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# Mediating Rules in Criminal Law

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## ARTICLE

### MEDIATING RULES IN CRIMINAL LAW

*Richard A. Bierschbach\* and Alex Stein\*\**

*THIS Article challenges the conventional divide between substantive criminal law theory, on the one hand, and evidence law, on the other, by exposing an important and unrecognized function of evidence rules in criminal law. Throughout the criminal law, special rules of evidence work to mediate conflicts between criminal law's deterrence and retributivist goals. They do this by skewing errors in the actual application of the substantive criminal law to favor whichever theory has been disfavored by the substantive rule itself. The mediating potential of evidentiary rules is particularly strong in criminal law because the substantive law's dominant animating theories—deterrence and retributivism—respond asymmetrically to the workings of those rules. We analyze the features of “mediating rules,” explore their effects across a range of substantive areas, and offer a tentative normative assessment of their role in a pluralistic criminal law system.*

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## INTRODUCTION

Substantive criminal law is often appraised by reference to the animating theories of deterrence and retributivism. Scholars, judges, students, and policymakers laud or condemn doctrines based on notions of “just deserts” or ideas about the incentives they create for those disposed to commit a crime.<sup>1</sup> So, for example, a retributivist might decry a felony-murder rule as divorcing punishment from individual blameworthiness; a deterrence theorist might defend it as discouraging the commission of felonies in any manner that risks death. A retributivist might support a defense that treats an understandably provoked killing as deserving less punishment than a premeditated one; a proponent of deterrence might oppose it as signaling leniency toward losses of control.

When it comes to the numerous evidentiary and other rules that determine the course of prosecutions and proof, however, the con-

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<sup>1</sup> See, e.g., Joshua Dressler, *Cases and Materials on Criminal Law* 32 (3d ed. 2003) (“The dominant approaches to justification [of punishment] are retributive and utilitarian.” (quoting Kent Greenawalt, *Punishment*, in 3 *Encyclopedia of Crime and Justice* 1282 (Joshua Dressler ed., 2d ed. 2002))); Paul H. Robinson, *Criminal Law: Case Studies & Controversies* 83 (2005) (“Traditionally, two sorts of justifications for imposing punishment are given: utilitarian and retributivist.”).

versation is different. Here, questions of reliability, evidential worth, and accuracy in fact-finding predominate.<sup>2</sup> So, for instance, arguments about the merits of using hearsay statements to prove involvement in a conspiracy and its subsequent crimes turn on the degree to which such statements are reliable indicators of involvement. References to deterrence and retributivism are by and large absent. On some level, this makes perfect sense. Whether one is a proponent of deterrence, a retributivist, or something else altogether, it is hard to see how the purpose of any given substantive rule, be it conspiracy or any other, will be served by evidentiary doctrines that accomplish little in the way of the rule's proper application. Once one takes as a given a substantive rule aimed at deterrence or retributivist goals, the dominant evaluative criterion for a rule of evidence would seem to be the extent to which it affects the accuracy with which that substantive rule is applied. Scholars and policymakers thus overwhelmingly view evidentiary rules in criminal law as geared primarily toward accuracy in fact-finding.

This Article claims that this conventional understanding of evidentiary rules in criminal law is incomplete. Evidentiary rules also perform a deeper, systemic function by mediating latent conflicts between criminal law's deterrence and retributivist objectives. They do this by skewing errors in the application of the substantive law to favor whichever theory has been disfavored by the substantive rule itself. So, for example, if retributivism dominates the substantive law of insanity, special evidentiary rules governing the presentation and proof of that defense might cabin it in a way that responds to deterrence concerns by making it more difficult to invoke successfully.<sup>3</sup> We call these special evidentiary rules "mediat-

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<sup>2</sup> See, e.g., Fed. R. Evid. 102 (setting forth the purpose of the evidence rules as "secur[ing] fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined"); *Funk v. United States*, 290 U.S. 371, 381 (1933) (stating that "[t]he fundamental basis upon which all rules of evidence must rest—if they are to rest upon reason—is their adaptation to the successful development of the truth"); Graham C. Lilly, *Principles of Evidence* 1 (4th ed. 2006) (describing evidence rules as aiming primarily to secure the quality of information for the jury and minimize errors); Margaret A. Berger, *Laboratory Error Seen Through the Lens of Science and Policy*, 30 U.C. Davis L. Rev. 1081, 1088 (1997) (observing that the goal of evidentiary rules is to minimize and expose errors in fact-finding).

<sup>3</sup> See *infra* notes 182–89 and accompanying text.

ing rules." This Article uncovers their presence and offers an account of their function in criminal law.

The mediating potential of evidentiary rules in criminal law is particularly strong for a systemic reason. The substantive law's dominant animating theories—deterrence and retributivism—respond asymmetrically to the workings of evidentiary rules. Deterrence cares only about the incentives that the criminal law creates in the form of expected penalties. This means that the scope of a given criminal prohibition or the sanctions actually imposed for a given crime need not be exactly right. The punishment may be high or low, and the crime definition may be overbroad or too narrow—in either scenario, deterrence can still achieve the "right" expected penalty through evidentiary rules that raise or lower the barriers to conviction.<sup>4</sup>

Retributivism, in contrast, cares only about the actual implementation of the criminal law in accordance with the principle of just deserts. This means that all blameworthy defendants, and only blameworthy defendants, must be convicted and receive punishments that fit their particular crimes. Conviction and punishment of the undeserving and failure to convict and punish the deserving are both instances of injustice which retributivism abhors. Retributivism provides no framework for determining which of these failures of desert is worse. Thus, to the extent that rules of criminal evidence work to shift the balance between false positives and false negatives in the substantive law's application, retributivism has little to say about which particular evidentiary rules are best.<sup>5</sup>

As we show in Part I, this asymmetry allows evidentiary rules to mediate between deterrence and retributivist objectives in two different ways. First, where retributivist considerations determine the contours of the substantive law, special evidentiary rules can work to enhance or reduce expected penalties by skewing the balance of adjudicatory errors toward false positives or false negatives, respectively. A substantive rule that is too narrow from a deterrence perspective, for instance, might be paired with relaxed evidentiary standards that increase defendants' probability of conviction; conversely, heightened barriers to conviction might accompany a sub-

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<sup>4</sup> See *infra* Section I.B.

<sup>5</sup> See *infra* Section I.A.

stantive rule that is too broad. Second, where deterrence considerations determine the contours of the substantive law, special evidentiary rules can work to ameliorate retributivist concerns by skewing the actual application of the law in a way that effectively sorts between more and less blameworthy defendants. A severe, retributively overbroad liability rule for minor accomplices, for instance, might be paired with evidentiary doctrines that encourage prosecutors to offer especially attractive plea bargains to such persons in exchange for their cooperation in the pursuit of principals. This sorting effect, while imperfect, mitigates the definitional problem for retributivism without radically undermining deterrence.<sup>6</sup> Mediating rules, in short, help to result in a more balanced criminal law.

This tendency of evidentiary doctrines to function as mediating rules in criminal law has gone unnoticed by legal commentators, no doubt in large part because of the traditional division of labor between substantive criminal law theorists on the one hand and evidence law scholars on the other. Our new perspective adds to the traditional understanding of evidentiary rules as confined to fact-finding tasks and provides a richer descriptive account of a variety of special evidentiary doctrines that appear throughout the criminal law. It also suggests some attractive normative implications for the role that such rules might play in fostering social consensus in contested areas of criminal liability and punishment.

Our argument in the pages ahead unfolds in three parts. Part I lays out our basic account of mediating rules. In it, we analyze the general features of deterrence and retributivism vis-à-vis the three different kinds of rules—substantive rules, evidentiary and other procedural rules, and sanctioning rules—that govern determinations of criminal liability and punishment. We explore the ways in which deterrence and retributivism interact differently with these rules and show how this allows rules of evidence to perform a mediating function between the two approaches in substantive areas of acute conflict. Two specific traits of those theories play an especially important role in our analysis: retributivism's general agnosticism toward the allocation of errors in the substantive law's appli-

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<sup>6</sup> See *infra* notes 62–83 and accompanying text.

cation, and deterrence's overarching concern with expected sanctions.

Part II examines the presence of mediating rules in three important areas of the criminal law's general part: complicity, preparation versus attempt, and affirmative defenses. The substantive doctrine in each of these areas generates especially acute conflicts between deterrence and retributivist goals. In each case, special evidentiary rules accompany the substantive law. We show that, in each of these areas, those special rules work to temper the theoretical conflicts engendered by the substantive law, a function that helps to illuminate and explain the rules' existence where other explanations may be unsatisfying.

Finally, in Part III, we turn to the normative implications of mediating rules. Mediating rules, we suggest, can work to promote social consensus around criminal law in a moral universe that is diverse and pluralistic.

### I. RETRIBUTIVISM, DETERRENCE, AND MEDIATING RULES

Each instance of the imposition of criminal liability and punishment combines three different types of rules: substantive rules, by which we mean rules that draw the lines of substantive criminal liability, including the statutes and doctrines that define crimes and defenses; evidentiary and other procedural rules, by which we mean rules that control the manner in which crimes must be investigated, prosecuted, and proved, including constitutional, statutory, and judge-made rules of evidence; and sentencing rules, by which we mean the statutes, guidelines, and doctrines that establish the type and degree of sanctions appropriate for a given crime.<sup>7</sup> Because of the dissimilar orientations of deterrence and retributivism, these different types of rules interact differently with each theory. In particular, retributivism and deterrence relate to evidentiary rules in a strikingly asymmetric fashion. This insight, systematically overlooked by scholars writing in the field, is an important one. In light of it, the rules can combine in various ways to perform a mediating function between deterrence and retributivist objectives.

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<sup>7</sup> Throughout this Article, we use the term "rules" in its general sense, as synonymous with "laws," not in its more narrow, technical sense as denoting a certain type of law (for example, a "rule" as opposed to a "standard").

Section A examines the relationship of these rules to retributivism. Section B does the same for deterrence. Section C provides a general account of how evidentiary rules can work to mediate between the two theories.

### *A. Retributivism and Criminal Law Rules*

There are numerous varieties of retributivism, and retributivist scholars themselves are not in complete agreement on some of the specifics of retributivist theory. It is thus precarious on some level to talk too loosely about retributivism in a generalized, uniform way. Nevertheless, in this Article, that is what we must do. For the purposes of what follows, then, we will take the basic features of retributivism as we find them in the literature. We will not address all of the nuances of and qualifications to retributivist approaches to criminal law. While they might affect our account of mediating rules around the margins, they do not affect our core insight.

All varieties of retributivism care primarily about one thing: doing justice in the particular case.<sup>8</sup> Retributivism holds that an offender should be punished “because, and only because, [he] deserves it.”<sup>9</sup> Retributivism is case-focused because it judges the appropriateness of criminal liability and punishment by reference to the specific features of the wrongful act that has been committed. Retributivists gauge desert by focusing on the specific circumstances surrounding the act in question, such as the offender’s mental state at the time of the act, the nature of his conduct, and (on

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<sup>8</sup> See, e.g., Eric L. Muller, *The Virtue of Mercy in Criminal Sentencing*, 24 *Seton Hall L. Rev.* 288, 299 (1993) (“[A] retributivist’s primary concern is that a criminal sentence accurately reflect a criminal’s just deserts.”). For particularly useful surveys and critical analyses of the different retributivist theories, see Louis Kaplow & Steven Shavell, *Fairness Versus Welfare* 294–317 (2002); Michael Moore, *Placing Blame: A General Theory of the Criminal Law* 104–88 (1997); *Retributivism and Its Critics* (Wesley Cragg ed., 1992).

<sup>9</sup> Michael S. Moore, *The Moral Worth of Retribution*, in *Punishment and Rehabilitation* 94 (Jeffrie G. Murphy ed., 1995); see Moore, *supra* note 8, at 153–54 (observing that, under retributivism, desert is both a necessary and a sufficient condition of just punishment); Stephen P. Garvey, *Is It Wrong to Commute Death Row? Retribution, Atonement, and Mercy*, 82 *N.C. L. Rev.* 1319, 1324 (2004) (“Retributive justice obligates the state to punish an offender because and to the extent, but only to the extent, he deserves to be punished.”).



some accounts) the harm he caused.<sup>10</sup> These circumstances generally determine whether the act was wrongful and, if so, its objective moral gravity.<sup>11</sup>

These case-specific circumstances also determine the magnitude of the appropriate punishment. For retributivists, punishment must be proportional to the gravity of the offense in some way.<sup>12</sup> We say "in some way" because, typically, retributivism gives little guidance on precisely how much punishment is appropriate for any given offense.<sup>13</sup> Instead, the standard is often expressed as a relative one as between offenses: more serious offenses should be punished more severely than should less serious ones, although the precise quantum of punishment is flexible to some degree.<sup>14</sup> The social conse-

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<sup>10</sup> See, e.g., Darryl K. Brown, Third-Party Interests in Criminal Law, 80 Tex. L. Rev. 1383, 1408 (2002) ("Retributivism limits attention to an offender's mental state, conduct, and the harm he caused . . ."); Dan Markel, Against Mercy, 88 Minn. L. Rev. 1421, 1445 (2004) (noting that "[r]etribution is often characterized as being concerned with the offender's past wrongdoing" and that retributivism generally holds that punishment "should be commensurate to the seriousness of the wrong and [the offender's] blameworthiness in committing it"). Some varieties of retributivism also focus more explicitly on the offender's character. See, e.g., Jeffrie G. Murphy, Repentance, Punishment, and Mercy, in *Repentance: A Comparative Perspective* 143, 149 (Amitai Etzioni & David E. Carney eds., 1997) (describing a conception of character retributivism).

<sup>11</sup> See Douglas A. Berman, Distinguishing Offense Conduct and Offender Characteristics in Modern Sentencing Reforms, 58 Stan. L. Rev. 277, 289 (2005) (summarizing retributivist theories of punishment as typically contending that "both offense conduct and offender characteristics should play a central role in meting out punishment based on an offender's culpability").

<sup>12</sup> See, e.g., Immanuel Kant, *The Metaphysical Elements of Justice* \*333 (famously arguing for the *lex talionis* principle under which the criminal should suffer the same harm as he inflicted on the victim); Jeremy Waldron, *Lex Talionis*, 34 Ariz. L. Rev. 25 (1992) (explaining the *lex talionis* principle as a normative aspiration that imposes the requirement of proportionality in punishment).

<sup>13</sup> Kant favored the *lex talionis* or "eye-for-an-eye" approach, see Kant, *supra* note 12, at \*363, but even he did not produce workable precepts for determining the correct punishment. Most retributivists reject *lex talionis*. See Kaplow & Shavell, *supra* note 8, at 307 (noting the "many retributivists who do not endorse *lex talionis*"); Youngjae Lee, The Constitutional Right Against Excessive Punishment, 91 Va. L. Rev. 677, 701 n.112 (2005) (noting retributivist critics of *lex talionis*). H.L.A. Hart has called the notion of proportionality "the most perplexing feature" of retributivism. H.L.A. Hart, Postscript: Responsibility and Retribution, in *Punishment and Responsibility: Essays in the Philosophy of Law* 210, 233 (1968).

<sup>14</sup> See, e.g., Michael Tonry, Intermediate Sanctions in Sentencing Guidelines, 23 Crime & Just. 199, 206 (1998) ("Proportionality . . . require[s] that punishment severity be scaled to the seriousness of crimes, which means that . . . offenders convicted of comparably serious crimes must receive comparably severe punishments."); Andrew

quences of conviction or acquittal, the costs and benefits of punishment, the incentives criminal law creates for the offender and others like him, and similar consequentialist considerations are irrelevant, at least in theory.<sup>15</sup> For the retributivist, what matters is that “the punishment fit the crime.”<sup>16</sup>

Retributivism’s case-focused orientation shapes its stance toward the three different types of criminal law rules that go into any liability and punishment determination. For the retributivist, substantive rules and sanctioning rules are—or at least should be—generally more important than evidentiary rules.<sup>17</sup> Substantive and

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von Hirsch, *Proportionality in the Philosophy of Punishment*, 16 *Crime & Just.* 55, 55–98 (1992) (providing a detailed account of a conception of proportionality that ranks crimes ordinarily—that is, relative to each other—but noting that any cardinal ranking of absolute severity is not possible); Waldron, *supra* note 12, at 38–49 (arguing that retributivism leaves room for a range of punishments for any given crime).

<sup>15</sup> See, e.g., George P. Fletcher, *Rethinking Criminal Law* 415 (1978) (“[T]he principle of retribution holds that punishment is just regardless of its consequences. Of course, desirable consequences may follow from punishment, but these incidental benefits do not enter into a retributive rationale.”); Kant, *supra* note 12, at \*331 (“Judicial punishment can never be used merely as a means to promote some other good for the criminal himself or for civil society, but instead it must in all cases be imposed on him only on the ground that he has committed a crime . . .”); Waldron, *supra* note 12, at 29–30 (discussing the nonconsequentialist nature of retributive punishment).

<sup>16</sup> See Fletcher, *supra* note 15, at 415 (“What makes punishment just, regardless of the social good that might follow, is that it is a fitting social response to the commission of the crime.”); Douglas Husak, *The Criminal Law as Last Resort*, 24 *Oxford J. Legal Stud.* 207, 218–19 (2004) (describing proportionality as implementing a “principle of rank ordering” under which less serious offenses should not be punished with greater severity than more serious ones, “even if deviat[ing] from this principle [would] prove[] effective in reducing crime”).

<sup>17</sup> Despite the extensive literature on retributivism, very little has been written on its implications for the design of procedural and evidentiary rules. See, e.g., Moore, *supra* note 8, at 91, 154 (describing retributivism as an abstract moral duty to set up institutions that achieve just punishment, without discussing the problems of uncertainty, scarce resources, and risks of error); Russell L. Christopher, *The Prosecutor’s Dilemma: Bargains and Punishments*, 72 *Fordham L. Rev.* 93, 165–66 (2003) (criticizing retributivism for failing to offer guidance for making prosecutorial choices under resource constraints); Michael T. Cahill, *Real-World Retributivism 2* (Aug. 2, 2006) (unpublished manuscript, on file with authors) (noting that “[r]etributivism . . . speaks only to the content of criminal-law rules, and not to their implementation”). But see Paul H. Robinson & Michael T. Cahill, *Law Without Justice* 53–71 (2006) (reviewing and briefly analyzing the relationship of the just deserts standard to procedural and evidentiary rules arguably designed to enhance reliability); Russell L. Christopher, *Deterring Retributivism: The Injustice of “Just” Punishment*, 96 *Nw. U. L. Rev.* 843, 865–76, 910–15 (2002) (discussing different varieties of retributivism and their relationships to standards of proof in criminal cases).

sanctioning rules are the primary determinants of whether any given instance of criminal liability and punishment satisfies the just deserts requirement. Poorly crafted, overbroad substantive rules mean that some individuals who in fact do not deserve punishment may be punished anyway; poorly crafted, underinclusive ones mean that some who in fact do deserve it may not be. Overly harsh or unduly lenient sanctioning rules mean that some wrongdoers will be punished out of proportion to the gravity of their offenses. A petty thief may be punished as a murderer, or a murderer may walk away with a slap on the wrist. The application of such rules in any given case means that the punishment will *not* fit the crime. The retributivist, therefore, will want to craft and calibrate substantive and sanctioning rules to track the just deserts criterion as closely as possible.

