIAMOND, KIT KINSPORTS & THOMAS H. MORANETZ, CRIMINAL LAW 249-52 (1994).

4. *See* WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW 242-49 (2d. ed. 1986).

5. *See infra* Part IV.

6. *See infra* Parts I.B, C. Negligence is an objective inquiry into what a reasonable person under the circumstances would have done. Criminal negligence differs from civil (tort) negligence only by degree, and criminal negligence requires a gross negligence or more significant unreasonable risk than required for civil negligence. *See* MODEL PENAL CODE § (1985); *see also* LAFAVE & SCOTT, *supra* note 4, at 211-13.

7. *See* Robert Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57, 70-71, 93-95, 96 (1984) (discussing different theories adopted by critical legal historians to explore the use of the law in society).

8. *See id.*

9. *See, e.g.*, RICHARD A. EPSTEIN, CRIME AND TORT: OLD WIRE IN OLD BOTTLES IN

chosen to do wrong.[10] Criminal law is society's synthesis of what is evil and taboo as opposed to respectable transgressions.[11] Ultimately criminal law is the instrument by which the definitions of social morality are woven.[12]

Any complex society presents a multitude of wrongs which could be criminally condemned. Indeed, by looking at the wrongs which we defined as criminal, one can attempt to delineate principles which both do and should govern the decision to criminalize.

I. HISTORIC TABOOS

A. Bigamy and Statutory Rape

Bigamy[13] and statutory rape[14] are problematic crimes. Both impose potentially severe prison punishments,[15] yet neither traditionally has required a culpable state of mind.[16] Bigamy has traditionally punished simultaneous marriages even if the transgressor reasonably believed he or she was not simultaneously married.[17] Statutory rape historically has punished sexual intercourse between an adult male with an underage female even when the male

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ASSESSING THE CRIMINAL (1977); Robert Cooter, *Prices and Sanctions*, 84 COLUM. L. REV. 1523 (1984).

10. *See infra* Parts I, II.

11. *See, e.g.*, Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401 (1958). In the article, Mr. Hart stated:

> [W]e can say readily enough what a "crime" is. It is not simply anything which a legislature chooses to call a "crime." It is not simply antisocial conduct which public officers are given a responsibility to suppress. It is not simply any conduct to which a legislature chooses to attach a "criminal" penalty. It is conduct which, if duly shown to have taken place, will incur a *formal and solemn pronouncement of the moral condemnation of the community.*

Id. at 404-05 (emphasis added).

12. *See infra* Parts V, VI.

13. *See* SALTZBURG ET AL., *supra* note 3, at 250-51 (discussing bigamy).

14. *See id.* at 381-91 (discussing statutory rape).

15. *See, e.g.*, CAL. PENAL CODE § 261.5 (West 1995 & Supp. 1996) (punishing sexual intercourse by an individual 21 years or older with a minor who is under the age of 16 with one year in county jail or up to four years in state prison).

16. *See* W.E. Shipley, Annotation, *Mistake or Lack of Information as to Victim's Age as Defense to Statutory Rape*, 8 A.L.R.3D 1100 (1966) (noting that a majority of states still do not provide a mistake of age defense, thus resulting in prosecution of perpetrators without regards to their state of mind).

17. *See* Staley v. State, 131 N.W. 1028 (Neb. 1911) (defendant convicted of bigamy even though he was informed by three lawyers that his first marriage was void); *see also* People v. Vogel, 299 P.2d 850, 852-53 (Cal. 1956) (unlike statutory rape, courts have eliminated strict liability bigamy, perhaps reflecting contemporary flexibility over marriage structure).

reasonably believed the female was old enough to consent.[18] Punishment may be imposed, even though the defendant may not have acted in a subjective blameworthy manner because of a non-culpable factual mistake.[19] This is in contrast to most crimes, which would excuse a reasonable mistake of fact.[20] Bigamy and statutory rape address fundamental structural conceptions of how American and English society is organized.[21] Any transgression is condemnable without personal fault.[22]

B. Homicide

If the criminal law is unforgiving about bigamy and statutory rape, why is the criminal law more forgiving about murder and non-statutory rape? Like most crimes, murder excuses reasonable mistakes of fact.[23] If A believes B is an assailant, A's shooting of B is non-criminal, provided A's mistake is reasonable.[24] The privilege of self-defense excuses a reasonable error even when

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18. *See supra* note 16; *see also* State v. Stifler, 763 P.2d 308, 309-10 (Idaho Ct. App. 1988), *aff'd*, 788 P.2d 220 (Idaho 1990) (finding that an honest and reasonable mistake as to the victim's age was not a defense to the charge of statutory rape).

19. *See id.*; *see also* Shipley, *supra* note 16 (detailing that a mistake as to the victim's age is no excuse to liability for statutory rape). *But see* California v. Hernandez, 393 P.2d 673, 678 (Cal. 1964) (holding that a statutory rape defendant was entitled to present evidence of his reasonable belief that the woman was over the age of consent; if proved, the defendant would not be liable).

20. *See infra* Part IV.

21. *See* Diamond, *supra* note 1 (discussing the use of law in outlining "directional boundaries" for behavior in society).

For a discussion of the reasoning behind the original formulation and functional significance of statutory rape laws, see *Regina v. Prince*, All E.R. 881, 886, 887-88 (Cr. Cas. Res. 1875) (acknowledging that the purpose of such a statute was to recognize the father's "legal right" to the possession of his daughter). *See also* State v. Vicars, 183 N.W.2d 241, 243 (Neb. 1971) (illustrating the societal organizations' aspects of statutory rape through the recognition of the gravamen of the crime as the deprivation of an underage woman of her virginal chastity).

22. Even the Model Penal Code lacks a requirement of personal fault and refuses to acknowledge a mistake of age defense for statutory rape, yet it provides increased flexibility with regards to minors between the ages of ten and sixteen. *See* MODEL PENAL CODE §§ 213.1(1)(d), 213.1(1)(a), 213.4(4), 213.4(6) (1985).

23. *See* Gordon v. State, 52 Ala. 308 (1875) (stating that "[t]he criminal intention being of the essence of crime, if the intent is dependent on a knowledge of particular facts, a want of such knowledge, not the result of carelessness or negligence, relieves the act of criminality"); *see also* MODEL PENAL CODE § 2.04(1)(a) (1985); LAFAVE & SCOTT, *supra* note 4, at 405; SALTZBURG ET AL., *supra* note 3, at 216-17.

24. *See* People v. Goetz, 497 N.E.2d 41, 47 (N.Y. 1986) (interpreting the New York penal code self defense provision as requiring an objective reasonable belief that the use of force was necessary for protection against serious bodily injury, death, etc); *see also* Massachusetts v. Pierce, 138 Mass 165, 176 (1884) (stating that negligence should be measured by an objective standard,

an innocent victim is killed.[25] The explanation may be that the social order excuses and in many instances justifies and extols homicide.[26] What is critical to the ideological order is not the absence of homicide, but the absence of unexcused "malice aforethought." The ideological boundaries being advanced do not prohibit homicide but prohibit homicide with "malice aforethought," a specific mens rea.[27] The mens rea in most crimes is not necessarily present to provide an element of subjective culpability to criminal penalties, but to define objective boundaries that in this instance requires not merely acts and results but a specific state of mind.[28]

The lack of interest in the personal fault of the actor is underscored by homicide crimes, such as involuntary manslaughter, which require only the objective mens rea of negligence.[29] Negligence does not depend on the defendant's state of mind or his capacity.[30] Instead, it provides an objective standard of thought; what the reasonable person should think.[31] Some scholars have condemned negligence-based crimes because they do not necessarily require personal fault.[32] Consequently, negligence may appear along with strict liability crimes inconsistent with the subjective mens rea most crimes appear to embrace.[33]

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noting that the goal of the criminal law is to establish a "general standard" or at least general negative limits of conduct for the community, in the interest of the safety of all"). *Compare* MODEL PENAL CODE § 3.04(2)(b) (1985) and minority view which require a subjective belief that the use of force was necessary. *See also* John F. Wagner, Jr., Annotation, *Standard for Determination of Reasonableness of Criminal Defendant's Belief, for Purposes of Self-Defense Claim, That Physical Force is Necessary - Modern Cases*, 73 A.L.R.4TH 993 (1989).

