

NOVEL CRIMINAL FRAUD

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The crime of fraud has been underdescribed and undertheorized, both as a wrong and as a legal prohibition. These deficits contribute to contention and uncertainty over the practice of punishing white-collar crime. This Article provides a fuller account of criminal fraud, describing fraud law's open-textured, common law, and adaptive qualities and explaining how fraud law develops along its leading edge while limiting violence to the legality principle. The legal system has a surprising, often overlooked methodology for resolving whether to treat novel commercial behaviors as frauds: Courts and enforcers often conduct an ex post examination of whether an actor's mental state included "consciousness of wrongdoing." The Article summarizes this methodology's history and contemporary applications before moving to the question of its justification. Among possible normative justifications for this unusual fault methodology, one fits best and involves the fewest complications: An actor's pursuit of a novel course of conduct (that involves, as with all fraud, some deception causing or threatening harm), in the face of actual knowledge that prevailing norms reject that behavior, renders the actor equivalently blameworthy to an actor who intentionally pursues a course of conduct that the law has previously described as fraud. The Article concludes that ex post decisionmakers should continue to apply this methodology, despite its imperfections; that importing the methodology into fraud's conduct rules would be possible but also perilous; and that the methodology identifies the subset of frauds for which criminal sanctions are justified if one purpose of sanctioning fraud is to assess blame.

INTRODUCTION	1972
I. THE PROBLEM AND POSSIBLE RESPONSES	1977
II. THE PHENOMENON OF NOVEL FRAUD	1987
A. <i>The Phenomenon Is Old</i>	1988
B. <i>The Phenomenon Persists</i>	1993
III. LAW'S RESPONSE TO NOVEL FRAUD: CONSCIOUSNESS OF WRONGDOING	1996
A. <i>Badges of Guilt</i>	1997
B. <i>White-Collar Crime in the Supreme Court</i>	2005
C. <i>A Comparative Note: English Law</i>	2011

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IV. EXPLANATIONS FOR CONSCIOUSNESS OF	
WRONGDOING	2014
A. <i>Consciousness of Wrongdoing and Market Norms</i> ..	2015
1. <i>Argument</i>	2015
2. <i>Problems and Responses</i>	2017
B. <i>Consciousness of Wrongdoing as Culpability</i>	2022
1. <i>Notice as Fault</i>	2022
2. <i>Modified Mistake of Law</i>	2029
3. <i>Intent to Defraud</i>	2031
V. IMPLICATIONS	2036
A. <i>Conduct Rule or Decision Rule?</i>	2036
B. <i>Civil vs. Criminal Sanctioning</i>	2040
CONCLUSION	2043

Quoeritur, ut crescant tot magna volumina legis?

In promptu causa est, crescit in orbe dolus.

[If you ask why are there so many laws,
the answer is that fraud ever increases on this earth.]

—Lord Coke, *Twyne's Case*, 1601¹

INTRODUCTION

Fraud is a special kind of crime, important characteristics of which can easily be missed or misunderstood. In modern criminal law, we have put to rest many questions about the essential elements of core crimes such as theft and homicide.² When it comes to fraud, however, the first-order question of substantive criminal law—what conduct constitutes the crime—is unusually unsettled and controversial. This friction is mainly observable in the heated social conflict over the legal system's treatment of "white-collar" crime and in judicial decisions about criminal fraud. It has not been sufficiently addressed in legal theory and scholarship. This Article is designed to compensate for this deficiency and help to settle some of the debate and uncertainty that pervade this field of criminal law and enforcement.

Instability in the law of fraud is structural. The constant and rapid pace of economic innovation, along with evolving sophistication

¹ *Twyne's Case*, (1601) 3 Co. Rep. 80b, 82a, 76 Eng. Rep. 809, 815–16 (K.B.) (reporting as Queen's Attorney General). The translation of Lord Coke's Latin phrase is taken from CHARLES ROSS, *ELIZABETHAN LITERATURE AND THE LAW OF FRAUDULENT CONVEYANCE* 105 (2003).

² See Herbert Wechsler, *Foreword to MODEL PENAL CODE* pt. II, at xi (1980) (describing widespread acceptance and use of 1962 version of Code, including provisions covering theft and homicide).

of social norms about commercial behavior, guarantee that fraud law will always confront novel economic practices that have not previously been classified as fraudulent.³ It is not just that professionals continually produce novel means of doing business; *context* can shift too, transforming a benign existing practice into something quite threatening. Only a utopian regulatory state would have the capacity to anticipate and prejudge every conceivable economic innovation and every relevant change in commercial and social context.

Thus, by design, fraud prohibitions are exceedingly open-textured, setting forth conduct rules that usually amount to little more than the declaration, "Do not defraud."⁴ In truth, fraud is a residual common law crime within the modern criminal law.⁵ We can only partially answer the question, "What is fraud?," with rules, restatements, and abstract principles. We mostly need to study the facts of particular economic encounters to determine what qualifies as an impermissibly deceptive practice.

More than other offenses, the substantive crime of fraud anticipates adaptation by its regulatory subjects by itself remaining adaptable. It posits the fraud perpetrator (or, if you prefer the telling colloquialism, "fraud artist") as a person who seeks to accomplish indirectly, by deception, what would not be permitted directly: separating another from his property in the absence of full voluntariness. Because fraud is an effort to take without violating the basic prohibition against theft, this offender by definition structures her conduct in an effort to avoid legal restraint. Fraud law thus assumes that overly specific *ex ante* articulation of what counts as fraud will only supply a clearer roadmap to the evasive actor, frustrating efforts to punish *ex*

³ The Anglo-American conception of criminal economic wrong as a broader category than simple physical appropriations of property has been developing for over two centuries. See MODEL PENAL CODE § 223.1 cmt. 2 (1980) (discussing "long history of expansion of the role of the criminal law" to eventually cover all taking of another's property without his consent).

⁴ See, e.g., 18 U.S.C. § 371 (2000) ("If two or more persons conspire . . . to defraud the United States . . . and one or more of such persons do any act to effect the object of the conspiracy, each shall be [punished]."). A highly open-textured legal rule is a rule with which one easily arrives at the point where the rule's application to particular cases is indeterminate. H.L.A. HART, *THE CONCEPT OF LAW* 128 (2d ed. 1994). As will be apparent when I describe the law of fraud in Parts I and II, *infra*, what I mean by "design" is both intentional legislative strategies and what Meir Dan-Cohen calls "social phenomena, patterns, and practices that look like (that is, are amenable to an illuminating interpretation as) tactics for promoting certain human interests or values." MEIR DAN-COHEN, *HARMFUL THOUGHTS: ESSAYS ON LAW, SELF, AND MORALITY* 45 (2002).

⁵ See Dan M. Kahan, *Lenity and Federal Common Law Crimes*, 1994 SUP. CT. REV. 345, 347, 373–78 (describing how much of modern federal criminal law remains subject to common law development, and how fraud "has traditionally been understood to be one of the most open-ended concepts in law").

post what in substance *is* fraud (or, more precisely, what is just as blameworthy or undesirable as what the law previously has specified as fraud).⁶

For purposes of analytical convenience (as opposed to doctrinal rigor), it may be useful to divide fraud roughly into two realms. The first encompasses that portion of fraud that consists in express misrepresentations and similar, relatively direct and settled forms of deception that can be easily described, and proscribed, through *ex ante* conduct rules. The second, which is the primary concern of this Article, is composed of indirect or implicit misrepresentations, often connected to particular duties that accompany certain relationships. In this second type of fraud, a perpetrator (*P*) accomplishes deception of a victim (*V*) by exploiting *V*'s reliance on expectations of how parties customarily behave in the context in which *P* and *V* are dealing with one another. To take a simple example, *P* might know that, in the market for a particular product, the custom is for a seller to disclose the existence of a particular defect to the buyer. *P*, as seller, decides not to disclose such a defect to *V*, as buyer. *V* buys the product from *P*, believing no such defect exists. *P* has defrauded *V*. More complex iterations of this form of fraud might involve, for example, a corporate executive's failure to disclose material information to shareholders about a public company's accounting results.

This second realm of fraud is the locus of much of the development of fraud law and its application to novel commercial behaviors. It is here where fraud's *ex ante* conduct rules cease to be sufficient and the legal system relies on defining fraud *ex post*. To be sure, the

⁶ Modern enforcement theory is beginning to take better account of this basic problem of regulation. See, e.g., Alex Raskolnikov, *Crime and Punishment in Taxation: Deceit, Deterrence, and the Self-Adjusting Penalty*, 106 COLUM. L. REV. 569, 571 (2006) (explaining how taxpayers structure activities to avoid enforcement scheme); Chris William Sanchirico, *Detection Avoidance*, 81 N.Y.U. L. REV. 1331, 1337 (2006) (describing how "[s]anctioning a given species of violation . . . encourages those who still commit the violation to expend additional resources avoiding detection"); cf. *Bullen v. Wisconsin*, 240 U.S. 625, 630-31 (1916) (Holmes, J.) ("When an act is condemned as an evasion, what is meant is that it is on the wrong side of the line indicated by the policy if not the mere letter of the law."). Leo Katz argues that novel forms of evasion are not an inevitable failing of open-textured law that law should continually pursue and attempt to stamp out, but a largely unobjectionable feature of morality. LEO KATZ, *ILL-GOTTEN GAINS: EVASION, BLACKMAIL, FRAUD, AND KINDRED PUZZLES OF THE LAW*, at x, 131-32 (1996). I will avoid Katz's argument for now by asserting that the positive law of fraud rejects his view of individual obligations. However, Katz's account of moral obligations is highly contestable. See, e.g., Larry Alexander, *Is Morality Like the Tax Code?*, 95 MICH. L. REV. 1839, 1840, 1843-46 (1997) (contesting Katz's central claim that formalism is necessary feature of any deontological moral system); Dan M. Kahan, *Some Realism About Retroactive Criminal Lawmaking*, 3 ROGER WILLIAMS U. L. REV. 95, 100 (1997) ("Loopholers, by hypothesis, are searching out means of violating the moral rights of others with impunity.").

boundaries between my two realms of fraud are somewhat porous. Problems of novelty and context dependence can also challenge fraud law in the realm of express misrepresentations. Whether commercial actors justifiably expect full candor, or should be on guard given customs of aggressive spin and salesmanship, can also depend on the context and evolution of commercial norms such that *ex ante* conduct rules cannot fully address express forms of fraud.⁷ In any event, our intellectual and legal traditions have been on a modernizing trajectory—from the rudimentary beginnings of the law of larceny to today's sophisticated law of fraud—that identifies the wrong of taking from another as susceptible to commission through increasingly indirect and subtle (though still threatening) means.⁸

This Article has two primary objectives. One is to describe the law of criminal fraud differently, and more completely, than it has previously been described. We must understand that the crime of fraud cannot be fully articulated with an abstract and static framework, as

⁷ Nonetheless, it is fair to say that legal actors have been more successful at setting out *ex ante* conduct rules to deal with the problem of novelty in the realm of express fraud. Examples of such doctrine include rules about forward-looking statements in securities fraud, *see, e.g.*, 15 U.S.C. § 77z-2(c)(1) (2000) (identifying when untrue or misleading forward-looking statements are not grounds for finding of liability), puffery, *see, e.g.*, IAN AYRES & GREGORY KLASS, *INSINCERE PROMISES: THE LAW OF MISREPRESENTED INTENT* 151 (2005) (describing absence of liability for statements upon which reliance would be "objectively unreasonable"); David A. Hoffman, *The Best Puffery Article Ever*, 91 IOWA L. REV. (forthcoming 2006) (manuscript at 1, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=887720) ("Favorable comments by sellers with respect to their products are universally accepted and expected in the marketplace."), and the core element of materiality in fraud, *see, e.g.*, *Neder v. United States*, 527 U.S. 1, 21–23 (1999) (holding that Congress intended materiality to be element of various types of fraud). For discussion of some of the genuine difficulty in determining when even express misrepresentations amount to fraud, *see generally* AYRES & KLASS, *supra*.

⁸ Ian Ayres reproduces, and I must too, Gulliver's description of the Lilliputians (written in 1726):

They look upon fraud as a greater crime than theft, and therefore seldom fail to punish it with death; for they allege, that care and vigilance, with a very common understanding, may preserve a man's goods from thieves, but honesty has no fence against superior cunning: and since it is necessary that there should be perpetual intercourse of buying and selling, and dealing upon credit, where fraud is permitted and connived at, or hath no law to punish it, the honest dealer is always undone, and the knave gets the advantage. I remember, when I was once interceding with the King for a criminal who had wronged his master of a great sum of money, which he had received by order, and ran away with; and happening to tell his Majesty, by way of extenuation, that it was only a breach of trust, the Emperor thought it monstrous in me to offer, as a defence, the greatest aggravation of the crime: and truly I had little to say in return, farther than the common answer, that different nations had different customs; for, I confess, I was heartily ashamed.

JONATHAN SWIFT, *GULLIVER'S TRAVELS* 48–49 (Arthur Case ed., Ronald Press Co. 1938) (1726) (quoted in part in AYRES & KLASS, *supra* note 7, at 176–77).

one might find in a restatement or a statute. And we must understand just how the organic crime of fraud develops. It turns out that the most important part of the mechanism by which the concept of fraud evolves to encompass new commercial behaviors is a startling principle, nearly anomalous within the criminal law: that an actor's belief about the wrongfulness of her own behavior—what courts have called “consciousness of wrongdoing”—justifies punishment.

The other objective of this Article is to see whether this surprising mechanism for locating fault in novel fraud cases has normative justification. This ground is entirely uncharted. Consciousness of wrongdoing has been a persistent but somewhat subterranean theme in the law of criminal fraud; even in those places where it has been explicitly discussed, no articulation of its purposes and justifications has been attempted. I will identify two forms of normative justification, following consequentialist and deontological traditions of reasoning. To oversimplify for introductory purposes, a consequentialist account would see the legal system's reliance on an actor's consciousness of wrongdoing as a means of locating and enforcing, in the name of efficiency, market-specific norms about undesirable commercial behavior; a deontological account would see an actor's decision to pursue a course of conduct with awareness of its wrongfulness as making the actor more blameworthy than one who pursued the same course of conduct without such knowledge.

While each of these accounts runs into substantial complications, an explanation for consciousness of wrongdoing grounded in the blame-assessing function of the criminal law is less beset by conceptual difficulties, fits better with the description of positive law I provide, and is more useful in demarcating a defensible boundary between civil and criminal sanctions for fraud. I thus conclude (albeit tentatively in light of the absence of prior theoretical analysis of this phenomenon) that fraud law's previously unexplored reliance on consciousness of wrongdoing is justified, even if it is an imperfect means of managing the powerful competing interests that dominate the problem of novel criminal fraud: the need for legal adaptability in the face of innovation and deep normative commitments connected to the legality principle.

In Part I, I articulate more concretely the problem of law that concerns me and summarize my inquiry into that problem. In Part II, I describe how policing innovative wrongdoing in markets has long posed a challenge for the law of fraud in Anglo-American legal systems. In Part III, I identify and explain an approach to determining fault in the law of fraud that examines consciousness of wrongdoing, connecting this fault approach to longstanding practice and contempo-

rary problems of white-collar crime.⁹ In Part IV, I evaluate this fault methodology's potential normative underpinnings. In Part V, I suggest that we should accept consciousness of wrongdoing as a workable but imperfect rule of decision for novel fraud cases; warn that importing the idea into fraud's *ex ante* conduct rules might be perilous; and explain how my evaluation of fraud law may assist higher-order debate about the relationship between civil and criminal sanctioning of economic conduct.

I

THE PROBLEM AND POSSIBLE RESPONSES

Let us begin by setting out more concretely the problem of novel fraud and the analytical framework I will apply to it. A brief example should assist.¹⁰ Suppose that, in Year 1, the Chief Executive Officer (CEO) of a large public corporation receives a compensation package that includes, as was common in the 1990s, large, frequent stock-option grants and a \$5 million line of credit with the corporation.¹¹ The line of credit permits the CEO, in the event of a short-term cash need, to make cash withdrawals from the company of up to \$5 million. The credit line is revolving: As long as she pays down her indebtedness below the \$5 million limit, she can make additional withdrawals.