When it comes to evidentiary rules, things are more complex. Like substantive and sanctioning rules, evidentiary rules are important to retributivists insofar as they ensure that the truly deserving are held liable and punished while the truly undeserving are not. They are important, in other words, to the extent that they can achieve ultimate factual accuracy of outcomes in individual cases.<sup>18</sup> Substantive and sanctioning rules, after all, can do little to track the just deserts criterion if poor evidentiary rules lead to their improper implementation.

Where crime definitions are perfectly tailored to retributive purposes, the only concern of retributivists vis-à-vis evidentiary rules should be ensuring that the definitions are properly applied. Under conditions of uncertainty, however, minimizing adjudicative errors—by which we mean applications of the law to erroneously determined facts—always involves tradeoffs. That is to say, where one can never know with absolute certainty whether an individual did or did not commit a crime, virtually all evidentiary rules designed to increase the factual accuracy of a legal determination of

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<sup>18</sup> See Kaplow & Shavell, *supra* note 8, at 258 (explaining that fairness-based notions, such as retributivism, are ordinarily understood as favoring accuracy in the choice of procedural and evidentiary rules); Moore, *supra* note 8, at 91 (underscoring that, for retributivism, what matters is actual punishment in accordance with the maxim of “just deserts”); Dan Markel, *State, Be Not Proud: A Retributivist Defense of the Commutation of Death Row and the Abolition of the Death Penalty*, 40 Harv. C.R.-C.L. L. Rev. 407, 463 (2005) (“[T]he concern for accuracy in distribution of punishment is fundamentally a retributivist concern . . .”).

guilt will at the same time decrease the factual accuracy of a legal determination of innocence.<sup>19</sup> Requiring the government to prove guilt “beyond a reasonable doubt,” for example, means that criminal convictions must be as factually accurate as practically feasible.<sup>20</sup> Acquittals, consequently, can rest upon any “reasonable doubt,” that is, upon any doubt substantiated by the evidence.<sup>21</sup> A “reasonable doubt” standard greatly increases the chances that a defendant found guilty will in fact have committed the crime in question, and greatly decreases the chances that factually innocent defendants will be convicted (although they still are). By the same token, though, a “reasonable doubt” standard also greatly increases the chances that many factually guilty defendants will not be convicted. In short, by decreasing the incidence of false positives (erroneous convictions of the factually innocent), the standard increases the incidence of false negatives (erroneous acquittals and non-prosecutions of the factually guilty). Sticking with standards of proof, one could decrease the incidence of false negatives by, say, lowering the standard to one of preponderance of the evidence. A preponderance standard would result in more convictions of factually guilty defendants. But it would result in more convictions of factually innocent defendants as well. False negatives would go down, but false positives would go up.<sup>22</sup>

This aspect of fact-finding in the face of uncertainty about any given defendant’s factual guilt leaves retributivism with little to say about the precise evidentiary rules that should govern the imposition of liability and punishment. For retributivists, both false positives and false negatives violate just deserts.<sup>23</sup> Both therefore are

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<sup>19</sup> See, e.g., Richard A. Posner, *Economic Analysis of Law* 618 n.2 (6th ed. 2003) (observing that “[t]rading off [false positives] and [false negatives] is a pervasive feature of evidence law”); Alex Stein, *Foundations of Evidence Law* 172–78 (2005) (discussing this tradeoff in the context of criminal trials).

<sup>20</sup> See Stein, *supra* note 19.

<sup>21</sup> See *In re Winship*, 397 U.S. 358 (1970) (holding that the Constitution’s Due Process Clause requires proof of guilt in criminal cases “beyond a reasonable doubt”); *Victor v. Nebraska*, 511 U.S. 1, 19–20 (1994) (reviewing reasonable doubt standard).

<sup>22</sup> See Posner, *supra* note 19, at 618; Stein, *supra* note 19, at 143–53, 172–78.

<sup>23</sup> See Moore, *supra* note 8, at 154 (“The desert of offenders certainly gives [state] officials *permission* to punish offenders . . . . But retributivism goes further. As a theory of a kind of justice, it *obligates* us to seek retribution through the punishment of the guilty.”); Stephen P. Garvey, “As the Gentle Rain From Heaven”: Mercy in Capital Sentencing, 81 *Cornell L. Rev.* 989, 1006 n.63 (1996) (“A hard retributivist . . .

instances of injustice in the individual case. Tinkering with evidentiary rules in a way that decreases one at the expense of the other thus does not much matter to retributivism. This is not to say that retributivists care nothing at all for accuracy in adjudication. They clearly do.<sup>24</sup> Our point about retributivism is different, namely: among the various combinations of rules that promote accurate fact-finding and reduce the risk of error in adjudication, retributive theory expresses no strong preferences for whether such rules skew more toward the side of false positives or more toward false negatives.<sup>25</sup> Retributivism would accept almost any set of evidentiary rules that promotes accurate fact-finding and helps fact-finders to avoid error. So long as substantive liability rules are properly crafted to reflect moral blame, any rational system aiming at the pursuit of truth should be acceptable.

Where substantive rules are not tailored to retributivist concerns, however, retributivism becomes less ambivalent about the specifics of evidence and procedure. Recall that overbroad crime definitions offend retributivism by capturing persons who do not deserve punishment under retributivist principles. In the face of retributively overbroad crimes, retributivism should favor evidentiary doctrines that work to channel the application of such overbroad definitions toward deserving defendants and away from

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would rate the injustice of a false-negative on a par with the injustice of a false-positive.”); Alan Wertheimer, *Punishing the Innocent—Unintentionally*, 20 *Inquiry* 45, 61 (1977) (stating that retributivism considers erroneous acquittals as well as erroneous convictions instances of injustice); *supra* note 9 and accompanying text. Which of these two injustices is greater than the other is an issue that retributivism does not address. See Cahill, *supra* note 17, at 3–5.

<sup>24</sup> See *supra* note 18 and accompanying text.

<sup>25</sup> See Cahill, *supra* note 17, at 2 (observing that retributivism’s “principled moral rules . . . offer no obvious guidance about what priorities to set or what tradeoffs or compromises are acceptable . . . in the real world, with its inevitable resource constraints and other limitations”). Some retributivists, we acknowledge, might express a strong preference one way or the other. For example, a strong negative or “limiting” retributivist might believe that it is better for the state to acquit many factually guilty defendants than to convict even one factually innocent defendant. See, e.g., Garvey, *supra* note 23, at 1005–06. A strong positive retributivist, by contrast, might take the view that the moral obligation to convict and punish as many factually guilty defendants as possible justifies a significant risk of convicting some factually innocent defendants. See, e.g., Ernest van den Haag, *The Ultimate Punishment: A Defense*, 99 *Harv. L. Rev.* 1662 (1986). To sustain a “strong negative” or “strong positive” retributivist position, however, one needs some supplementary moral theory of how to measure instances of injustice against each other.

undeserving ones. Note that, in this scenario, retributivism cares about evidentiary rules solely as a means for narrowing the scope of criminal liability on the ground. The general allocation of the risk of adjudicative error and the incidence of false positives and false negatives is not on the retributivist agenda.

For example, suppose that a jurisdiction defines business fraud as engaging in or devising “any scheme or artifice to defraud,” including one that deprives another of “the intangible right of honest services.”<sup>26</sup> Such a broad definition may be justifiable on consequentialist grounds. As Samuel Buell explains, the business world moves fast and changes even faster, and specifying *ex ante* all of the ways in which conduct can rise to the level of fraud is well-nigh impossible and may actually be detrimental from a crime-control standpoint.<sup>27</sup> From a retributive standpoint, however, a broad definition threatens to capture a great deal of commonplace business conduct—bluffing, hard bargaining, and the like—that, while perhaps unsavory around the margins, is not deserving of punishment as fraud. Retributivism would thus favor an evidentiary doctrine that encourages prosecutors to identify and prosecute only the most blameworthy persons from among those falling within the formal definition. The “badges of guilt” doctrine has that effect in cases of fraud.<sup>28</sup> The doctrine says that, in unclear business fraud cases, efforts at concealment provide powerful evidence separating truly culpable defendants from all the rest.<sup>29</sup> As a result, prosecutors tend to charge, and courts tend to convict, those types of defendants much more often, even though the substantive fraud definition itself contains no such limitation and casts a much wider net.

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<sup>26</sup> 18 U.S.C. §§ 1341, 1346 (2000); see also 15 U.S.C. §§ 78j, 78ff (2000); 17 C.F.R. § 240.10b-5 (2006) (prohibiting willfully “engag[ing] in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security”).

<sup>27</sup> See Samuel W. Buell, *Novel Criminal Fraud*, 81 N.Y.U. L. Rev. 1971, 1972–74, 1987–88 (2006).

<sup>28</sup> See *id.* at 1997–2005 (discussing and identifying this effect in numerous cases in which courts have used the “badges of guilt” inference against defendants).

<sup>29</sup> See *United States v. Dial*, 757 F.2d 163, 170 (7th Cir. 1985) (dismissing worries about a potentially overbroad application of mail and wire fraud statutes to the defendants on the ground that their “elaborate efforts at concealment provide powerful evidence of their own consciousness of wrongdoing”); Buell, *supra* note 27, at 1997–99 (laying out the “badges of guilt” doctrine and reviewing its origins).

*B. Deterrence and Criminal Law Rules*

Now take deterrence. Again, we will speak of deterrence here in only the most general terms. By "deterrence," we mean the basic notion that the purpose of criminal liability and punishment is to avert future harm by imposing costs on undesirable conduct.<sup>30</sup> In contrast to retributivism, deterrence is system-focused. Deterrence gauges the appropriateness of criminal liability and punishment by reference to the social costs of wrongful conduct and the social costs of measures necessary to prevent it. Harmful conduct should be criminalized and punished whenever doing so is the most cost-effective way to disincentivize that conduct.<sup>31</sup>

Disincentives are strictly a matter of costs and benefits. Liability rules should be drawn and punishments calibrated so that the expected cost of engaging in socially harmful activity outweighs the expected benefit to the potential wrongdoer. Where that is the case, the wrongdoer will be deterred.<sup>32</sup> Actual instances of conviction and punishment are important only insofar as they affect this cost-benefit calculus for future wrongdoers by sending a message about what to expect.<sup>33</sup> It is the threat projected by the system of conviction and punishment, and not the justness of any given conviction or punishment actually imposed, that matters.

Substantive, sanctioning, and evidentiary rules all affect that threat and the incentives it creates. Substantive rules carve out the categories of harmful conduct that trigger the threat. Poorly drafted substantive rules may impose unnecessary costs on society either by threatening and hence disincentivizing conduct that is not

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<sup>30</sup> See Posner, *supra* note 19, at 220 (stating that "the criminal sanction ought to be so contrived that the criminal is made worse off by committing the act"); Dan M. Kahan, *The Secret Ambition of Deterrence*, 113 *Harv. L. Rev.* 413, 425 (1999) (reviewing basics of deterrence theory).

<sup>31</sup> See, e.g., Posner, *supra* note 19, at 219–27.

<sup>32</sup> See Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* 170 & n.1 (Clarendon Press 1907) (1789); Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 *J. Pol. Econ.* 169, 179–80 (1968). Modern theorists also increasingly focus on the degree to which deterrence can work at a deeper level to affect compliance by shaping social meaning and harnessing the power of social influence. See, e.g., Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 *Va. L. Rev.* 349, 351 (1997) (setting forth a "social influence conception of deterrence").

<sup>33</sup> See, e.g., Robert Cooter & Thomas Ulen, *Law and Economics* 435–63 (3d ed. 2000).

harmful (overbroad rules) or by failing to threaten conduct that is (underinclusive rules).<sup>34</sup> Sanctioning rules establish the magnitude and type of the threat—a fine, community service, prison, or worse. Extremely lenient sanctions may underdeter by threatening an expected penalty that does not offset the gains to be had from crime. Extremely harsh ones may overdeter by threatening a punishment so severe that it drives wrongdoers to commit additional serious crimes to avoid detection (such as shredding documents or murdering a witness)<sup>35</sup> or to substitute many other, “cheaper” crimes instead (such as selling more heroin instead of crack cocaine).<sup>36</sup> Finally, evidentiary rules affect the likelihood that the government will ultimately “make good” on the threat. It is basic deterrence theory that expected penalties are a function not only of the size of a sanction, but also of the likelihood that it will be imposed.<sup>37</sup> Evidentiary rules that make it more difficult to obtain a conviction—such as a stringent “beyond all reasonable doubt” standard and other evidentiary barriers—will erode the expected penalty by causing an offender to discount the likelihood of actually being punished. Those rules that make it easier to convict—such as rules requiring a defendant to prove any affirmative defense by a preponderance of the evidence<sup>38</sup>—will do the opposite. False positives and false negatives thus matter to deterrence because they affect the expected penalty by affecting the probability that the penalty will be imposed.

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<sup>34</sup> See Frederick Schauer, *Playing by the Rules* 31–34 (1991) (discussing the over- and under-inclusiveness of rules).

<sup>35</sup> See generally Chris William Sanchirico, *Detection Avoidance*, 81 N.Y.U. L. Rev. 1331 (2006) (analyzing the relationship of legal sanctions to detection-avoidance efforts).

<sup>36</sup> See Neal Kumar Katyal, *Deterrence’s Difficulty*, 95 Mich. L. Rev. 2385, 2391–408 (1997) (describing and analyzing substitution effects in criminal law). Extremely harsh sanctions may also discourage prosecutors from charging certain crimes and discourage victimized communities from reporting them. See Tracey L. Meares, Neal Kumar Katyal & Dan M. Kahan, *Updating the Study of Punishment*, 56 Stan. L. Rev. 1171, 1185–86, 1185 n.42 (2004); see also Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 Nw. U. L. Rev. 453, 471–88 (1997) (observing that departure from moral norms erodes citizens’ compliance with the law).

<sup>37</sup> See, e.g., Cooter & Ulen, *supra* note 33, at 435–41; Becker, *supra* note 32, at 176–79.

<sup>38</sup> See, e.g., N.Y. Penal Law § 25.00(2) (McKinney 2004) (“When a defense declared by statute to be an ‘affirmative defense’ is raised at a trial, the defendant has the burden of establishing such defense by a preponderance of the evidence.”).



Unlike retributivism, then, deterrence cares equally about all three types of rules. But (also unlike retributivism) it does not much care about any of them per se. What matters to deterrence is the product of the rules—the expected penalty, and the incentives that penalty creates for future conduct. What matters to retributivism is the application of the rules themselves—the actual penalty, and whether it is just or unjust. Deterrence looks forward, while retributivism looks back. For example, in contrast to retributivism, deterrence would be largely indifferent to the distributive effects of the “badges of guilt” doctrine noted earlier in the fraud context. As long as the doctrine does not dramatically reduce the expected penalty, it would not do much to undermine deterrence objectives.

*C. How Evidentiary Rules Mediate Between Retributivism and Deterrence*

The asymmetrical orientations of deterrence and retributivism with respect to evidentiary rules provide a flexibility in the crafting of criminal law doctrine that commentators have overlooked. Given that these theories react to those rules in different ways, the combinations of rules that go into any liability and punishment determination can be adjusted to perform a mediating function between deterrence and retributivist objectives. Retributivism, for instance, might mandate a crime definition (a substantive rule) that is somewhat too broad and a punishment (a sanctioning rule) that is somewhat too harsh from a deterrence perspective. Deterrence objectives could nevertheless be accommodated in such a case by imposing evidentiary requirements for conviction that are stringent enough to bring the expected penalty back down into the permissible range for deterrence. So long as those requirements do so without undermining rational fact-finding, retributivists should not object to them. By the same token, deterrence might favor a substantive rule that is somewhat too broad from a retributive standpoint. Retributivists, though, might still be able to live with this if there were some way to focus the actual application of the rule on only those persons who are truly blameworthy. Evidentiary rules that help to sort between truly deserving and more borderline cases by encouraging prosecutors to pursue the former but not the latter could be used toward this end. Alternatively, the definition of the crime might be narrowed to accommodate retributivist con-

cerns, which would be acceptable from a deterrence standpoint so long as the barriers to conviction were set low or the penalty were increased.<sup>39</sup>

All of this means that, contrary to conventional perceptions, the gulf between deterrence and retributivism in criminal law need not be and is not as wide as it might seem from the state of the criminal law literature. Even in cases in which retributivism and deterrence demand different substantive crime definitions, the two theories can still approach some mutual accommodation through the use of mediating rules. For a deterrence theorist, definitions and sanctions can be retributively tailored if they do not substantially modify the appropriate expected penalty for prospective offenders. For a retributivist, the way the legal system chooses to threaten prospective offenders and allocate its resources is immaterial, so long as it delivers individual deserts in actual cases.<sup>40</sup> Under existing constraints, the legal system would ordinarily satisfy retributivists by punishing most criminals in proportion to their crimes and by making a sustained effort to avoid conviction and punishment of the innocent. Each theory can accept some adjustments in the definitions of crimes, in the applicable punishments, and in the underlying rules of evidence if the effective combination of rules still generally comports with the theory's objective. Because the interplay of the various rules matters to each theory in a different way, these adjustments can be geared towards case-focused retribution and system-focused deterrence at once.

As an example, take the crime of perjury.<sup>41</sup> For present purposes, assume that, from the retributivist perspective, what makes perjury deserving of its particular degree of condemnation and punishment is that it involves an especially onerous type of deception, namely, an intentional lie that affirmatively misleads the court. A well-tailored retributive definition of perjury which tracks this view, then, should extend the crime's prohibition and punishment only to

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<sup>39</sup> At some point, of course, the penalty increase could become so great that it would offend retributive notions of proportionality. See *supra* text accompanying notes 12–14. In that scenario, lowering the barriers to conviction would be the only viable option for satisfying deterrence objectives.

<sup>40</sup> See *supra* notes 12–25 and accompanying text.

<sup>41</sup> We have discussed the particulars of this crime in greater detail elsewhere. See Richard A. Bierschbach & Alex Stein, *Overenforcement*, 93 *Geo. L.J.* 1743, 1765–71 (2005).

outright liars who harbor an intent to mislead the finder of fact. It should not cover reticent non-acknowledgment of the truth, merely evasive testimony, or, arguably, even technically false testimony accompanied by signals from the witness that the court should place little weight in what he is saying. From the standpoint of desert and blame, these acts, while condemnable, are less blameworthy than are affirmative attempts to bring about an injustice.<sup>42</sup> Embracing this view, a few jurisdictions have adopted narrowly focused perjury statutes.<sup>43</sup>

From the standpoint of deterrence, the situation looks different. Whatever the moral difference between lying and evading, the line between the two is often a very difficult one to discern in practice. A narrow, retributively correct perjury statute that requires a prosecutor to prove falsity and an intent to mislead beyond all reasonable doubt would give many reluctant witnesses an "easy out" by leaving space for self-exonerating excuses that are easy to fabricate but difficult to refute. The prospect of an easy out means a lower expected punishment, which in turn means that more people would be willing to take the risk of lying on the stand as an alternative to revealing an unpleasant truth. Focusing only on definitions, then, deterrence favors a broader substantive rule.