25. *See id.*

26. For a discussion of justification defenses, see SALTZBURG ET AL., *supra* note 3, at 739-805. For a discussion of excuse defenses, see *id.* at 807-83.

27. *See, e.g.*, *Goetz*, 497 N.E.2d at 50 (N.Y. 1986) (noting that "[t]o completely exonerate such an individual, no matter how aberrational or bizarre his thought patterns, would allow citizens to set their own standards for the permissible use of force").

28. *See* Ronald L. Gainer, *The Culpability Provisions of the Model Penal Code*, 19 RUTGERS L.J. 575, 576-77 (1988) (providing a history of the role of mens rea in Anglo-Saxon law).

29. *See* Commonwealth v. Welansky, 55 N.E.2d 902 (Mass. 1944); Commonwealth v. Feinberg, 253 A.2d 636 (Pa. 1969); *see also* LAFAVE & SCOTT, *supra* note 4, at 669-774.

30. *See Welansky*, 55 N.E.2d at 910 (distinguishing negligence from recklessness and noting that, "[t]o constitute wanton or reckless conduct, as distinguished from mere negligence, grave danger to others must have been apparent and the defendant must have chosen to run the risk rather than alter his conduct so as to avoid the act or omission which caused the harm").

31. *See, e.g.*, Bussard v. State, 288 N.W. 187, 189 (Wis. 1939) (requiring awareness of risk in order to support an involuntary manslaughter conviction).

32. *See* JEROME HALL, LAW, SOCIAL SCIENCE AND CRIMINAL THEORY 244-65 (1982) (criticizing the Model Penal Code for advocating the inclusion of negligence within the criminal law).

33. *See generally* Martin R. Gardner, *The Mens Rea Enigma: Observations on the Role of Motive in the Criminal Law Past and Present*, 1993 UTAH L. REV. 635 (1993) (noting the elusive

Yet, there is consistency. Society is regulating the mind just as it regulates acts. Some acts like bigamy and statutory rape are per se physical transgressions,[34] while others like homicide require requisite states of mind to be transgressions. Killing the innocent is simply not a social taboo in many instances. There can, of course, be ideological transformations. Drunk driving and killing by drunk driving may be perceived differently in different eras.[35] The ideology to be imposed changes, but not concern for personal culpability per se.[36]

Homicide is often characterized as encompassing large variations in culpability.[37] Under a typical statutory scheme, first degree murder encompasses intent to kill with premeditation and deliberation.[38] Second degree murder includes the following: (1) intent to kill; (2) intent to commit serious bodily injury; and (3) extreme recklessness to human life.[39] In addition, under a typical felony murder scheme a death resulting from a felony can result in first degree murder if that felony is enumerated by the homicide statute and second degree murder if death occurs during other unlisted dangerous felonies.[40]

The lesser crime of voluntary manslaughter under the common law is applicable when one's intent to kill, intent to commit serious bodily injury or reckless conduct—although causing the victim's death was prompted by a provocation that would cause a reasonable person to lose his cool.[41] Historically, such provocations were statutorily enumerated and included, for example, encountering a spouse committing adultery.[42] Involuntary manslaughter

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and imprecise nature of mens rea). *See also* Richard G. Singer, *The Resurgence of Mens Rea: III—The Rise and Fall of Strict Criminal Liability*, 30 B.C. L. REV. 357 (1989) (providing a detailed analysis of the historic use of strict liability in the United States).

34. *See supra* Part I.A.

35. Most states today address drunk driving offenses which result in the death of another specifically within their murder/homicide statutes. *See, e.g.*, CAL. PENAL CODE § 191.5 (1987); N.Y. PENAL LAW § 125.12 (1983).

36. Involuntary intoxication remains a defense as the defendant is not culpable due to unawareness of ingestion of a substance or forced involuntary ingestion. *See, e.g.*, People v. Scott, 194 Cal. Rptr. 633 (Cal. Ct. App. 1983) (defendant raised the successful defense of mistake of fact emanating from his involuntary intoxication by an unknowing ingestion of a hallucinogenic substance).

37. *See* Gardner, *supra* note 33.

38. *See, e.g.*, CAL. PENAL CODE § 187-189, 191.5, 192 (1987). *See also* People v. Anderson, 447 P.2d 942 (Cal. 1968); Commonwealth v. Carroll, 194 A.2d 911 (Pa. 1963).

39. *See* SALTZBURG ET AL., *supra* note 3, at 259-60; *see also* Francis B. Sayre, *Mens Rea*, 45 HARV. L. REV. 974, 994-98 (1932); MODEL PENAL CODE § 210.2.

40. *See, e.g.*, People v. Washington, 402 P.2d 130 (Cal. 1965). *See also* State v. Wesson, 802 P.2d 574 (Kan. 1990) (discussing the imposition of a first degree murder offense on all felony murders unlike the bifurcated approach utilized in most states).

41. *See, e.g.*, State v. Thornton, 730 S.W.2d 309 (Tenn. 1987); Maher v. People, 10 Mich. 212 (1862); State v. Ross, 501 P.2d 632 (Utah 1972).

42. *See* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 477 (1987) (listing as traditional provocations under the common law: a serious assault or battery; witnessing adultery

criminalizes an accidental killing caused by gross or criminal negligence and, like voluntary manslaughter, is punished much less severely than murder.[43]

The variations in homicide based on an identical result—the victim's death—but involving a different mens rea, are often perceived as evidence of the role of culpability within the criminal law.[44] Yet, homicide is also quite substantial evidence that culpability is *not* the fundamental explanation for the homicide distinctions in punishment and condemnation.[45] The persistence in most jurisdictions of felony murder is blatantly inconsistent with a system punishing in proportion to personal fault.[46] An unforeseen, accidental death, if the death occurred during certain felonies such as robbery or burglary, can in many jurisdictions result in a first degree murder conviction.[47] Yet, it is very difficult to argue that an unanticipated heart attack stimulated by a burglary or robbery, where no deadly weapon or force is employed, constitutes the most culpable kind of homicide warranting a first degree conviction.[48] Involuntary manslaughter is also problematic from a personal culpability perspective, since criminal negligence—the relevant "mens rea"—does not inquire into the defendant's mind.[49] Instead, negligence simply inquires whether a reasonable person would have found the behavior to be a substantial, unjustified risk.[50] The

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by one's wife, mutual consent, an unlawful arrest; and a crime against a close relative).