In Year 2, the CEO is fully drawn on the line of credit and in the midst of a costly divorce. She informs the corporation's board of directors that she has a serious cash shortage and would like to be permitted to repay her outstanding loan balance with some of her mature stock options, thus using the loan facility to exchange stock for

⁹ The term "white-collar crime" is problematic because it covers different precincts of the criminal law and criminal activity, depending on how those realms are divided. Even the definition provided by the term's author is questionable. EDWIN H. SUTHERLAND, *WHITE COLLAR CRIME: THE UNCUT VERSION* 7 (1983) (defining white-collar crime as "crime committed by a person of respectability and high social status in the course of his occupation"); cf. Stanton Wheeler et al., *Sentencing the White Collar Offender: Rhetoric and Reality*, 47 AM. SOC. REV. 641, 642–43 (1982) (defining white-collar crimes as "economic offenses committed through the use of some combination of fraud, deception, or collusion"). The term is so entrenched as to be unavoidable and probably harmless, as long as one is clear about which kinds of cases and crimes one is talking about. See Stuart P. Green, *The Concept of White Collar Crime in Law and Legal Theory*, 8 BUFF. CRIM. L. REV. 1, 1–3 (2004) (noting indispensability of term and inquiring into its "many meanings"); *infra* note 49 and accompanying text (recommending effort to define category with reference to trust).

¹⁰ Notice how hypotheticals in this context become substantially more complex than the type that we are accustomed to manipulating in considering problems of substantive criminal law (e.g., *A* fires a gun at *B*, intending to kill *B*, but misses and kills *C* instead). This is perhaps an artifact of fraud's continual evolution in relation to law.

¹¹ Congress has since prohibited these kinds of loan arrangements. See 15 U.S.C. § 78m(k) (Supp. III 2003).

cash. Company lawyers report that no SEC rule prohibits the repayment of a company loan with company stock and that such stock sales, because they are not on the open market, are not covered by the SEC rules requiring public reporting of executive stock sales. The board grants the CEO's request.

By Year 5, the CEO has amassed \$100 million in company stock options. In turn, she has pledged them all to various banks as security for margin loans, proceeds of which she has invested in other things, including equity of other businesses, real estate, boats, and fine art. Early in Year 5, due to questions about the reliability of the company's financial reporting, the company's stock begins a steady decline, losing seventy-five percent of its value over six months. The banks repeatedly warn the CEO that margin calls are forthcoming. She thus faces a choice of liquidating the company stock she has pledged or producing alternative assets or cash to replace the stock as security for her margin loans.

The CEO solves her dilemma by using the company line of credit. On twenty occasions over six months, she withdraws \$5 million in cash from the company and transfers it to her banks, uses company stock options to pay down her line of credit with the company, withdraws another \$5 million in cash from the company, and so on. Only a few administrative employees of the company are aware of this activity. Because there are no reports of these stock sales filed with the SEC, neither the shareholders nor the directors learn of them. By the end of Year 5, the company has landed in bankruptcy and its shareholders and creditors have lost hundreds of millions. The CEO, however, has fully retired her \$100 million in debt and divested herself of almost all of her company stock.¹²

This case presents, among other issues, the question of whether the CEO has defrauded her company's shareholders. The statutory law of fraud does not answer that question. Consistent with the general characteristics of fraud law, the highly open-textured federal statutes most likely to be used in the CEO's case make it criminal to

¹² This example is drawn from questions about exploitation of executive loan programs during the 1990s that arose in cases involving executives of the Tyco and Enron corporations. See Superseding Indictment at 53–58, *United States v. Lay*, No. H-04-25 (S-2) (S.D. Tex. May 25, 2006), available at <http://f11.findlaw.com/news.findlaw.com/wp/docs/enron/usvlay70704ind.pdf> (charging former Enron Chairman Kenneth L. Lay not with defrauding Enron for his use of company line of credit but with defrauding banks with which he had margin loans); David Leonhardt, *It's Called a "Loan," but It's Far Sweeter*, N.Y. TIMES, Feb. 3, 2002, § 3, at 1 (discussing executive loan practices at Tyco and other corporations and abuse thereof at Tyco); Floyd Norris & David Barboza, *Lay Sold Shares for \$100 Million*, N.Y. TIMES, Feb. 16, 2002, at A1 (further discussing Kenneth Lay's use of executive loan practices to surreptitiously sell large quantities of Enron stock).

“devise *any* scheme or artifice to defraud,” including one that deprives another of “the intangible right to honest services”;¹³ and to willfully “employ *any* device, scheme, or artifice to defraud. . . . [or] engage 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.”¹⁴

The CEO’s conduct implicates these statutes. She has fiduciary duties to the company’s shareholders in her management of the company’s finances; she has sold securities *to* those same shareholders; and she has transferred cash from the shareholders to herself in a manner that might be said to have deceived the shareholders: If they (in the person of the directors) had known the CEO would use or was using the line of credit as an ATM for invisibly disposing of her stock holdings, they would have entered into a different *ex ante* arrangement or revoked the existing one. They also might have fired her. Yet the CEO would argue that her conduct, at least at some level of generality, was approved by the board; that the SEC rules did not prohibit, or require reporting of, a stock transfer to the company; and that the above-quoted fraud statutes do not say, in any explicit way, that her conduct was a crime.

Judicial decisions likely will be of limited assistance. We can assume the law has not had occasion to examine this scenario, for the CEO would have been unlikely to choose this course in the face of specific rules prohibiting *this* practice. Ultimately, the hypothetical’s result was the product of certain compensation practices, regulatory arrangements, and inventive structuring of behavior by the CEO at a particular moment in time. (Novel fraud tends to involve new *and* ephemeral behavior.)

¹³ 18 U.S.C. §§ 1341, 1346 (2000 & Supp. III 2003) (emphasis added). Novel specifications of this prohibition have included, for example, lawyers bribing insurance adjusters to expedite settlement of clients’ claims, *United States v. Rybicki*, 354 F.3d 124, 126–27 (2d Cir. 2003) (en banc), and a journalist trading securities on the basis of advance information about publications likely to influence price, *Carpenter v. United States*, 484 U.S. 19, 22–24 (1987).

¹⁴ 17 C.F.R. § 240.10b-5 (2005) (emphasis added); *see also* 15 U.S.C. § 78j (2000) (prohibiting “any manipulative or deceptive device”); *id.* § 78ff (2000 & Supp. III 2003) (prohibiting statements “false or misleading with regard to any material fact”). Novel specifications of this framework have included, in another era, trades of securities on the basis of material nonpublic information, *see In re Cady, Roberts & Co.*, 40 S.E.C. 907 (1961), and, more recently, construction of financial structures that exploited accounting regulations to create a misleading picture of a major public company, *see Superseding Indictment*, *supra* note 12 (criminal case against former Enron executives); *see also United States v. Ebbers*, No. 05-4059-CR, 2006 WL 2106634, at *1, *14–16 (2d Cir. July 28, 2006) (holding that literal compliance with Generally Accepted Accounting Principles (GAAP) is not dispositive as to whether accounting scheme defrauded investors); *United States v. Simon*, 425 F.2d 796, 798 (2d Cir. 1969) (same).

What options might the legal system have for solving this problem? How might prosecutors and judges determine whether they have a fraud on their hands? A bright-line solution would be to say that a novel case like this one is outside the scope of fraud law. If the rules of fraud have not specified, in advance of an actor's conduct, that a particular behavior counts as fraud, then that behavior is not fraud. The trouble with this approach, of course, is that it would freeze the law of fraud, perhaps limiting its application to those simple forms of chicanery that characterized fraud at its origins, leaving the law impotent in the face of continually modernizing commercial predation.¹⁵

Another option would be to adopt a mistake of law defense for fraud. Unless the prosecution can prove that the CEO knew her conduct was criminal (or, perhaps even more specifically, was criminal fraud), she is not guilty. But this approach would upend settled law, which has never afforded a defense of mistake of law to a fraud charge or any other core crime with common law roots.¹⁶ And it would yield the same result as freezing the law of fraud to previously articulated frauds: By definition, in every case in which a fraud statute were applied to a novel commercial behavior, the actor would be able to assert that she did not know *this* behavior was something the law called fraud.

A third alternative would be to allow prosecutors and judges to engage in retroactive lawmaking. If the particular economic conduct, in the judgment of legal actors, is something that ought to be a prohib-

¹⁵ Even sharp critics of modern "overcriminalization" have recognized that "if we freeze the evolution of the [mail fraud] statute, new forms of predatory behavior will appear to which the legislature cannot realistically be expected to respond quickly," John C. Coffee, Jr., *The Metastasis of Mail Fraud: The Continuing Story of the "Evolution" of a White-Collar Crime*, 21 AM. CRIM. L. REV. 1, 3 (1983) [hereinafter Coffee, *Metastasis*], and that a narrow fraud statute tracking the common law would fail to cover "subtle" frauds involving "serious dishonesty," William J. Stuntz, *The Pathological Politics of the Criminal Law*, 100 MICH. L. REV. 505, 547 (2001); see also John C. Coffee, Jr., *Does "Unlawful" Mean "Criminal"? Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. REV. 193, 200 (1991) [hereinafter Coffee, *Tort/Crime*] (arguing that excluding traditionally regulatory offenses such as "worker safety, toxic dumping, or environmental pollution" from scope of criminal law involves defending "antiquarian definition of blameworthiness").

¹⁶ See, e.g., *Ratzlaf v. United States*, 510 U.S. 135, 149 (1994) (noting "venerable principle that ignorance of law is no defense" before holding that "Congress may decree otherwise" in particular contexts, such as regulatory crime of structuring financial transactions at issue in case); *Cheek v. United States*, 498 U.S. 192, 199–200 (1991) (noting same principle and citing cases, before again finding that Congress had created mistake of law defense in limited contexts, in this case, nonpayment of taxes); Dan M. Kahan, *Ignorance of the Law Is an Excuse—but Only for the Virtuous*, 96 MICH. L. REV. 127, 145–49 (1997) (describing *Cheek* and successor cases as providing ignorance defense for honest mistakes that violate laws not backed by moral norms).

ited form of predation, it would be charged and then adjudicated as a fraud and criminal punishment would follow. Though some have suggested this is something like the law we have,¹⁷ it would be such a problematic practice that we ought to be skeptical that it could have taken firm hold and we should guard against its ascension. In the unrestrained hands of legal actors operating *ex post*, open-textured fraud statutes can easily collide with values connected to the legality principle.¹⁸ Application of such loose and pliable standards to novel behaviors risks that citizens will not receive adequate notice *ex ante* of what behavior the law condemns; will be judged *ex post* according to rapidly evolving norms that may have shifted between the time of conduct and the time of punishment, thereby producing retroactive criminalization; and will be regulated by enforcers unconstrained by principle, and susceptible to caprice and prejudice, in the selection of whom to treat as criminal.¹⁹ Even if the criminal law's technical requirements for notice are mostly constructive and fictional, a residual commitment either to congruity between the criminal law and moral norms or to actual notice of the law remains an essential feature of our polity's account of minimal due process, at least in serious crim-

¹⁷ See, e.g., Kahan, *supra* note 6, at 96 (arguing that, in exercising "de facto common-lawmaking authority in the guise of statutory interpretation," courts have "long" been creating retroactive criminal law); Joseph E. Kennedy, *Making the Crime Fit the Punishment*, 51 EMORY L.J. 753, 754–55 (2002) (suggesting that, having lost punishment discretion due to Federal Sentencing Guidelines, Supreme Court was heightening mens rea requirements to avoid punishing blameless); Stuntz, *supra* note 15, at 590–97 (suggesting that though it "sounds like the antithesis of the rule of law," "un-lawlike judging" involving "seat-of-the-pants judgments by particular trial judges and appellate panels" may be only alternative to "less lawlike prosecution"); John Shepard Wiley, Jr., *Not Guilty by Reason of Blamelessness: Culpability in Federal Criminal Interpretation*, 85 VA. L. REV. 1021, 1022–23 (1999) (describing move by Supreme Court to read federal criminal statutes as requiring moral culpability).

¹⁸ The concept "legality" can be deceptively simple. The legality principle is an umbrella term covering a cluster of normative commitments and their operational doctrines. As I will specify in the course of this Article, I deal primarily with the beliefs that the state must provide sufficient *ex ante* notice of what the law prohibits and that the law must restrain the state from enforcing prohibitions in an arbitrary or discriminatory manner. See generally, e.g., MICHAEL S. MOORE, *ACT AND CRIME: THE IMPLICATIONS OF THE PHILOSOPHY OF ACTION FOR THE CRIMINAL LAW* 239–44 (1993) (describing legality as comprised of nine doctrines justified by four values having to do with protection from unfair surprise, liberty of choice, democratic decisionmaking, and equality of treatment by state). For an up-to-date summary of the doctrines and motivating concerns that comprise the legality principle, see Paul H. Robinson, *Fair Notice and Fair Adjudication: Two Kinds of Legality*, 154 U. PA. L. REV. 335, 336–67 (2005).

¹⁹ See *United States v. Leahy*, 445 F.3d 634, 650 (3d Cir. 2006) (pointing out that ambiguity in defining fraud with reference to concepts "such as morality and fairness" raises concerns about adequate notice, common law crime, and prosecutorial discretion).

inal cases.²⁰ No matter how big and ubiquitous the state has become, liberal democracies still posit the integrity of the "choosing being" as their regulatory subject.²¹

Equally concerning, a criminal regulatory program that surprises its subjects, specifies norms *ex post*, and fails to guide enforcement decisions with principles risks failure. If the project of regulating non-violent market behavior with the criminal law is both socially important and beset with contest over its proper scope,²² then law that selects cases properly is vital. Mistakes about who is blameworthy, and about who should and can be deterred, will undermine deterrence and offend retributive principles, dissolving faith in such a regulatory program. The criminal law's presence in the vast realm of economic activity is small, at least quantitatively. Its ambition here is less to sanction most wrongdoing than to punish selectively in order to exploit indirect, educative, and nonlegal mechanisms of control.²³ Expecting prosecutors and judges, with their limitations of empirical competence, political influence, and human capacity, to divine prevailing social standards about economic behavior and to refuse to criminalize conduct not shown to diverge from such "objectively" derived baselines is both unrealistic and perilous.

Fortunately, there is still another and perhaps more satisfying solution to the problem of the novel fraud case. While my account will embrace this approach, at least in part, the approach is not mine but comes from the actual decisions of prosecutors and judges in fraud cases. In the *application* of criminal fraud laws, prosecutors, courts,

²⁰ See John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189, 206-12 (1985) (arguing that, although notice requirement can functionally be "shallow and unreal" at times, it has meaning as "standard that prohibits punishment that ordinary citizen would have no reason to believe is illegal").

²¹ See H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 49 (1968) (arguing that criminal law "distributes coercive sanctions" in manner that acknowledges and respects individuals as having choices).

²² I mostly assume *some* role for the criminal law in regulating inventive fraud and ask how we might circumscribe the criminal law's position in the framework of economic regulation. This is a valid assumption to make solely on positive grounds, since modern policing of economic behavior has always included criminal sanctions for fraud. Nonetheless, as will be apparent, my descriptive account of fraud law will serve to justify much of the law we have by identifying valid reasons why many features of fraud law have developed as they have.

²³ See HART, *supra* note 21, at 50 (noting that for most citizens, criminal sanction is not matter of fear but of "a guarantee that the antisocial minority who would not otherwise obey will be coerced into obedience by fear" and that acting obediently without such assurance "would be to risk going to the wall"); Tracey L. Meares et al., *Updating the Study of Punishment*, 56 STAN. L. REV. 1171, 1182 (2004) ("The educational impact of the criminal law is not a brittle Skinnerian stimulus and response, but rather one that works through a complex process of social interaction.").

and possibly also juries often ask whether the actor was aware at the time of her conduct that others would consider her conduct to be wrongful. The method of detecting this cognitive state of consciousness of wrongdoing has been to examine whether the actor took steps to conceal aspects of her conduct, manifesting subjective expectation of condemnation by others. This inquiry into a form of evidence I call “badges of guilt,” which is a means of measuring *ex post* the *ex ante* normative import of particular economic conduct, has been an important feature of the law’s response to commercial behavior since the seventeenth century.²⁴

To connect this methodology to our problem, consider once more the case of the CEO. Some indication of consciousness of wrongdoing might tell us the difference between her conduct being a fraud on her company’s shareholders and a permissible, if less-than-praiseworthy, business practice. If a prosecutor were to act solely in response to harm (as well as resulting outrage) by charging the CEO with fraud only because she quietly drained \$100 million in cash from a failing company, we might have a worrisome case of what often is decried in debate about white-collar crime: malleable law allowing unjust example-making and scapegoating.²⁵

But suppose that the CEO went back to the board of directors in the midst of her stock selling and requested that the board raise her loan limit to \$10 million because she had “greater cash needs,” without disclosing anything about her leveraged position or her past and intended future use of the loan as a means for unloading stock.