A broader rule is, in fact, what the vast majority of jurisdictions have adopted. While the specifics of perjury statutes vary, courts frequently interpret them as allowing conviction upon proof of mere awareness of falsity, without more.<sup>44</sup> A witness need not be aware of how his false statement might affect the trial, nor must he act out of malice or with an intent to mislead.<sup>45</sup> Falsity, moreover,

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<sup>42</sup> See *id.* at 1770 & nn.124-25 (discussing this point).

<sup>43</sup> See Mo. Ann. Stat. § 575.040 (West 2003) (requiring that a person "knowingly testify falsely" with "the purpose to deceive" the court); Tenn. Code Ann. § 39-16-702 (2006) (requiring an "intent to deceive"); Tex. Penal Code Ann. § 37.02(a) (Vernon 2003) (requiring an "intent to deceive" and "knowledge of the statement's meaning").

<sup>44</sup> See, e.g., Model Penal Code § 241.1 (Proposed Official Draft 1962) ("A person is guilty of perjury . . . if in any official proceeding he makes a false statement under oath or equivalent affirmation . . . when the statement is material and he does not believe it to be true."); Jared S. Hosid, *Perjury*, 39 Am. Crim. L. Rev. 895 (2002) (analyzing this definition).

<sup>45</sup> See, e.g., *United States v. Williams*, 874 F.2d 968, 980 (5th Cir. 1989); *United States v. Giarratano*, 622 F.2d 153, 156 & n.7 (5th Cir. 1980); *United States v. Lewis*, 876 F. Supp. 308, 312 (D. Mass. 1994); Alan Heinrich, Note, *Clinton's Little White Lies: The Materiality Requirement for Perjury in Civil Discovery*, 32 Loy. L.A. L.

cannot be offset by self-acknowledged reticence, evasiveness, or the like.<sup>46</sup> From the deterrence standpoint, broadly defining perjury in this way keeps witnesses in line by creating a credible threat of a successful prosecution in cases in which witnesses have in fact lied.<sup>47</sup> But it also potentially deviates from the just deserts requirement by allowing conviction of witnesses who would not deserve full punishment for perjury under the narrower retributive view.

One way to resolve this conflict might be to keep the narrow definition favored by retributivism while raising the punishment for perjury, thereby increasing the expected penalty to the level favored by deterrence. If the new punishment were still acceptable to a retributivist, this would be unproblematic. If, however, the punishment were too high, some other method would be necessary.<sup>48</sup> In that case, another approach might be to keep the broad definition and interpose some extraordinary procedural or evidentiary rule into the mix that has the effect of encouraging prosecutors to focus their perjury prosecutions on only the most egregious liars.

Many jurisdictions effectively take this approach by imposing special corroboration requirements upon prosecutors seeking convictions for perjury.<sup>49</sup> In criminal cases, even the most serious ones, the general rule regarding sufficiency of evidence is that the credible testimony of a single witness is enough to support a convic-

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Rev. 1303, 1311–16 (1999) (discussing courts' practice of interpreting perjury statutes in very broad terms).

<sup>46</sup> See, e.g., *United States v. Andrews*, 370 F. Supp. 365, 367–68 (D. Conn. 1974) (rejecting argument that evasive and misleading, but technically true, statements cannot provide the basis for a perjury prosecution); *United States v. Crandall*, 363 F. Supp. 648, 655 (W.D. Pa. 1973) (holding that a false statement, once made, subjects a witness to liability for perjury even if the witness later goes on to "resum[e] his role as a witness and substitut[es] the truth for his previous falsehood"); *Ostendorf v. State*, 128 P. 143, 154 (Okla. Crim. App. 1912) (holding that willful suppression of part of the truth is equivalent to an affirmative statement of falsehood); *Flowers v. State*, 163 P. 558, 559 (Okla. Crim. App. 1917) (same).

<sup>47</sup> See Robert Cooter & Winand Emons, *Truth-Bonding and Other Truth-Revealing Mechanisms for Courts*, 17 *Eur. J. Law & Econ.* 307, 310 (2004).

<sup>48</sup> See *supra* text accompanying notes 12–14 and note 39.

<sup>49</sup> See *Weiler v. United States*, 323 U.S. 606, 608–09 (1945) (noting the history and prevalence of the corroboration rule); *United States v. Chaplin*, 25 F.3d 1373, 1378 (7th Cir. 1994) (holding that "although criticized by some, the two-witness rule remains viable in perjury prosecutions").

tion.<sup>50</sup> Corroboration requirements for perjury convictions alter that rule and force prosecutors to provide additional, independent proof of the alleged perjury—for example, a document or a wiretap recording revealing that a witness clearly lied in his testimony. In general, prosecutors will have an easier time producing such evidence for outright liars falling within the heartland of perjury's prohibition than they will for merely evasive or reticent witnesses who approach the prohibition's border.<sup>51</sup> The corroboration requirement thus tends to focus the application of the perjury statute on truly blameworthy perjurers.

This mitigates the problem of perjury's overbroad definition for retributivists without seriously undermining the deterrence concerns that justified that definition to begin with. Of course, some witnesses who do not deserve it may still be convicted and punished under the overbroad rule. Likewise, deterrence objectives do suffer something as well. Corroboration requirements lessen the expected penalty somewhat for all witnesses, thereby emboldening some would-be perjurers. But by mediating between the two theories, the evidentiary rule achieves a rough accommodation that is more difficult to achieve by focusing upon substantive or sanctioning rules alone.

The significance of this crime-specific example is mainly methodological. It is a means for demonstrating how special procedural or evidentiary rules sometimes serve an unrecognized mediating function between antagonistic criminal law theories. This function of evidentiary rules in criminal law has been overlooked by scholars in the field, due in large part to its balkanization. Substantive law scholars focus almost exclusively on the law's substantive contours; scholars of procedure and evidence focus almost exclusively

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<sup>50</sup> See *Weiler*, 323 U.S. at 608 ("The touchstone is always credibility; the ultimate measure of testimonial worth is quality and not quantity."); 7 John Henry Wigmore, *Evidence in Trials at Common Law* § 2034, at 342–43 (James H. Chadbourne ed., rev. ed. 1978) (stating the general common law principle that a jury may convict the defendant upon testimony of a single witness).

<sup>51</sup> See Stephen A. Saltzburg, *Perjury and False Testimony: Should the Difference Matter So Much?*, 68 *Fordham L. Rev.* 1537, 1577 (2000) (acknowledging, while criticizing, the law's tendency to penalize and provide remedies for clear perjury, as opposed to merely misleading testimony).

on questions of evidence and procedure.<sup>52</sup> The discourse within each group is wholly internal, and the intersection between the two is lost.

In Part II, we approach positive law in a more systematic way. We focus not on specific crimes but rather on the fundamentals of criminal liability—what criminal law scholars call the “general part” of the criminal law. Several fundamental criminal law doctrines—complicity, liability for attempt, and affirmative defenses—exhibit features of our mediating framework that, until now, have gone undiscussed. Part III unwinds the implications of our account for criminal law more broadly.

## II. MEDIATING RULES IN CRIMINAL LAW

This Part illustrates how mediating rules appear in criminal law doctrine by examining several areas of the criminal law in which the conflict between retributivist and deterrence approaches is particularly acute. Unlike most garden-variety rules of evidence such as hearsay, character, opinion, and many others, these rules are not trans-substantive. With only minor exceptions, each of them is tied to and directs the application of a specific substantive criminal law doctrine. Our intent in discussing them is not only to provide concrete illustrations of our theory, but also to demonstrate how it helps to illuminate and explain many otherwise unique evidentiary rules that accompany the substantive doctrine in these areas.

Before we do this, it is important to clarify the limits of our argument. We do not purport to offer a historical or motivational account of mediating rules’ origin and evolution. The examples we are about to discuss are not meant to be exhaustive.<sup>53</sup> The doctrine

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<sup>52</sup> The two exceptions are William Stuntz and Stephanos Bibas. See, e.g., William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 *Yale L.J.* 1, 6 (1997) (decrying the artificial separation between criminal procedure and substantive criminal law and exploring its consequences for the administration of criminal justice); Stephanos Bibas, *Harmonizing Substantive-Criminal-Law Values and Criminal Procedure: The Case of Alford and Nolo Contendere Pleas*, 88 *Cornell L. Rev.* 1361, 1367 (2003) (examining the way in which a proceduralist approach to certain types of plea bargains undercuts the substantive values at which criminal law aims). Neither scholar, however, touches on the relationship between rules of criminal evidence and substantive criminal law theory that we discuss here.

<sup>53</sup> We choose these examples because they represent some of the most salient and economical (for purposes of discussion) illustrations of our theory from the criminal

in each of these areas has been worked out under varying constraints and by varying actors (often, common law judges) over a long period of time. Many considerations have gone into the mix, and the resulting balance of objectives is often untidy. We seek to offer a novel interpretive account of how evidentiary rules have helped to shape that balance by striking a rough compromise between criminal law's deterrence and retributivist visions. Although we believe this account of mediating rules has important normative implications as well, we defer discussion of that point until Part III.

### *A. Complicity*

The criminal law of complicity concerns the circumstances under which a person who does not personally commit a proscribed act may be held accountable for the conduct of an associate. Complicity law includes both conspiracy and accomplice liability. Each of these areas involves its own unusually complex web of substantive and evidentiary rules that govern the liability of associates for each others' crimes. As we explain below, at least some of this complexity might plausibly be seen as stemming from the acute conflict between retributivist and deterrence considerations that situations of complicity often present. Retributivist principles of just deserts dictate that, even in cases of group criminality, associates in a crime ought not to be punished out of proportion to their own individual contribution to the crime. Deterrence, in contrast, is especially concerned with the synergies that flow from group activity and with the egoistic incentives of group members. As such, it often favors substantive liability rules and punishments that go well beyond that limitation. Subsections A.1 and A.2 show how the doctrinal frameworks governing accomplice liability and conspiracy use different combinations of substantive and evidentiary rules to resolve these clashes.

#### *1. Accomplice Liability*

Accomplice liability casts a fairly wide net under prevalent doctrine in most states. As a general matter, associate *A* is an accom-

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law's general part. Additional examples from that part, as well as crime-specific examples, see, for example, *supra* notes 26–29, 41–51, and accompanying text, exist.

plice of principal *P* if *A* intentionally assists *P* in the conduct that constitutes the crime.<sup>54</sup> Assistance is broadly defined and can take many forms—physical participation, solicitation, mere advice, encouragement, planning, procuring supplies—and even the tiniest bit, no matter how trivial, will do. So, for example, *A* is clearly an accomplice to *P*'s bank robbery if *A* intentionally supplies him with ski masks and tools for safecracking. But, as some classic criminal law cases make clear, he is also an accomplice to *P*'s crime of murder if (with the requisite *mens rea*) he shouts to *P*'s victim to "die like a man,"<sup>55</sup> or to larceny if he holds *P*'s baby while *P* rifles through a cash register,<sup>56</sup> or to robbery of the corner store if he asks *P* to come back with bananas.<sup>57</sup>

Even in cases of trivial assistance, the consequences of accomplice liability are severe. An accomplice typically is subject to the same punishment as is the principal perpetrator of the crime.<sup>58</sup> Even more significant, in most jurisdictions, "a person encouraging or facilitating the commission of a crime"—in other words, an accomplice—may "be held criminally liable not only for that crime, but for any other offense that was a 'natural and probable conse-

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<sup>54</sup> See, e.g., Wayne R. LaFave, *Criminal Law* § 13.2, at 671 (4th ed. 2003) (laying out basic test for accomplice liability). Some ambiguity exists as to what kind of intent is sufficient for turning a person into an accomplice. Under the prevalent doctrine, awareness that the principal is committing the crime is enough, especially in relation to serious crimes; the accomplice need not always have the conscious objective of bringing the crime about. See *id.* § 13.2(d), at 678; *Backun v. United States*, 112 F.2d 635, 637 (4th Cir. 1940).

<sup>55</sup> *Hicks v. United States*, 150 U.S. 442, 446 (1893).

<sup>56</sup> *State v. Duran*, 526 P.2d 188, 188 (N.M. Ct. App. 1974).

<sup>57</sup> *State v. Helmenstein*, 163 N.W.2d 85, 89 (N.D. 1968); see also, e.g., *Wilcox v. Jeffery*, (1951) 1 All E.R. 464, 466 (K.B.) (holding that concertgoer's appearing in the audience was enough to establish his accomplice liability for playing an unauthorized concert); *Alexander v. State*, 102 So. 597, 598 (Ala. Ct. App. 1925) (holding that wife's bringing husband his lunch was enough to establish her accomplice liability for operating an illegal still).

<sup>58</sup> See 1 Charles E. Torcia, *Wharton's Criminal Law* §§ 34–35, at 201–03 (15th ed. 1993 & Supp. 2005) (noting that at common law, "[t]he principal and accessory were treated as equally guilty and subject to the same punishment" and that modern codifications of criminal codes have not changed this practice); LaFave, *supra* note 54, § 13.6(a), at 716–17 (observing same except with respect to accessories after the fact). Cooperating accomplices, of course, stand to receive significant discounts at the discretion of sentencing judges and prosecutors and under sentencing guidelines, where applicable. See *infra* note 83.



quence' of the crime aided and abetted."<sup>59</sup> If, when *P* robs the corner store, he encounters resistance and shoots the store clerk, then *A* (along with *P*) can be prosecuted for murder as well. This is so regardless of whether *A* intended to encourage the murder; his encouragement of the robbery is enough.<sup>60</sup>

The most commonly offered justifications for this harsh scheme overwhelmingly sound in deterrence. Put simply, punishing accomplices severely and extending liability to even the most minor aid substantially increase both principals' cost of securing assistance and potential accomplices' incentives not to assist.<sup>61</sup> Small-time accomplices, facing an expected penalty that far exceeds what they presumably stand to reap from their aid, will demand a much higher price from the principal for their continued assistance. They also will go out of their way to encourage the principal to take special care not to commit any collateral crimes that will expand their liability and punishment under the "natural and probable consequences" doctrine. If they are caught, accomplices also will have an increased incentive to cooperate with prosecutors in catching and convicting the principal. Anticipating this possibility, some prospective offenders may actively forego assistance and try to act alone.

Whatever the persuasiveness of these arguments, they do little to comfort retributivists. The harsh penalties attached to accomplice liability deviate substantially from an individualized application of the just deserts standard.<sup>62</sup> Asking for bananas as one's friend

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<sup>59</sup> *People v. Prettyman*, 926 P.2d 1013, 1019 (Cal. 1996). See generally LaFave, *supra* note 54, § 13.3(b), at 687 ("The established rule, as it is usually stated by courts and commentators, is that accomplice liability extends to acts of the principal . . . which were a 'natural and probable consequence' of the criminal scheme the accomplice encouraged or aided.") (citation omitted)).

<sup>60</sup> See *Torcia*, *supra* note 58, § 35, at 209–10. Nor does it make a difference that *A* might have hoped or affirmatively desired that *P* not commit any violent act in the course of the robbery, so long as *A* encouraged the robbery itself. See, e.g., *Morriss v. United States*, 554 A.2d 784, 789 (D.C. 1989).

<sup>61</sup> See Posner, *supra* note 19, at 231. Because it is difficult to determine in advance the potential benefit that any given accomplice might receive from the principal's success—will his cut be ten percent or fifty percent?—deterrence assumes the worst and sets the punishment equal to that of the principal.

<sup>62</sup> See, e.g., Stephen J. Morse, Reason, Results, and Criminal Responsibility, 2004 U. Ill. L. Rev. 363, 399 (arguing, on just deserts grounds, that "accomplice liability should not be automatically equal to the perpetrator's," but rather "should be differentiated according to the individual mens rea of the accomplice and the perpetrator"); LaFave,

leaves to rob the store might warrant some punishment from the standpoint of desert. But it certainly does not warrant the same amount of punishment as does driving the getaway car or, even worse, committing the robbery oneself. And it does not even come close to calling for punishment for murder if the robber happens to kill the store clerk on the way out the door. In short, instead of giving accomplices their individual deserts, the doctrine uses them as a means for deterring others.

A more narrowly fashioned, retributively focused accomplice liability doctrine would make more of an effort to tailor liability to individual blame at the definitional level. Perfect tailoring, of course, is unachievable. It is the very nature of rules to exhibit some over- or under-inclusiveness (or both) in their application.<sup>63</sup> But a doctrine rooted in retributivism would at least do away with or substantially modify the “natural and probable consequences” rule. It also would make some effort to ensure that persons providing minor aid or encouragement receive less punishment than do those who are more actively involved in helping to commit the crime, perhaps by restricting the former to prosecution for some lesser offense of criminal facilitation.<sup>64</sup>

Here is where rules of evidence become important. While they cannot completely solve the overbreadth problem for retributivists, they can and do go some way toward substantially lessening it. In the accomplice liability context, several rules of evidence skew the application of the law back toward retributivist goals.

The existing rules of evidence limit the prosecution’s ability to use accomplices’ statements and testimony as evidence against other participants in the crime. Relative to other barriers to convic-

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supra note 54, § 13.3(b), at 688 (making similar argument); *United States v. Andrews*, 75 F.3d 552, 555 (9th Cir. 1996) (same). Absent cooperation or plea, an accomplice’s sentence is usually close to that of the principal offender. *People v. Shafou*, 330 N.W.2d 647, 654 (Mich. 1982) (“Accomplices generally are punished as severely as the principal, on the premise that when a crime has been committed, those who aid in its commission should be punished like the principal.”).

<sup>63</sup> See, e.g., Schauer, supra note 34, at 32 (observing that the generalizations of most rules “encompass states of affairs that might in particular instances not produce the consequence representing the rule’s justification”).

<sup>64</sup> Several states have recently adopted this approach, although they remain a small minority. See *Ariz. Rev. Stat. Ann.* § 13-1004 (2001); *Ky. Rev. Stat. Ann.* § 506.080 (LexisNexis 1999); *N.Y. Penal Law* § 115.05 (McKinney 2004); *N.D. Cent. Code* § 12.1-06-02 (1997).

tion,<sup>65</sup> these limitations are particularly broad. As an initial and general matter, given the Fifth Amendment, an accomplice need not say anything at all to police or prosecutors if he does not want to.<sup>66</sup> Nor can he be compelled to serve as a witness at trial against the principal in any way that might be self-incriminating, unless the accomplice has first been convicted or acquitted himself or granted use immunity.<sup>67</sup> Even if the prosecutor can induce the accomplice to waive the privilege and testify—say, by offering him immunity or at least an attractive plea bargain<sup>68</sup>—his testimony without more will not be enough. In nearly all states, special evidentiary rules make accomplice testimony that implicates the principal insufficient to sustain the principal's conviction absent independent corroborating evidence of guilt.<sup>69</sup>

Prosecutors generally cannot avoid these problems by falling back on out-of-court statements from the accomplice that incriminate the principal. The special corroboration rule applies to those statements as well.<sup>70</sup> More important, such statements typically

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<sup>65</sup> The "barriers to conviction" terminology as applied to evidentiary rules is borrowed from Mirjan R. Damaška, *Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study*, 121 U. Pa. L. Rev. 506 (1973).

<sup>66</sup> See U.S. Const. amend. V ("No person . . . shall be compelled in any criminal case to be a witness against himself . . ."); *Escobedo v. Illinois*, 378 U.S. 478, 491 (1964) (describing a defendant's "absolute constitutional right to remain silent" during interrogation by the police).