43. *See, e.g.*, Commonwealth v. Pierce, 138 Mass. 165, 180 (1884); Walker v. Superior Court, 763 P.2d 852, 868 (Cal. 1988). *See* PA. CONS. STAT. ANN. § 2504 (West 1983 & Supp. 1997); CAL. PENAL CODE § 192 (1987); *see also* N.Y. PENAL LAW § 125.10 (utilizing criminally negligent homicide in lieu of the involuntary manslaughter title).

44. *See* Jerome Michael & Herbert Wechsler, *A Rationale of the Law of Homicide*, 37 COLUM. L. REV. 701 (1937).

45. *See generally* Diamond, *supra* note 1.

46. *See id.*

47. *See* SALZBURG ET AL., *supra* note 3, at 325-40 (discussing the felony murder rule).

48. *See* People v. Stamp, 82 Cal. Rpt. 598 (Cal. Ct. App. 1969) (60-year-old obese man with heart problems dies of heart attack in armed robbery); *In re* Anthony M., 471 N.E.2d 447 (N.Y. 1984) (83-year-old woman dies from hip operation for injury caused by purse snatching amounting to robbery).

49. *But see* Wagner, *supra* note 24 (noting that not every court defines criminal negligence objectively). *See, e.g.*, Commonwealth v. Feinberg, 253 A.2d 636 (Pa. 1969). *Compare* Peter W. Low, *The Model Penal Code, the Common Law, and Mistakes of Fact: Recklessness, Negligence, or Strict Liability?*, 19 RUTGERS L.J. 539 (1989). The author notes the following:

> At bottom, negligence involves a judgment that, based on what the actor knew, he or she should have known something else and should therefore have known enough to have understood the obligation to act more carefully. In spite of its concentration on objective components, the baseline for negligence is the context as the actor perceived it. Negligence, therefore, involves a subjective inquiry (what the actor actually knew about the context) and an objective inquiry (the inferences that should have been drawn from what the actor knew).

Id. at 549.

50. *See, e.g.*, Washington v. Williams, 484 P.2d 1167 (Wash Ct. App. 1971) (The court

intellectual ability of the defendant to have recognized the risk is simply not at issue.[51]

An ideological model of criminal law does explain these apparent anomalies in an analysis dependent on individual culpability. Unlike traditional strict liability crimes[52]—such as statutory rape, bigamy and public welfare crimes—society can not condemn all homicides because society does not view all killing as wrong or even undesirable.[53] It is heroic to kill in military contexts; it is heroic to kill on behalf of law enforcement. The police officer or private citizen who shoots the serial killer who is in the process of killing an innocent victim has not committed a social wrong. Indeed, the police officer who, without a less deadly alternative, declines to intervene on behalf of an innocent victim would instead be criticized if not condemned. It is, therefore, impossible to criminalize all homicides. On the other hand, society can and traditionally does condemn multiple marriage or sexual intercourse with a minor.[54] There is no "good" simultaneous marriage or "good" sexual intercourse with a child.[55]

Criminal homicide could be circumstantially criminalized without any reference to a mental state. For example, if A kills B as B is in the process of killing A or C, A's killing could be declared justified and non-criminal based on the objective actual necessity of A to defend himself or another.[56] Instead, the common law will justify the killing whenever A reasonably believes self-defense in response to imminent deadly force is necessary.[57] Yet, the standard still maintains an important objective component, namely the circumstances under which a reasonable person would perceive that he or she was in imminent danger from an attack.[58] The criminal law instead of condemning force alone is

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found defendant parents, who had sixth and eleventh grade educations, negligent under an objective standard for failing to present their child to a physician for treatment. The parents claimed that they believed the child had a toothache, but did not realize that the condition had worsened into gangrene.).

51. *See id.*; *see also* GLANVILLE LLEWELYN WILLIAMS, CRIMINAL LAW: THE GENERAL PART 99 (2d ed. 1961) ("With the best will in the world, we all of us at some time in our lives make negligent mistakes.").

52. *See supra* Part I.A.

53. For a discussion of defenses, see SALTZBURG ET AL., *supra* note 3, at 739-882.

54. *See supra* Part I.A.

55. *See, e.g.*, Kenneth L. Karst, *Woman's Constitution*, 1984 DUKE L.J. 447 (discussing statutory rape as a protection of a girl or young woman against her own immaturity).

56. *See* Joshua Dressler, *New Thoughts about the Concept of Justification in the Criminal Law: A Critique of Fletcher's Thinkers and Rethinking*, 32 UCLA L. REV. 61 (1984).

57. For a discussion of self-defense, see SALTZBURG ET AL., *supra* note 3, at 740-71.

58. *See* Wagner, *supra* note 24 (discussing objective versus subjective standards for establishment of the defense of self defense). *See, e.g.*, People v. Goetz, 497 N.E.2d 41, 41 (N.Y. 1986) (requiring an objectively reasonable belief and arguing that a subjectively reasonable belief would allow citizens to set their own standards). *Compare* MODEL PENAL CODE § 3.04(1) (1985) (adopting a subjective standard limited by the provisions of MODEL PENAL CODE § 3.09(2) (1985), providing, in turn, that recklessness or negligence in a belief or acquisition of information will

condemning force when the idealized reasonable person would not use force.[59] In short, society is proscribing conduct in the context of particular sensory perceptions. Society has chosen not to condemn killing in actual self-defense. Similarly, society has chosen not to condemn killing when the hypothetical reasonable person of ordinary intelligence and experience would "perceive" the circumstances as requiring self-defense.[60]

It is wrong, however, to equate the introduction of this "mens rea" as requiring personal culpability.[61] The "mens rea" is still objective. Indeed, while the defendant must subjectively possess the approved mens rea standard to be excused from murder, the standard itself is objective. The standard is not whether the defendant in good faith perceived self-defense necessary, but whether the defendant under the circumstances *should have* perceived circumstances that justified killing.[62] In most instances, the objective condition could preclude any justification without reference to the defendant's actual mental ability, perceptions or conclusions.[63] The ability of the defendant to perceive like a reasonable person is irrelevant, except where a physical sensory disability like blindness is present.[64]

Personal culpability, in the sense of choosing to do wrong, is simply not a basic component of mens rea. Instead, the criminal law imposes physical *and* mental standards to which one must subscribe. The traditional law authorizing defense of others illustrates this proposition well.[65] If A killed B to save an innocent C, A is not necessarily excused even if A reasonably believed B wrongfully attacked C with deadly force.[66] Traditionally, A is justified to use force only when the reasonable perception of the need for self-defense existed

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deprive the defendant of a self-defense claim).

See GEORGE P. FLETCHER, A CRIME OF SELF-DEFENSE: BERNARD GOETZ AND THE LAW ON TRIAL 61 (1988) (criticizing the subjective approach to self-defense).

59. *See id.*

60. *See id.*

61. *See, e.g.*, MODEL PENAL CODE § 3.04(1) (1985). This section creates a subjective standard for self defense which, pursuant to MODEL PENAL CODE § 3.09(2) (1985), does not provide protection for a reckless or negligent misjudgment, thus effectively creating an objective standard. *Id.*

62. *See id. See, e.g., Goetz*, 497 N.E.2d at 51 (requiring an objectively reasonable belief).

63. Some states have adopted the concept of imperfect self defense wherein a subjectively honest fear, while not objectively reasonable, negates the malice required to attain a murder conviction. *See, e.g.*, State v. Faulkner, 483 A.2d 759, 768 (Md. 1984); Commonwealth v. Colandro, 80 A. 571, 573-75 (Pa. 1911). Note that in a jurisdiction not following this view, an honest but objectively unreasonable fear would result in a murder conviction against the defendant.