²⁴ See *Twyne’s Case*, (1601) 3 Co. Rep. 80b, 82a, 76 Eng. Rep. 809, 815–16 (K.B.) (describing actions such as quickly transferring money to family member or fleeing country as indicative of guilt); WILLIAM BLACKSTONE, 4 COMMENTARIES *232 (Wayne Morrison ed., 2001) (“[O]rdinary discovery of a felonious intent is where the party does it clandestinely . . .”). The concept of “badges of fraud,” which supplies the basis for my term, is a part of practitioners’ common parlance but has received surprisingly little attention in criminal law scholarship. See G. Robert Blakey & Kevin P. Roddy, *Reflections on Reves v. Ernst & Young: Its Meaning and Impact on Substantive, Accessory, Aiding Abetting and Conspiracy Liability Under RICO*, 33 AM. CRIM. L. REV. 1345, 1591–92 (1996) (mentioning badges of fraud as demonstrative of intent to defraud but not discussing in depth); Mark Zingale, Note, *Fashioning a Victim Standard in Mail and Wire Fraud: Ordinary Prudent Person or Monumentally Credulous Gull?*, 99 COLUM. L. REV. 795, 830 (1999) (mentioning and defining badges of fraud by reference to *Twyne’s Case* but not analyzing concept further).

²⁵ See, e.g., CESARE BECCARIA, ON CRIMES AND PUNISHMENTS 11 (David Young trans., Hackett Publ’g Co. 1986) (1764) (“Nothing is more dangerous than the common axiom that one must consult the spirit of the law. This is a dike that is readily breached by the torrent of opinion. . . . Everybody has his own point of view, and everybody has a different one at different times.”); Kara Scannell, *Ten More KPMG Executives Indicted over Shelters*, WALL ST. J., Oct. 18, 2005, at C4 (reporting that indicted white-collar defendant’s lawyer complained that prosecutors “are using 2005 eyes to view actions in 1997, 1998 and 1999 that certainly no one considered criminal at the time”).

Or suppose she was asked by the financial press or the company's employees how much stock she had sold during the year and she supplied only the publicly reported data, which showed only trivial sales. These would perhaps be closer cases. Now what if we add that she instructed bookkeeping personnel in the controller's office at the company not to discuss her loan-related stock transactions with anyone else at the company? As a matter both of intuition and of how prosecutors and courts tend to evaluate fraud cases, things now begin to look quite different in the calculus of whether the CEO's case is a fraud. We reach the point at which we are likely to say, "She knew that what she was doing was wrong."

Before my descriptive exploration of novel fraud and the role of consciousness of wrongdoing, it may help to put on the table a sketch of the normative analysis that will follow. One account would make the large claim that requiring consciousness of wrongdoing is a means of defining the conduct making out the offense of fraud.²⁶ If we define fraud as involving deception that results when the perpetrator (*P*) deviates in a veiled fashion from a course of behavior that the victim (*V*) reasonably and justifiably expects, then developing the law of fraud requires legal actors to know something about a baseline of relevant commercial norms in order to determine whether a particular practice amounts to a deceptive deviation. Put simply, conduct that might be perfectly permissible for a used car dealer might properly be considered blatant fraud if engaged in by a corporate officer. Consciousness of wrongdoing would be the means of locating the requisite baseline. Prosecutors and judges—who must make determinations in individual criminal adjudication about what counts as fraud without better means of deriving empirical information about markets—look to the *beliefs* of market actors (in the person of *P*) about market norms in order to locate those norms. To add weight to the claim, *P*'s steps to conceal, from *V* and other parties, her deviation from market norms, prevent market sanctions from penalizing or deterring her undesirable conduct and thus justify legal intervention.

This claim will encounter problems. The subjective understanding of individuals is a flawed way to discover prevailing norms, since an individual's belief about norms can be erroneous. The method will be overinclusive because people conceal aspects of their behavior from others for a variety of reasons, only one of which is to avoid adverse normative judgments, thus presenting the danger of false positives. Conversely, the method could be underinclusive because norm-deaf *Ps* who behave callously toward others might dis-

²⁶ See *infra* Part IV.A.

play no consciousness of wrongdoing while engaging in novel and quite harmful forms of deception that legal actors, if they could clearly see market norms, would readily deem to be frauds. More importantly, to believe that reliance on consciousness of wrongdoing is a general strategy for regulating markets is to get carried away. As will be clear in Parts II and III, no account of the positive law of fraud could credibly describe the peculiar presence of this subjectivist approach to fault as the product of a top-down regulatory strategy.

A second normative account explains consciousness of wrongdoing as a component of the *mens rea* for fraud, serving as a culpability measure that helps in novel circumstances when conventional culpability devices are insufficient.²⁷ As a technical matter, the *mens rea* for fraud is “specific intent to defraud.”²⁸ But if we understand intent in the usual sense of “conscious object,”²⁹ it is somewhat question-begging to say the *mens rea* for fraud is “intent to defraud.” We need to know what counts as a fraud to know whether the defendant’s conscious object was to defraud or simply to engage in the particular behavior in which she engaged. It does not help much to substitute a word like “deceive” or “mislead” for “defraud”; virtually all salespeople could be described as trying to induce others to act on the basis of a misimpression.

In many fraud cases, identifying conduct that “goes too far” is no trouble because if the law has previously and clearly articulated the specific behavior as fraudulent, we can conclude from the mere purposeful pursuit of that behavior that the defendant had the “intent to defraud.” In the novel case, however, we need some additional means for concluding that the defendant harbored the culpable mental state we call “intent to defraud.” Badges of guilt, on this account, gives us a device for locating the necessary culpable mental state. An actor who chooses to disregard shared norms that exist to facilitate collective activities, in favor of pursuing her individual gain by means of unfair advantage, is blameworthy.

The route to this result is surprising. Insistence upon subjective awareness of wrongdoing is a response both to the concern that punishing in its absence would violate the legality principle by depriving the individual of the *ex ante* notice to which she is entitled and to the concern that foregoing punishment in novel cases, even in the pres-

²⁷ See *infra* Part IV.B.

²⁸ See, e.g., *United States v. Harms*, 442 F.3d 367, 372 (5th Cir. 2006) (listing specific intent as requirement for mail fraud).

²⁹ See, e.g., MODEL PENAL CODE § 2.02(2) (1980) (“Action is not purposive with respect to the nature or result of actor’s conduct unless it was his conscious object to perform an action of that nature or to cause such a result.”).

ence of consciousness of wrongdoing, would gut the law of fraud. In the end, the legality-related concern, which began as a reason to *limit* a form of criminal liability, leads to a positive justification for punishment. The questions of whether the particular conduct performed with the particular mental state result in criminal liability and whether punishment of that behavior would be legality-satisficing collapse into a single inquiry. Here, "fair notice" is about *fault* and *responsibility*, not restraining the state.³⁰

While this explanation for the role of consciousness of wrongdoing fits better with positive law, it too has difficulties. "You knowingly disregarded social constraints" is much too broad as a freestanding justification for criminal punishment. It would permit treatment of every social transgression as a crime. So broad a concept of fraud law might also cause law to spiral in its development, as actors envision (and disregard) more and more *potential* extensions of normative boundaries.

Consider my example of the CEO. I do not mean to suggest that the CEO's consciousness of wrongdoing alone would suffice to make her actions fraud, without inquiry into other features of her conduct. No theory of fraud can dispense with the essence of the crime: that someone have been harmed (or placed at risk of harm) by means of deception.³¹ In addition, fraud is a relational concept. It often turns on whether the law recognizes a duty to behave a certain way, which depends on the nature of parties' relationships.³² Where duties are settled, they often do much of the work in determining whether someone's conduct worked a fraud. Even when the law has not confronted a particular question of relationship or duty, prior recognitions of relationships and duties as warranting the intervention of fraud law serve as a starting point for analysis, including reasoning by analogy.

³⁰ As I will discuss in Part IV.B.2, *infra*, this account could also be styled (though in a less illuminating form) as a claim that requiring consciousness of wrongdoing is a modified form of the mistake of law defense, allowed in novel fraud cases as an exception to the general rule against claims of legal mistake. This rationale makes sense if we think of punishing novel fraud as designed to combat loopholing. If what we really want is to induce restraint among actors knowingly operating along the margins of the legal regime and to condemn those who fail to exercise such restraint, we might have rules saying, *ex ante*, "When in doubt, hold back," and, *ex post*, "If the actor was oblivious to being on the margin, she was neither deterrable nor does she merit blame." See Kahan, *supra* note 16, at 152-53 (offering similar rationale for general positive law of legal mistake).

³¹ As will be demonstrated in Part II, *infra*, courts have described the essence of fraud using a variety of formulations; this one is meant only as an analytical tool.

³² See, e.g., *Chiarella v. United States*, 445 U.S. 222, 228 (1980) ("[O]ne who fails to disclose material information prior to the consummation of a transaction commits fraud only when he is under a duty to do so.").

The question in the novel case is whether the standing principle (do not defraud) and the class of its existing applications (those forms of deception and harm in those kinds of relations that fraud law has previously recognized) can be *extended* to some analogous form of deception and harm in some new set of relations. The novel actor's consciousness of wrongdoing renders her mental state sufficiently culpable to justify criminal punishment—when coupled with behavior that satisfies general requirements of fraud law's *ex ante* conduct rules (deception, threat of causally related harm, an analogous relationship of duty, and so on). Without this additional, subjective component of fault, punishment of the novel commercial behavior as fraud—even if it can be fit within those broad forms of wrongdoing that fraud's *ex ante* conduct rules describe—is a grave departure from the criminal law's requirements that serious responsibility be ascribed, and painful punishment imposed, only on the basis of individual blameworthiness.³³

In Part IV, I will examine in detail these potential rationales for attending to consciousness of wrongdoing in cases of novel fraud. First, it is important to show that this is not a new problem that might be dismissed as a pathology of the contemporary regulatory state. To this end, I will make a more detailed case that novel fraud is a dilemma Anglo-American criminal law has faced for some centuries and consciousness of wrongdoing an undeniable element in positive law's response. Parts II and III of this Article supply material to support that case.

II

THE PHENOMENON OF NOVEL FRAUD

The law of fraud has expanded. The idea of what it means to take (or attempt to take) wrongfully by deception has grown to include more, and more elaborate, means and methods, while at the same time the means and methods of deception have evolved. It would be a mistake, however, to think that the broadening of fraud law beyond something like “express, material, false representations that cause or threaten serious monetary harm” is a recent phenomenon that can be ascribed to contemporary “overcriminalization,” at least as to a significant portion of cases.³⁴ Expansion of fraud law, producing friction between legality-related values and the demands of market policing,

³³ See JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 1.01, at 3 (3d ed. 2001) (stating that “punishment may not justly be imposed where a person is not blameworthy”).

³⁴ See, e.g., William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 780, 781–82 (2006) (arguing that overcriminalization exists and is response to attempts to control enforcers by constitutionalizing criminal procedure).

appears to be a persistent and unavoidable feature of the liberal regulatory state.

A. *The Phenomenon Is Old*

This Article does not aspire to supply a historical study of fraud in Anglo-American law. It will instead offer a sampling of approaches to fraud among leading authorities to support the claim that fraud has a chameleon-like quality. Take the transition to a market economy in sixteenth-century England: It pushed Elizabethans to make their fraud law open-textured and adaptive to novel forms of abuse. Lord Coke, arguing in 1601 as the Queen's Attorney General in *Twyne's Case*, pressed an interpretation of an Elizabethan statute that paved the way for the modern law of fraudulent conveyances. Reporting the case, he wrote:

To one who marvelled what should be the reason that Acts and statutes are continually made at every Parliament without intermission, and without end; a wise man made a good and short answer, both which are well composed in verse:

Quoeritur, ut crescunt tot magna volumina legis?

In promptu causa est, crescit in orbe dolus.

And because fraud and deceit abound in these days more than in former times, it was resolved in this case by the whole Court, that all statutes made against fraud should be liberally and beneficially expounded to suppress the fraud.³⁵

In the eighteenth century, Lord Hardwicke observed in discussing equity jurisdiction:

Fraud is infinite, and were a court of Equity once to lay down rules, how far they would go, and no farther, in extending their relief against it, or to define strictly the species or evidence of it, the jurisdiction would be cramped, and perpetually eluded by new schemes, which the fertility of man's invention would contrive.³⁶

³⁵ *Twyne's Case*, (1601) 3 Co. Rep. 80b, 82a, 76 Eng. Rep. 809, 815-16 (K.B.). The Latin verse (also appearing in this Article's epigraph) translates to: "If you ask why are there so many laws, the answer is that fraud ever increases on this earth." Ross, *supra* note 1, at 105. Lest anyone be alarmed by my reliance on a Star Chamber case, that body "was not yet the place of Stuart unpopularity" at the time of *Twyne's Case*. *Id.* at 101; see also J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 136-37 (3d ed. 1990) (noting that before becoming forum in 1630s for unpopular prosecution of sedition and ecclesiastical offenses, Star Chamber exercised civil and misdemeanor jurisdiction and handled real property matters, often providing access to justice that was otherwise unavailable).

³⁶ Letter from Lord Hardwicke to Lord Kames (June 30, 1759), in JOSEPH PARKES, A HISTORY OF THE COURT OF CHANCERY 501, 508 (1828).

A wave of deceptive practices during the Industrial Revolution, first in England and then in the United States, led nineteenth-century courts to view fraud prohibitions in similar terms:

The common law not only gives no definition of fraud, but perhaps wisely asserts as a principle that there shall be no definition of it, for, as it is the very nature and essence of fraud to elude all laws in fact, without appearing to break them in form, a technical definition of fraud, making everything come within the scope of its words before the law could deal with it as such, would be in effect telling to the crafty precisely how to avoid the grasp of the law.³⁷

Sir James Fitzjames Stephen, in his monumental account of English criminal law, concluded, "The difficulty of giving an adequate definition of fraud has been felt at all times."³⁸

The idea that the state must guard against a class of persons who harbor a quasi-professional aim of evading legal constraint to the injury of others, and the fear of articulating law in an overly specific manner that only makes evasion easier for this class, naturally generate law that is extremely open-textured. Take, for example, an 1857 ruling of the Supreme Judicial Court of Massachusetts. William Tuckerman, Treasurer of the Eastern Railroad Company, converted to his own use \$5000 of his employer's funds by drawing a check on the company's account in his official capacity.³⁹ The court, in deciding whether Tuckerman's conduct constituted embezzlement "with a fraudulent intent,"⁴⁰ as the statute required, described the offense this way:

In fraud there is always some kind of deception. And a fraud may be defined to be any artifice whereby he who practises it gains, or attempts to gain, some undue advantage to himself, or to work some wrong or do some injury to another, by means of a representation which he knows to be false, or of an act which he knows to be against right or in violation of some positive duty.⁴¹

This is a sprawling concept of criminal wrongdoing: achieving undue advantage through deception or breach of duty. One might think this formulation to be the product of a legal system still partially

³⁷ *McAleer v. Horsey*, 35 Md. 439, 452 (1872).

³⁸ 1 JAMES FITZJAMES STEPHEN, *A HISTORY OF THE CRIMINAL LAW OF ENGLAND* 28 (1883). Stephen declined to attempt a definition of fraud "which will meet every case which might be suggested," concluding that fraud requires "two elements at least": "deceit or an intention to deceive or in some cases mere secrecy" and "actual injury or possible injury or an intent to expose some person either to actual injury or to a risk of possible injury." *See id.* at 121–22.

³⁹ *Commonwealth v. Tuckerman*, 76 Mass. (9 Gray) 173, 178 (1857).

⁴⁰ *Id.* at 197.

⁴¹ *Id.* at 203.

aligned with common law crimes and equity jurisdiction. But if we move forward a full century, we find an even broader view from the United States Court of Appeals for the Fifth Circuit:

[The federal criminal law of fraud furthers] a reflection of moral uprightness, of fundamental honesty, fair play and right dealing in the general and business life of members of society. . . . [A]s Judge Holmes so colorfully put it "The law does not define fraud; it needs no definition; it is as old as falsehood and as versable as human ingenuity."⁴²

Between the account of the Massachusetts court, a product of a system steeped in the common law of crime, and the account of the Fifth Circuit, a product of the modern statutory era, Congress passed a criminal fraud prohibition, the first federal mail fraud statute. Codification did not change the nature of the problem. At virtually the first opportunity, the Supreme Court created an all-purpose antifraud provision out of what might have been cast as a measure solely concerned with charlatans exploiting the postal system.⁴³ Despite occasional misgivings,⁴⁴ the impetus to frame the federal mail fraud statute as a one-size-fits-all device for policing market predators controlled for the next century.⁴⁵

⁴² *Gregory v. United States*, 253 F.2d 104, 109 (5th Cir. 1958) (quoting *Weiss v. United States*, 122 F.2d 675, 681 (5th Cir. 1941)). For some variations on this theme from the decisions of English courts, see *R v. Scott*, [1975] A.C. 819, 839 (H.L. 1974) (appeal taken from A.C.), which defines "to defraud" as "to deprive a person dishonestly of something which is his or of something to which he is or would or might but for the perpetration of the fraud be entitled," and *In re London & Globe Fin. Corp.*, (1903) 1 Ch. 728, 733, where the court states, "[T]o deceive is by falsehood to induce a state of mind; to defraud is by deceit to induce a course of action."