<sup>67</sup> See *Kastigar v. United States*, 406 U.S. 441, 462 (1972) (explaining that use immunity must leave "the witness and the prosecutorial authorities in substantially the same position as if the witness had claimed the Fifth Amendment privilege"); *Murphy v. Waterfront Comm'n of N.Y. Harbor*, 378 U.S. 52, 79 (1964) (prohibiting federal government from utilizing state witness's prior compelled testimony in criminal proceedings against him); see also John G. Douglass, *Confronting the Reluctant Accomplice*, 101 Colum. L. Rev. 1797, 1869–71 (2001) (exploring the conflict between an accomplice's privilege against self-incrimination and a principal's constitutional right to confront witnesses).

<sup>68</sup> Such offers do not render the accomplice's testimony inadmissible. See, e.g., *People v. Dillon*, 327 N.E.2d 225, 233 (Ill. App. Ct. 1975); *People v. Berry*, 269 N.W.2d 694, 695–96 (Mich. Ct. App. 1978); *Commonwealth v. Byrd*, 417 A.2d 173, 177 (Pa. 1980).

<sup>69</sup> See, e.g., *Torcia*, *supra* note 58, § 38, at 238–39 ("At common law, a conviction of an accused could be based solely upon the testimony of an accomplice. However, as a result of statute, it is now commonly required that the accomplice's testimony be corroborated."); *id.* at 239 n.12 (citing statutes and case law from two dozen states). The corroboration rule does not apply in federal courts. See John C. O'Brien & Roger L. Goldman, *Federal Criminal Trial Evidence* 626 & n.43 (1989).

<sup>70</sup> See *Torcia*, *supra* note 58, § 38, at 238–39.

qualify as inadmissible hearsay.<sup>71</sup> The only exception is where the accomplice's statement amounts to a statement "against penal interest,"<sup>72</sup> but even that is a narrow one in the accomplice context. In *Williamson v. United States*, the U.S. Supreme Court rejected the argument that a statement from an accomplice incriminating both himself and the principal is admissible under the "against penal interest" exception to the federal hearsay rule.<sup>73</sup> Instead, the Court held, courts must separate the self-incriminating portion from all other parts—including any part implicating the principal—and may admit only that portion, if it is still relevant.<sup>74</sup> State courts have followed suit in interpreting their own rules of evidence.<sup>75</sup>

Out-of-court statements made in response to police questioning, moreover, are more difficult to use. Under *Crawford v. Washington*, those statements normally count as "testimonial" for purposes of the Confrontation Clause.<sup>76</sup> They thus cannot constitutionally be introduced against the principal unless the accomplice testifies and is subject to cross-examination at trial or a hearing.<sup>77</sup> Where the two are tried jointly, things are even trickier for prosecutors. In

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<sup>71</sup> See, e.g., *Douglass*, supra note 67, at 1809–12 (underscoring the evidentiary importance to prosecutors of hearsay statements made by defendants' accomplices).

<sup>72</sup> See Fed. R. Evid. 804(b)(3) ("A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true.").

<sup>73</sup> *Williamson v. United States*, 512 U.S. 594, 601 (1994).

<sup>74</sup> See *id.* at 602.

<sup>75</sup> See, e.g., *People v. Lawley*, 38 P.3d 461, 497 (Cal. 2002); *Bernal v. People*, 44 P.3d 184, 199 (Colo. 2002); *Jolly v. United States*, 704 A.2d 855, 863 n.12 (D.C. 1997); *State v. Wiley*, 880 So. 2d 854, 869 (La. Ct. App. 2004); *Commonwealth v. Marrero*, 800 N.E.2d 1048, 1051–52 (Mass. App. Ct. 2003); *State v. Jones*, 556 N.W.2d 903, 908–09 (Minn. 1996); *State v. Gonzales*, 989 P.2d 419, 421 (N.M. 1999); *Scott v. State*, 165 S.W.3d 27, 46–47 (Tex. Crim. App. 2005); *State v. Roberts*, 14 P.3d 713, 727 (Wash. 2000); *In re Ray*, 489 S.E.2d 289, 297 (W. Va. 1997).

<sup>76</sup> 541 U.S. 36, 68 (2004).

<sup>77</sup> See *Ohio v. Roberts*, 448 U.S. 56, 66 (1980), overruled in part by *Crawford v. Washington*, 541 U.S. 36 (2004). Out-of-court statements that do not fall into *Crawford*'s "testimonial" category still must exhibit substantial indicia of reliability to be admitted. The accomplice also must be unavailable to testify as a witness. See *Lilly v. Virginia*, 527 U.S. 116, 133–34 (1999); see also *Idaho v. Wright*, 497 U.S. 805, 820–21 (1990) (holding that indicia of reliability must be internal to statement itself). Statements from accomplices usually fail the reliability test in light of the substantial incentives accomplices have to curry favor with police and prosecutors. See *Lilly*, 527 U.S. at 137–39.

that case, the principal's due process and confrontation rights prohibit the introduction of the accomplice's self-incriminating statements against even the accomplice himself.<sup>78</sup> The reason for this, the Supreme Court has explained, is to guard against pernicious "guilt by association" and other spillover effects, a task to which the Court thought the normal remedy of a limiting instruction ill-suited under the circumstances.<sup>79</sup> This rule forces the prosecution to indict and try many accomplices and principals separately instead of jointly, which makes it even more difficult to convict noncooperating accomplices and principals through trial.<sup>80</sup>

Police and prosecutors have substantial career- and resource-driven motivations for concentrating their efforts on well-evidenced cases and serious crimes.<sup>81</sup> The heightened evidentiary rules that apply to accomplices greatly increase the significance of these motivations in cases involving minor or trivial assistance. Trivial assistance often leaves only a weak evidentiary trail, making conviction difficult. Often the best source of evidence against a minor accomplice will be the principal himself. But the requirements we just discussed apply with equal force to the use of principals' testimony against accomplices as they do to the use of accomplices' testimony against principals.<sup>82</sup> This makes it especially burdensome to prosecute both the principal and the accomplice to the fullest extent of the law. Prosecutors thus face a choice: either expend sub-

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<sup>78</sup> See *Bruton v. United States*, 391 U.S. 123, 127-37 (1968) (holding that the admission of nontestifying co-defendant's confession at his joint trial with defendant violated defendant's Due Process and Sixth Amendment rights).

<sup>79</sup> See *id.* at 135-37 (explaining that a prophylactic rule eliminates any danger of the confession's potential spillover effect on the nonconfessing defendant).

<sup>80</sup> See Judith L. Ritter, *The X Files: Joint Trials, Redacted Confessions and Thirty Years of Sidestepping Bruton*, 42 Vill. L. Rev. 855, 857 (1997) (observing that after *Bruton*, prosecutors' failure to try defendants separately will make it extremely difficult for them to use an accomplice's confession against his co-defendant in court).

<sup>81</sup> See Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 Harv. L. Rev. 2463, 2470-71 (2004) ("Trials are much more time consuming than plea bargains, so prosecutors have incentives to negotiate deals instead of trying cases. . . . In addition to lightening their workloads, prosecutors want to ensure convictions. . . . Favorable win-loss statistics boost prosecutors' egos, their esteem, their praise by colleagues, and their prospects for promotion and career advancement.") (citations omitted); Richard A. Posner, *An Economic Approach to the Law of Evidence*, 51 Stan. L. Rev. 1477, 1505 (1999) (discussing similar factors).

<sup>82</sup> The accomplice relationship is bi-directional: for the purposes of the evidentiary doctrines at issue here, courts treat each party as an accomplice of the other.

stantial extra effort to go after both, or cut one side a deal and use him against the other. Because the principal's involvement in the crime is by definition more significant and the evidence against him is often stronger, prosecutors very often choose to deal with the accomplice. While the harsh substantive doctrine of accomplice liability gives prosecutors much leverage and the accomplice much to lose, the stringent evidentiary requirements restricting uncooperative use of his statements give him a bargaining chip as well. In exchange for their cooperation against principals, minor accomplices often walk away with a fairly favorable plea, if they are even charged at all.<sup>83</sup>

Notice how this scheme mediates between deterrence and retributivist considerations. The end result of the interplay between substantive law, evidentiary rules, and the incentives they create is that ordinarily only major accomplices to a crime are tried, convicted, and punished to a degree similar to that of the principal offender. Minor accomplices usually receive correspondingly minor punishments. As applied, then, the overbroad substantive rule roughly accords with the retributive just deserts standard, although it is by no means perfect.<sup>84</sup> It also satisfies deterrence objectives much better than would the retributive prototype of a narrowly tailored, pro-rated punishment rule. By establishing a ceiling above which punishment could not go for a minor accomplice, a pro-rated rule would reduce both the principal's cost of recruiting help and the leverage that prosecutors could bring to bear on the accomplice in pushing for his cooperation.

Evidentiary barriers to conviction do not do this. To be sure, those barriers do reduce the expected punishment for accomplices to some extent, especially for repeat players who have a sense of the discount they stand to receive from cooperating. But, unlike a pro-rated rule, evidentiary barriers do not completely eliminate

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<sup>83</sup> See Bibas, *supra* note 81, at 2490–91 (“For example, a prosecutor may decline to charge under a three-strikes law if the defendant provides information leading to the conviction of his co-conspirators.”); Neal Kumar Katyal, *Conspiracy Theory*, 112 *Yale L.J.* 1307, 1370 (2003) (noting that increasing the potential sanctions in cases of group criminality does not mean that such sanctions are actually imposed on cooperators, which “rarely happens”); Ian Weinstein, *Regulating the Market for Snitches*, 47 *Buff. L. Rev.* 563, 578 (1999) (“For many defendants, cooperation offers the only opportunity for significant sentence mitigation or escaping prison all together.”).

<sup>84</sup> See *supra* text accompanying notes 63–64.

prosecutors' ability to pursue an extremely harsh sanction against any given accomplice should they choose to do so. They thereby allow prosecutors an especially strong hammer with which to threaten accomplices in persuading them to cooperate, even if the costs of actually using that hammer in any given case are substantial.<sup>85</sup>

## 2. *Conspiracy*

One might expect to see a similar pattern when it comes to conspiracy. Conspiracy and accomplice liability are, after all, close cousins. The deterrence reasons for increasing both the costs of acting in concert and the incentives to betray one's partners in crime if caught are even stronger in the conspiracy context in light of the special dangers created by advance agreement and planning.<sup>86</sup> In the conspiracy context, however, retributivist concerns play a more significant role in determining the content of the substantive rules. The specific pattern that emerges is the opposite: instead of a broad liability rule coupled with more stringent evidentiary rules, conspiracy is characterized by narrower liability rules coupled with lax evidentiary standards that help to protect deterrence concerns.

Conspiracy is both a substantive crime and a doctrine of complicity. In its most basic form, the substantive crime of conspiracy is simply an agreement between two or more persons to commit a crime.<sup>87</sup> Prosecutors may convict a defendant of conspiracy by showing only that he entered into the prohibited agreement and (in most states) that some member of the conspiracy performed some

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<sup>85</sup> In cases in which accomplices refuse to cooperate, it is in prosecutors' interests to pursue harsh sanctions despite the cost of doing so. Cf. Posner, *supra* note 81, at 1505 ("The government has enormous prosecutorial resources. It can allocate these across cases as it pleases, extracting guilty pleas by threatening to concentrate its resources against any defendant who refuses to plead and using the resources thus conserved to wallop the occasional defendant who does invoke his right to a trial.") (citation omitted).

<sup>86</sup> See *infra* notes 90-98 and accompanying text.

<sup>87</sup> See, e.g., Model Penal Code § 5.03(1) (1962) ("A person is guilty of conspiracy with another person or persons to commit a crime if with the purpose of promoting or facilitating its commission he: (a) agrees with such other person or persons that they or one or more of them will engage in conduct that constitutes such crime . . . ; or (b) agrees to aid such other person or persons in the planning or commission of such crime . . .").

“overt act,” however trivial—sending an email, making a phone call, drawing up a plan—in furtherance of it.<sup>88</sup> Punishment for the substantive crime frequently tracks that for the crime that was the object of the agreement, so that agreements to commit more serious crimes are punished more severely, and lesser crimes less severely.<sup>89</sup>

None of this is especially problematic for the retributivist. The retributivist justification for conspiracy mirrors that for other inchoate crimes: deliberately agreeing with others to carry out an unlawful act is a form of blameworthy conduct that creates a real risk of social harm, making conspirators culpable and deserving of punishment.<sup>90</sup> The Supreme Court has long recognized that conspiracy is a “distinct evil” in this regard because of its dangerous group dynamic.<sup>91</sup> Acting in a group allows conspirators to divide tasks, develop specializations, gather information, generate economies of scale, and more easily conceal their criminal activities from police.<sup>92</sup> It also facilitates formation of a dangerous group identity that discourages defection and encourages risk-taking and

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<sup>88</sup> See *Yates v. United States*, 354 U.S. 298, 334 (1957) (“The function of the overt act in a conspiracy prosecution is simply to manifest ‘that the conspiracy is at work.’”) (citation omitted); LaFave, *supra* note 54, § 12.2(b), at 626 & n.52 (reviewing the “overt act” requirement).

<sup>89</sup> See, e.g., Model Penal Code § 5.05; LaFave, *supra* note 54, § 12.4(d), at 662 (stating that many states follow the Model Penal Code in grading the conspiracy offense on the same level as the offense that is the object of the conspiracy).

<sup>90</sup> See, e.g., Katyal, *supra* note 83, at 1369 (“In the same way that someone who drives drunk deserves punishment, the conspirator is culpable for the dangerous inchoate agreement.”).

<sup>91</sup> *United States v. Recio*, 537 U.S. 270, 274–75 (2003) (quoting *Salinas v. United States*, 522 U.S. 52, 65 (1997)); see also *Krulewitch v. United States*, 336 U.S. 440, 448–49 (1949) (Jackson, J., concurring) (acknowledging “the basic conspiracy principle” that “to unite, back of a criminal purpose, the strength, opportunities and resources of many is obviously more dangerous and more difficult to police than the efforts of a lone wrongdoer”); *United States v. Rabinowich*, 238 U.S. 78, 88 (1915) (“For two or more to confederate and combine together to commit . . . a breach of the criminal laws, is an offense of the gravest character, sometimes quite outweighing, in injury to the public, the mere commission of the contemplated crime. It involves deliberate plotting to subvert the laws, educating and preparing the conspirators for further and habitual criminal practices. And it is characterized by secrecy, rendering it difficult of detection, requiring more time for its discovery, and adding to the importance of punishing it when discovered.”)

<sup>92</sup> See, e.g., Katyal, *supra* note 83, at 1325 (pointing out that a conspiracy minimizes competition among members, builds a “framework of trust” that “reduce[s] the transaction costs,” and enables the group to “hire specialists” and otherwise divide labor).



the subordination of individual interests to the attainment of group goals.<sup>93</sup> It thus poses a special “threat to the public,” which “may exist and be punished whether or not the substantive crime ensues.”<sup>94</sup> Threats of more culpable or dangerous crimes receive proportionately higher punishments.

The problems arise when conspiracy is invoked as a doctrine of complicity in addition to a substantive crime. In that case, we see the same conflict between deterrence and retributivist goals that we saw in the case of accomplice liability. Just deserts dictate restricting one conspirator’s liability for the crimes of his co-conspirators to only those crimes that the former aided or encouraged, and doing even this proportionately.<sup>95</sup> Deterrence demands a much wider net, such as that cast by the complicity rule of *Pinkerton v. United States*.<sup>96</sup>

Under *Pinkerton*, liability for the substantive crime of conspiracy also triggers broad complicity liability along the lines of and for the same reasons as the “natural and probable consequences” doctrine that applies to accomplices. A conspirator is liable for all “reasonably foresee[able]” crimes perpetrated by any other co-conspirators in furtherance of the conspiracy, regardless of whether the conspirator actually foresaw them, agreed to their commission as part of the conspiracy, personally had anything to do with them, or even knew of the existence of the co-conspirator who ultimately committed them.<sup>97</sup> *Pinkerton*, in short, opens a growing liability account for all conspirators, increasing their potential punishments with the scope and activities of the conspiracy. The benefits of this

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<sup>93</sup> See *id.* at 1325; see also *Recio*, 537 U.S. at 275 (“[C]ombination in crime makes more likely the commission of [other] crimes [and] decreases the probability that the individuals involved will depart from their path of criminality.” (quoting *Callanan v. United States*, 364 U.S. 587, 593–94 (1961))).

<sup>94</sup> *Recio*, 537 U.S. at 274–75 (quoting *Salinas v. United States*, 522 U.S. 52, 65 (1997)).

<sup>95</sup> See *supra* notes 62–64 and accompanying text.

<sup>96</sup> 328 U.S. 640 (1946).

<sup>97</sup> See *id.* at 646–48; *United States v. Weidner*, 437 F.3d 1023, 1044 (10th Cir. 2006); *United States v. McLee*, 436 F.3d 751, 758 (7th Cir. 2006); *United States v. Silvestri*, 409 F.3d 1311, 1335–37 (11th Cir. 2005); *United States v. Mothersill*, 87 F.3d 1214, 1218–19 (11th Cir. 1996); *United States v. Alvarez*, 755 F.2d 830, 847–51 (11th Cir. 1985).

rule for prosecutors mirror those of the broad accomplice liability rule.<sup>98</sup>

Unlike the accomplice rule, however, most states reject the sweeping rule of *Pinkerton*, which applies only to conspiracy charges brought in federal court.<sup>99</sup> States that do not reject it outright apply it very sparingly, as do some federal courts.<sup>100</sup> These dissimilar stances toward *Pinkerton*, on the one hand, and the broad liability rule for accomplices, on the other, are curious, given the similarly expansive scope of both doctrines. One explanation might lie in the vague and somewhat slippery nature of conspiracy as being a crime predominantly mental in composition (that is, a “meeting of the minds” and an intent). Many courts have recognized that “the looseness and pliability of [conspiracy] present inherent dangers which should be in the background of judicial thought whenever it is sought to extend the doctrine to meet the exigencies of a particular case.”<sup>101</sup> Such concerns apply with less force to accom-

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<sup>98</sup> As Katyal explains, by providing massive leverage to prosecutors, *Pinkerton* greatly increases incentives to cooperate, which in turn fractures trust and increases monitoring costs among conspirators. See Katyal, *supra* note 83, at 1372–75. It also increases the up-front price that potential members will demand to join the conspiracy, their incentives to reduce its scope, and the benefits they stand to gain by affirmatively withdrawing if the conspiracy becomes too broad. See *id.*; see also *supra* note 61 and accompanying text.

<sup>99</sup> See, e.g., *State ex rel. Woods v. Cohen*, 844 P.2d 1147, 1151 (Ariz. 1992); *State v. Carrasco*, 946 P.2d 1075, 1079 (N.M. 1997); *People v. McGee*, 399 N.E.2d 1177, 1182 (N.Y. 1979); *State v. Stein*, 972 P.2d 505, 509 (Wash. Ct. App. 1999). See generally LaFave, *supra* note 54, § 13.3(a), at 685–86 (noting that *Pinkerton* “never gained broad acceptance” at the state level and that most states “reject[] the conclusion that complicity is coextensive with conspiracy”).