64. *See* Washington v. Williams, 484 P.2d 1167, 1171 (Wash. Ct. App. 1971).

65. *See* SALTZBURG ET AL., *supra* note 3, at 750 (discussing of the defense of others justification); *see also* Danny R. Veilleux, Annotation, *Construction and Application of Statutes Justifying the Use of Force to Prevent the Use of Force Against Another*, 71 A.L.R.4TH 940 (1989).

66. *See id.*

with C, the intended victim.[67] A good Samaritan who intervened improperly is not excused even if a reasonable person would have made the same mistake.[68] The circumstances, including the mental perceptions, had to be justified from the victim's perspective.[69] While mental perception is being utilized, it is not always the defendant's mental perception or culpability which is at issue.

I do not mean to suggest that personal culpability does not correlate in many instances to criminal boundaries. The unjustified intent to kill with premeditation and deliberation is more evil than an accidental killing covered by manslaughter. It is wrong, however, to view partial overlap as an overriding principle.[70] Since only some homicides are condemnable, as opposed to all statutory rapes[71] or adulterated food in commerce,[72] the mens rea accompanying the acts becomes critical so that desirable acts are not condemned. Society encourages acts of self-defense and is laudatory of such behavior even if the innocent are killed by a reasonable misperception of the circumstance. Yet, criminal homicide is not based on a "mens rea" of personal culpability, despite inevitable overlap. Involuntary manslaughter and self-defense are prescribed by objective negligence which condemns good faith conduct that fails to meet an objective standard of behavior.[73] Felony murder imposes strict liability once the defendant engages in the mens rea of other qualifying felonies such as burglary or robbery.[74]

The Model Penal Code recognized how traditional homicide deviated from a principled criminal law based on culpability and attempted to adjust it. The defenses under the Model Penal Code require only good faith and not reasonable

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67. *See* LAFAVE & SCOTT, *supra* note 4, at 663-67 (discussing the sometimes called "alter ego" rule, wherein the right to defend another coexists with the right of the other to defend himself). *See, e.g.*, People v. Young, 183 N.E.2d 319, 320 (N.Y. 1962) (holding that while the defendant may have reasonably believed the third party was being attacked when in fact he was being arrested by undercover officers, the right to defend a third party could not exceed the right to self defense. The third party had no right to defend himself against a lawful arrest; thus, the defense of others justification failed.).

68. *See id.* (observing that an alternate view finds that, so long as the defendant reasonably believed the other is being unlawfully attacked, a defense of others justification should be permitted). *See, e.g.*, Fersner v. United States, 482 A.2d 387 (D.C. 1984) (finding a trial judge error in instructing that a defendant's self-defense justification depended exclusively on the perceptions of the third party).

69. *See Young*, 183 N.E.2d at 319-20 (noting that "the right of a person to defend another ordinarily should not be greater than such persons right to defend himself"). *But see* N.Y. PENAL LAW § 35.15 (1983) (providing that the force a reasonable person believes necessary to defend himself would suffice to support the person's defense of a third party).

70. *See* Diamond, *supra* note 1.

71. *See supra* Part II.A.

72. *See infra* Part II.

73. *See supra* notes 24, 29 and accompanying text.

74. *See supra* note 46 and accompanying text.

belief in the necessity of force.[75] Nevertheless, most jurisdictions have not adopted the Model Penal Code position.[76] Furthermore, the Model Penal Code itself would still impose criminal liability in this context for negligent homicide,[77] a crime the Model Penal Code conceived to remove negligence from involuntary manslaughter. Yet, negligent homicide under the Model Penal Code scheme is still punishable by five years imprisonment.[78]

C. Rape

The contrast in treatment between forcible rape[79] and statutory rape[80] also illustrates that mens rea is better explained as an ideological boundary rather than a mechanism of defining personal culpability.[81] Statutory rape as noted above is generally a strict liability crime.[82] A reasonable mistake that the female is underage is not a defense.[83] Any physical intrusion into this social boundary, originally intended to protect the father's property interest, is criminal.[84] Forcible rape initially also had a very limited requisite mens rea.[85] Just as statutory rape, intent to have sexual intercourse was the only mens rea required.

In lieu of additional mens rea requirements, however, non-statutory rape traditionally required a variety of physical acts by the female victim, including

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75. *See* MODEL PENAL CODE § 3.04(1) (1985).

76. *See* Richard Singer, *The Resurgence of Mens Rea: II—Honest but Unreasonable Mistake of Fact in Self Defense*, 28 B.C. L. REV. 459, 505-06 (1986) (observing that only two states, Delaware and Kentucky, have followed the Model Penal Code and eliminated defective defenses); *see also* SALTZBURG ET AL., *supra* note 3, at 748.

77. *See* MODEL PENAL CODE § 210.4 (1985).

78. *See* MODEL PENAL CODE §§ 3.09(2), 210.4, & 6.06(3) (1985) (imposing a maximum of five years imprisonment).

79. *See, e.g.*, People v. Barnes, 721 P.2d 110 (Cal. 1986); State v. Rusk, 424 A.2d 720 (Md. 1981) (providing statutory definitions for forcible rape or coerced sexual intercourse).

80. *See, e.g.*, State v. Stiffler, 763 P.2d 308 (Idaho App. 1988), *aff'd*, 788 P.2d 220 (Idaho 1990).

81. For a discussion of the evolution and changing nature of rape laws, see Patricia Searles & Ronald J. Berger, *The Current Status of Rape Reform Legislation: An Examination of State Statutes*, 10 WOMEN'S RTS. L. REP. 25, 40 (1987).

82. *See* SALTZBURG ET AL., *supra* note 3, at 386-87; *see also* W.D. Shipley, Annotation, *Mistake or Lack of Information as to Victim's Age as Defense to Statutory Rape*, 8 A.L.R.3D 1100 (1966).

83. *See id.*; *see also supra* notes 15, 16.

84. *See* Karst, *supra* note 55, at 458 (Statutory rape "originated in thirteenth century England in order to conserve a girl's eligibility for marriage, and thus her value to her father as a means to enhance the family's wealth. What was being protected was not the girl's freedom, but precisely her status as an object.").

85. For a discussion of the history of mens rea in forcible rape cases, see *Reynolds v. State*, 664 P.2d 621 (Alaska App. 1983).

"utmost resistance" to the sexual assault.[86] Under traditional rape law, the husband is exempt from criminal liability for coerced sexual intercourse with his wife.[87] Traditional forcible rape for non-spouses, as noted above, did not condemn duressed sexual intercourse but only sex where the woman resisted violence to the utmost.[88] The evolution of rape law shows shifts in the amount of resistance the victim must display.[89] The rigorous physical requirements, which defined rape in a very limited number of instances, have been primarily replaced by mens rea requirements specifying that the actor's belief as to the victim's consent generally must be either negligent or reckless.[90]

Such boundaries of criminal behavior reflect dominant social ideology which is more tolerant toward compelled sexual intercourse of an adult woman than consensual sex with an underage girl.[91] The issue is not the defendant's personal culpability but the physical and mental conduct of the defendant. Indeed, the transition from less requisite physical acts to more required mens rea or mental behavior for adult rape, if anything, increases the vulnerability of an actor for inadvertent criminality.[92] The historic rape crime (excluding statutory rape) was so defendant oriented in its physical requirements that the removal of specific physical requirements, such as utmost resistance, more than compensate for an additional mental element.[93] Further, the mental element in jurisdictions adopting criminal liability for the actor's negligent perception of consent (the mens rea of negligence) still would make no inquiry into the actual capacity or subjective culpability of the defendant.[94]

The utilization of mens rea in imposing criminality on individuals can

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86. *See* People v. Barnes, 721 P.2d 110 (Cal. 1986); State v. Rusk, 424 A.2d 720 (Md. 1981).