⁴³ See Act of Mar. 2, 1889, 25 Stat. 873 (1889) (original mail fraud prohibition); *Durland v. United States*, 161 U.S. 306, 313 (1895) ("[The mail fraud statute] includes everything designed to defraud by representations as to the past or present, or suggestions and promises as to the future. The significant fact is the intent and purpose.").

⁴⁴ See, e.g., *Schmuck v. United States*, 489 U.S. 705, 723 (1989) (Scalia, J., dissenting) ("[I]t is mail fraud, not mail and fraud, that incurs liability."); *McNally v. United States*, 483 U.S. 350, 355-56 (1987) (rejecting interpretation of mail fraud statute as "proscrib[ing] schemes to defraud citizens of their intangible rights to honest and impartial government"); *United States v. Brown*, No. 05-20319, 2006 WL 2130525, at *18 (5th Cir. Aug. 1, 2006) (DeMoss, J., concurring in part and dissenting in part) ("[T]he constitutionality of [18 U.S.C. § 1346] may well be in serious doubt."); *United States v. Rybicki*, 354 F.3d 124, 160 (2d Cir. 2003) (en banc) (Jacobs, J., dissenting) ("It is only too obvious that there is no settled meaning to the phrase 'the intangible right of honest services' that is capable of providing constitutionally adequate notice."). But see 18 U.S.C. § 1346 (2000) (overruling *McNally*).

⁴⁵ See, e.g., *McNally*, 483 U.S. at 372-73 (Stevens, J., dissenting) ("Statutes like the Sherman Act, the civil rights legislation, and the mail fraud statute were written in broad general language on the understanding that the courts would have wide latitude in construing them to achieve the remedial purposes that Congress had identified."); *United States v. Maze*, 414 U.S. 395, 405-07 (1974) (Burger, C.J., dissenting) ("When a 'new' fraud

To be sure, much has changed since the age of the common law. Social conditions constantly evolve, challenging the legal order and repeatedly bringing to the fore this question of how to reconcile legality-related commitments with the demand to manage innovative harmful behavior in markets. At each juncture, the question seems to become more serious and difficult. In Elizabethan England, for example, the new mass marketplace created a “crisis of representation, one wherein traditional social signs and symbols had metamorphosed into detached and manipulable commodities”; people were confronted in a new way with “calculated misrepresentations of private meanings in the negotiated relations among men and women”; and “[w]hat a person could be said to ‘have in mind’ grew in importance as the signs of his or her social identity grew in obscurity.”⁴⁶ Centuries later, according to one historical study, Victorians were “plagued by white-collar crime,” primarily because of the explosion in technologies accompanying the Industrial Revolution and the simultaneous advent of new financial institutions, including the public stock company.⁴⁷

Open-textured law that grows and innovates in competition with those who seek to evade it appears to be characteristic of any legal order that seeks to control harmful human behavior, at least in any society mature enough to have a large economy.⁴⁸ Perhaps surpris-

develops—as constantly happens—the mail fraud statute becomes a stopgap device to deal on a temporary basis with the new phenomenon The criminal mail fraud statute must remain strong . . . to cope with the new varieties of fraud that the ever-inventive American ‘con artist’ is sure to develop.”); see also Jed S. Rakoff, *The Federal Mail Fraud Statute (Part I)*, 18 DUQ. L. REV. 771, 772 (1980) (noting that mail fraud statute has consistently been interpreted expansively and seen as “the sole instrument of justice that could be wielded against the ever-innovative practitioners of deceit”).

⁴⁶ JEAN-CHRISTOPHE AGNEW, *WORLDS APART: THE MARKET AND THE THEATER IN ANGLO-AMERICAN THOUGHT, 1550–1750*, at 60, 97 (1986) (emphasis omitted).

⁴⁷ GEORGE ROBB, *WHITE COLLAR CRIME IN MODERN ENGLAND* 3, 181 (1992); see also *id.* at 181, 186 (noting that by end of nineteenth century, two-fifths of British national wealth was invested in public company shares, which was amount unprecedented in any nation in history, and that fraud was seen as “a canker at the heart” of complicated new system bound together by stocks, bonds, contracts, bills of exchange, letters of credit, and promissory notes).

⁴⁸ See Stuart P. Green, *Lying, Misleading, and Falsely Denying: How Moral Concepts Inform the Law of Perjury, Fraud, and False Statements*, 53 HASTINGS L.J. 157, 182–91 (2001) (tracing development of fraud law, from common law through appearance of modern mail fraud, as tracking growing complexity in commercial relations); see also MICHAEL LEVI, *REGULATING FRAUD: WHITE-COLLAR CRIME AND THE CRIMINAL PROCESS I* (1987) (identifying fraud as public policy problem as early as Roman and Byzantine states, and noting that English law prohibited fraud as early as 1292). As liberal democracies have matured, the depth of political commitment to a requirement of advanced, legislative specification of crime also has grown greatly, alongside expansion of the legal system’s response to innovative forms of harm. See Jeffries, *supra* note 20, at 190–95 (describing development of legality principle in Anglo-American law).

ingly, the larger and less cohesive social networks become (and so the shorter trust is in supply), the more markets seem to depend on trust to function efficiently, and the more the legal system is pressured to step in and police violations of trust.⁴⁹ Consider, for example, this declaration of the United States Court of Appeals for the Eighth Circuit in 1933: "To try to delimit 'fraud' by definition would tend to reward subtle and ingenious circumvention and is not done."⁵⁰ Specifying what behavior the criminal law prohibits? In this area, according to some courts at least, it is just not done.

Fraud might be the strongest instance in the criminal law of what H.L.A. Hart described as the unavoidable tendency of limitations in human capacity, consisting of both "relative ignorance of fact" and "relative indeterminacy of aim," to produce open texture in law.⁵¹ Hart urged, "[W]e need to remind ourselves that human ability to anticipate the future, which is at the root of this indeterminacy, varies in degree in different fields of conduct, and that legal systems cater for this inability by a corresponding variety of techniques."⁵² Hart's polar examples were the standard of due care versus the law of murder.⁵³ The law of criminal fraud resembles the standard of due care far more than the law of murder.⁵⁴

⁴⁹ See TAMAR FRANKEL, *TRUST AND HONESTY: AMERICA'S BUSINESS CULTURE AT A CROSSROAD* 3, 49–55 (2006) (arguing that trust is crucial in promoting prosperity, essential in order to enjoy benefits of specialization, and efficient because verification is costly); *id.* at 49 (quoting Alan Greenspan as stating that "trust is at the root of any economic system based on mutually beneficial exchange" and is necessary for "exchange of goods and services . . . on any reasonable scale"); ROBB, *supra* note 47, at 4 ("Trust is that evanescent quality without which the operations of modern business would be impossible."). For the difficult task of defining white-collar crime, trust may be a more promising concept than job status, social status, category of criminal violation, or others frequently employed, because the existence (and violation) of trust explains why policing this form of crime is both a social imperative and an often ambiguous and challenging project. See STANTON WHEELER ET AL., *SITTING IN JUDGMENT: THE SENTENCING OF WHITE-COLLAR CRIMINALS* 21 (1988) (finding from examination of sentences by federal judges that "the most serious of white-collar crimes are often judged to be those in which huge economic gains are made at the expense of trusting victims").

⁵⁰ *Foshay v. United States*, 68 F.2d 205, 211 (8th Cir. 1933). Some judicial writings on this subject appear to exhibit odd admiration for the suppleness of fraud. See, e.g., *United States v. Falkowitz*, 214 F. Supp. 2d 365, 369 (S.D.N.Y. 2002) (commencing with ode to fraud for its "acute imagination," "inventive spirit," "peculiar charm," "craft and guiles of the dramatic arts," "ingenuities," and "nimbleness").

⁵¹ HART, *supra* note 4, at 128; see also 1 WAYNE R. LAFAVE, *SUBSTANTIVE CRIMINAL LAW* § 2.1(a), at 104 (2d ed. 2003) (defining legality challenge as, "If someone intentionally or by chance finds a loophole, may the courts create a new crime to plug that gap?").

⁵² HART, *supra* note 4, at 130–31.

⁵³ *Id.* at 133.

⁵⁴ If you prefer a Wittgensteinian conception, you might say that fraud sits somewhere along a spectrum that has at one end legal concepts than can be stated easily in terms of necessary and sufficient conditions (say, the offense of "speeding" on a highway marked as

B. *The Phenomenon Persists*

It should not surprise anyone who has been following market and legal developments of the past several years to be told that we remain subject to pressures to produce and sustain open-textured law of white-collar crime. To see a contemporary manifestation of the problem, consider another, somewhat stylized example. Suppose a broker on a commodities futures exchange, knowing that a client plans to place a large order for futures that is likely to change the market price, purchases a hefty block of futures for his own account, hoping to profit from the expected price change. When he does this, no rule specifically applicable to the commodities futures exchange prohibits insider trading by brokers. However, a federal law that makes it criminal for a fiduciary to “devise or intend[] to devise a scheme or artifice to defraud” that would deprive a client of the “intangible right” to the fiduciary’s “honest services”⁵⁵ might be said to apply to the broker’s conduct. The broker has put the client’s confidential information to personal use without the client’s permission, and the broker’s trading activity could itself move the market in detriment to the client.

Like our earlier example involving the CEO with the loan arrangement, the broker’s case is contestable, having aspects that might call for criminal blame and punishment but also features that raise concerns about notice and control of enforcement discretion. The failure of regulators to have addressed self-dealing of this sort does not seem like it ought to excuse the broker if he placed his interests ahead of those of his client in a harmful manner. However, given the absence of specific legal authority and perhaps of any precedent, the application of the general federal criminal fraud prohibition to the broker’s conduct might be an unfair surprise, that is, an *ex post* determination that insider trading by commodities brokers *should* be condemned rather than the enforcement of a general prohibitory norm against fraud that encompasses such activity.

The broker’s case, based on the facts in a Seventh Circuit decision,⁵⁶ resembles problems presented by “late trading” and other

a sixty-five-miles-per-hour zone) and at the other end concepts that are defined by what Wittgenstein termed “family resemblances”: some commonalities of traits among any two instances of the concept but no single trait that all instances share (Wittgenstein illustrated with the concept of “games”). LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* 31–32 (G.E.M. Anscombe trans., Basil Blackwell Oxford 2d ed. 1958). Fraud is not a pure case of a “family resemblance” concept but neither is it a clear case of a concept defined by necessary and sufficient conditions.

⁵⁵ 18 U.S.C. §§ 1341, 1343 (Supp. II 2002); *id.* § 1346 (2000).

⁵⁶ *United States v. Dial*, 757 F.2d 163 (7th Cir. 1985).

recent practices by mutual fund fiduciaries that were novel, abusive, and not obviously covered by any specific criminal prohibition.⁵⁷ The market disruptions of 2001 and 2002 in the United States, and the ongoing regulatory response to those developments, have produced abundant evidence of the growth and urgency of the problem of novel fraud.⁵⁸ Some of the most prominent and difficult cases among the recent wave of prosecutions in the corporate sector exhibit the tension and contestable nature of novel fraud. These cases often arise for the very reason that individuals act in response to haziness in legal standards. A plausible description of the Enron Corporation, for example, holds that much of the financial structure of the company was based on “creative” accounting mechanisms designed for the purpose of generating a deceptive impression of the company’s finances without violating the technical strictures of GAAP.⁵⁹

Persistence of the problem of the novel fraud case is not a peculiarity of the American system. At the moment, England is engaged in an effort to reform its criminal law to remedy the law’s perceived

⁵⁷ See, e.g., Felony Complaint, *People v. Flynn* (N.Y. Crim. Ct. Feb. 3, 2004), available at http://www.oag.state.ny.us/press/2004/feb/feb3b_04_attach.pdf (detailing alleged market timing crimes committed by Canadian Imperial Bank director); Attorney General of the State of New York, Bureau of Investment Protection, Assurance of Discontinuance Pursuant to Executive Law § 63 (15), *In re Alliance Capital Management L.P.* (Aug. 19, 2004), available at http://www.oag.state.ny.us/investors/alliance_cap_mgmt_aod.pdf (describing investigation into market timing and late trading by Alliance Capital); Attorney General of the State of New York, Bureau of Investment Protection, Assurance of Discontinuance Pursuant to Executive Law § 63 (15), *In re Janus Capital Management LLC* (Aug. 2004), available at <http://www.oag.state.ny.us/investors/jcm/aod.pdf> (describing investigation into market timing and late trading by Janus Capital Management); Press Release, Office of N.Y. State Att’y Gen. Eliot Spitzer, Banker Charged with Late Trading (Feb. 3, 2004), available at http://www.oag.state.ny.us/press/2004/feb/feb03b_04.html (announcing arrest of banker for alleged unlawful trades).

⁵⁸ See, e.g., President’s Corporate Fraud Tax Force, Significant Criminal Cases and Charging Documents, <http://www.usdoj.gov/dag/cftf/cases.htm> (last visited Sept. 7, 2006) (collecting charging documents in more than one hundred and thirty federal criminal cases brought in last several years involving fraud and other offenses in large national business associations).

⁵⁹ See, e.g., John R. Kroger, *Enron, Fraud, and Securities Reform*, 76 U. COLO. L. REV. 57, 69–74 (2005) (describing steps Enron took to deceive investors about its financial position); see also *United States v. Ebberts*, No. 05-4059-CR, 2006 WL 2106634, at *14–16 (2d Cir. July 28, 2006) (holding technical compliance with GAAP not absolute defense to charge of securities fraud). The essence of the competition between regulators and their subjects was nicely captured by the recent comments of an attorney representing a tax advisor indicted for participating in the design and marketing of fraudulent tax shelters. He said of the case, “From what I can see, the Justice Department appears to be doing exactly what they’re charging the defendants with doing, and that is taking a misguided, overly aggressive, unprecedented view of a complicated legal area.” Jonathan D. Glater, *Indictment Broadens in Shelters at KPMG*, N.Y. TIMES, Oct. 18, 2005, at C1.

shortcomings in adapting to market harms.⁶⁰ At least since the 1960s, English law has dealt with many cases of financial crime through larceny statutes that are susceptible to evasion.⁶¹ The English reformers are concerned that existing offenses are “over-specific and vulnerable to technical assaults” and that “defendants have successfully argued that the consequences of their particular deceptive behaviour did not fit the definition of the offence with which they had been charged.”⁶² They conclude, “It is not a realistic solution to continue plugging loopholes in fraud law by the addition of more specific offenses.”⁶³ At the same time, the reformers have worried that England’s common law conspiracy offense is “so wide that it provides little guidance on the difference between lawful and fraudulent conduct.”⁶⁴ Parliament is considering adopting a new antifraud statute in order “to encompass all forms of fraudulent conduct, with a law that is flexible enough to deal with developing technology.”⁶⁵

⁶⁰ See HOME OFFICE, FRAUD LAW REFORM: CONSULTATION ON PROPOSALS FOR LEGISLATION (May 2004), available at http://www.homeoffice.gov.uk/documents/cons-fraud-law-reform/fraud_law_reform.pdf (describing proposal to amend law of fraud).

⁶¹ Prosecution of a garden-variety mortgage fraud, for example, might fail on the ground that the defendant did not “obtain property belonging to another” under the larceny statutes because debiting the lender’s bank account in favor of the defendant’s account simply created a “chase in action” in favor of the defendant against his own bank. *R v. Preddy*, [1996] A.C. 815, 834 (H.L.) (appeal taken from A.C.). While English law has long included a common law offense of conspiracy to commit fraud, by anomaly a single fraudster acting alone commits no crime, and the conspiracy offense is said to be too amorphous to guide prosecutors, judges, and jurors. HOME OFFICE, *supra* note 60, at 7 (“[Conspiracy to defraud] can make it a crime for two people to conspire to do something, which would be lawful if they did it individually.”).

⁶² HOME OFFICE, *supra* note 60, at 7.

⁶³ *Id.*; see also Press Release, Law Comm’n, News from the Law Commission: The Law Commission Recommends a Simpler Law of Fraud 2 (July 30, 2002), available at <http://www.lawcom.gov.uk/docs/lc276sum.pdf> (“[A] single comprehensive offence of fraud will encompass fraud in its many unpredictable forms. . . . [T]he law seems always to be struggling to catch up, with a patchwork series of specific offences designed to cope with particular ways of committing a fraud, . . . introduced after the fraudulent method has been developed.” (emphasis added)).