<sup>100</sup> See, e.g., *United States v. Castaneda*, 9 F.3d 761, 766 (9th Cir. 1993) (“[D]ue process constrains the application of *Pinkerton* where the relationship between the defendant and the substantive offense is slight.”); *State v. Diaz*, 679 A.2d 902, 911 (Conn. 1996) (observing that “a factual scenario may be envisioned in which the nexus between the defendant’s role in the conspiracy and the illegal conduct of a co-conspirator is so attenuated or remote, notwithstanding the fact that the latter’s actions were a natural consequence of the unlawful agreement, that it would be unjust to hold the defendant responsible for the criminal conduct of his coconspirator”).

<sup>101</sup> *Krulewitch v. United States*, 336 U.S. 440, 449 (1949) (Jackson, J., concurring); see also *United States v. Lane*, 474 U.S. 438, 475 (1986) (noting “deep abhorrence of the notion of ‘guilt by association’” as a reason to carefully police misjoinder in conspiracy trials); *Addonizio v. United States*, 405 U.S. 936, 938 (1972) (Douglas, J., dissenting) (acknowledging the “guilt by association” danger that a broad conspiracy doctrine presents).

plices, who must actively engage in at least some form of immediate encouragement or participation, even if it is minor.<sup>102</sup>

In any event, we are concerned less with the reasons behind these different complicity rules than with the implications that they have for the evidentiary rules that accompany conspiracy law. Where, as here, the clash between retributivist and deterrence objectives is especially acute, a conspiracy doctrine that hews more closely to retributivist concerns by rejecting *Pinkerton* ought to be paired with evidentiary rules that give ground back to deterrence by lowering the barriers to conviction and thereby increasing expected penalties. The law of conspiracy includes at least two special evidentiary rules governing hearsay that do just this. The first is the general co-conspirator exception to the hearsay rule.<sup>103</sup> The second is the adoptive admission exception to the hearsay rule,<sup>104</sup> as specially applied to conspiracy cases.<sup>105</sup>

The co-conspirator exception to the hearsay rule is expansive and sweeps across many cases. It provides that any out-of-court statement by any co-conspirator—including even an uncharged and unidentifiable one<sup>106</sup>—made during the course and in furtherance of the conspiracy is admissible as evidence against all other conspirators.<sup>107</sup> Courts frequently apply the “in furtherance” require-

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<sup>102</sup> See supra notes 54–57 and accompanying text; *Krulewitch*, 336 U.S. at 450 (Jackson, J., concurring) (“[T]he conspiracy doctrine will incriminate persons on the fringe of offending who would not be guilty of aiding and abetting or of becoming an accessory, for those charges only lie when an act which is a crime has actually been committed.”).

<sup>103</sup> See Fed. R. Evid. 801(d)(2)(E) (rendering admissible as evidence of the truth of its contents any out-of-court statement “by a coconspirator of a party during the course and in furtherance of the conspiracy”). This exception applies in various forms in every state. See 6 Jack B. Weinstein & Margaret A. Berger, Weinstein’s Federal Evidence T-107–11 (Joseph M. McLaughlin ed., 2d ed. 2006).

<sup>104</sup> See Fed. R. Evid. 801(d)(2)(B) (rendering admissible as evidence of the truth of its contents any out-of-court statement “of which the party has manifested an adoption or belief in its truth”). This exception also applies in various forms in every state. See Weinstein & Berger, supra note 103, at T-107–11.

<sup>105</sup> See cases cited infra notes 114–15.

<sup>106</sup> See *United States v. Olweiss*, 138 F.2d 798, 800 (2d Cir. 1943) (Hand, J.) (explaining that admissibility of joint venturers’ statements is “an incident of the general principle of agency” and does not require an indictment); *Bigelow v. State*, 768 P.2d 558, 562 (Wyo. 1989) (“A conspiracy need not be charged for a joint venturer to be considered a co-conspirator.”).

<sup>107</sup> See Fed. R. Evid. 801(d)(2)(E); *People v. Caban*, 833 N.E.2d 213, 217 (N.Y. 2005) (“A declaration by a coconspirator during the course and in furtherance of the con-

ment broadly, such that any statements that relate to the conspiracy in some way are held to be admissible.<sup>108</sup> Likewise, “admissible” means admissible for virtually any purpose. Prosecutors thus routinely invoke this exception to prove an untold variety of incriminating facts, including the division of tasks and distribution of benefits between conspirators; the conspiracy’s recruitment efforts; efforts to obtain tools and transportation; strategies for concealment, trace removal, and destruction of evidence; and many others.<sup>109</sup> The exception can even be used to help prove the conspiracy itself, a bootstrapping maneuver which the Supreme Court has explicitly approved.<sup>110</sup> To invoke the co-conspirator exception, moreover, prosecutors need only establish the conspiracy’s existence by a preponderance of the evidence or (in some states) *prima facie*, a significantly lighter burden than the normal “proof beyond all reasonable doubt.”<sup>111</sup> The scope of the exception tracks the scope of the conspiracy.<sup>112</sup>

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spiracy is admissible against another coconspirator as an exception to the hearsay rule.”) (internal quotations omitted); see also *Bourjaily v. United States*, 483 U.S. 171, 183 (1987) (holding that the Confrontation Clause does not require the unavailability of the declarant or special indicia of reliability for the hearsay exception to apply to out-of-court statements of a co-conspirator).

<sup>108</sup> See LaFave, *supra* note 54, § 12.1(b)(3), at 618 (noting that, despite the “in furtherance” requirement, “any evidence somehow relating to the conspiracy [often] comes in” under the co-conspirator exception); see, e.g., *United States v. Davis*, 457 F.3d 817, 825 (8th Cir. 2006) (invoking broad interpretation of “in furtherance” to uphold admission of testimony that a third party not named as a participant in the conspiracy had told the witness that he purchased cocaine from defendant). The exception does not extend to statements made after the conspiracy ended, successfully or unsuccessfully. See *Krulewitch v. United States*, 336 U.S. 440, 442 (1949).

<sup>109</sup> See *King v. State*, 189 S.W.3d 347, 360 (Tex. Crim. App. 2006) (reviewing examples).

<sup>110</sup> See *Bourjaily*, 483 U.S. at 180 (holding that a court may consider a co-conspirator’s hearsay statement itself in determining whether a conspiracy exists for purposes of the application of the co-conspirator exception); see also *Caban*, 833 N.E.2d at 217 (noting the importance of co-conspirator statements in establishing conspiracy). The out-of-court statement, however, cannot be the sole evidence supporting the conspiracy’s existence. See Fed. R. Evid. 801(d)(2)(E) (prescribing that the “contents of the statement shall be considered but are not alone sufficient to establish . . . the existence of the conspiracy and the participation therein of the declarant and the party against whom the statement is offered”).

<sup>111</sup> See *Bourjaily*, 483 U.S. at 175 (adopting preponderance standard for ruling a statement admissible under the co-conspirator exception to the hearsay rule); *People v. Salko*, 391 N.E.2d 976, 981 (N.Y. 1979) (holding that the co-conspirator exception to the hearsay rule applies “only upon a showing that a *prima facie* case of conspiracy has been established”).

<sup>112</sup> See *Bourjaily*, 483 U.S. at 188–90.

The hearsay rule's usual barrier to conviction is further lowered in conspiracy cases by the application of the adoptive admission exception.<sup>113</sup> Under this exception, when someone (typically, a co-conspirator) makes an inculpatory statement in a conspirator's presence, the latter can be deemed by the jury to have adopted that statement if he fails to renounce or correct it.<sup>114</sup> So, for example, when a defendant's co-conspirator exclaims out of court that a drug deal went well or a fight failed to go as planned, and the defendant fails to contradict the statement, the jury is expressly allowed to draw "an inference of assent or acquiescence as to the truth of the statement."<sup>115</sup>

As applied in this way to conspiracy cases, this exception is particularly broad. Statements like the ones just mentioned could not be admitted under the regular co-conspirator exception to the hearsay rule. Because the conspiracies had already concluded at the time the statements were made, they would fail to satisfy the "during the course" and "in furtherance" conditions.<sup>116</sup> Nor could a similar statement be so easily admitted in a civil case. In civil cases, courts interpret the adoptive admission exception much more nar-

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<sup>113</sup> See Fed. R. Evid. 801(d)(2)(B) (laying out exception).

<sup>114</sup> See, e.g., *People v. Williams*, 676 N.Y.S.2d 49, 50 (N.Y. App. Div. 1998) (affirming admission of inculpatory out-of-court statements by a co-conspirator under adoptive admission exception because defendant failed to contradict those statements at the time they were made); *Paredes v. State*, 129 S.W.3d 530, 534 (Tex. Crim. App. 2004) (holding that defendant adopted statements of co-conspirator when he "stood by and listened to [his] description of . . . murders and . . . surrounding events without disrupting them"); *Cantu v. State*, 939 S.W.2d 627, 634-35 (Tex. Crim. App. 1997) (stating general rule that statements by a co-conspirator are admissible as another conspirator's adoptive admission when the latter manifests agreement with those statements through silence).

<sup>115</sup> *People v. Gomez*, 801 N.Y.S.2d 294, 295 (N.Y. App. Div. 2005) (holding that defendant's failure to contradict co-conspirator's statement "that defendant was part of the drug-selling team" amounted to defendant's adoptive admission of that statement); *United States v. Henke*, 222 F.3d 633, 642 (9th Cir. 2000) (affirming ruling that the defendant's response of "next question please" to a reporter's accusation that defendants were "cooking the books" was an adoptive admission on the ground that the natural response would be to address or deny the accusation); *People v. Ferrara*, 92 N.E. 1054, 1059 (N.Y. 1910) (finding that defendant's shrugging of the shoulders in reaction to a stabbing accusation made by an accomplice at a jailhouse confrontation qualified as adoptive admission); *People v. Campney*, 726 N.E.2d 468, 470-71 (N.Y. 1999) (ruling that circumstantial evidence alone satisfies the foundational standard for adoptive admissions and affirming the application of that principle in *Ferrara*).

<sup>116</sup> See *supra* note 108 and accompanying text.

rowly to require a clear, if not unequivocal, indication of the defendant's agreement with a statement as a condition for its admission. Evidence that a doctor stood silent after hearing a patient exclaim, "you guys charged me for something I didn't need" would not qualify as an adoptive admission in an action for damages.<sup>117</sup> It would, however, qualify as such in a prosecution for conspiracy to commit insurance fraud.<sup>118</sup>

It is easy to see how such broad hearsay exceptions counteract some of the effects of a narrow complicity rule for deterrence purposes. Conspirators talk—a lot. Allowing evidence of their conversations to be introduced against all members of the conspiracy under fairly lax standards not only raises the probability of conviction and punishment for the conspiracy itself, but it also increases the probability of conviction and punishment for the offenses of one's co-conspirators. The many jurisdictions rejecting *Pinkerton* ordinarily require that a conspirator meet the requirements for accomplice liability to be liable for the crimes of his co-conspirators—that is, he must intentionally assist or encourage those crimes in some way.<sup>119</sup> For prosecutors, one of the most readily available means of proving this is to introduce hearsay statements suggesting that the conspirator knew of those crimes and was on board with their commission.<sup>120</sup> To the extent that such statements fall within the

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<sup>117</sup> See, e.g., *Davis v. Reid*, 612 S.E.2d 112, 115–16 (Ga. Ct. App. 2005); *Hamilton v. Walker*, 893 So. 2d 1002, 1007 (La. Ct. App. 2005); *Powers v. Coccia*, 861 A.2d 466, 470 (R.I. 2004); Maria L. Ontiveros, *Adoptive Admissions and the Meaning of Silence: Continuing the Inquiry into Evidence Law and Issues of Race, Class, Gender, and Ethnicity*, 28 Sw. U. L. Rev. 337, 340 (1999) (observing that the adoptive admission exception to the hearsay rule impacts "especially criminal defendants, more than most").

<sup>118</sup> See *supra* note 115 and accompanying text.

<sup>119</sup> See, e.g., *State ex rel. Woods v. Cohen*, 844 P.2d 1147, 1149–50 (Ariz. 1992) ("The fact that one can be criminally responsible for the crime of conspiracy without committing the planned substantive offenses does not mean that one is also criminally responsible for the substantive offenses without being either an accomplice or principal to those offenses."); *People v. McGee*, 399 N.E.2d 1177, 1182 (N.Y. 1979) ("We . . . decline to follow the rule adopted for Federal prosecutions in *Pinkerton*. . . . Accessorial conduct may not be equated with mere membership in a conspiracy and the State may not rely solely on the latter to prove guilt of the substantive offense.") (citation omitted); *id.* (requiring proof of accomplice liability as the only basis for complicity).

<sup>120</sup> See *People v. Salko*, 391 N.E.2d 976, 981–82 (N.Y. 1979) ("Th[e] [coconspirator] exception is not limited to permitting introduction of a conspirator's declaration to prove that a coconspirator committed the crime of conspiracy, but, rather, may be in-

conspiracy exceptions, the accomplice rules discussed earlier will not prevent their admission.<sup>121</sup> The substantive effects of this scheme, of course, are similar to those of *Pinkerton*: higher expected punishments, increased incentives to withdraw and cooperate, fractured trust and fragmented communication, and higher costs in getting the conspiracy off the ground initially. Many jurisdictions that reject *Pinkerton* recognize these deterrence-enhancing effects of their broad hearsay exceptions for conspiracy cases.<sup>122</sup>

### B. Preparation Versus Attempt

The line separating preparation from attempt is an important one in the law of inchoate crimes. Attempts are punishable as crimes. Mere preparations for a criminal act are not.<sup>123</sup> A spurned

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voked to support introduction of such declaration to prove a coconspirator's commission of a substantive crime for which the conspiracy was formed."); see also *People v. Caban*, 833 N.E.2d 213, 217 (N.Y. 2005).

<sup>121</sup> See, e.g., *Lilly v. Virginia*, 527 U.S. 116, 137 (1999) ("We have held . . . that any inherent unreliability that accompanies co-conspirator statements made during the course and in furtherance of the conspiracy is *per se* rebutted by the circumstances giving rise to the long history of admitting such statements."); *United States v. Sanchez-Berrios*, 424 F.3d 65, 76 (1st Cir. 2005) (holding that "there is no [Confrontation Clause] problem when a statement falls within the coconspirator exception to the hearsay rule") (citation and internal quotation marks omitted); *State v. Baumgartner*, 637 N.W.2d 14, 16 (N.D. 2001) ("[T]he term accomplice is not synonymous with co-conspirator, and there is no rule requiring corroboration of a co-conspirator's testimony."); see also *State v. Lynn*, 835 P.2d 251, 256 n.11 (Wash. App. 1992) ("Neither unavailability, reliability or corroboration need be shown for the admission of a co-conspirator's statements."). Not all accomplices are also conspirators. See, e.g., LaFave, *supra* note 54, § 13.3(a), at 684. Minor accomplices who are not parties to the larger conspiratorial agreement can still claim the protections of the evidentiary rules that attach to the use of accomplice statements.

<sup>122</sup> New York is one good example. See *supra* notes 119–20120. *Salko*, we note, was a companion case to *McGee*, in which the New York Court of Appeals rejected *Pinkerton*. Conversely, when the Supreme Court rejected what effectively would have been a further expansion of the co-conspirator exception in *Krulewitch*, the Court cited as one of its reasons *Pinkerton*'s already existing "tendency . . . to expand th[e] elastic offense [of conspiracy] and to facilitate its proof." *Krulewitch v. United States*, 336 U.S. 440, 451 (1949) (Jackson, J., concurring); see *id.* at 443–44.

<sup>123</sup> See LaFave, *supra* note 54, § 11.4(a), at 588; see also *State v. Spies*, 672 N.W.2d 792, 797–98 (Iowa 2003) ("It is doubtless true that mere acts of preparation not proximately leading to the consummation of the intended crime will not suffice to establish an intent to commit it . . ."); Rollin M. Perkins & Ronald N. Boyce, *Criminal*

husband may decide to poison his wife, plan how he will do so, read up on poisons, and perhaps even purchase the one he intends to use. Under current law, these acts without more likely amount only to preparation.<sup>124</sup> If he later pours the poison into a glass of wine which he intends his wife to drink, he crosses the line of preparation and becomes an attempted murderer. The law ascribing him this criminal status says that a person becomes an attempter only after manifesting a significant degree of culpability through the commission of some blameworthy act.<sup>125</sup> Today, the dominant doctrinal criterion for identifying when this occurs is whenever the person can be held to have taken a "substantial step" toward the commission of the crime.<sup>126</sup> In the past (and occasionally still today in some jurisdictions), it might have been when he took the "last act," or acted "unequivocally," or reached a point "dangerously close" to his objective.<sup>127</sup> The underlying motivation of all

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Law 617 (3d ed. 1982) ("The difference between [preparation and attempt] may not be 'wide' as a matter of fact. . . . But it is wide as a matter of law.")

<sup>124</sup> See, e.g., *Commonwealth v. Ortiz*, 560 N.E.2d 698, 703 (Mass. 1990) (holding that riding in a car with a loaded gun in an unsuccessful search for intended victim was insufficient to support a conviction for attempted assault and battery, "even though the evidence would have warranted a finding that the defendant intended and prepared for an assault and battery" on his target); *People v. Coleman*, 86 N.W.2d 281, 285 (Mich. 1957) (holding that "the purchase of a hunting rifle, secretly intended for the murder of the neighbor" is "merely an act of preparation"); *United States v. Stephens*, 12 F. 52, 55 (C.C.D. Or. 1882) (holding that "the purchase of a gun with a design to commit murder, or the purchase of poison with the same intent . . . are considered in the nature of preliminary preparations" which, "although co-existent with a guilty intent," do not rise to the level of an attempt). Under the "substantial step" test, the acts might possibly cross the line if they strongly corroborate evidence of a criminal purpose. See Model Penal Code § 5.01(2) (1962).

<sup>125</sup> See Glanville Williams, *Textbook of Criminal Law* 405 (2d ed. 1983) (arguing that liability for attempts should attach to incomplete offenses that "distinctly betoken[] criminal mentality"); Herbert Morris, *Punishment for Thoughts*, 49 *Monist* 342, 360–61 (1965) (grounding liability for attempts on what can be described as the "accumulated culpability" rationale).

<sup>126</sup> See Model Penal Code § 5.01(1)(c) (1962) ("A person is guilty of an attempt to commit a crime if, acting with the kind of culpability otherwise required for commission of the crime, he . . . purposely does or omits to do anything that, under the circumstances as he believes them to be, is an act or omission constituting a substantial step in a course of conduct planned to culminate in his commission of the crime."); LaFave, *supra* note 54, § 11.4(e), at 594 ("The Model Penal Code's 'substantial step' language is to be found in the great majority of the attempt statutes in the modern re-codifications.").