87. *See, e.g.*, People v. Brown, 632 P.2d 1025 (Colo. 1981); MODEL PENAL CODE § 213.6(2) cmt. at 418 (1985) (preserving marital example for "persons living together as man and wife, regardless of the legal status of the relationship").

88. *See, e.g.*, People v. Dohring, 59 N.Y. 374, 384 (1874).

89. *See Reynolds*, 664 P.2d at 623 (noting that the common law mens rea requirement of intentional intercourse was mitigated by the requirement that the victim had expressed lack of consent through utmost resistance); *see also* People v. Mayberry, 542 P.2d 1337, 1345 (Cal. 1975) (requiring proof of at least negligence concerning victim's lack of consent in addition to proof of intentional intercourse in order to uphold a rape conviction).

90. *See Mayberry*, 542 P.2d at 1345.

91. *See* Karst, *supra* note 55, at 458 (discussing the changing nature of the justification for the imposition of strict liability in statutory rape cases). Traditional justification was based on the protection of a father's property interests. Modern justification is based upon protecting a young woman from her own immaturity. *Id.*

92. *See Mayberry*, 542 P.2d at 1344-45 (considering the imposition of liability for negligent rape); *see also* Dana Berliner, Note, *Rethinking the Reasonable Belief Defense to Rape*, 100 YALE L.J. 2687, 2704 (1991). *Consider* Lani A. Remick, *Read Her Lips: An Argument for a Verbal Consent Standard in Rape*, 141 U. PA. L. REV. 1103, 1114 (1993).

93. *See Reynolds*, 664 P.2d at 625.

94. *See Mayberry*, 542 P.2d at 1346.

therefore be misleading. Mens rea is often simply another *objective* requirement of behavior, one involving mental or ideological compliance.

II. PUBLIC WELFARE CRIMES

Public welfare crimes,[95] those which impact generally on the public well-being, ordinarily subject violation to only minor monetary penalties. Examples of such crimes include the following: adulterated food;[96] serving alcohol to minors;[97] and mislabeling the weight of commodities for sale.[98] Public welfare crimes have traditionally dispensed with any mens rea.[99] Consequently, even a defendant's reasonable mistake which inadvertently violates conduct rules is criminalized.[100] In general, such crimes are theoretically dismissed by many contemporary criminal law theorists as minor aberrations from the contemporary approach of emphasizing the blameworthiness of criminal law violators.[101] Since penalties for these crimes are usually minor in nature and generally involve only slight monetary sanctions, such theorists tend to discount public welfare crimes as something less than real crimes.[102] Nevertheless, the persistence and

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95. For a discussion of the historical theory of public welfare offenses, see JEROME HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 327-37 (2d ed. 1960).

96. *See, e.g.*, United States v. Park, 421 U.S. 658 (1975).

97. *See, e.g.*, Commonwealth v. Koczwara, 155 A.2d 825, 826-27 (Pa. 1959).

98. *See, e.g.*, *Ex parte* Marley, 175 P.2d 832, 833 (Cal. 1946).

99. *See* Commonwealth v. Farren, 91 Mass. 489, 490 (1864) (justifying the imposition of criminal strict liability for the selling of adulterated milk by emphasizing, the language of the statute; the fact the penalty was a fine; the impracticability of requiring proof of knowledge; the importance of protecting the community against the common adulteration of food; and the reasonableness of imposing the risk upon the dealer and thus holding him "absolutely liable").

100. *See supra* Part I.A for a comparison with bigamy and statutory rape. *See also* John C. Coffee, Jr., *Does "Unlawful" Mean "Criminal"?: Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. REV. 193, 198-200 (1991) (discussing the danger of overcriminalization, whereby acts are labeled criminal even thought the actor lacked "blameworthiness"); Abraham S. Goldstein, *White-Collar Crime and Civil Sanctions*, 101 YALE L.J. 1895, 1897 (1992) (warning that white collar crime might over-generalize in some areas and stigmatize individuals who lack subjective culpability).

101. *See Koczwara*, 55 A.2d at 827. The court in *Koczwara* observed that

> [s]uch so-called statutory crimes are in reality an attempt to utilize the machinery of criminal administration as an enforcing arm for social regulations of a purely civil nature, with the punishment totally unrelated to questions of moral wrongdoing or guilt. It is here that the social interest in the general well-being and security of the populace has been held to outweigh the individual interest of the particular defendant. The penalty is imposed despite the defendant's lack of a criminal intent or mens rea.

Id.

102. See, for example, the Model Penal Code position, which

> makes a frontal attack on absolute or strict liability in the penal law, whenever the offense carries the possibility of criminal conviction, for which a sentence of probation

occasionally more severe penalties imposed suggest that such crimes resonate a true theme in understanding the nature of criminal law.[103]

Public welfare crimes, like statutory rape and bigamy, generally address social structural rules and provide boundaries which help to organize the transactional and ideological infrastructure of society.[104] The family structure, symbolized in this but not all other cultures, by monogamy, is perceived as fundamental to social organization.[105] Mitigation for non-culpable transgressions would confuse the ideological imperative. In a similar vein, statutory rape protects social infrastructure. Sexual autonomy of what society defines as a non-sexual child under the authority of the father under traditional rationale (and the parents under more modern parlance) would challenge the basic family structure as American and English society so defined it.[106]

Similarly, public welfare crimes address commercial and economic infrastructure.[107] Confidence in mass-produced foods, commercial commodities, and regulated distribution of controlled substances (including alcohol), require complete acknowledgment in the accepted social mores of conduct. However, such commercial rules are less-imbedded into the social organization and the penalties for transgression are clearly less.

This is not to suggest that rules against property crimes or crimes of violence are not essential to social order. The ideology that must be transmitted is, however, more obscure. Acquiring property from others or engaging in violence is often well accepted within societal norms. Consequently, only certain mindsets in the acquisition of property or imposition of violence are condemnable.

III. STRUCTURAL VERSUS TRANSACTIONAL CRIMES

Crimes of violence and crimes against property are directed toward individuals within society but do not generally challenge the structural

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or imprisonment may be imposed. The method used is not to abrogate strict liability completely, but to provide that when conviction rests upon that basis the grade of the offense is reduced to a violation, which is not a "crime" and under Sections 1.04(5) and 6.02(4) may result in no sentence other than a fine, or a fine and forfeiture or other authorized civil penalty.

MODEL PENAL CODE § 2.05 cmt. at 282-83 (1985).

103. *See, e.g.*, United States v. Park, 421 U.S. 658 (1975). *See* Diamond, *supra* note 1, at 116-17 (noting that despite the Model Penal Code's rejection of strict liability as inconsistent with a moral fault system, most political jurisdictions still utilize strict liability punishments and crimes).

104. *See* Karst, *supra* note 55, at 473.