⁶⁴ HOME OFFICE, *supra* note 60, at 7.

⁶⁵ *Id.* at 5. The bill had a second reading in the House of Commons in June 2006. See U.K. Parliament, Complete List of Public Bills Before Parliament This Session, <http://www.publications.parliament.uk/pa/cm/cmweb/pub.htm#comp> (last visited June 12, 2006). The English reform work results largely from a series of troubling cases, some of which caused serious financial harm involving hundreds of millions of pounds, that threatened to thwart regulation. See generally LAW COMM’N, FRAUD 13–23 (2002), available at <http://www.lawcom.gov.uk/docs/lc276.pdf> (describing cases); *id.* at 27–28 (describing scheme in which directors of brewer Guinness PLC who fraudulently inflated value of Guinness shares, in order to gain advantage in battle for takeover of distiller, could not be charged under existing deception statutes because of manner in which gains and losses were caused, and could not be charged with conspiracy to defraud because controlling decision held that conspiracy to defraud could be charged only in absence of statutory conspiracy); *R v. Manjandria*, 1993 CRIM. L.R. 73, 74 (Ct. App. Crim. Div. 1992) (deciding in case of mort-

Novelty is a continual feature of, and challenge for, the law of fraud. Novelty might even be *constitutive* of the concept of fraud, if we understand the choice to treat fraud as a category of wrongdoing as a choice to prohibit something residual like "other forms of indirect taking of property."

III

LAW'S RESPONSE TO NOVEL FRAUD: CONSCIOUSNESS OF WRONGDOING

For over two centuries, Anglo-American law has both recognized that fraud law must be open-textured and adaptable, and established and solidified the criminal law's deep foundations in the principle of legality. It is not surprising that the criminal law would have sought a means of responding to the tension between these two ideas. Given the general progression of the criminal law toward deeper inquiry into mental state, and given that we have come to focus on mental state in white-collar crime more intensely than perhaps anywhere else in the criminal law,⁶⁶ it also should be unsurprising that the criminal law's response has consisted of an inquiry into mental state.

What is surprising is that this particular inquiry would progress beyond the conventional hierarchy of negligence, recklessness, knowledge, and purpose (including specific intent) to a somewhat anomalous state of mind described as consciousness of wrongdoing. Like all mental states, this one is not visible and must be detected, imperfectly and underinclusively, with conventional technologies of proof. The method for discovering this mental state is to look for what I call "badges of guilt," that is, evidence that the actor sought to conceal some aspect of the truth about her conduct in order to avoid the adverse normative assessments of others.

In this Part, I will show that consciousness of wrongdoing and badges of guilt are an important part of Anglo-American fraud law. They can be found in the common law and in contemporary English and American law. With this descriptive work complete, we will be prepared to turn in Part IV to the normative underpinnings of this methodology for locating fault in cases of novel fraud.

gation fraud that telegraphic transfer of funds from bank to defendant's solicitor was insufficient to establish that defendant obtained "valuable security" within meaning of Theft Act).

⁶⁶ See Kenneth Mann, *White Collar Crime and the Poverty of the Criminal Law*, 17 LAW & SOC. INQUIRY 561, 569 (1992) ("[I]t is harder to make clear and understandable definitions of culpability and blameworthiness in respect to white-collar crimes than it is for street crimes.").

A. Badges of Guilt

Blackstone famously said of larceny:

This taking, and carrying away, must also be *felonious*; that is, done *animo furandi* [with the intention of stealing]; or, as the civil law expresses it, *lucri causa* [for the sake of gain]. . . . The ordinary discovery of a felonious intent is where the party doth it clandestinely; or, being charged with the fact, denies it.⁶⁷

This statement is generally read as an early articulation of the requirement of some culpable mental state for imposition of criminal liability.⁶⁸ Blackstone, however, may have recognized in the common law the idea that blameworthy people hide. Otherwise, Blackstone's statement would be odd. He was talking about larceny, not fraud. The criminal act was the taking and carrying away, not the "clandestine" behavior or "denial." Why did it matter whether a larceny defendant was slinking about? Maybe because larceny, in its early days, was an evolving crime.⁶⁹ Many takings now seen as obviously criminal once were not so.⁷⁰ Perhaps Blackstone was saying that consciousness of wrongdoing should be required for larceny and that furtiveness would be the "ordinary" (perhaps only) way of discovering such a mental state. Blackstone's statement at least indicates that the law had developed a practice of looking at a person's masking of herself as a good indicator of the criminal mind.⁷¹

⁶⁷ BLACKSTONE, 4 COMMENTARIES, *supra* note 24, at *232.

⁶⁸ George Fletcher and Lloyd Weinreb have debated Fletcher's reading that Blackstone meant something different from the modern understanding of mens rea. See GEORGE P. FLETCHER, RETHINKING CRIMINAL LAW 115–18 (1978) [hereinafter FLETCHER, RETHINKING CRIMINAL LAW] (arguing that common law "up to the time of Blackstone reflected what we may call the pattern of manifest criminality"); Lloyd L. Weinreb, *Manifest Criminality, Criminal Intent, and the "Metamorphosis" of Larceny*, 90 YALE L.J. 294, 294–95 (1980) (rejecting Fletcher's claim that law of larceny "underwent 'metamorphosis' at the end of the eighteenth century from the pattern of manifest criminality to the pattern of subjective criminality"); George P. Fletcher, *Manifest Criminality, Criminal Intent, and the Metamorphosis of Lloyd Weinreb*, 90 YALE L.J. 319, 319 (1980) [hereinafter Fletcher, *Manifest Criminality*] (replying).

⁶⁹ See 3 LAFAVE, *supra* note 51, § 19.1(a), at 57–59 (noting that common law crime of larceny began narrowly, then was broadened through interpretation in response to growth of manufacturing and expansion of trade and business).

⁷⁰ See WAYNE R. LAFAVE, CRIMINAL LAW § 19.1(a), at 919–22 (4th ed. 2003) (describing development of larceny law).

⁷¹ This Article describes something different from George Fletcher's "pattern of manifest criminality." Fletcher argues that the early conception of common law larceny included a threshold requirement of an act objectively manifesting criminality (such as the breaking apart of a bail of goods entrusted to the defendant for delivery in whole), without which there could be no subjective consideration of culpability. See FLETCHER, RETHINKING CRIMINAL LAW, *supra* note 68, at 115–18. But see Weinreb, *supra* note 68, at 294 (disputing Fletcher). Fletcher further contends that traces of this requirement of "manifest criminality" remain in criminal law. See Fletcher, *Manifest Criminality*, *supra*

Lord Coke exhibited this same feature of the criminal law in his account of *Twyne's Case*, the fraudulent conveyance case in which he described the imperative for open-textured fraud law. In that case, Twyne agreed with Pearce that Pearce could convey all of his possessions to Twyne in satisfaction of a debt to Twyne, at a time when Pearce was indebted to a third party. Twyne then allowed Pearce to continue to exercise control over the possessions. In discussing Twyne's behavior, Coke warned, "[T]herefore, reader, when any gift shall be to you in satisfaction of a debt, by one who is indebted to others also; 1st, Let it be made in a public manner, and before the neighbours, and not in private, for *secrecy is a mark of fraud*."⁷² Coke then described several more of what have become known to debtor-creditor law, as a blackletter matter, as the "badges of fraud." Rooted in Coke's seventeenth-century analysis, doctrine now holds, to the point of codification, that "badges" establish a debtor's fraud.⁷³

What seems to have been missed is that Coke's badges have had a life in the criminal law, and that their staying power has been almost as strong as in the law of fraudulent conveyances. Let us return to our case of the commodities broker who traded ahead of his client's order. One way to address the tension between legality-related values and policing imperatives in the broker's case is to ask whether the novel behavior of the broker was so socially harmful, or so against pre-

note 68, at 340–42. This Article argues that, in close cases of innovative market crime, we tend to find subjective culpability by requiring that it be manifest in an outward display of furtiveness. It would seem formalistic to take the additional steps of saying that the manifest display stands apart from subjective intent and that, without it, we do not consider subjective culpability. The question is, and always will be, culpability. Of course, there can be no route to culpability other than through a person's conduct.

⁷² *Twyne's Case*, (1601) 3 Co. Rep. 80b, 81a, 76 Eng. Rep. 809, 814 (K.B.) (emphasis added).

⁷³ In the law of fraudulent conveyances, "[i]n determining actual intent . . . consideration may be given, among other factors, to whether": the transfer was to an insider; the debtor retained possession or control; the transfer was "disclosed or concealed"; the debtor had been sued; the transfer included substantially all of the debtor's assets; the debtor absconded; the debtor "removed or concealed assets"; the consideration was reasonably equivalent to value; the debtor became insolvent shortly after the transfer; the transfer was made shortly before or after the debt was incurred; and the debtor transferred the assets of a business to a lienor, who then transferred them to an insider of the business. UNIF. FRAUDULENT TRANSFER ACT § 4(b), 7A U.L.A. 639 (1984); see *Twyne's Case*, (1601) 3 Co. Rep. at 81a–82a, 76 Eng. Rep. at 814–15 (describing factors relevant to determination of whether conveyance is fraudulent). The statute in *Twyne's Case* forbade "fraudulent feoffments, giftes, grants, . . . suits, judgments and executions, as well of Lands and tenements as of goods and chattels . . . devised and contrived of malice, fraud, covin, collusion or guile, to the end, purpose and intent, to delay, hinder or defraud creditors and others of their just and lawful actions." Act Against Fraudulent Deeds, Alienations, &c., 1570, 13 Eliz., c. 5, quoted in Ross, *supra* note 1, at 2. It included a penal provision that could result in forfeiture of some of the property to the crown and imprisonment for up to half a year. Ross, *supra* note 1, at 30.

vailing norms for how brokers ought to behave, that the conduct should have drawn a criminal response. The court began with such an analysis, concluding that “trading ahead serves no social function at all.”⁷⁴ This *ex post* method of norm articulation is one available response to the problem of novel market crime, though it clashes with legality-related values.

Another way to address the case is to ask whether the broker was venal about what he did. Did he know, at the time of his trade, that he was doing something that others would judge as wrong? In other words, was he conscious of his own wrongdoing? Posing this question would not necessarily mean giving him a mistake of law defense. Instead of asking whether he knew (in reality, could *predict*) that federal fraud law would cover his conduct, we might ask whether he knew subjectively that his conduct would be viewed by others as *objectively* wrongful. This is not the same—not as stringent a *mens rea* requirement—as proving his knowledge of an applicable legal prohibition.⁷⁵

As it turns out, the Seventh Circuit did not decide the case involving the broker through its analysis of the lack of utility in insider trading among commodities brokers. The court instead focused on the facts that the broker sent misleading signals to the market by trading, against normal practice, without margin (i.e., with his own money at risk); that he used a special trading account with an intentionally oblique name; and that his accomplice ordered deletion of the records of the special account from the brokerage house’s computers.⁷⁶ The court turned aside worries about where “the outer bounds of mail and wire fraud” might lie with the assertion that “defendants’ elaborate efforts at concealment provide powerful evidence of their own *consciousness of wrongdoing*, making it unnecessary for us to decide whether the same conduct, done without active efforts at concealment, would have been criminal.”⁷⁷

Consider a few more examples of how courts have applied this method. The Seventh Circuit again deployed the “badges” analysis in affirming the federal fraud conviction of a judge who took loans from lawyers who litigated before him. The court reasoned that “elaborate efforts at concealment” like the ones the judge made are “powerful

⁷⁴ *United States v. Dial*, 757 F.2d 163, 166 (7th Cir. 1985).

⁷⁵ Even a requirement of knowledge of legal prohibition can mean different things. It might mean general knowledge that one’s conduct, or at least some important aspect of it, is by some legal measure unlawful. Or it might mean specific knowledge of just that legal instrument being used to prosecute a person.

⁷⁶ *Dial*, 757 F.2d at 169.

⁷⁷ *Id.* at 170 (emphasis added) (citation omitted).

evidence that a defendant's conduct violates an ethical standard well known to him and the whole community, and not just something thought up after the fact by a perhaps overly sensitive federal judge."⁷⁸ In a leading case on the criminality of stock manipulation (trading in securities solely to create appearances that will move their price) the Second Circuit reversed a conviction because the defendant had "conspicuously purchased the shares . . . in the open market" and it could find "[n]one of the traditional badges of manipulation," such as matched orders, wash sales, or fictitious accounts.⁷⁹ Stock manipulation presents a clear problem of the tension between legality-related values and the need for adaptive legal prohibitions. Only a trader's sole intent to manipulate price distinguishes the criminal block trade from the welcome one.⁸⁰

Badges of guilt play a particularly important role in fraud cases that turn on nondisclosure by fiduciaries, which tend to be among the most contestable cases of criminal fraud. An inquiry relying on badges of guilt is concerned with an actor's outward behavior that manifests consciousness of wrongdoing. Concealment, which implies affirmative efforts, is more telling than a simple omission to disclose something, which standing alone might say little about fault. Not all nondisclosure is fraudulent. Markets do not expect or require complete transparency. Duties to disclose turn on context, expectations,

⁷⁸ *United States v. Holzer*, 816 F.2d 304, 309 (7th Cir. 1987), *vacated and remanded on other grounds*, 484 U.S. 807 (1987).

⁷⁹ *United States v. Mulheren*, 938 F.2d 364, 369–72 (2d Cir. 1991); *see also* *United States v. McNeive*, 536 F.2d 1245, 1251–52 (8th Cir. 1976) (reversing fraud conviction of plumbing inspector for taking gratuities in large part because no evidence was presented that defendant "materially misrepresented any facts in order to assure continuation of the gratuities scheme or that he actively concealed his scheme").

⁸⁰ *See* *United States v. Larrabee*, 240 F.3d 18, 23–24 (1st Cir. 2001) (finding that efforts of misappropriator and accomplice who traded on misappropriated information to "conceal their relationship and the purchases made by [the accomplice]" were significant in establishing that defendants possessed material nonpublic information in case of insider trading). Even some widely criticized decisions might look different in this light. For example, *United States v. Bronston*, 658 F.2d 920 (2d Cir. 1981), a case sometimes described as making the mere nondisclosure of a conflict of interest a federal crime, *see* *Coffee, Tort/Crime*, *supra* note 15, at 203–04, involved a lawyer who failed to heed warnings about the wrongfulness of his behavior and appeared to take steps to conceal his conduct. Attorney Bronston persisted in representing a client who was competing for a large municipal contract with a client of Bronston's firm despite being told explicitly by his partners that the representation posed a clear conflict and that he should bill no time to the matter. *Bronston*, 658 F.2d at 923–24. Not only did Bronston spend many hours working to help his own client win the contract, he kept track of his time and arranged to be paid for it in the form of a check made out to him instead of to the firm. *Id.* at 922–24, 926. The court described the case as one in which the defendant, for compensation, "*secretly continu[ed] his relationship*" with another client's direct competitor. *Id.* at 924 (emphasis added).

and custom. Not surprisingly, decisions in cases of fraud by fiduciaries often exhibit close attention to this distinction.⁸¹ Faced with an allegation of fraudulent nondisclosure by a fiduciary, courts often point to the fiduciary's affirmative efforts to conceal material information (or, at a minimum, failure to disclose under circumstances in which the fiduciary obviously considered the obligation to disclose) as critical to a finding that the fiduciary was criminally culpable.⁸²

By appearances, the search for badges of guilt continues to drive how many decisionmakers select novel cases for criminal enforcement. The prosecutor's quasi-adjudicative function is especially pronounced in the field of novel white-collar crime because the prosecutor has so much control over not only *who* is selected for pros-

⁸¹ In one prominent example, the Tenth Circuit reversed the pretrial dismissal of an indictment of promoters of the 2002 Salt Lake City Olympic Games for making tuition, travel, and other payments to members of the International Olympic Committee, in part on the ground that defendants' "concerted efforts to conceal their conduct" made "remote" the possibility that defendants did not have clear warning that their conduct could be criminal. *United States v. Welch*, 327 F.3d 1081, 1100 (10th Cir. 2003). The defendants were acquitted at trial, possibly because their payments had not been kept secret. See Barry Tarlow, *RICO Report: Let the Games Begin*, CHAMPION, Sept.-Oct. 2004, at 52-53, 58, 60 (2004). Other circuit courts have similarly concentrated on actors' efforts to conceal. See, e.g., *United States v. Pennington*, 168 F.3d 1060, 1065 (8th Cir. 1999) (finding that president of grocery chain had violated "honest services" mail fraud statute because he not only failed to disclose payments shared with supply-contracts consultant to grocery chain but also concealed them by having them paid to corporation established solely for purpose of receiving payments); *United States v. Bryan*, 58 F.3d 933, 942-43 (4th Cir. 1995) (holding that meaning of "honest services" mail fraud statute was clear enough that defendant should have known it would apply to his conduct and "it appear[ed] from the extensive measures he undertook to disguise his behind-the-scenes scheming that he in fact did believe in the illegality of that conduct"); *United States v. Phillips*, 600 F.2d 535, 540 (5th Cir. 1979) (finding that government failed to prove fraudulent intent in light of lack of evidence that defendant's "behavior had been so devious, and so uncharacteristic of an innocent person, that [defendant] must have known he was doing wrong").