<sup>127</sup> See, e.g., *R v. Eagleton*, (1855) 169 Eng. Rep. 826, 835–36 (Crim. App.) (laying out "last act" test); *King v. Barker* [1924] N.Z.L.R. 865 (C.A.) (laying out "unequivo-



these criteria, both past and present, has never changed. Each criterion seeks to separate incipient criminals who are sufficiently culpable to assume liability for attempt from those who are not. While the specific criteria for drawing this distinction have shifted over the years, the continued insistence that the defendant exhibit some palpable culpability has always marked those criteria as having an important retributivist component.<sup>128</sup>

From the deterrence perspective, focusing on culpability as the pivotal factor in the punishment of attempts is misguided. What matters for deterrence is the expected harm from a potential crime, not the culpability of the potential attempter. A deterrence approach to the issue of incomplete attempts should focus on expected harm alone—an approach that rejects the distinction between attempt and preparation to begin with. Under this approach, the expected harm is determined by its probability and magnitude, not by the culpability of the person creating it. Even the smallest step that a potential criminal takes toward his goal creates some proportionate risk of harm by increasing the chance that the goal will be realized. Likewise, and for the same reason, with each step the criminal derives some benefit from his actions. A forward-looking criminal law aiming to minimize social harm thus ought to criminalize any step taken toward crime. The further the potential criminal goes along his crime continuum, moreover, the more severe the punishment should be.<sup>129</sup>

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cality" test); *People v. Rizzo*, 158 N.E. 888, 889 (N.Y. 1927) (laying out "physical proximity" test). For an excellent doctrinal and theoretical survey of the law of attempts, see R.A. Duff, *Criminal Attempts* (1996).

<sup>128</sup> See, e.g., Duff, *supra* note 127, at 124–25 (surveying retributivist approaches to attempt); Joshua Dressler, *Understanding Criminal Law* § 27.04[a][2], at 382 (3d ed. 2001) (same); Arthur Ripstein, *Equality, Responsibility and the Law* 235–40 (1999); Larry Alexander & Kimberly D. Kessler, *Mens Rea and Inchoate Crimes*, 87 J. Crim. L. & Criminology 1138, 1168–74 (1997); Morris, *supra* note 125, at 360–61; Williams, *supra* note 125, at 405; Bruce Chapman, *Agency and Contingency: The Case of Criminal Attempts*, 38 U. Toronto L.J. 355, 360–61 (1988); see also Alan Brudner, *The Unity of the Common Law* 211–60 (1995) (laying out a retributivist justification of the common law "unequivocality" test as grounded in the attempter's denial of his intended victim's right).

<sup>129</sup> One might object that at some point it becomes counterproductive to increase the punishment for attempt proportionately with the risk it creates because bringing the punishment for attempts too close to that for the completed crime would dilute attempters' incentives to desist. When attempted and completed crimes carry roughly equal punishments, the argument goes, offenders would rationally prefer to offset the

The case of our spurned husband illustrates this. There, each consecutive step that the husband takes toward his objective increases the probability of the harm. The failure to criminalize such preparatory acts means that he and other would-be criminals are free to put their plans in motion and move along their continuum until they cross the border of "attempt."<sup>130</sup> From the safe vantage point of complete preparation, they can gather information, secure supplies, and assess their chances of success and escape. They can, in short, proceed to the point in their process where they possess sufficient information, resources, and resolve to take a next step that would render them unqualifiedly culpable. It is the very purpose of deterrence to discourage such activities. While deterrence would not go so far as to advocate punishing for bad thoughts alone—the chilling effect on daily life would be enormous<sup>131</sup>—it would punish nearly any activity that could be proved to be part of a preparation for crime. Subject to law-enforcement costs, it would erase the preparation versus attempt distinction, and move the liability line as far down the crime continuum as is practically possible.<sup>132</sup>

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possible punishment by trying to secure the benefits from the completed crime. See Posner, *supra* note 19, at 229–30. Most jurisdictions, however, solve this problem with a substantive "abandonment" rule which provides that abandonment of a crime is a complete defense to a charge of attempt. See Steven Shavell, *Foundations of Economic Analysis of Law* 557 (2004); Model Penal Code § 5.01(4) (1962) (laying out defense of abandonment).

<sup>130</sup> See Omri Ben-Shahar & Alon Harel, *The Economics of the Law of Criminal Attempts: A Victim-Centered Perspective*, 145 U. Pa. L. Rev. 299, 322 (1996) (noting that the exemption for preparation is detrimental to society in that it reduces the costs of pre-crime activities for criminals).

<sup>131</sup> Punishing bad thoughts without more also would almost certainly be unconstitutional. See *United States v. O'Brien*, 391 U.S. 367, 381–82 (1968) (discussing the constitutional necessity of basing punishment on conduct rather than thoughts and communication of ideas); Susan Gellman, *Sticks and Stones Can Put You in Jail, but Can Words Increase Your Sentence? Constitutional and Policy Dilemmas of Ethnic Intimidation Laws*, 39 UCLA L. Rev. 333, 362–68 (1991) (arguing that punishment for thoughts or bad motives alone is unconstitutional).

<sup>132</sup> See, e.g., Samuel Kramer, *An Economic Analysis of Criminal Attempt: Marginal Deterrence and the Optimal Structure of Sanctions*, 81 J. Crim. L. & Criminology 398, 410–11, 414 (1990) (arguing that preparation should be punishable as a "stage one" attempt and that sanctions should increase as the wrongdoer progresses further through additional stages). See generally Posner, *supra* note 19, at 229 (treating any criminal endangerment as requiring deterrence, subject to costs); Shavell, *supra* note 129, at 556 (same).

The retributivist unwillingness to criminalize merely preparatory acts thus yields a narrow definition of incomplete attempts that insufficiently deters potential criminals. Many such persons go free under the various tests for attempt not because there is any question about their intent to commit a crime or the harm they stood to cause, but simply because they were apprehended at too early a point in the process.<sup>133</sup> One obvious way to address this problem from a deterrence perspective would be to abandon the retributivist commitment to the line between preparation and attempt. Another way to address it, while still respecting that commitment to at least some degree, would be to keep the formal line as a background safeguard while effectively lowering the barriers to conviction for the categories of preparatory acts that are most likely to give rise to some real risk of social harm. As with the "badges of guilt" doctrine,<sup>134</sup> special evidentiary rules could work to steer prosecutors toward such cases by treating the acts involved as powerful evidence that the persons in question have crossed the line from blameless preparers to culpable attempters. This approach would intensify deterrence of would-be criminals with respect to especially worrisome preparatory activities without a wholesale elimination of the distinction between preparation and attempt.

The Model Penal Code contains a set of special evidentiary rules that function in this way in combination with its "substantial step" test for attempt. That test respects the distinction between preparation and attempt by providing that a person becomes liable for attempt only after taking "a substantial step in a course of conduct planned to culminate in his commission of the crime."<sup>135</sup> The Code then goes on to provide, however, that certain preparatory activi-

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<sup>133</sup> See, e.g., *United States v. Plenty Arrows*, 946 F.2d 62, 66 (8th Cir. 1991) (holding that placing a penis against the back and buttocks of a nine-year-old boy is not a "substantial step" toward the consummation of the crime of aggravated sexual abuse); *United States v. Buffington*, 815 F.2d 1292, 1301-03 (9th Cir. 1987) (holding that procurement of handguns and disguise materials and twice driving by a bank slowly does not cross the "substantial step" line for attempted bank robbery); *People v. Rizzo*, 158 N.E. 888, 888 (N.Y. 1927) ("The police of the city of New York did excellent work in this case by preventing the commission of a serious crime. . . . Whether or not the steps which the defendant had taken up to the time of his arrest amounted to the commission of a crime, as defined by our law, is, however, another matter.").

<sup>134</sup> See *supra* notes 26-29 and accompanying text.

<sup>135</sup> Model Penal Code § 5.01(1)(c) (1962).

ties, "if strongly corroborative of the [defendant's] criminal purpose," must be held to qualify as evidence upon which the jury can find the defendant guilty of attempt.<sup>136</sup> As clarified in the Code's explanatory note, this provision functions as a special rule of evidence which requires the judge to submit the issue of attempt to the jury whenever evidence of any of these activities is present.<sup>137</sup> Potential criminals still must cross some line, but the special evidentiary rules allow the jury to find that they have done so on the basis of specified types of preparation. The judge, in other words, cannot directly acquit the defendant, which means that the provision automatically allows prosecutors to discharge their burden of production whenever evidence of the specified acts is present.<sup>138</sup>

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<sup>136</sup> Specifically, Model Penal Code § 5.01(2) provides:

Without negating the sufficiency of other conduct, the following, if strongly corroborative of the actor's criminal purpose, shall not be held insufficient as a matter of law:

- (a) lying in wait, searching for or following the contemplated victim of the crime;
- (b) enticing or seeking to entice the contemplated victim of the crime to go to the place contemplated for its commission;
- (c) reconnoitering the place contemplated for the commission of the crime;
- (d) unlawful entry of a structure, vehicle or enclosure in which it is contemplated that the crime will be committed;
- (e) possession of materials to be employed in the commission of the crime, that are specially designed for such unlawful use or that can serve no lawful purpose of the actor under the circumstances;
- (f) possession, collection or fabrication of materials to be employed in the commission of the crime, at or near the place contemplated for its commission, if such possession, collection or fabrication serves no lawful purpose of the actor under the circumstances;
- (g) soliciting an innocent agent to engage in conduct constituting an element of the crime.

<sup>137</sup> See Model Penal Code § 5.01 explanatory note (noting that where preparatory conduct strongly corroborates the actor's criminal purpose, the issue of guilt must be submitted to the jury); see also *id.* § 5.01 cmt. 6(c) ("[T]he judge can refuse to submit the issue to the jury or refuse to accept the decision of the jury only if there is insufficient evidence of criminal purpose or there is no reasonable basis for holding that the defendant's conduct was 'strongly corroborative' of the criminal purpose attributed to him.").

<sup>138</sup> See 2 McCormick on Evidence 478–83 (6th ed. 2006); see also *County Ct. of Ulster County v. Allen*, 442 U.S. 140, 157 (1979) (holding that, as long as fact-finders remain free to decide the case either way under the "proof beyond a reasonable doubt" standard, any inference they can rationally draw satisfies due process). The jury, of course, would then be free to go on to convict the defendant of attempt on the basis of that evidence.

The upshot of this provision for deterrence is that persons contemplating the commission of a crime will have significant incentives to avoid doing anything that might bring them within its scope. The provision therefore discourages potential criminals from engaging in such traditionally "merely preparatory" activities as tracking down or following the potential victim;<sup>139</sup> obtaining tools, weapons and other materials to be used in the crime;<sup>140</sup> "reconnoitering the place contemplated for the commission of the crime,"<sup>141</sup> and trespassing in areas in which the crime might be committed.<sup>142</sup> In this manner, it works to offset the retributively driven substantive test for attempt embodied in the Code's formal definition.<sup>143</sup> Of course, in marking out certain categories of preparatory activities as sufficient to support conviction, the Code's evidentiary rules also risk convicting some persons whom retributivism would not view as culpable enough to deserve punishment for attempt. By removing an "insufficiency of the evidence" safety valve for certain categories of activities, those rules allow the conviction of more defendants than would be possible under the normal requirements for proof. But they do not do so in a way that is irrational or haphazard; while some undeserving persons might be more likely to be convicted, many fully deserving ones will be as well. For retributivism, this potential change in the balance of false positives and false negatives should be no different from that caused by any other adjudicative errors that inevitably occur.

Mediating rules of this sort appear throughout the law of attempt in the form of crime-specific evidentiary rules as well. For example, courts in some jurisdictions have developed a special rule for drug cases that permits the jury to treat the defendant's possession of a complete (or nearly complete) methamphetamine lab as an attempt to manufacture methamphetamine.<sup>144</sup> Statutes prohibit-

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<sup>139</sup> Model Penal Code § 5.01(2)(a)–(b) (1962).

<sup>140</sup> Id. § 5.01(2)(e)–(f).

<sup>141</sup> Id. § 5.01(2)(c).

<sup>142</sup> Id. § 5.01(2)(d).

<sup>143</sup> Several states have adopted the same evidentiary framework. See Model Penal Code § 5.01 cmt. 6(b), at 332 n.131 (1985) (noting that Connecticut and Maryland include substantially the same list of factors within the provision as enacted and that four other states include the list in commentaries).

<sup>144</sup> See, e.g., *United States v. Anderson*, 987 F.2d 251, 255–56 (5th Cir. 1993); *State v. Rollett*, 80 S.W.3d 514, 523 (Mo. Ct. App. 2002).

ing attempted arson sometimes explicitly specify types of preparatory activities that courts shall consider as rising to the level of attempt.<sup>145</sup> Many similar examples exist in both judge-made and statutory law.<sup>146</sup>

### *C. Defenses*

Our examples in this Part have thus far largely focused on the mediating features of rules and doctrines governing the admission and use of evidence. As we suggested earlier, standards of proof can function in a similar way. We see this dynamic in the varying standards of proof commonly applied to different categories of criminal law defenses. Criminal law recognizes a large and diverse array of defenses.<sup>147</sup> The term “defense” is usually used “to mean any set of identifiable conditions or circumstances which may prevent a conviction for an offense.”<sup>148</sup> Many defenses do this by eliminating a defendant’s liability entirely; others mitigate liability to that for a lesser crime.<sup>149</sup> Commentators have spilled much ink both in attempting to classify the various defenses into distinct conceptual categories and in debating the usefulness of doing so.<sup>150</sup>

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<sup>145</sup> See, e.g., Cal. Penal Code § 455 (West 2006) (“The placing or distributing of any flammable, explosive or combustible material or substance, or any device in or about any structure, forest land or property in an arrangement or preparation with intent to eventually willfully and maliciously set fire to or burn same, or to procure the setting fire to or burning of the same shall, for the purposes of this act constitute an attempt to burn such structure, forest land or property.”).

<sup>146</sup> See Sanford H. Kadish & Stephen J. Schulhofer, *Criminal Law and its Processes: Cases and Materials* 572–73 (7th ed. 2001) (observing that “the law today contains many instances of merely preparatory behavior defined as substantive crimes” and reviewing examples from various statutes); Ira P. Robbins, *Double Inchoate Crimes*, 26 Harv. J. on Legis. 1, 16–25 (1989) (listing and analyzing a variety of preparatory offenses).

<sup>147</sup> 1 Paul H. Robinson, *Criminal Law Defenses* § 2(a), at 3 n.1 (1984 & Supp. 2005) (laying out a comprehensive list of defenses). See generally Fletcher, *supra* note 15, at 759–875 (examining theoretical bases of numerous defenses).

<sup>148</sup> Paul H. Robinson, *Criminal Law Defenses: A Systematic Analysis*, 82 Colum. L. Rev. 199, 203 (1982).

<sup>149</sup> See *id.*; Robinson, *supra* note 147, § 21, at 70.

<sup>150</sup> Official commentaries accompanying the Model Penal Code, for instance, note that the “Code does not . . . attempt to draw a fine line between all those situations in which a defense might more precisely be labelled a justification and all those situations in which a defense might more precisely be labelled an excuse . . . on the belief that any possible value of attempting such a line would be outweighed by the cost of

We focus our analysis here on the distinction between justification and excuse defenses, a topic that has received much attention in the literature.<sup>151</sup> Justifications are conduct-focused defenses. They mark out circumstances under which conduct that would otherwise be criminal is socially acceptable and deserving of neither criminal liability nor censure, usually because the conduct prevents even greater harm or furthers a greater interest than that sought to be protected by the criminal prohibition.<sup>152</sup> Self-defense—say, wrestling a person to the ground when he attempts to stab you—and necessity—say, burning a field of corn to create a firebreak which saves a nearby town from destruction—are classic examples. Justified conduct is thus considered conduct that is to be encouraged or, at the very least, not deterred. Excuses, by contrast, are actor-focused defenses. Excuse defenses mark out scenarios in which, while the conduct at issue is still socially unacceptable and deserving of censure, some peculiar characteristic of the actor diminishes or even eliminates his responsibility and blameworthiness.<sup>153</sup> Insanity is the classic example. While the conduct remains wrong and something to be discouraged, the criminal law deems the actor an inappropriate candidate for punishment.

That is the basic substantive distinction. Equally important for our purposes is a basic procedural distinction governing the use of these two categories of defenses. In most jurisdictions, core justification defenses—such as self-defense and necessity—once raised by a defendant, must be disproved by the prosecution beyond all

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complicating the content of relevant provisions.” Model Penal Code, intro. to art. 3, at 2–3 (1985).

<sup>151</sup> See, e.g., *id.* at 2–4; Joshua Dressler, *Justifications and Excuses: A Brief Review of the Concepts and the Literature*, 33 Wayne L. Rev. 1155 (1987); Albin Eser, *Justification and Excuse*, 24 Am. J. Comp. L. 621 (1976); George P. Fletcher, *Domination in the Theory of Justification and Excuse*, 57 U. Pitt. L. Rev. 553, 563–67, 576–78 (1996); Kent Greenawalt, *The Perplexing Borders of Justification and Excuse*, 84 Colum. L. Rev. 1897 (1984).

<sup>152</sup> See Robinson, *supra* note 148, at 213 (“The harm caused by the justified behavior remains a legally recognized harm which is to be avoided whenever possible. Under the special justifying circumstances, however, that harm is outweighed by the need to avoid an even greater harm or to further a greater societal interest.”).

<sup>153</sup> See Fletcher, *supra* note 15, at 811 (“Excuses . . . do not constitute exceptions or modifications of the [prohibitory] norm, but rather a judgment in the particular case that an individual cannot be fairly held accountable for violating the norm.”); see also George P. Fletcher, *The Individualization of Excusing Conditions*, 47 S. Cal. L. Rev. 1269, 1304–05 (1974).

reasonable doubt.<sup>154</sup> By contrast, also in most jurisdictions, core excuse defenses—such as insanity, duress, and provocation—must be both raised and subsequently proved by the defendant by a preponderance of the evidence (and in some cases by an even higher standard).<sup>155</sup>

This divergence is puzzling. Constitutional criminal procedure requires only that jurisdictions not remove from the prosecution the burden to prove all elements of a crime beyond a reasonable doubt.<sup>156</sup> Jurisdictions thus cannot shift the burden to the defendant for any defenses that negate an element, such as a mistake negating *mens rea*.<sup>157</sup> While a jurisdiction could choose to include the “ab-

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<sup>154</sup> See 2 Robinson, *supra* note 147, § 132, at 99–100 (“The burden of production for the defense of self-defense is always on the defendant. The burden of persuasion is almost always on the state, beyond a reasonable doubt.”) (citations omitted); *id.* at 99 nn.11–12 (citing supporting federal and state cases); *id.* § 124(a), at 47 (“The burden of production for the defense of lesser evils (choice of evils, necessity) is always on the defendant. The burden of persuasion is nearly always on the state, beyond a reasonable doubt, and is for the determination of the trier of fact.”) (citations omitted); *id.* at 47 nn.2–3 (citing supporting federal and state cases); see also 1 Barbara E. Bergman & Nancy Hollander, *Wharton’s Criminal Evidence* § 2.10, at 64 nn.97–99 (15th ed. 1997 & Supp. 2006) (citing supporting federal and state cases with respect to the burden of production and persuasion where self-defense is alleged).