105. *See* Zablocki v. Redhall, 434 U.S. 374, 384 (1978). The Court characterized marriage as a "bilateral loyalty" and stating that it is "the foundation of family and society." *Id.*

106. *See* Karst, *supra* note 55, at 458 (discussing the traditional justification of transgressions against the traditional property rights of father in their daughters).

107. Commonwealth v. Farren, 91 Mass. 489 (1864).

organization of the culture.[108] Rather than being what can be characterized as *structural* crimes, crimes of violence and property acquisition are *transactional* crimes.[109] Structural crimes such as bigamy and statutory rape define taboo relationships in a manner that insures the basic family structure around which society builds.[110] In a much less intense way, the public welfare crimes enforce the general rules and organizational infrastructure of commerce.[111] There is theoretically a social structure within which individual behavior must interact.[112]

What I characterize as structural crimes do not require mens rea because the actions are defined as wrong and condemnable in virtually all circumstances. Historically, statutory rape and bigamy are constant "wrongs."[113] The mens rea is irrelevant to its desirability of punishing these crimes. Similarly, the sale of adulterated goods and the utilization of false weights in mass commerce are unjustified wrongs which, like statutory rape, traditionally define the social organization of society.[114] Transactional crimes are more complex than structural crimes and require the establishment of a culpable mens rea. Killing, the imposition of physical injury, and coerced sexual intercourse against adults (as opposed to statutory rape) are not prohibited but instead regulated.[115] Not all homicide is criminal homicide, just as not all coerced sexual intercourse is criminal.[116]

In a military or crime-prevention context, as discussed above, killing can be perceived as highly laudatory. Killing in self-defense is justified, within certain

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108. *See generally* Hart, *supra* note 11 (arguing that crime is conduct the community finds blameworthy).

109. A comparative distinction is often made between crimes which are *malum in se* versus *malum prohibitum*. An act which is *malum in se* is "inherently and essentially evil, that is, immoral in its nature and injurious in its consequences, without any regard to the fact of its being noticed or punished by the law of the state." BLACKS LAW DICTIONARY 959 (6th ed. 1990). An act which is *malum prohibitum* is "an act which is not inherently immoral but becomes so because its commission is expressly forbidden by positive law; an act involving illegality resulting from positive law." *Id.* at 960.

However, this distinction is different from the structural versus transactional crime distinction. Structural violations are culpable simply as transgressions against societal mores despite the absence of a specific mens rea. Both statutory rape and public welfare crimes are structural crimes, while only statutory rape is *malum in se*. Transactional crimes are those which require a specific mens rea in order to establish a breach of societal mores. The killing of another in self-defense is simply not a transgression against society if it is justifiable, despite that fact that the killing of another is *malum in se*.

110. *See supra* Part I.A.

111. *See supra* Part II.

112. *See generally* HALL, *supra* note 32. *See also* Commonwealth v. Farren, 91 Mass. 490 (1864) (justifying the imposition of criminal strict liability for the sale of adulterated milk).

113. *See supra* Part I.A.

114. *See supra* Part II, notes 103-05 and accompanying text.

115. *See supra* Parts I.B-C.

116. *Id.*

constraints.[117] Traditionally and still prevalently, a reasonable belief of imminent danger of death or serious bodily injury allows the actor the privilege to kill an apparent assailant.[118] The justification exists even if in reality the apparent assailant is innocent.[119] Furthermore, while there is some inquiry into the actor's mental state to determine whether he sincerely perceived the necessity to kill, the defense requires a reasonable belief as well.[120] Consequently, an unreasonable but sincere belief, while not subjectively culpable since the actor may not have the capacity to act reasonably, nevertheless imposes criminal condemnation.[121]

Coercive sexual intercourse is also allowed under certain circumstances. Most states give the husband immunity from coerced sexual intercourse.[122] Traditionally, criminal condemnation for a non-husband's coerced sexual intercourse required utmost resistance by the victim.[123] Certain forms of coercion remain outside the reach of most criminal rape statutes.

In property crimes[124] the criminal law must delineate between wrongful and praiseworthy property acquisition activities in a capitalistic society.[125] For example, in most states false promises inducing transfer of title is not a basis for criminal theft.[126] The use of false pretense in obtaining title to property was initially not criminal, and one who engaged in such misconduct was even perceived with some degree of admiration as a sharp, crafty business negotiator.[127] Similarly, embezzlement—the appropriation of property that had been entrusted to another—was not perceived as criminal but rather was viewed as a private, civil dispute between associates.[128] Even today, states restrict false pretenses to misrepresentations of past or present facts and most exclude misrepresentations of "present intent" as a qualifying present fact. Thus, fraudulent promises are not criminalized.[129] Similarly, wrongful borrowings are

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117. *See supra* notes 57, 58.

118. *See* Wagner, *supra* note 24, § 2.

119. *Id.*

120. *Id.*

121. *See supra* note 63.

122. *See* DAVID FINKELHOR & KERSTI YLLO, LICENSE TO RAPE: SEXUAL ABUSE OF WIVES 6-7 (1985); DIANA E.H. RUSSEL, RAPE IN MARRIAGE 57-58 (1990).

123. *See supra* Part I.C.

124. *See supra* note 84, at 459-553 (discussing property crimes).

125. *See* LOUIS B. SCHWARTZ, THEFT, ENCYCLOPEDIA OF CRIME AND JUSTICE, THEFT 1537 (1983) (The author observes that, "One problem that dogs the law of theft . . . is that in a commercial society no clear line can be drawn between greedy antisocial acquisitive behavior on the one hand and, on the other hand, aggressive selling advertising, and other entrepreneurial activity that is highly regarded or at least commonly tolerated.").

126. *See, e.g.*, Chaplin v. United States, 157 F.2d 697, 698 (D.C. Cir. 1946).

127. *See* ROLLIN M. PERKINS & RONALD N. BOYCE, CRIMINAL LAW 289 (3d ed. 1982).

128. *See* JEROME HALL, THEFT, LAW AND SOCIETY 35-38 (2d ed. 1952).

129. *See, e.g.*, Commonwealth v. Bomersbach, 302 A.2d 472, 473 (Pa. Super. Ct. 1973) (holding that representations of actions to be taken in the future will not suffice for false pretenses). *See also* MODEL PENAL CODE § 223.2 (1985) (following a minority approach which criminalizes

not generally criminalized.[130]

The criminal regulation of intrasocial interaction is, at times, complex. Conduct alone is not being condemned, but particular states of mind accompanying conduct are jointly condemned.[131] Such states of mind do not necessarily relate to blameworthy conduct. Instead, the criminal law is proscribing mental conduct (often as in defenses in the context of what the hypothetical reasonable person would think) as an objective boundary along with acts. Ultimately, criminal law is enforcing an ideological mindset and punishing deviation whether voluntary or not.[132]

IV. IGNORANCE OF THE LAW

In general, criminal law does not forgive innocent ignorance of the criminal law.[133] With the exception of estoppel arguments where the state has mislead the individual, even reasonable ignorance is not excused.[134] This is in distinct contrast to mistakes of fact where most crimes excuse reasonable mistakes and some so-called specific intent crimes excuse sincere, even if unreasonable, mistakes as well.[135] While what I have categorized as structural crimes (bigamy, statutory rape and public welfare crimes) are exceptions and do not excuse

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false promises as a provable lie of present intentions).

130. *See, e.g.*, People v. Kunkin, 507 P.2d 1392, 1396-97 (Cal. 1973). Critical to criminalization is whether the defendant intended to return the property.