⁸² See, e.g., *United States v. Autuori*, 212 F.3d 105, 116-17 (2d Cir. 2000) (finding that critical fact inculpatory accountant in scheme to market debt in overvalued enterprise was accountant's continued assurances to victims about health of enterprise after he must have known that letters meant to disclose problems in enterprise intentionally were not mailed to victims); *United States v. Colton*, 231 F.3d 890, 899-901 (4th Cir. 2000) (distinguishing concealment, "characterized by deceptive acts or contrivances intended to hide information, mislead, avoid suspicion, or prevent further inquiry into a material matter," from nondisclosure, "characterized by mere silence," and finding that fiduciaries committed bank fraud because they were "actively seeking ways to hide, mask, or divert attention away" from undisclosed material fact); *United States v. Bush*, 522 F.2d 641, 648 (7th Cir. 1975) (finding public servant's nondisclosure criminally fraudulent because of his "material misrepresentations" and "active concealment" of his breach of fiduciary duty); see also LAW COMM'N, *supra* note 65, at 23 (contrasting one English decision, where court found directors of company had not committed fraud by failing to disclose secret profits in breach of fiduciary duties, with another decision, where company director was found to have committed fraud because he took affirmative steps to conceal secret profits).

ecution but also *what conduct* is treated as criminal.⁸³ Needing a metric for selecting cases—and for arguing with defense counsel and to judges and jurors about whether the right cases have been selected—prosecutors tend to focus on badges of guilt.⁸⁴

Consider several recent examples. New York's Attorney General chose only a few cases for criminal prosecution out of his inquiry into widespread "late trading" and "market timing" practices in the mutual fund industry. Late trading involves mutual fund managers arranging for favored clients to circumvent normal procedures for when transactions are priced, in order to have the option of profiting at the expense of other fund investors from changes in price that, in large transactions, can change outcomes by millions of dollars. One fund manager criminally charged for late trading permitted clients to watch how prices moved after the daily 4 p.m. deadline for submitting orders and then decide whether to make a trade that would be deemed submitted before 4 p.m. This was contrary to the procedure requiring that trades submitted after 4 p.m. be valued at the following day's price. The

⁸³ See Gerard E. Lynch, *The Role of the Criminal Law in Policing Corporate Misconduct*, 60 LAW & CONTEMP. PROBS. 23, 24–25, 58–60 (1997) (describing lawyers in white-collar cases as commonly speaking in terms of largely unexpressed paradigm of what kinds of cases "should" be treated as criminal, creating de facto system of substantive criminal law). Prior to the passage of the Federal Sentencing Guidelines, judges also had opportunities to create de facto substantive law in white-collar criminal cases. See WHEELER ET AL., *supra* note 49, at ix, 19–22 (noting that before sentencing guidelines, federal judges applied "common law of sentencing" in white-collar cases, thereby assessing cases according to harm caused and moral culpability of defendant).

⁸⁴ In a recent trial of two former executives of the Tyco Corporation for looting the company, mostly through abuses of executive loan programs, jurors reported that they disagreed about what type of intent the defendants had. Some thought there was sufficient intent, noting how the defendants tried to conceal their actions. Others disagreed, pointing to the ostentatiousness of the defendants' use of company funds as *exculpatory*. See Jonathan D. Glater, *Tyco Case Puts New Focus on Issues of Criminal Intent*, N.Y. TIMES, Apr. 8, 2004, at C1 (using example of Tyco case to discuss difficulties of proving criminal intent in corporate malfeasance cases). Defendants were convicted at retrial. Andrew Ross Sorkin, *Ex-Chief and Aide Guilty of Looting Millions at Tyco*, N.Y. TIMES, June 18, 2005, at A1. Contemporary enforcers are acting consistently with their predecessors of twenty years earlier. Michael Milken's and Ivan Boesky's "stock parking," an activity of at least contestable criminality at the time, see DANIEL R. FISCHER, *PAYBACK: THE CONSPIRACY TO DESTROY MICHAEL MILKEN AND HIS FINANCIAL REVOLUTION* 70–82 (1995), was punished at least in part because Milken and Boesky disguised payments for their stock warehousing arrangements as "consulting fees" and because Boesky had a ledger destroyed that reflected their agreements. See CONNIE BRUCK, *THE PREDATOR'S BALL* 320–21 (1989) (describing \$5.3 million payment characterized as "consulting and advising fees" as "centerpiece" of case alleging illegal stock parking arrangement); JAMIE S. GORELICK ET AL., *DESTRUCTION OF EVIDENCE* § 9.4, at 429–30 (1989 & Supp. 2007) (listing other instances of prosecutions in which document destruction played major role); Stanton Wheeler, *Adversarial Biography: Reflections on the Sentencing of Michael Milken*, 3 FED. SENT'G REP. 167, 170 (1990) (discussing judge's emphasis on Milken's attempts to avoid detection).

manager wrote a memo explaining how he would disguise the clients' trades as those of retirement plans or third-party administrators in order "to reduce the chance that they would appear to be timing a specific mutual fund."⁸⁵

Likewise, the Department of Justice's recent indictment of tax planners associated with the KPMG audit and consulting firm addresses a somewhat novel question: Can tax shelters—accepted as a potentially *legitimate* form of loopholing—be so abusive as to constitute criminal fraud?⁸⁶ The government appears to have identified the KPMG case as crossing a line into criminality because the defendants displayed a consciousness of wrongdoing that, we can expect the government will argue, belies any assertion that the defendants believed they were creatively but permissibly engineering around the tax code. The indictment alleges that one defendant told others not to permit clients to retain copies of a KPMG presentation because the document, by revealing the true purpose of the transaction, would destroy any chance that the client could persuade the IRS that tax treatment of the transaction should not be invalidated under the "step transaction" doctrine; that internal discussions demonstrated defendants thought their tax treatment of shelter structures was likely to fail in any litigation with the IRS but they took contrary, optimistic positions in opinion letters to clients; and that the defendants chose not to register their shelters with the IRS for fear that the shelters would not survive scrutiny.⁸⁷

⁸⁵ Press Release, Office of N.Y. State Att'y Gen. Eliot Spitzer, *supra* note 57; see also Felony Complaint, *supra* note 57, at 4 (detailing how late-trading activity was disguised). To date, the only manager charged in connection with "market timing" is charged with evidence tampering for instructing an employee to delete e-mails after being informed of a subpoena. See Felony Complaint at 1–3, *People v. Connelly*, Sup. Ct. No. 05648-2003 (N.Y. Sup. Ct. Dec. 17, 2003), available at http://www.oag.state.ny.us/press/2003/oct/connelly_complaint.pdf (narrating Connelly's alleged order to destroy e-mails). For an explanation of how "late trading" in a mutual fund benefits arbitrageurs at the expense of longterm investors, see Complaint at 16–18, *New York v. Canary Capital Partners LLC*, Index No. 402830-2003 (N.Y. Sup. Ct. Sept. 3, 2003), available at http://www.oag.state.ny.us/press/2003/sep/canary_complaint.pdf, which details the relationship between Bank of America and Canary LLC that allowed both parties to profit through after-hours trading to the detriment of longterm investors.

⁸⁶ Whether tax-related activities are so normatively distinct that they do not belong at all in analysis of the problem of novel fraud is a valid question that would require separate and careful treatment. See *Helvering v. Gregory*, 69 F.2d 809, 810 (2d Cir. 1934) (L. Hand, J.) ("Any one may so arrange his affairs that his taxes shall be as low as possible; he is not bound to choose that pattern which will best pay the Treasury; there is not even a patriotic duty to increase one's taxes."); see generally David M. Schizer, *Sticks and Snakes: Derivatives and Curtailing Aggressive Tax Planning*, 73 S. CAL. L. REV. 1339 (2000) (demonstrating ubiquitousness of taxpayer exploitation of non-open-textured tax laws).

⁸⁷ See Superseding Indictment at 9–10, 14–24, *United States v. Stein*, No. S1 05 Cr. 888 (LAK) (S.D.N.Y. Oct. 17, 2005), available at <http://www.usdoj.gov/usao/nys/Press%20>

Next, consider the recent fraud indictment charging a plaintiffs' class action law firm, two of its partners, and a retired lawyer who served as the named plaintiff in numerous large securities lawsuits filed by the firm with circumventing prohibitions against class action named plaintiffs sharing in attorney's fees. The government alleges that the defendant firm funneled kickback payments to named plaintiffs by, among other things, disguising them as referral fees and routing them through intermediary law firms.⁸⁸ The case has not been tried, but the government has made clear that it will rely on a memorandum written by someone at the intermediary law firm stating that the practice of crediting the monies from the defendant firm to cover the defendant's legal services "just smells bad . . . and probably would to an investigator"; that the defendant requested that the intermediary firm account for the funds as income to the firm, not funds held in trust for the defendant; that the defendant "apparently does not want to document the relationship so as to avoid confirming the 'matching' of fees received by [the intermediary firm] and the services provided to [the defendant]"; and that the class action lawyers made some of the payments in cash that would be difficult to trace, including cash obtained through casinos.⁸⁹

Finally, what about the latest of controversies involving corporate conduct: apparently widespread practices of altering the grant dates (including by "backdating" them) on stock options provided as compensation to employees in order to capture low points in a stock's price history and thus increase profits for the employee upon exercise

Releases/October%2005/TaxShelterFraudSupersedingSteinetal.pdf. The KPMG prosecution is sufficiently complex and theoretically challenging that adequate evaluation of the case would require a separate article. See, e.g., Calvin H. Johnson, *Tales from the KPMG Skunk Works: The Basis-Shift or Defective-Redemption Shelter*, TAX NOTES, July 25, 2005, at 431 (condemning one shelter, and KPMG's role in it, on merits); Robert Weisberg & David Mills, *A Very Strange Indictment*, WALL ST. J., Oct. 12, 2005, at A16 (criticizing indictment).

⁸⁸ See First Superseding Indictment at 10–24, *United States v. Milberg Weiss Bershad & Schulman LLP*, No. CR 05-587(A) (C.D. Cal. May 18, 2006) <http://fl1.findlaw.com/news.findlaw.com/hdocs/docs/clssactns/usmlbrg51806ind.pdf>. The allegations include that the lawyers and named plaintiffs defrauded class members of both their right to the honest services of the named plaintiffs and their rightful share of recoveries. *Id.* at 12–14.

⁸⁹ *Id.* at 30–31; Justin Scheck, *Lazar Fee Deal 'Smells Bad,' Firm Said in '94 Memo*, RECORDER (S.F.), Jan. 3, 2006, at 1. Consider also the recent fraud indictment of an international newspaper mogul for arranging to have large noncompetition payments to himself included in deals in which the public company he led and controlled sold off media assets. See Indictment at 9–21, *United States v. Black*, No. 05 CR 727 (N.D. Ill. Nov. 17, 2005), available at http://www.usdoj.gov/usao/iln/indict/2005/us_v_black2.pdf. The indictment alleges that the defendant concealed material facts from the company's audit committee about these payments and lied about other facts. *Id.* at 49. It should be expected that the question of criminal culpability for the executive's receipt of personal payments not to compete may turn on the presence or absence of strong badges of guilt.

of the options? It is too early to see how the options affair will play out in terms of the law of criminal fraud. But it is interesting that the practice seems to have been surprisingly widespread across companies and industries, raising the question of how the legal system will respond without criminalizing possibly dozens of actors and hundreds of perhaps routine transactions. To date, the only criminal cases involve clear badges of guilt;⁹⁰ some have speculated that, as the matter unfolds, only cases with similar markers will be treated criminally.⁹¹

My purpose is not to engage deeply with the merits of these cases. I only wish to demonstrate that there is a striking tendency among courts and prosecutors to resolve doubt about whether criminal punishment of a particular course of economic conduct would be just by resting culpability analysis on a telling fact or two that involve something the defendant did to display that he knew that others would condemn what he was doing as objectively wrong.

B. *White-Collar Crime in the Supreme Court*

Despite the prominence of badges of guilt in judicial opinions and in contemporary legal practice, the phenomenon has escaped scrutiny in the literature. This omission might be due in part to commentators' focus on the Supreme Court, which has not yet carefully explored the problem of innovative market crime.⁹²

In a 1943 case deciding the meaning of the "willfulness" element that transformed tax evasion from a misdemeanor into a felony, the Court flirted with careful exploration of culpability in white-collar crime.⁹³ The Court stated that:

⁹⁰ Affidavit in Support of Arrest Warrants at 24–25, *United States v. Alexander*, No. M-06-817 (E.D.N.Y. July 31, 2006), available at <http://online.wsj.com/public/resources/documents/20060809-ConverseSignedComplaintAlexander.pdf> (containing allegations including presentation of fictitious persons to compensation committee of board of directors for approval of options grants); Charles Forelle et al., *Brocade Ex-CEO, 2 Others Charged in Options Probe; Authorities Signal Hard Line as Backdating Investigations Extend to Over 80 Companies*, WALL ST. J., July 21, 2006, at A1 (describing allegations including preparation of fictitious minutes of meetings of compensation committee of board of directors).

⁹¹ Julie Creswell, *Investigations Are Sifting Good, Bad, and Only Ugly*, N.Y. TIMES, July 25, 2006, at C1.

⁹² Henry Hart famously observed, "Despite the unmistakable indications that the Constitution means something definite and something serious when it speaks of 'crime,' the Supreme Court of the United States has hardly got to first base in working out what that something is." Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401, 431 (1958).

⁹³ *Spies v. United States*, 317 U.S. 492 (1943).

["Willfulness" means] some element of evil motive and want of justification . . . inferred from conduct such as keeping a double set of books, making false entries or alterations, or false invoices or documents, destruction of books or records, concealment of assets or covering up of sources of income, handling of one's affairs to avoid making the records usual in transactions of the kind, and any conduct, the likely effect of which would be to mislead or conceal.⁹⁴

In spite of this acknowledgment that concealment evidences a heightened *mens rea* like "evil motive," the badges of guilt concept has not achieved prominence in the Court's decisions. The Court eventually defined tax-evasion willfulness as the "intentional violation of a known legal duty," meaning that mistake of law would be a defense in such cases.⁹⁵ Later, the Court added that even an objectively unreasonable mistake about the tax laws could defeat an evasion charge.⁹⁶

In other recent decisions about criminal culpability requirements, the Court has said that an unlicensed gun dealer who had to be shown to have acted "willfully" could be convicted as long as he "acted with knowledge that his conduct was unlawful," even if he did not know that he was required to have a federal license;⁹⁷ but a gambler who broke up a \$100,000 banking transaction into a series of transactions of less than \$10,000 each, so as to circumvent a federal reporting law, had a valid defense in not knowing about the specific federal rule that prohibited his circumvention tactic.⁹⁸ What clinched the case against the gun dealer was that the Court thought he looked like a criminal: He used straw purchasers to buy guns in Ohio and transport them for sale on the streets of Brooklyn.⁹⁹ The gambler trying to hide his cash, by contrast, was engaged in conduct "not inevitably nefarious."¹⁰⁰

⁹⁴ *Id.* at 498–99.

⁹⁵ *See* *United States v. Pomponio*, 429 U.S. 10, 12 (1976) (*per curiam*) (quoting *United States v. Bishop*, 412 U.S. 346, 360 (1973)).

⁹⁶ *Cheek v. United States*, 498 U.S. 192, 201–03 (1991).

⁹⁷ *Bryan v. United States*, 524 U.S. 184, 192 (1998).

⁹⁸ *Ratzlaf v. United States*, 510 U.S. 135, 138 (1994).

⁹⁹ *Bryan*, 524 U.S. at 189.