<sup>155</sup> See *Dixon v. United States*, 126 S. Ct. 2437, 2445 (2006) (observing that “the common law long required the defendant to bear the burden of proving the existence of duress”); LaFave, *supra* note 54, § 8.3, at 427 (“In about ten states, . . . the prosecution must . . . prove [sanity] beyond a reasonable doubt. In the other states, the burden of persuasion is on the defendant to convince the jury of his insanity, usually by the civil standard of a preponderance of the evidence.”) (citations omitted); Robinson, *supra* note 147, § 102(a)(2), at 483 (“The burden of production for the defense of extreme emotional disturbance is nearly always on the defendant. . . . [T]he burden of persuasion for the defense is usually placed on the defendant, by a preponderance of the evidence.”) (citations omitted). Some jurisdictions go even further in cases of insanity, requiring defendants to prove it by clear and convincing evidence or even beyond a reasonable doubt. See, e.g., 18 U.S.C. § 17(b) (2001) (clear and convincing evidence, in federal cases); Ala. Code § 13A-3-1(c) (2005) (clear and convincing evidence); N.H. Rev. Stat. Ann. § 628:2(II) (1996) (same); S.D. Codified Laws § 22-5-10 (1998) (same); Leland v. Oregon, 343 U.S. 790, 798 (1952) (upholding constitutionality of Oregon statute requiring defendant to prove insanity beyond all reasonable doubt). The Model Penal Code rejects this burden-shifting approach for excuses, see Model Penal Code § 1.12(1)-(2), although it is not widely followed on this point.

<sup>156</sup> See *Patterson v. New York*, 432 U.S. 197, 204–06, 210 (1977).

<sup>157</sup> See Christopher B. Mueller & Laird C. Kirkpatrick, *Evidence* 134–39 (3d ed. 2003) (explaining that where a defense overlaps with the elements of a crime, the prosecution must disprove it beyond a reasonable doubt); see, e.g., *United States v. Goodwin*, 440 F.2d 1152, 1156 (3d Cir. 1971) (“[A] mistake of fact which negates the existence of the necessary criminal intent will constitute a defense.”).



sence of a justification” (or a similar condition) as a necessary element of any given crime,<sup>158</sup> thereby requiring the prosecution to disprove it beyond all reasonable doubt once it is raised, nothing inherent in justification defenses requires this. As a matter of due process, then, jurisdictions are free to treat justification and excuse defenses more or less the same.<sup>159</sup> Yet they do not. Even those criminal codes that pool all “affirmative defenses” together often incorporate “unlawfulness” or “without a justification” in the definitions of their core crimes.<sup>160</sup> As already noted, this drafting technique requires the prosecution to disprove beyond all reasonable doubt self-defense, necessity, or any other justification defense that a defendant might raise.<sup>161</sup>

Apart from discussions of the constitutional limitations on crime definition, with which we are not concerned here, little scholarship addresses the allocation of burdens of proof for defenses in crimi-

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<sup>158</sup> For an example of statutory language that would do so for both excuse and justification defenses, see Model Penal Code § 1.13(9) (stating that “‘element of an offense’ means (i) such conduct or (ii) such attendant circumstances or (iii) such a result of conduct as . . . negatives an excuse or justification for such conduct”).

<sup>159</sup> See *Patterson*, 432 U.S. at 207–08 (holding that states can require defendants to prove any affirmative defense by a preponderance of the evidence and that the Constitution does not put states “to the choice of abandoning those defenses or undertaking to disprove their existence in order to convict of a crime which otherwise is within [their] constitutional powers to sanction by substantial punishment”). Both the Due Process Clause, U.S. Const. amend. V, XIV, and the Cruel and Unusual Punishments Clause, U.S. Const. amend. VIII, impose some outer limits on a jurisdiction’s ability to define the elements of a crime in a way that shifts to a defendant the burden to disprove his own criminality. See *Patterson*, 432 U.S. at 210; John Calvin Jeffries, Jr. & Paul B. Stephan III, *Defenses, Presumptions, and Burden of Proof in the Criminal Law*, 88 Yale L.J. 1325, 1370–79 (1979). See generally McCormick, *supra* note 138, at 527–30 (outlining the constitutional limits of the “affirmative defense” doctrine).

<sup>160</sup> See, e.g., Fla. Stat. Ann. § 782.04 (West 2000) (defining actus reus of murder as “[t]he unlawful killing of a human being”); Ga. Code Ann. § 16-5-1 (2003) (defining actus reus of murder as causing the death of another human being “unlawfully and with malice aforethought”); Okla. Stat. tit. 21, § 701.7 (2002) (same); Or. Rev. Stat. Ann. § 163.005 (West 2003) (defining actus reus of homicide as killing another human being “without justification”); Miss. Code Ann. § 97-3-35 (2006) (defining actus reus of manslaughter as killing a human being “in a cruel or unusual manner, or by the use of a dangerous weapon, without authority of law, and not in necessary self-defense”).

<sup>161</sup> See *supra* note 157 and accompanying text; see also *Mullaney v. Wilbur*, 421 U.S. 684, 686, 702–04 (1975) (holding that, because a “heat of passion” defense necessarily negated the “malice aforethought” element of a murder statute, constitutional due process required the prosecutor to disprove the defense beyond a reasonable doubt).

nal law.<sup>162</sup> The treatments that do exist are by and large normative and often focus on the degree to which the specific defense at issue turns on subjective elements that would be difficult for prosecutors to prove by reference to external, objective facts. The more subjective the defense, the arguments go, the more sense it makes to place the burden on the defendant as the party with the best knowledge of and access to the relevant evidence.<sup>163</sup> Whatever their normative validity, these arguments do a poor job of accounting for positive law. Most core excuse defenses like duress and provocation stand or fall on a reasonableness inquiry that makes them primarily objective in nature.<sup>164</sup> Moreover, to the extent that the reasonableness inquiry takes into account the subjective situation of the defendant, as it does in many jurisdictions, it does so for justification defenses as well.<sup>165</sup>

A more robust understanding of the doctrine starts with the importance of the conceptual differences between justification and excuse to deterrence and retributivism. It then considers the ways in which shifting the burden of proof helps to mediate between the demands of those two theories. Conflict between deterrence and retributivism in the creation and definition of justification defenses is on the whole small. Most retributivists, for instance, would be-

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<sup>162</sup> One major exception is George P. Fletcher, *Two Kinds of Legal Rules: A Comparative Study of Burden-of-Persuasion Practices in Criminal Cases*, 77 *Yale L.J.* 880 (1968); see also Robinson, *supra* note 148, at 250–63.

<sup>163</sup> See McCormick, *supra* note 138, at 475 (“A doctrine often repeated by the courts is that where the facts with regard to an issue lie peculiarly in the knowledge of a party, that party has the burden of proving the issue.”).

<sup>164</sup> See Paul H. Robinson, *Criminal Law: Case Studies & Controversies* 663 (2005) (“While we may tend to think of excuses as being very subjective, the fact is that in principle all modern excuses hold an actor to some form of objective standard in judging his or her efforts to remain law-abiding. Several excuses have explicit objective standards as part of their criteria.”). Insanity and, to a lesser extent, intoxication are the main exceptions. Even for those excuses, however, proof of the subjective states on which they turn overwhelmingly involves objective evidence (for example bizarre behavior). For a good overview of the various excusing conditions recognized in criminal law, see *id.* at 657–771.

<sup>165</sup> See, e.g., Del. Code Ann. tit. 11 § 464(b) (2001) (“[A] person employing protective force may estimate the necessity thereof under the circumstances as the person believes them to be when the force is used . . . .”); Tex. Penal Code Ann. § 9.32(a) (Vernon 2003) (“A person is justified in using deadly force against another . . . if a reasonable person in the actor’s situation would not have retreated . . . .”); Model Penal Code §§ 2.02(2)(c)–(d), 3.09(2) (1962) (incorporating “the actor’s situation” and “the circumstances known to him” into the reasonableness inquiry for self-defense).

lieve that there is nothing blameworthy in responding to an unprovoked attack with proportional force in order to protect oneself, or in breaking down the door of an empty cabin in the woods in order to keep from starving.<sup>166</sup> The precise reasons for that moral assessment might vary depending on the particular variant of retributivism—whether it is because the conduct does not reveal a defective character, or protects one's moral right, or at least does not infringe on someone else's—but the conclusion that punishment is undeserved would not.<sup>167</sup>

Deterrence likewise supports such defenses because, properly cabined, they increase social welfare. Self-defense (and defense of others), for example, deters would-be aggressors much more cheaply than would an “always retreat and call the police” rule.<sup>168</sup> Necessity, for its part, expressly conditions the availability of a defense on taking an action that minimizes social harm, and in many cases disallows the defense if the actor could easily have avoided the dilemma to begin with.<sup>169</sup> As we noted above, it is in the nature of all justification defenses that they avoid some greater harm or further some greater societal interest than would application of the criminal prohibition in the circumstances of the particular case. It is

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<sup>166</sup> See, e.g., Fletcher, *supra* note 15, at 799 (“If [an actor] disables an aggressor in order to save the life of another, his conduct speaks well for his courage . . . . Justifications require good reasons for violating the prohibitory norm; someone who chooses to act on these reasons is likely to deserve respect and praise rather than blame.”).

<sup>167</sup> See, e.g., Fletcher, *supra* note 15, at 857–58 (culpability-centered account); Larry Alexander, *Crime and Culpability*, 5 J. Contemp. Legal Issues 1 (1994) (same); Paul H. Robinson, *A Theory of Justification: Societal Harm as a Prerequisite for Criminal Liability*, 23 UCLA L. Rev. 266, 272–91 (1975) (harm-centered account); David Wasserman, *Justifying Self-Defense*, 16 Phil. & Pub. Aff. 356 (1987) (agency-based “forced choice” account).

<sup>168</sup> See Shavell, *supra* note 129, at 566 (arguing that allowing the use of protective force enhances deterrence of aggression by warding off aggressors more efficiently than the police).

<sup>169</sup> See, e.g., Model Penal Code § 3.02(1)–(2) (1962) (“Conduct that the actor believes to be necessary to avoid a harm or evil to himself or to another is justifiable, provided that . . . the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged . . . [unless] the actor was reckless or negligent in bringing about the situation requiring a choice of harms or evils or in appraising the necessity for his conduct . . . .”); N.Y. Penal Law § 35.05 (McKinney 2004) (laying out a similar necessity defense); Shavell, *supra* note 129, at 566 (“The defense of necessity may be asserted when an individual, forced by circumstances to choose between two harmful acts, chooses the less harmful act.”).

for this reason that society rarely condemns justified conduct, and in some cases even affirmatively encourages it.<sup>170</sup>

Basic agreement between deterrence and retributivism regarding the impropriety of punishing justified conduct means that little need exists to mediate between the two theories through resort to special rules governing evidence presentment and proof.<sup>171</sup> This is not so with excuse defenses. Here the divergence between the two theories is sharp. Deterrence judges excuses by the same normative criterion it applies to justifications: their effect on social welfare. For deterrence, recognizing an excuse defense makes sense only when it removes a chilling effect from an activity that society has no reason to chill—only, that is, when it creates the proper incentives for future action.<sup>172</sup> As always, retributivism rejects this test in favor of an individualized and ex post approach. The recognition of an excuse is appropriate for the retributivist whenever there is something peculiar to the actor and his situation—a mental disease or defect that distorts his senses, or a coercive threat of great bodily harm—that vitiates his blameworthiness and renders punishment unjust in the particular case.<sup>173</sup> To the retributivist, excuses are concessions to human frailty that a liberal society gives to indi-

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<sup>170</sup> See, e.g., Fletcher, *supra* note 15, at 799 (“In a case of justified conduct, the act typically reflects well on the actor’s courage or devotion to the public interest.”).

<sup>171</sup> This is not to say, of course, that the two theories always agree, especially around the margins. For an example in which deterrence might allow a necessity defense while at least some varieties of retributivism might not, see the famous case of *Regina v. Dudley & Stephens*, (1884) 14 Q.B.D. 273 (involving cannibalism on the high seas). Nor is it to say that there might not be other reasons for shifting the burden of proof with respect to some justification defenses.

<sup>172</sup> See, e.g., Posner, *supra* note 19, at 221; Shavell, *supra* note 129, at 561–66.

<sup>173</sup> See, e.g., Robinson, *supra* note 147, § 102(a), at 479 (“The defenses of provocation and extreme emotional disturbance attempt to take account of circumstances that may reduce [but not eliminate] the blameworthiness of a defendant who satisfies the normal requirements of murder, but who acts in part because of special provoking circumstances.”). Again, the precise reasons for why excusing conditions vitiate blameworthiness differ depending on the particular version of retributivism. See, e.g., Peter Arenella, Character, Choice, and Moral Agency, in *Crime, Culpability, and Remedy* 59 (E. Paul et al. eds., 1990); Sanford H. Kadish, Excusing Crime, in *Blame and Punishment* 81, 86–88 (1987); Michael S. Moore, Choice, Character, and Excuse, in *Crime, Culpability, and Remedy*, *supra*, at 29; George Vuoso, Background, Responsibility, and Excuse, 96 Yale L.J. 1661, 1679–85 (1987).

viduals whose conduct it still deplores.<sup>174</sup> The problem for deterrence is that while frailty may not be blameworthy, it is not something to be encouraged, either. And frailty leading to social harm is something to be affirmatively discouraged. Retributivism thus recognizes a far broader range of excuse defenses than deterrence would allow.

Take, for example, the defense of provocation, known today in many jurisdictions as “extreme emotional disturbance.” This defense mitigates murder to manslaughter if, to use the traditional common law formulation of *Maier v. People*, it is “committed under the influence of passion or in heat of blood, produced by an adequate or reasonable provocation, and before a reasonable time has elapsed for the blood to cool and reason to resume its habitual control.”<sup>175</sup>

The rationale for the provocation defense is decidedly nonutilitarian and retributivist. As Paul Robinson explains, it “arose from a recognition that passion frequently obscures reason and, in some limited way, renders the provoked intentional killer less blameworthy than the unprovoked intentional killer.”<sup>176</sup> It is also the stuff of a classic excuse: “the act of killing . . . [is deemed to be] the result of the temporary excitement, by which the control of reason was disturbed, rather than of any wickedness of heart or cruelty . . . .”<sup>177</sup>

It is not hard to see how recognition of this excuse is undesirable from the standpoint of deterrence. Heat of passion killings do not benefit society—quite the opposite. Mitigating liability on account of one’s passions in such cases diminishes incentives to keep those passions in check, or at least to try (for example, by avoiding extreme situations in which passion might prevail over reason). It also sends a message to others that, in some situations, a loss of

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<sup>174</sup> See Fletcher, *supra* note 15, at 817 (observing that “excuses derive primarily from commitment to do justice in the particular case” and that they are “an expression of compassion in the criminal process”); Hart, *supra* note 13, at 13–14.

<sup>175</sup> 10 Mich. 212, 219 (1862); see also, e.g., N.Y. Penal Law § 125.20(2) (McKinney 2006) (reducing murder to manslaughter if committed “under the influence of extreme emotional disturbance”); Model Penal Code § 210.3(1)(b) (1962) (reducing murder to manslaughter if “committed under the influence of extreme mental or emotional disturbance”).

<sup>176</sup> Robinson, *supra* note 164, at 268.

<sup>177</sup> *Maier*, 10 Mich. at 219; see also LaFave, *supra* note 54, at 654–55 (“[O]ne who reacts to the provocation by killing his provoker should not be guilty of murder. But neither should he be guilty of no crime at all.”).

control that results in homicide is on some level understandable.<sup>178</sup> If the goal is to shape norms for future conduct, however, the message should be the opposite. One might even argue that a deterrence-oriented criminal law should treat provoked murders *more* severely than unprovoked ones.<sup>179</sup> If what is usually a sufficient threat to deter becomes too weak in the face of passion, the most effective response may well be to increase the threat.<sup>180</sup> The same holds true for duress and other similar excuses in which, while it might be difficult to resist committing a crime, and not especially blameworthy to fail to do so, it is at least possible to try.<sup>181</sup>

But what of excuses involving conditions that are quite literally irresistible? What of insanity, for instance, or involuntary intoxication, or diminished responsibility? Even here, the conflict between deterrence and retributivism remains sharp. The retributivist ground for excuses in such cases is uncontroversial. An offender who is unable to appreciate the criminality of his conduct or to conform it to the requirements of law—a common legal test for insanity and, if successfully proved, a complete defense<sup>182</sup>—is hardly

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<sup>178</sup> See, e.g., Victoria Nourse, *Passion's Progress: Modern Law Reform and the Provocation Defense*, 106 *Yale L.J.* 1331, 1338 (1997) (“[W]e excuse not because reasonable men kill but because the law sees reason in the defendant’s emotion . . . .”); Stephen J. Morse, *Undiminished Confusion in Diminished Capacity*, 75 *J. Crim. L. & Criminology* 1, 33–34 (1984) (“Reasonable people do not kill no matter how much they are provoked . . . . We cheapen both life and our conception of responsibility by maintaining the provocation/passion mitigation.”).

<sup>179</sup> See Dan M. Kahan & Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 *Colum. L. Rev.* 269, 311–12 & n.178 (1996) (arguing that economic and other consequentialist theories favor intensifying penalties for emotionally driven killings). But see Alon Harel, *Efficiency and Fairness in Criminal Law: The Case for a Criminal Law Principle of Comparative Fault*, 82 *Cal. L. Rev.* 1181, 1193–97 (1994) (arguing that provocation and similar doctrines may promote efficiency by providing victims an incentive to take precautions against crime).

<sup>180</sup> See Kahan & Nussbaum, *supra* note 179, at 310–12.

<sup>181</sup> See, e.g., Model Penal Code § 2.09(1) (1962) (conditioning availability of the duress defense on whether “a person of reasonable firmness in [the defendant’s] situation would have been unable to resist” the threat); *Zelenak v. Commonwealth*, 475 S.E.2d 853, 855 (Va. Ct. App. 1996) (finding defendant’s susceptibility to intimidation and manipulation relevant to establishing her duress defense).

<sup>182</sup> See *Clark v. Arizona*, S. Ct. 2709, 2716 (2006) (analyzing and upholding the constitutionality of one such provision in Arizona law); Model Penal Code § 4.01(1) (laying out a common modern version of the insanity defense); *M’Naughten’s Case*, (1843) 8 Eng. Rep. 718, 721 (H.L.) (laying out one classic version of the defense); *Davis v. United States*, 165 U.S. 373, 378 (1897) (expanding upon the *M’Naughten* test in federal cases).

culpable in any ordinary sense of the concept. So too with diminished responsibility.<sup>183</sup> At first glance, one might think that deterrence would support the recognition of excuses in these cases as well. Punishment for the truly undeterrable, the argument would go, is by definition ineffective and thus decreases social welfare by wasting resources that could be put to better use.<sup>184</sup> For deterrence, however, conviction and punishment in cases of insanity or diminished responsibility are not directed exclusively, or even primarily, at the particular defendant in a particular case. They are directed at the general public. Some members of that larger group might fall at the margins of the excuses at issue; some might fall within the legal definitions but have the capacity to avoid interactions or situations that could drive them into crime; some might be "normal" but believe they could convince a jury that they are not; some might hope to be excused for no reason at all; and some might simply take the serious crimes that are often at issue in cases involving excuses a little less seriously. Convicting and punishing in such cases thus still works to deter conduct that is socially harmful, regardless of its effect on the particular defendant and those in his position.<sup>185</sup>

A deterrence-driven doctrine of defenses would accordingly be loath to recognize any excuse defenses. The fact that positive law recognizes many illustrates the degree to which retributivist con-

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<sup>183</sup> The defense of diminished responsibility covers mental or emotional disturbances that neither amount to insanity nor negate the defendant's *mens rea*. See, e.g., *United States v. Leandre*, 132 F.3d 796, 803 (D.C. Cir. 1998) (explaining the federal version of diminished responsibility, embodied in U.S. Sentencing Guidelines Manual § 5K2.13 (1997)). Few American jurisdictions recognize the defense. In those that do, it often functions as a "partial" defense, much like provocation, mitigating punishment or allowing conviction for a lesser-included offense. See Kadish & Schulhofer, *supra* note 146, at 1004-05 (discussing the diminished responsibility defense and reviewing jurisdictions in which it applies).