131. *See, e.g.*, SALTZBURG ET AL., *supra* note 3, at 504-15 (discussing the intent to permanently deprive another of his property, an element which is required to support a larceny conviction).

132. *See* Diamond, *supra* note 1. The author notes the following:

> [C]riminal law can be perceived usefully as a constellation of symbolic behavioral guideposts that project value and directional mandates. The immorality is not necessarily that of an individual transgressor or criminal, but the potentially inadvertent and, in a normative (but not positive) sense, non-culpable transgression of those directional boundaries. In essence, criminal law can be understood as a strict liability regime where personal condemnation is imposed on the transgressor for intentional *or* innocent boundary broaching.

Id. at 112.

133. *See, e.g.*, People v. Wendt, 539 N.E.2d 768 (Ill. App. Ct. 1989) (rejecting the defendant's argument that he was not guilty of tax evasion because he had a good faith belief that he was not subject to the income tax).

134. *See* MODEL PENAL CODE § 2.04(3) (Proposed Official Draft 1962) (listing as defenses situations where: (1) a law was not published, (2) reasonable reliance was placed on a statute later determined invalid, (3) reasonable reliance was placed on a court decision later overturned, and (4) reasonable reliance was placed on the advice of a public official).

135. *See Gordon*, 52 Ala. at 308; *see also* MODEL PENAL CODE § 2.04(1)(a) (1985) (providing a mistake of fact defense when the factual mistake negates the mens rea of the crime). *See, e.g.*, People v. Navarro, 160 Cal. Rptr. 692, 677-78 (Cal. App. 1979) (holding that a mistake of fact need not be reasonable to negate the intent of the crime).

reasonable mistakes of facts, the general contrast between mistake of fact and mistake of law is striking.

Once criminal law's primary role as the ideological transmission of social and cultural boundaries is acknowledged, the distinction between mistakes of fact and law becomes quite explainable. So long as the actor acknowledges the criminal boundaries, factual mistakes do not substantially challenge the ideological function of criminal law. Indeed, society, where its structural integrity is not at stake, ultimately is only enforcing acknowledgments that specific mens rea are prohibited. Mistakes of facts unlike mistakes of law do not challenge what the law requires. From a deterrence perspective, it would be difficult to justify not excusing reasonable mistakes of law.[136] The actor is not deterred since he did not know about the prohibition nor is his ignorance a reflection of negligence.[137] Furthermore, from a moral perspective, there is simply no culpability. The criminal has transgressed the boundaries, but he is not subjectively at fault. Yet even scholars that express strong dislike for crimes based on a negligence and certainly a strict liability mens rea in reference to mistakes of facts rarely challenge the strict liability imposed for ignorance of the law.[138]

V. THE ROLE OF IDEOLOGY

Criminal law is too often viewed as a utilitarian deterrence system which exacts a price for deviant conduct.[139] Scholars from an economic perspective have argued that criminal law supplements civil sanctions by providing a deterrent for judgment-proof defendants who have little to lose in civil litigation.[140] Alternatively, it has been argued that criminal law deters the wealthy from bypassing authorized market transactions by simply paying off a civil judgment.[141] The difficulty with these perspectives is that in large measure criminal law continues to punish those who are not necessarily aware that what

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136. *See* MODEL PENAL CODE § 2.04(1)(a) (1985) (providing that a mistake of law is a defense only if it negates the mens rea required by the statute).

137. *See, e.g.*, United States v. Klotz, 500 F.2d 580, 581-82 (8th Cir. 1974) (holding that defendants could not be convicted of knowingly failing to register unless it was proved that they were aware of their obligation to register). Despite the court's holding, most crimes do not require proof that a defendant was aware of the law and a mistake of law would thus provide no defense. *Id.* at 582.

138. *See* Thomas A. White, Note, *Reliance on Apparent Authority as a Defense to Criminal Prosecutions*, 77 COLUM. L. REV. 775, 784-89 (1977). The author notes that, "Only where . . . a person has made a reasonable effort to know the basis of legality of his actions, should he be granted a defense. An uninformed subjective belief in the legality of one's actions, unsupported by a reasonable basis for that belief, should not provide a defense." *Id.* at 799.

139. *See generally* JOHN STUART MILL, ON LIBERTY (1859).

140. *See, e.g.*, Richard A. Posner, *An Economic Theory of the Criminal Law*, 85 COLUM. L. REV. 1193, 1198 (1985).

141. *See id.* at 1195.

they are doing is criminally proscribed. It is, of course, possible to marginalize as insignificant those who are punished, despite their ignorance of the law. However, the descriptive discrepancy between the economic theorists' explanations and the criminal law itself persists both in theory and practice.

Similarly, efforts to delineate civil and criminal law on the basis of a defendant's individual subjective fault falter.[142] Mens rea is often (although not always) required, but blameworthiness in theory is quite regularly excluded.[143] The use of objective negligence, non-exculpation for ignorance of the law, and strict liability crimes are too pervasive in theory and practice to be ignored.[144] Ultimately, criminal law is imposing ideological boundaries that society utilizes to organize and define itself. Criminal law cannot always provide specific or general deterrence, but it can enunciate boundaries beyond which social condemnation and potential exclusion is possible.

Criminal law is rich with symbolic imagery.[145] Convicted criminals are social demons, who while potentially redeemable through rehabilitation have nevertheless violated social limits, even if in some instances inadvertently.[146] Culpability is imposed regardless of fault, except where society defined the boundaries as requiring subjective fault.[147] Just as language conveys enormous information about a culture, the rhetoric of criminalization defines a society. While the rhetoric encompasses mens rea, it is, for the most part, objective and not subjective in theory.[148] Transgressors may quite often choose criminality, but it is not a prerequisite.

Through public trials, society utilizes the rich ritual of condemnation to define wrongs. There is admittedly great discretion in a prosecutor's agenda, particularly at the highest federal level. Ultimately, many prosecutors reflect and help define social ideology. The great criminal trials often reflect these debates over values.

VI. THE CRISIS IN CRIMINAL IDEOLOGY

There are limits to any socio-cultural instrument. The sociologist, Professor Kai Erikson, for example, has noted that society appears to accommodate an optimum level of criminal deviance.[149] Such deviance helps to define the society

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142. *See* Diamond, *supra* note 1.

143. *See id.*

144. *See id.* at 122.

145. *See* THURMAN W. ARNOLD, LAW AS SYMBOLISM, SOCIOLOGY OF LAW 45-51 (1969) (describing law as "a great reservoir of emotionally important social symbols").

146. *See, e.g.*, JEFFREY H. REIMAN, THE RICH GET RICHER AND THE POOR GET PRISON: IDEOLOGY, CLASS AND CRIMINAL JUSTICE 116-40 (3d ed. 1990) (discussing the demonization of criminals).

147. *See supra* Part III (discussing transactional crimes).

148. *See* People v. Goetz, 497 N.E.2d 41, 47 (N.Y. 1986) (discussing the objective nature of a self defense determination in many jurisdictions).

149. KAI T. ERIKSON, WAYWARD PURITANS—A STUDY IN THE SOCIOLOGY OF DEVIANCE

by labeling what society appears not to tolerate. Erikson also notes, however, that the definition of criminal deviance attracts some would-be criminals who choose in a sense to be society's criminal.[150]

If the criminal law is a significant method of imposing cultural boundaries, its optimum use, one can surmise, requires selectivity. From a psychological perspective, to warn against everything is to warn against nothing. The ideology society intends to impose is arguably cluttered with excessive use of the criminal law, as if it were the ultimate tort—ready to deter if civil liability might not.[151]

Overcriminalization has been extensively explored,[152] particularly where it ventures into matters the observer finds inappropriately condemned. Obviously, the criminal justice system has limited resources. Furthermore, it is important that the criminal law not squander its moral authority or force too many to define themselves as deviant and hence no longer interested in subscribing to society's values.