¹⁰⁰ *Ratzlaf*, 510 U.S. at 144. Lower courts predictably have fractured federal criminal law into an inconsistent body of *mens rea* rules. For example, in some circuits "willfully" in the federal false statements statute, 18 U.S.C. § 1001 (2000), means a "specific intent" to deceive a federal official, *see, e.g.*, *United States v. Shah*, 44 F.3d 285, 289 (5th Cir. 1995), but in others the statute only requires "the knowing and willful making of a false statement," *see* *United States v. Ranum*, 96 F.3d 1020, 1029 (7th Cir. 1996) (deciding § 1097(a) case but strongly suggesting court would interpret that statute and § 1001 together). Securities fraud is criminal only if committed "willfully," 15 U.S.C. § 78ff(a) (Supp. III 2003), but courts have said that means only "the intentional doing of the wrongful acts," because acts involved in securities fraud "do not involve conduct that is innocently undertaken," *United States v. O'Hagan*, 139 F.3d 641, 647 (8th Cir. 1998). According to one study, the Supreme

One scholar has distilled from the Court's cases a rule of mandatory "moral culpability" in criminal statutory interpretation. Under this rule, if the Court finds that a "morally blameless" person could violate the statute, it will create "an additional and minimally sufficient element," usually a requirement of proof of knowledge of the applicable law, in order to shield the "blameless."¹⁰¹ Another reading suggests that courts will be apt to (and *should*) declare that the mistake of law defense is generally available for "especially broad regulatory offenses," a category described as including mail fraud cases involving conduct "well shy of traditional common law fraud."¹⁰² This formulation would dictate a "functional" requirement of notice, under which courts would consider "whether the defendant knew that his behavior was, in some more general sense, out of line," and judges would make "open-ended, ungrounded value judgments: this behavior merits punishment; that behavior doesn't, for no better reason than because I think so (and because I think and hope most of the local population will agree)."¹⁰³

Court's handling of the term "willfully" is "grounded on doubtful, unchallenged logic and has bequeathed a legacy of grave interpretive confusion" that looms over as many as one hundred sixty federal criminal statutes that use such terms. Sharon L. Davies, *The Jurisprudence of Willfulness: An Evolving Theory of Excusable Ignorance*, 48 DUKE L.J. 341, 346-48 (1998); see also *Spies v. United States*, 317 U.S. 492, 497 (1943) ("[W]illful, as we have said, is a word of many meanings.").

¹⁰¹ Wiley, *supra* note 17, at 1023; see also Kennedy, *supra* note 17, at 754-64 (providing similar analysis of Court's behavior and finding that Court looks to severity of penalty to determine how stringent to make statute's mens rea requirements).

¹⁰² See William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 67 (1997). But see *id.* at 73-74 (noting that "heightened mens rea requirements for overbroad crimes beg the question of which crimes are overbroad," which calls for normative decision).

¹⁰³ See Stuntz, *supra* note 15, at 590-93; see also Jeffries, *supra* note 20, at 220-31 (stating that courts should ask, "Would an ordinarily law-abiding person in the actor's situation have had reason to behave differently?" and suggesting that "[t]he real source of notice is not the arcane pronouncements of the law reports but the customs of society and the sensibilities of the people"). A stronger form of this argument holds that ambiguity in criminal prohibitions is welcome because it chills the devious from engineering around the law and encourages everyone to be a "good person." See Kahan, *supra* note 5, at 400-02 (concluding that if conduct is clearly socially undesirable, then insistence on requirement of notice "is insensitive to differences in social context that are decisive to the moral assessment of an individual's entitlement to rely on what she understands the law to be"). The rule ought to require, it therefore follows, fair notice in "boundary" criminal offenses but not in ones involving conduct in the "interior" of criminality. See *id.* at 412-14; cf. Kahan, *supra* note 16, at 129-39 (arguing that mistake of law defense is available for *malum prohibitum* crimes because such crimes "wouldn't be viewed as immoral were it not for the existence of a legal duty"). Judges can be relied on to decide ex post the difference between virtuous people unfairly caught up in the machinery of justice and morally bad people who had no desire to steer clear of violating the law—in other words, to "interpret society's morality in the course of interpreting its criminal statutes." Kahan, *supra* note 16, at 153; see also Kahan, *supra* note 5, at 415-16 (arguing that courts can distinguish between

This kind of thesis is a natural response to the Supreme Court's recent line of cases about mens rea. The Court has been deciding whether to require proof of knowledge of the law by determining, by itself and ex post, prevailing mores.¹⁰⁴ However, as I have discussed, this essentially retroactive process of lawmaking is not an attractive methodology for determining criminal fault, at least not in serious fraud cases. By and large, the Court has limited its culpability approach to less serious offenses (currency transaction reporting rules, particularities of taxpayers' obligations, gun registration rules, and so on). It would be a mistake to transpose the Court's treatment of the boundaries between "regulatory" and "serious" prohibitions to the problem of reconciling legality-related values with the need for broad, open-textured law to handle novel frauds.

The Court may be recognizing the limitations of its existing mens rea cases in addressing the problem of novel white-collar crime. The recent decision in *Arthur Andersen LLP v. United States*¹⁰⁵ involved a public auditor that instructed employees to destroy documents on the eve of receiving an SEC subpoena. A unanimous Supreme Court decided that a jury instruction stating that the defendant could be held criminally liable for destroying evidence with a purpose of impeding an SEC investigation did not say enough about culpability.¹⁰⁶ The Court expressed concern over ambiguity about the wrongfulness in a regulated actor's destruction of evidence to avoid its production in response to a future subpoena.¹⁰⁷ Based on the Court's recent decisions, one might have thought that the Court therefore would hold that the government was required to prove that the defendant had knowledge of a prohibition against such anticipatory document

individuals who engage in socially desirable conduct and those who deliberately engage in undesirable conduct while protecting rights of persons in former class).

¹⁰⁴ See Wiley, *supra* note 17; cf. Coffee, *Tort/Crime*, *supra* note 15, at 198 (describing federal white-collar crime as "judge-made to an unprecedented degree, with courts deciding on a case-by-case, retrospective basis whether conduct falls within often vaguely defined legislative prohibitions").

¹⁰⁵ 544 U.S. 696 (2005).

¹⁰⁶ The statute prohibited "corruptly persuad[ing] another person . . . to . . . destroy . . . an object with intent to impair the object's integrity or availability for use in an official proceeding." 18 U.S.C. § 1512(b) (2000). The trial court's instructions were consistent with then-prevailing federal authorities. See *United States v. Khatami*, 280 F.3d 907, 911–14 (9th Cir. 2002) (affirming § 1512(b) conviction arising out of noncoercive attempts to persuade witnesses to lie to investigators); *United States v. Shotts*, 145 F.3d 1289, 1301 (11th Cir. 1998) (finding that "corruptly persuade" requires no more than action "motivated by an improper purpose"); *United States v. Thompson*, 76 F.3d 442, 452 (2d Cir. 1996) (same). But see *United States v. Farrell*, 126 F.3d 484, 489–90 (3d Cir. 1997) (holding that "corruptly" requires greater showing of culpability than merely "improper purpose").

¹⁰⁷ See *Andersen*, 544 U.S. at 703–04 (noting that persuading another to withhold testimony or documents from government is "not inherently malign").

destruction. Instead, the Court somewhat cryptically held that only “persuaders conscious of their wrongdoing” violate the statute.¹⁰⁸ The Court declined to go further, stating, “The outer limits of this element need not be explored here because the jury instructions at issue simply failed to convey the requisite *consciousness of wrongdoing*.”¹⁰⁹ The Court was silent on the question of mistake of law, even though the defendant argued that the statute required proof of knowledge of illegality and the opinion below had addressed and rejected that contention.¹¹⁰

The Supreme Court’s attention in *Andersen* to consciousness of wrongdoing may be a departure from its own recent decisions, and *Andersen* was not a fraud case. But the decision is no innovation, and it bears rather directly on the problem of how the legal system manages open texture in antifraud law. *Andersen* may mark the point at which the Court has recognized that in cases of serious white-collar crime, resolving difficult questions of criminal culpability by engaging in retrospective judicial inquiry into prevailing social norms is neither

¹⁰⁸ *Id.* at 706. As the Court must have recognized, to hold that proof of knowledge of illegality was required would have upended the settled understanding that obstruction of justice is not the sort of crime that allows for a mistake of law defense. See, e.g., *Padilla v. Gonzales*, 397 F.3d 1017, 1020 (7th Cir. 2005) (holding that obstruction of justice “cannot fairly be characterized as *malum prohibitum*”).

¹⁰⁹ *Andersen*, 544 U.S. at 706 (emphasis added). Justice Frankfurter was similarly opaque when he used the term “consciousness of wrongdoing” in *Lambert v. California*, 355 U.S. 225, 231 (1957) (Frankfurter, J., dissenting). He wrote, “Considerations of hardship often lead courts, naturally enough, to attribute to a statute the requirement of a certain mental element—some consciousness of wrongdoing and knowledge of the law’s command—as a matter of statutory construction.” *Id.* *Andersen* was not retried, so we do not know whether a jury would have found “consciousness of wrongdoing” in that case. The facts included several badges of guilt. Partners instructed the firm’s employees to destroy documents not by telling them that they ought to accelerate destruction of Enron documents because such destruction was permissible until an SEC subpoena arrived, but by telling them to follow the firm’s document “retention” policy (which mostly talked about destruction). For example, a partner told employees that he was “not telling you to go shred a bunch of documents or anything, but you need to make sure you’re in compliance with the firm’s retention policy.” Trial Transcript at 1891–93, 3237, *Andersen*, No. 04-368, 544 U.S. 696 (on file with the *New York University Law Review*). Another partner confided to a manager that if he talked about “getting rid of documents . . . it would always be along the lines of being in compliance with the firm’s retention policy.” *Id.* at 3243; see also *id.* at 4087–92, 4952, 4965, 5035–36 (discussing various situations where individuals began destroying documents according to policy). Another partner told a group of employees at a training session that if a document were destroyed under the firm policy and litigation were filed “the next day,” that would be “great” because “whatever there was that might have been of interest to somebody . . . is gone and irretrievable” but “we’ve followed our own policy.” Gov’t Ex. 1010B at 4, *Andersen*, No. 04-368, 544 U.S. 696 (on file with the *New York University Law Review*).

¹¹⁰ See *United States v. Andersen*, 374 F.3d 281, 299 (5th Cir. 2004) (“[K]nowledge of one’s violation is not an element of § 1512(b)(2).”).

sufficiently illuminating nor sufficiently attentive to individual blameworthiness.

The Court turns out to have seen the more specific connection between consciousness of wrongdoing and *fraud* some time ago in the context of considering the constitutionality of punitive damages awards. In *BMW of North America, Inc. v. Gore*,¹¹¹ a jury awarded a plaintiff \$4 million in punitive damages because a manufacturer sold the plaintiff a new car without disclosing presale repairs to the car that cost less than three percent of the car's value.¹¹² The suit was controlled by Alabama statutes stating that "[s]uppression of a material fact which the party is under an obligation to communicate constitutes fraud"¹¹³ and authorizing punitive damages for "gross, oppressive or malicious" fraud.¹¹⁴ The Court found that the award of punitive damages violated the defendant's constitutional right to due process of law. The Court's chief rationale was that "[p]erhaps the most important indicium of the reasonableness of a punitive damages award," as measured against the constitutional requirement of adequate notice, is "the degree of reprehensibility of the defendant's conduct."¹¹⁵ In *BMW v. Gore*, the reprehensibility requirement was not satisfied largely because there was no evidence of "deliberate false statements, acts of affirmative misconduct, or concealment of evidence of improper motive."¹¹⁶ The crux of the decision in *BMW v. Gore*—consistent with a significant strand in the law of punitive damages—is that a defendant's lack of consciousness about the wrongfulness of its conduct means that an ordinary fraud is not blameworthy enough to be punished.¹¹⁷

¹¹¹ 517 U.S. 559 (1996).

¹¹² *Id.* at 562–63. Subsequent to the jury award, but prior to the Supreme Court taking the case, the Alabama Supreme Court reduced the award from \$4 million to \$2 million. *Id.* at 565, 567.

¹¹³ *Id.* at 563 n.3 (quoting Ala. Code § 6-5-102 (1993)).

¹¹⁴ *Id.* at 565 (quoting Ala. Code §§ 6-11-20, 6-11-21 (1993)).

¹¹⁵ *Id.* at 575.

¹¹⁶ *Id.* at 575–79.

¹¹⁷ See *State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S. 408, 431–36 (2003) (Ginsburg, J., dissenting) (arguing that majority overlooked substantial evidence of "reprehensibility," including falsification and destruction of records, employee's decision to quit in response to witnessing dishonest acts, instructions to pad files with self-serving documents, and efforts to prevent creation of damaging documents); *Green Oil Co. v. Hornsby*, 539 So. 2d 218, 223 (Ala. 1989) (including "the degree of the defendant's awareness of any hazard which his conduct has caused or is likely to cause, and any concealment or 'cover-up' of that hazard, and the existence and frequency of similar past conduct" as factors relevant to determining "reprehensibility" for punitive damages purposes (quoting *Aetna Life Ins. Co. v. Lavoie*, 505 So. 2d 1050, 1062 (Ala. 1987) (Houston, J., concurring specially))); *Young v. Goodyear Serv. Stores*, 137 S.E.2d 578, 582 (S.C. 1964) ("[C]onsciousness of wrongdoing . . . justifies the assessment of punitive damages against

C. A Comparative Note: English Law

One more piece of evidence will add weight to the descriptive claim that inquiry into an actor's consciousness of wrongdoing in novel fraud cases is an established and prevalent fault methodology that merits serious attention. English law, quite apart from any influence on (or from) modern American law, has developed a distinctive form of the consciousness-of-wrongdoing inquiry. In England, Blackstone's "felonious intent" and Coke's "mark of fraud" have evolved into a culpability measure called "dishonesty." Over half of all criminal prosecutions in England involve crimes requiring proof of the element of "dishonesty," including robbery, theft, fraud, and most burglaries.¹¹⁸ A typical modern statute is the following theft-by-deception offense: "A person who by any deception *dishonestly* obtains property belonging to another, with the intention of permanently depriving another of it, [shall be imprisoned]."¹¹⁹ The seminal case explaining "dishonesty" is *R v. Ghosh*,¹²⁰ which held:

In determining whether the prosecution has proved that the defendant was acting dishonestly, a jury must first of all decide whether according to the ordinary standards of reasonable and honest people what was done was dishonest. If it was not dishonest by those standards, that is the end of the matter and the prosecution fails. If it was dishonest by those standards, then the jury must consider whether the defendant himself must have realised that what he was doing was by those standards dishonest.¹²¹

The *Ghosh* court hastened to add that the dishonesty inquiry is all but superfluous in cases of obvious criminality, implying that the element's real work (and purpose) is in the difficult and novel cases.¹²²

the tort-feasor." (quoting *Rogers v. Florence Printing Co.*, 106 S.E.2d 258, 263 (S.C. 1958))).

¹¹⁸ See Edward Griew, *Dishonesty: Objections to Feely and Ghosh*, 1985 CRIM. L.R. 341, 341 (Eng.).

¹¹⁹ Theft Act, 1968, c. 60, § 15(1) (Eng.) (emphasis added).

¹²⁰ (1982) 2 All E.R. 689, 691 (A.C.).

¹²¹ *Id.* at 696. This holding is called "the *Ghosh* test," although the first, objective tier of the analysis of dishonesty comes from *R v. Feely*, (1973) 1 All E.R. 341, 345 (A.C.).