<sup>184</sup> Jeremy Bentham in fact attempted to explain excuse defenses in criminal law on just this ground. See Bentham, *supra* note 32, at 170-73.

<sup>185</sup> See, e.g., Fletcher, *supra* note 15, at 816 (noting that there is no reason to believe that the potential deterrent effect of punishment in cases involving excuses would be limited to persons sharing the precise characteristics that define the excuse); Herbert L. Packer, *The Limits of the Criminal Sanction* 110 (1968) (same); Hart, *supra* note 13, at 19 (critiquing Bentham's argument as a "*spectacular non sequitur*"). For deterrence, then, the categories of excuse and justification are largely irrelevant. What matters is whether recognizing any given defense would increase social welfare.

siderations have dominated this area.<sup>186</sup> It also provides a more illuminating explanation for the divergent burdens of proof that jurisdictions commonly apply to justification and excuse defenses. As with conspiracy, where retributivist considerations propel a doctrine's substantive content, special rules of proof serve to enhance deterrence objectives. Here, those rules take the form of requiring the defendant to carry the burden of persuading the trier of fact of his excuse by at least a preponderance of the evidence rather than, as in cases of justification, requiring prosecutors to disprove it beyond a reasonable doubt—an unusual, but constitutionally permissible, change in the rules of the road for a criminal case.

Setting the default rule in this manner serves deterrence objectives in several ways. Placing the burden on defendants decreases the probability that they will escape liability by virtue of an excuse, thereby increasing the expected penalty in all cases in which excuse doctrines might come into play. It does so, moreover, while performing a sorting function that focuses the strongest disincentives on the category of defendants most likely to fake or fabricate their excuses. The distinction between objective and subjective proof matters here, but not for reasons inherent to excuses. It matters because fabricated or borderline excuse defenses usually involve only the vaguest objective evidence—such as, in the case of duress, an unclear and only arguable “threat”—and often turn heavily on assessments of defendants' credibility. Where there are few objective reasons to prefer one account over the other, it is difficult for the defendant to establish an excuse defense by a preponderance of the evidence. The default rule is thus often dispositive, working against defendants who have little evidentiary support for their claims.<sup>187</sup> Finally, in weeding out weak or questionable cases of excuse, the preponderance standard also mutes some of the questionable normative messages that some excuse doctrines send.<sup>188</sup> Excuses that must be proved by a preponderance will come to be

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<sup>186</sup> See Robinson, *supra* note 164, at 658 (“That excuses are in fact recognized by current doctrine suggests that in this instance desert and possibly special deterrence are the guiding distributive principles . . .”).

<sup>187</sup> See, e.g., *United States v. Becerra-Montes*, 181 Fed. App'x 743, 745 (10th Cir. 2006); *United States v. Salazar-Samaniega*, 361 F.3d 1271, 1278 (10th Cir. 2004); *In re Canfield*, 190 F. 266, 269–70 (S.D.N.Y. 1911); see also Stein, *supra* note 19, at 149–50.

<sup>188</sup> See *supra* note 178 and accompanying text.



viewed less as generally dependable, conduct-guiding norms and more as particularized instances of compassion that the law grants only for good reason on a case-by-case basis.<sup>189</sup>

A compromise of this sort cannot be achieved by tinkering with excuses at the substantive definitional level alone. Any substantive redefinition that satisfies deterrence necessarily comes at the expense of retributivism; making the defense unavailable to those whose circumstances mitigate their culpability would result in many instances of unjust punishment.<sup>190</sup> Shifting to a preponderance standard under which defendants must carry the burden largely avoids this problem because it enhances deterrence not by changing the substantive scope of excuses, but instead by altering the balance of false positives and false negatives in a way that retributivism can accept. Under a preponderance standard, more excuses are erroneously denied, but fewer are erroneously granted.<sup>191</sup> Most important for deterrence, the absolute number of excuses granted goes down.

### III. THE VIRTUES OF MEDIATING RULES?

So far we have concerned ourselves with providing a largely positive account of mediating rules in criminal law. We have explained how the dissimilar orientations of criminal law's dominant animating theories give evidentiary rules their mediating potential, and have explored the mediating role of special evidentiary doctrines in several important substantive areas in which those theories sharply conflict. We now turn briefly to the normative implications of our account. Are mediating rules a virtue or a vice? Are they something to be rooted out and eliminated, or something to be quietly tolerated or even encouraged?

We cannot comprehensively address these questions here. Even so, we would like to frame at least a tentative answer in this Part by

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<sup>189</sup> Excuses will thus function less as conduct rules directed primarily at citizens than they will as decision rules directed primarily at adjudicators. See Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 *Harv. L. Rev.* 625, 626-36 (1984) (laying out distinction between decision rules and conduct rules).

<sup>190</sup> See *supra* notes 173-174 and accompanying text.

<sup>191</sup> See *supra* text accompanying notes 19-25 (explaining retributivism's stance toward false positives and false negatives).

offering a qualified normative assessment of mediating rules. Our ambition, again, is not to provide a full-blown justification or any absolute endorsement of such rules. Rather, we wish to sketch a way in which mediating rules might be seen to respect and enhance some of the deeper values of a liberal criminal law. Whatever their ultimate merits or demerits, we suggest, mediating rules exhibit one important liberal virtue: they foster and promote a rough social consensus around criminal law in a moral universe that is diverse and pluralistic.

### *A. Liberal Criminal Law*

At first blush, our account of mediating rules may strike some readers as unsettling. The substance of the criminal law in any given area, after all, is—or at least might be held to be—the product of principled debate over what normative vision ought to control in that particular area.<sup>192</sup> Thus, whether one personally would prefer that deterrence, retributivism, or some other animating theory control, everyone in the end ought to respect and abide by whichever principle actually does control as embodied in the positive law. Special evidentiary rules that undermine the criminal law's substantive judgment might thus be seen as illegitimately thwarting the accepted processes for resolving political disagreement.<sup>193</sup>

We will return to this point more directly below. For now, however, it is important to emphasize that, in a pluralistic society characterized by competing moral visions and a diversity of viewpoints, law and the development of legal doctrine serve broader purposes than the rote implementation of majority will. John Rawls and other liberal legal theorists have long argued that one overarching purpose of law and legal institutions is to provide a method for

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<sup>192</sup> Every modern American jurisdiction has reduced its substantive criminal law to statutory codification through the legislative process. See Paul H. Robinson, *Fair Notice and Fair Adjudication: Two Kinds of Legality*, 154 U. Pa. L. Rev. 335, 337–41, 365 (2005).

<sup>193</sup> See Dan-Cohen, *supra* note 189, at 665–67 & n.110 (outlining grounds on which some might question the legitimacy of “selective transmission” as a means for softening the edges of political conflicts with respect to criminal laws); cf. Kahan, *supra* note 30, at 414 (identifying and critically assessing the use of deterrence discourse as a means for attenuating political clashes in the criminal law domain).

both argumentation and self-governance that enables society to function and to maintain a workable justice system in the face of deep moral divisions.<sup>194</sup> As Dan Kahan explains, this liberal vision of legal doctrine and decisionmaking rests on two related notions. The first is that legal rules and judicial discourse that avoid the overt endorsement of contentious moral viewpoints are “thought to promote popular acceptance of law.”<sup>195</sup> Citizens of diverse moral viewpoints are more likely to converge around the law’s resolution of any given case if they do not see it as a referendum on some fundamental issue of values that might otherwise divide them.<sup>196</sup> The second notion is liberalism’s commitment to individual autonomy.<sup>197</sup> A system of legal rules that avoids repeatedly privileging the moral views of one group over another in its decisions conveys respect for the plurality of viewpoints and enables citizens to live together and to show each other some degree of reciprocity amid basic disagreement.<sup>198</sup>

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<sup>194</sup> See John Rawls, *Political Liberalism* 133–58 (expanded ed. 2005) (developing and defending the notion of overlapping consensus between rival moral viewpoints); Cass R. Sunstein, *Legal Reasoning and Political Conflict* 35–54 (1996) [hereinafter Sunstein, *Legal Reasoning*] (arguing that incompletely theorized agreements in law serve a liberal function of fostering consensus and stability); Cass R. Sunstein, *Incompletely Theorized Agreements in Constitutional Law* 13 (University of Chicago John M. Olin Law & Economics Working Paper No. 322, 2d Series, 2007) [hereinafter Sunstein, *Incompletely Theorized Agreements*] (observing that “two goals of a constitutional democracy and a liberal legal system [are] to enable people to live together[] and to permit them to show each other a measure of reciprocity and mutual respect”).

<sup>195</sup> Kahan, *supra* note 30, at 479.

<sup>196</sup> See *id.* at 479; see also Sunstein, *Legal Reasoning*, *supra* note 194, at 36 (explaining how “incompletely specified agreements” encourage such convergence because they “help produce a degree of social solidarity and shared commitment,” “constitute a democratic culture,” “allow[] people to show one another a high degree of mutual respect,” and “permit citizens to announce to one another that society shall not take sides on [politically contested] issues until it is required to do so”).

<sup>197</sup> See Rawls, *supra* note 194, at 98–99 (explaining how individual autonomy depends on a liberal society’s proper ordering of political values); Kahan, *supra* note 30, at 479 (arguing that liberal legislative choices must “disclaim any grounding in contentious moral presuppositions” so that “dissenting citizens can acquiesce in them without feeling that they are being forced to renounce their defining outlooks and commitments”).

<sup>198</sup> See Kahan, *supra* note 30, at 479; Sunstein, *Legal Reasoning*, *supra* note 194, at 46–47; Sunstein, *Incompletely Theorized Agreements*, *supra* note 194, at 14 (arguing, in part, that incompletely theorized agreements in constitutional law serve the “crucial function of reducing the political cost of enduring disagreements” because they

These notions are of particular importance in the area of criminal law. Criminal law, more than any other body of law, "is widely understood to signify a society's authoritative moral values."<sup>199</sup> It is also the body of law by reference to which the State justifies some of the most extreme and coercive uses of power against its citizens.<sup>200</sup> Thus, even if the substantive rules that comprise the criminal law in any given area can properly be seen as democratically justified, it is important to the well-functioning of that law that their applications also be as widely accepted as possible. This acceptance is essential for maintaining criminal law's moral credibility.<sup>201</sup>

### *B. Mediating Rules and Consensus*

As our positive account demonstrates, mediating rules can temper conflicts between theories of criminal law on the level of the law's actual application. Unlike those theories themselves, mediating rules eschew the embrace of any one abstract purpose over that of any other. Indeed, the dissimilar orientations of deterrence and retributivism to evidentiary rules mean that, in many important substantive areas, such rules can mediate between the two theories by achieving some measured accommodation of the "losing" theory without abandoning the core commitments of the theory that prevailed.<sup>202</sup> These special rules are instances of what Cass Sunstein has called "the ordinary material of legal 'doctrine'—the general

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"disavow large-scale theories" and thereby avoid rejecting or endorsing any abstract notion of the good or the right).

<sup>199</sup> Kahan, *supra* note 30, at 422; see also Joshua Dressler, *Battered Women and Sleeping Abusers: Some Reflections*, 3 Ohio St. J. Crim. L. 457, 471 (2006) ("Nowhere does morality play a more important role than in our criminal laws.").

<sup>200</sup> See, e.g., Husak, *supra* note 16, at 207 (arguing that, because of its extreme and coercive consequences for the individual, criminal law should be used only as a last resort).

<sup>201</sup> See, e.g., Janice Nadler, *Flouting the Law*, 83 Tex. L. Rev. 1399, 1407–31 (2005) (furnishing experimental evidence to the effect that a law's perceived legitimacy influences citizens' willingness to comply with laws generally); Robinson & Darley, *supra* note 36, at 477–88 (explaining that the criminal law's power to nurture and communicate societal norms is intimately connected to its moral credibility); see also Sunstein, *Legal Reasoning*, *supra* note 194, at 43 ("Any simple, general, and monistic or single-valued theory of a large area of the law . . . is likely to be too crude to fit with our best understandings of the multiple values that are at stake in that area.").

<sup>202</sup> See *supra* Part I.

class of [low-level] principles and justifications that are not said to derive from any large theories of the right or the good, that have ambiguous relations to large theories, and that are compatible with more than one such theory."<sup>203</sup> Rules of this kind can foster social convergence around concrete outcomes when citizens would otherwise diverge on some high-level proposition.<sup>204</sup> As Sunstein explains, "[w]hen the authoritative rationale for [a] result is disconnected from abstract theories of the good or the right, the losers can submit to legal obligations, even if reluctantly, without being forced to renounce their largest ideals."<sup>205</sup>

Rules of evidence, commonly perceived as among the most ordinary and workaday stuff of the legal system, are especially well-suited to this task. They regulate fact-finding and judicial case-management as well as determine what prosecutors can and cannot accomplish. Evidentiary rules thus undeniably affect the legal system's ability to achieve retribution, deterrence, or any other broad social purpose. For the most part, however, they do so without endorsing—quietly or loudly—one such purpose at the expense of others. This is their advantage over many substantive rules. Evidentiary rules can work to conserve and preserve the criminal law's moral credibility and expressive capital by providing a less morally charged locus for public disagreement and debate than that provided by substantive rules.<sup>206</sup> It is much easier, for instance, to accept an accom-

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<sup>203</sup> Sunstein, *Legal Reasoning*, *supra* note 194, at 37; see also Joseph Raz, *The Morality of Freedom* 58 (1986) (observing that the practice of having such rules "allows the creation of a pluralistic culture [because it] enables people to unite in support of some 'low or medium level' generalizations despite profound disagreements concerning their ultimate foundations, which some seek in religion, others in Marxism or in Liberalism, etc."); Cass R. Sunstein, *Problems with Rules*, 83 *Cal. L. Rev.* 953, 971 (1995) (similar).

<sup>204</sup> Sunstein, *Legal Reasoning*, *supra* note 194, at 37 ("What I am emphasizing here is that when people diverge on some (relatively) high-level proposition, they might be able to agree when they lower the level of abstraction."); *id.* at 39 ("The use of low-level principles or rules generally allows . . . citizens to find commonality and thus a common way of life without producing unnecessary antagonism.").

<sup>205</sup> *Id.* at 41 ("[I]t is an advantage, from the standpoint of freedom and stability, for a legal system to be able to tell most losers—many of whom are operating from foundations that have something to offer or that cannot be ruled out *a priori*—that their own deepest convictions may play a role elsewhere in the law.").

<sup>206</sup> See Kahan, *supra* note 30, at 417 (noting that "the deterrence idiom takes the political charge out of contentious issues and deflects expressive contention away from the criminal law"); *id.* at 480 ("Once the law gets out of the business of 'sending mes-

plice's lenient plea bargain as compelled in part by burdensome evidentiary barriers than it is to engage in an abstract argument over whether deterrence or retributivism should define accomplice liability.<sup>207</sup> Likewise, clashing over excuse defenses from the vantage points of these two theories would yield only disagreement and dissent in the vast majority of cases; allowing such defenses in general while conditioning their availability upon special proof, by contrast, carries the promise of muting those effects.<sup>208</sup>

None of this, of course, completely lays to rest the earlier concern that rules of evidence that operate in this way are on some level unprincipled or illegitimate. The normative attractiveness of mediating rules as tempering theoretical conflict and fostering rough consensus in contested areas of criminal law depends in the end on one's view of the value of doing so in a pluralistic society. One can imagine a society so fractured by disagreement that its participants would ban this use of evidentiary rules and insist on hewing closely to whatever theory for imposing criminal liability might have carried the day in a given substantive area, adverse consequences notwithstanding. Alternatively, one can imagine a different society whose members, though divided into distinct moral camps, are on the whole sufficiently attuned to pluralism, and sufficiently unsure of when either camp will prevail, that they view the accommodating effect of mediating rules as a virtue rather than a vice.<sup>209</sup> We need not evaluate the merits of these compet-

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sages' about whose values and commitments count and whose don't, it no longer serves as a lightning rod for expressive zealotry."); Dan-Cohen, *supra* note 189, at 672 (identifying a similar function of decision rules and conduct rules in criminal law); see also Sunstein, *Legal Reasoning*, *supra* note 194, at 38 (noting that "a key social function of rules is to allow people to agree on the meaning, authority, and even the soundness of a governing provision in the face of disagreements about much else"); Sunstein, *Incompletely Theorized Agreements*, *supra* note 194, at 13 (arguing that "[s]ilence . . . can help minimize conflict" because relying on rules and low-level principles as grounds for decisions "make[s] it unnecessary to resolve fundamental disagreements").

<sup>207</sup> See *supra* notes 61–85 and accompanying text; see also Bierschbach & Stein, *supra* note 41, at 1779 & n.173 ("Facially neutral procedural and evidentiary rules that make liability more difficult to prove minimize the appearance of overt tradeoffs between instrumental (optimal deterrence) and non-instrumental (moral condemnation) concerns . . .").

<sup>208</sup> See *supra* notes 171–91 and accompanying text.

<sup>209</sup> See Kahan, *supra* note 30, at 435–76 (demonstrating the consensus-inducing effect of the deterrence idiom on the politically contested issues of capital punishment, gun control, and hate crimes).

ing visions.<sup>210</sup> For the time being, we note that, whatever one's view of their normative worth, there is nothing inherent in mediating rules that renders them any less legitimate than any of the substantive rules on which they exert their effect. Like their substantive counterparts, mediating rules of evidence are the product of diverse institutional inputs and eras. They reflect the push and pull of the law over time.

### CONCLUSION

Advancement of legal thought is often achieved by breaking old dichotomies. That is what we have tried to do in this Article. By bridging the divide separating substantive criminal law theory, on the one hand, from traditional understandings of evidence, on the other, we have sought to show how special rules of evidence can work throughout the criminal law to mediate between its competing visions in areas in which the conflict between those visions is particularly acute. In this way, many special rules of evidence might be seen as previously unrecognized members of the set of devices that criminal law uses to negotiate tradeoffs between conflicting normative commitments, in the same family with prosecutorial discretion at charging, judicial discretion at sentencing, and jurors' discretion in rendering verdicts. Unlike such devices, however, special rules of evidence entrench this process by creating discrete legal spaces that accommodate pluralistic goals not embodied in the substantive law itself. Whether and the extent to which the criminal law might or should embrace one type of device over the other are questions that we leave to future research, uninhibited by artificial separations between evidentiary and substantive rules. The interactions between evidence and substantive criminal law are richer than both evidence and criminal law scholars take them to be.

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<sup>210</sup> Doing so would require, among other things, a philosophically ambitious investigation into the nature and limits of public reason. See Rawls, *supra* note 194, at 247–54.