One phenomenon that contemporary scholars have noted is the proliferation of criminal sanctions to address what were once only civil wrongs—the effective unification of torts and crimes.[153] The result is arguably a symbolic cluttering.[154] The ultimate ideology of society does not become embodied, because too many wrongs are defined as crimes. Historically, for example, only certain types of property acquisition was defined as criminal, a proposition that Professor Fletcher calls manifest criminality.[155] Today even the most technical transgression in capitalistic markets can be defined as criminal. If criminal law is a pricing system or trump card, perhaps such exploitation of criminal law is appropriate.[156] If, however, it is a mechanism by which society depicts values and the most fundamental, core ideology is conveyed, what is criminally wrong and right must be something more than what is merely civilly wrong and right. Undoubtedly, a society in transition fights over its criminal law, as it fights over the fabric of its ideology.

Nevertheless, change must not obscure the need to selectively condemn. The increasing proliferation of crimes competes for attention in society. Historically, the common law provided for only a handful of felonies. Crimes like murder, robbery, rape (narrowly defined) and larceny, for example, were all severely punished, initially with capital punishment.[157] Modern criminal codes are packed with multitudes of felonies that can entangle many. While in some ways this can equalize otherwise discriminatory emphasis, there is a social cost to such

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(1966).

150. *See id.*

151. *See* EPSTEIN, *supra* note 9.

152. *See, e.g.*, 62 H.L.A. HART, IMMORALITY AND TREASON IN THE LISTENER 162-63 (1959).

153. *See* EPSTEIN, *supra* note 9.

154. *See* Diamond, *supra* note 1.

155. GEORGE P. FLETCHER, RETHINKING CRIMINAL LAW 115-18, 232-33 (1978).

156. *See, e.g.*, Cooter, *supra* note 9, at 1548-49; Steven Shavell, *Criminal Law and the Optimal Use of Nonmonetary Sanctions as a Deterrent*, 85 COLUM. L. REV. 1232, 1232-35 (1985).

157. *See* Posner, *supra* note 140, at 1202, 1212.

proliferation. Already, many crimes of violence offer complex ideological messages. As previously discussed, the line between justified and criminal killing can be subtle.[158] If criminal law is to be successful in its communicative and persuasive function, it can not overly clutter its message.

Both the economic *and* moral model of criminal law risk dysfunctioning criminal law. By emphasizing the potential deterrence criminal law provides, the economic model invites criminal as opposed to civil sanctions, whenever the criminal threat appears an efficient instrument.[159] Indeed, the economic model appears to have had its impact on the epidemic of crimes that have been conceived that go well beyond an increasing concern for a non-violent social order. Society must ultimately be viewed holistically; to be effective the criminal law must have only so many commandments. It is not simply an issue of deterrence but one of cultural indoctrination. The utilitarian role of criminal law can not be viewed *too* narrowly.

The subjective fault model also, however, misstates criminal law.[160] Despite the gallant leadership of the Model Penal Code, the criminal law in theory and in practice punishes and condemns non-culpable conduct. Reasonable ignorance of the law is generally not exculpatory.[161] Objective negligence is an entrenched basis for criminality.[162] In the absence of legal insanity, the failure to perceive and conform to the law is condemnable. To define the criminal law system in purely culpable terms mischaracterizes the regime and only serves to distort and obscure its role. It is unfair to characterize all criminals as either intentionally or even negligently transgressing criminal boundaries since reasonable ignorance of those boundaries is non-exculpatory. This is not to deny that there is a strong correlation between moral fault and criminality, but in theory, although much less in practice, the correlation systematically deviates in many respects. Furthermore, a criminal law regime based on culpability encourages society to condemn culpability without the need to select and criminalize only what society will define as its fundamental wrongs. Criminal law is not simply condemning fault but also defining core values.

The ideological model of criminal law better explains what otherwise appear to be theoretical anomalies in substantive criminal law. Subjective moral fault is inconsistent with basic tenants of substantive criminal law. Individual moral culpability is not necessarily a prerequisite to criminal condemnation. Similarly, the economic pricing theories would require that criminal law penalties address only intentional and not inadvertent transgressions to persuasively characterize the criminal system as a pricing method to deter wrongdoing.

In contrast, an ideological transmission model of criminal law can explain the coexistence of culpable mens rea crimes, traditional strict liability crimes with severe penalties, the pervasive use of negligence in criminal law in lieu of

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158. *See, e.g.*, People v. Goetz, 497 N.E.2d 41, 46-52 (N.Y. 1986).

159. *See, e.g.*, Cooter, *supra* note 9, at 1548-49; Shavell, *supra* note 156, at 1232-35.

160. *See* Diamond, *supra* note 1, at 126-27.

161. *See, e.g.*, MODEL PENAL CODE § 2.04(1) (1985).

162. *See supra* Parts I.A, II.

subjective mens rea, and modern strict liability crimes. Further, such a model explains the criteria by which different standards are applied to different crimes.

Bigamy and statutory rape are structural crimes which historically defined the basic socio-cultural organization of the state.[163] Monogamy defines the family and any deviation is condemned and severely punished. Mens rea is irrelevant. Similarly, the family structure is enforced by the common law's imposition of strict liability in statutory rape.[164] Transgressing the basic family structure in society, by challenging the father's control over his unemancipated daughter, was unexcusable. The original purpose of statutory rape—protecting the father's exclusive control and value of his virgin daughter—has evolved arguably to protecting the minor's interest in avoiding exploitation.[165] Nevertheless, the resistance of most states to requiring any culpability as a prerequisite to punishing statutory rape suggest that a family structure encompassing a spousal sexual relationship and minor children devoid of sexual entanglement remains too fundamental to be concerned with exculpatory mitigation. Furthermore, the conception of the family unit requires a single spousal relationship. The ultimate social and political organization of the state is built on a particular family structure which presumably has implications to a society's fundamental organization.

In a similar manner, public welfare crimes condemn, without reference to mens rea, commercial deviations that challenge the structure of society.[166] Commercial discourse requires adherence to weight standards, food purity and the like.

Transactional crimes, on the other hand, regulate physical acts in the contexts of specific mens rea.[167] This mens rea must not, however, be confused with requisite culpability. Instead, the mens rea is providing more selective condemnation of acts which in some circumstances are justified.

Criminal law is ultimately different from tort and other civil law, not because it demands more culpability but because of the condemnation it imposes on its transgressors.[168] The imagery of criminal law, including the public ritual of its trials, defines a society's core ideology.[169] The crisis in the ideology of crime is the proliferation of crime and the failure to select sparingly from culpable civil wrongs. The danger is that too much condemnation dilutes and obscures the fundamental ideological boundary society needs to protect.

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163. *See supra* Part I.A.

164. While the Model Penal Code and some states reject strict liability in statutory rape, most states adhere to strict liability.

165. *See supra* note 21.

166. *See supra* Part II.

167. *See supra* Part III.

168. *See* ERIKSON, *supra* note 149, at 49.

169. *See id.*