¹²² See *Ghosh*, (1982) 2 All E.R. at 696 ("In most cases, where the actions are obviously dishonest by ordinary standards, there will be no doubt about it. . . . It is dishonest for a defendant to act in a way which he knows ordinary people consider to be dishonest, even if he . . . genuinely believes that he is morally justified."). English law's "dishonesty" does not bear much resemblance to the contemporary plain meaning of the word in either its British or American variations. 4 OXFORD ENGLISH DICTIONARY 781 (2d ed. 1989) (defining "dishonest" as "[w]anting in honesty, probity, or integrity," and "dishonesty" as "disposition to deceive, defraud, or steal"); WEBSTER'S II: NEW COLLEGE DICTIONARY 332 (3d ed. 2005) (defining "dishonest" as "[t]ending to lie, cheat, or deceive," and "dishonesty" as "[l]ack of integrity"). Consider the English theft-by-deception statute, for example. The crime requires the taking of another's property by *deception*. Theft Act

"Dishonesty" is an element in numerous English criminal statutes and more than half of all prosecutions, and it is fundamental to the present English effort to reform the law of fraud. England's proposed new fraud law would make it a crime to *dishonestly* do any of three things: make a false representation, wrongfully fail to disclose information, or secretly abuse a position of trust.¹²³ The reformers concluded that the dishonesty test was "useful" and "necessary" to any fraud offense, but that it could not supply a sufficient definition of fraud on its own, without one of the three defined acts, because such an offense would potentially criminalize any "legitimate" activity that a jury chose to deem dishonest.¹²⁴

The English reformers acknowledge "dishonesty"'s departure from modern thinking about criminal law reform: "It is unusual for the fact-finders to be asked to decide whether they think the defendant's conduct or state of mind was sufficiently blameworthy for it to constitute a crime."¹²⁵ But, they say, "It may be that moral elements such as dishonesty can only be defined with reference to the fact-finders' judgment."¹²⁶ The reformers distinguish two functions of dishonesty. Under a "positive" function, they say, dishonesty *is* the crime and the factfinder's power threatens values about fair notice and controlling enforcement discretion. Functioning "negatively," however, dishonesty merely permits a claim, in rebuttal to an argument that a person's conduct was criminal on its face, that the person did not act with a culpable state of mind.¹²⁷ The reformers reject basing fraud law on a "positive" element of dishonesty, because of its threat to legality-related values, but embrace including a "negative" component of dishonesty in fraud law because "there is a need to ensure that those who most people would consider morally blameless are not found guilty."¹²⁸ As the reformers see it, factfinders set the

§ 15(1). Assuming proof of some form of knowledge or intent is required, what could a dishonesty requirement possibly add if "dishonest" means "deceitful"? As the *Ghosh* test makes clear, though, the legal term of dishonesty does much more work. The word functions as a placeholder, or trigger, for an inquiry into normative deviance and self-consciousness of wrongdoing.

¹²³ HOME OFFICE, *supra* note 60, at 8.

¹²⁴ *Id.* Compare LAW COMM'N, *supra* note 65, at 14 (noting that "dishonest agreement to make a gain at another's expense," standing alone, defines fraud too broadly, because "commercial life revolves around the pursuit of gain for oneself and, as a corollary, others may lose out [and] . . . [s]uch behavior is perfectly legitimate"), with *id.* at 40–42 (defending inclusion of dishonesty standard as necessary, but not sufficient, test for fraud because "there is a need to ensure that those who most people would consider morally blameless are not found guilty").

¹²⁵ LAW COMM'N, *supra* note 65, at 39.

¹²⁶ *Id.* at 40.

¹²⁷ *Id.* at 41.

¹²⁸ *Id.* at 42.

boundaries of the law only when dishonesty “is a positive requirement which draws the boundary between wrongful and legitimate conduct.”¹²⁹ When dishonesty is only a “negative” constraint, however, “because the conduct is *prima facie* wrongful, it becomes a question of intent: was the defendant aware that the conduct was wrongful?”¹³⁰

In English law, concern that innovative forms of property crime will challenge the legal system to accurately distinguish legitimate commercial behavior from unwanted, blameworthy conduct has led to an extra culpability requirement consisting, in essence, of violation of prevailing norms (the objective tier of *Ghosh*). This element is seen as essential in any criminal case, but as latent in most cases. Only where there might be controversy over locating the normative line does the legal system inquire into whether the defendant’s particular conduct crossed normative boundaries.¹³¹ At the same time, an amorphous idea like “prevailing norms” threatens legality-related values, especially in the hands of jurors.¹³² So another layer is added to the

¹²⁹ *Id.* at 49.

¹³⁰ *Id.* The English “dishonesty” element presents further problems of a practical nature, including English law’s silence about *how* the factfinder should determine whether a person realized her conduct was dishonest by the standards of reasonable and honest people. See Griew, *supra* note 118, at 342–53 (detailing seventeen criticisms of combined *Feely* and *Ghosh* tests); see also Andrew Halpin, *The Test for Dishonesty*, 1996 CRIM. L. REV. 283, 286–93 (noting problem with *Ghosh* test is that it assumes set of “ordinary standards of dishonesty,” but wholly subjective approach would make “protection by the criminal law of a person’s property depend on the moral outlook of the person seeking to interfere with it”); GLANVILLE WILLIAMS, *TEXTBOOK OF CRIMINAL LAW* 727–28 (2d ed. 1983), quoted in Terry Palfrey, *Is Fraud Dishonest?*, 64 J. CRIM. L. 518, 523 (2000) (“Subjectivism of this degree gives subjectivism a bad name. The subjective approach to criminal liability, properly understood, looks to the defendant’s intentions and to the facts as he believed them to be, not to his system of values.”).

¹³¹ Examples found in discussions of English law include an antiques dealer charged with fraud for calling on vulnerable elderly people and buying their valuable furniture at exceptionally low prices, see HOME OFFICE, *supra* note 60, at 10, and a bettor charged with theft for keeping extra money his bookie mistakenly paid him when settling their bets, see *R v. Gilks*, (1972) 3 All E.R. 280, 280 (A.C.). The former example is also delightfully described in a Roald Dahl short story. ROALD DAHL, *Parson’s Pleasure*, in *Kiss Kiss* 74 (1960).

¹³² Canadian fraud law, in contrast to the proposed English law, has followed this course in defining the concept of “dishonesty.” See *The Queen v. Olan*, [1978] 2 S.C.R. 1175, 1177 (Can.) (defining “other fraudulent means” in Canadian criminal fraud statute as not only falsehood and deceit but also “all other means which can properly be stigmatized as dishonest”); see also *R. v. Zlatic*, [1993] 2 S.C.R. 29, 45 (Can.) (describing dishonesty as what “the reasonable person [would] stigmatize . . . as dishonest” and as connoting “an underhanded design which has the effect, or which engenders the risk, of depriving others of what is theirs”); *R. v. Thérout*, [1993] 2 S.C.R. 5, 19 (Can.) (defining *mens rea* for fraud as merely “subjective awareness that one was undertaking a prohibited act (the deceit, falsehood or other dishonest act)”). Not surprisingly, this development has been sharply criticized as undermining values connected to the legality principle. See Kevin Davis & Julian Roy, *Fraud in the Canadian Courts: An Unwarranted Expansion of the Scope of the Crim-*

culpability standard—the defendant must have *known* she was violating prevailing norms (the subjective tier of *Ghosh*)—leading to even more searching inquiry into mens rea.¹³³ The *Ghosh* test is another way of phrasing the consciousness-of-wrongdoing inquiry that appears in American law when cases of economic crime get difficult.¹³⁴

* * *

Repeatedly the law and legal actors return to this inquiry—“Did she know that what she was doing was wrong?”—when confronting the difficult and ever-arising question of whether a novel behavior counts as a fraud.¹³⁵ The inquiry goes back hundreds of years; crosses jurisdictional boundaries; controls decisions of prosecutors, juries, and judges; and appears at all levels of the courts. It is too salient and important for theoretical inquiry to continue to overlook.

IV

EXPLANATIONS FOR CONSCIOUSNESS OF WRONGDOING

Why has the legal system so often relied on consciousness of wrongdoing to determine outcomes in cases of novel fraud? This substantial normative question has not been asked. Though my first effort will not achieve certainty, I hope to set terms for a discussion. In this Part, I will evaluate two candidate explanations for fraud law’s

inal Sanction, 30 CAN. BUS. L.J. 210, 224, 233–34 (1998) (arguing that subjective component of fraud statute fails to provide citizens with fair notice of behavior that might be criminal and enables arbitrary and discriminatory prosecution).

¹³³ Note that “dishonesty” cannot be equated with knowledge of illegality. See *R v. Clowes*, (1994) 2 All E.R. 316, 331 (A.C. 1993) (“[T]his court emphasise[s] the clear distinction between an accused’s knowledge of the law and his appreciation that he was doing something which, by the ordinary standards of reasonable and honest people, would be regarded as dishonest.”).

¹³⁴ The American system, despite the absence of an explicit element like “dishonesty,” has advanced further than the English by concentrating the culpability inquiry on the badges of guilt. English law, by placing the critical culpability inquiry with the jury, buries and thereby avoids harder questions about self-consciousness of wrongdoing, namely, *why* self-aware people are more blameworthy and what it means to have a legal standard that is determined largely on a person’s own perceptions of what the standard is (or should be). See *Ghosh*, (1982) 2 All E.R. 689, 691 (A.C.) (quoting trial judge as instructing jury that, “I cannot really expand on [dishonesty] too much, but probably it is something rather like getting something for nothing, sharp practice, manipulating systems and many other matters which come to your mind”).

¹³⁵ See *United States v. Dixon*, 536 F.2d 1388, 1395–1401 (2d Cir. 1976) (Friendly, J.) (finding that defendant “willfully” violated criminal prohibition in securities laws through failure to report loans because he knew of reporting rule (even if he erred about its content) and constructed “thimblereg” to avoid rule rather than acting “with the aim of scrupulously obeying”).

use of consciousness of wrongdoing, each of which has variations. The first, following consequentialist reasoning, accounts for the practice as a means of determining, in the name of efficiency, what commercial behaviors should be deterred with legal sanctions. The second, based in deontological reasoning connected to the retributive aims of the criminal law, holds that the practice follows a principle of moral fault: An actor's consciousness of wrongdoing makes the actor's pursuit of conduct which otherwise meets fraud's requirements sufficiently blameworthy to justify criminal punishment. My evaluation will favor the second explanation, with qualification.

A. Consciousness of Wrongdoing and Market Norms

1. Argument

A consequentialist account might maintain that, at least in cases that are novel to the legal system, the commercial actor's belief in wrongfulness is not just a component of mental state but is part of the conduct that constitutes fraud. The law identifies frauds from among the total set of sharp, innovative economic practices by looking to whether market actors, as represented by the defendant at bar, deem particular conduct to be outside the bounds of market norms. The presence of consciousness of wrongdoing, as evidenced by steps taken to disguise the actor's conduct (badges of guilt), establishes that the actor feared and sought to evade the adverse judgments of her market peers, including refusal to transact.

At a high level of generality, fraud might be described as a veiled departure from market norms that subverts, invisibly and therefore deceptively, the reasonable and customary expectations of an actor's counterparty. To determine what counts as fraud, the legal system must have a means of locating, in each case, the relevant baseline of market norms. If the behavior is novel to the legal system, the law lacks any description of the relevant norms. Prosecutors and trial judges, who can only process individual criminal cases, are short on empirical means for locating those norms. The defendant's consciousness of wrongdoing supplies a proxy for market norms that is accessible through the conventional processes of examining mental state in criminal adjudication.

This kind of program for fraud law could have deterrence and efficiency merits. The conduct that draws sanction is the very behavior that market norms, as revealed in the mental states of market participants, have deemed wrongful and undesirable. Moreover, deterring actors who conceal is efficient because it promotes transparency in markets. If transparency and fair play make for pro-

ductive, open, and inviting markets, then we would want to use a deterrent program to exclude people who disguise themselves in order to exploit others.¹³⁶ We might further suppose that when they are transparent, markets self-regulate. We also might think that actors who reflect on the wrongfulness of their actions but nonetheless choose to pursue them are good candidates for sanction either because they pose a greater danger to others (by appearing especially bent on wrongdoing) *or* because they are easier to influence with a deterrent message (reflection is more likely to lead to restraint).¹³⁷

The consciousness-of-wrongdoing methodology also might appear efficient in view of the relationship between the legal system and markets. The relative opacity to regulators of the contours of socially optimal behavior makes it efficient for regulators to rely on community standards, as revealed in individual consciousness of wrongdoing, to determine when behavior should be not merely priced but also sanctioned through criminal punishment.¹³⁸ The more complex and heterogeneous society becomes, the more problematic it is for courts to rely on intuition in locating norms.¹³⁹

Notice the contrast between this analysis and some economic accounts of criminal sanctioning. Here, the presence of a particular mental state is more than a proxy for conditions that might make civil sanctions insufficient for deterrence, such as greater probability of harm, greater magnitude of harm, greater utility of the act to the offender, lesser social benefit in the activity, and greater probability

¹³⁶ See Stuart P. Green, *Cheating*, 23 LAW & PHIL. 137, 143–45 (2004) (arguing that many white-collar crimes can be understood as forms of cheating, defined as violations of fair and fairly enforced rules with intent to obtain advantage over persons with whom one is in cooperative, rule-bound relationships). On Green's account, cheating often involves, though does not require, deception. An actor can cheat flagrantly and openly. *Id.*

¹³⁷ But see Jerome Michael & Herbert Wechsler, *A Rationale of the Law of Homicide II*, 37 COLUM. L. REV. 1261, 1284 (1937) (concluding that argument that “the man who acts deliberately is more dangerous than the man who acts impulsively” only follows if “the probability that the former’s deliberations will result in wrong judgments is greater than the probability that the latter will not reflect before acting”).

¹³⁸ See Robert Cooter, *Prices and Sanctions*, 84 COLUM. L. REV. 1523, 1533 (1984) (noting that community standards representing socially optimal behavior can be observed in some situations in which costs cannot be fully calculated).

¹³⁹ DRESSLER, *supra* note 33, § 12.03, at 159 (“In today’s culturally heterogeneous American society . . . it does not inevitably follow that, because a court (or jury) believes particular conduct is immoral, the defendant must have known when he acted that he was crossing the nebulous immorality line.”) (commenting on “moral wrong” approach to mistakes of fact exemplified by *R v. Prince*, (1875) 2 L.R.C.C.R. 154 (Eng.)); HART, *supra* note 21, at 171 (“[I]t is sociologically very naïve to think that there is even in England a single homogeneous social morality whose mouthpiece the judge can be in fixing sentence, and in admitting one thing and rejecting another as a mitigating or aggravating factor.”).

that sanction will be evaded.¹⁴⁰ The particular *form* of intent (consciousness of wrongdoing) also marks out the *category* of behavior that is undesirable.¹⁴¹ In this context, the efficiency of the criminal sanction is not due to courts' ability to measure *ex post* whether a particular behavior is an inefficient "market bypass" or "coercive transfer" because transacting for the same result would be cheaper than enforcing legal rights.¹⁴² The efficiency is due to courts' ability to rely on market actors, in effect, to tell courts what behaviors markets have determined disqualify an actor from participation in a particular market.

2. Problems and Responses

This instrumental account of consciousness of wrongdoing runs into substantial trouble. A rule defining fraud in terms of consciousness of wrongdoing could easily be both over- and underinclusive. Start with problems of overbreadth or, perhaps better, false positives. This fault methodology would select for punishment actors who are most sensitive to social norms, which could be undesirable on two levels. Highly sensitive (or, if you prefer, risk-averse) actors might be apt to make mistakes about whether markets deem a particular conduct to be out of bounds. If the legal system relies on the views of those actors in setting the leading edge of fraud law, it might sanction

¹⁴⁰ See Steven Shavell, *Criminal Law and the Optimal Use of Nonmonetary Sanctions as a Deterrent*, 85 COLUM. L. REV. 1232, 1247–48 (1985) (linking criminal intent to conditions listed); see also Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169, 189–90 (1968) (arguing that law varies punishment according to intent because higher punishments deter intentional actors but will be relatively ineffective with impulsive actors).

¹⁴¹ Economic accounts of the criminal law usually assume *a priori* decisions about what conduct needs to be deterred and ask only why the state might choose imprisonment over civil sanctions as a means of deterrence. See, e.g., Becker, *supra* note 140, at 209 (recognizing existence of fundamental disagreements about acceptable conduct but "assum[ing] consensus"); Shavell, *supra* note 140, at 1234 (assuming "only the existence of a category of socially undesirable consequences" of conduct).

¹⁴² See Richard A. Posner, *An Economic Theory of the Criminal Law*, 85 COLUM. L. REV. 1193, 1195–96 (1985) ("Attempts to bypass the market will . . . be discouraged by a legal system bent on promoting efficiency."); *id.* at 1221 ("Maybe criminal intent is just a location that laymen use to describe a pure coercive transfer."); Keith N. Hylton, *The Theory of Penalties and the Economics of Criminal Law*, 1 REV. L. & ECON. 175, 181 (2005) (suggesting behavior should always be deterred if cost of transacting for same result would be less than cost of enforcing legal entitlements (leading to conclusion that all such behavior should be channeled into transacting)). As Claire Finkelstein shows, Posner's "pure coercive transfer" approach depends on the assumption that the offender's gain from a behavior never offsets the difference between the costs of transacting and the costs of enforcing legal rights. Such an assumption cannot be made in the absence of an *a priori* normative judgment about whether the offender's gain is legitimate or illegitimate. Claire Finkelstein, *The Inefficiency of Mens Rea*, 88 CAL. L. REV. 895, 902–05 (2000).

conduct that markets would welcome, fixing the boundaries of fraud law beyond where they ought to be and producing overdeterrence.

Further complicating matters, the legal system might make mistakes about whether outward manifestations in the conduct of actors, that is, badges of guilt, really evidence consciousness of wrongdoing. Concealment can have several meanings. Viewed *ex post*, a person's observable behavior involving furtiveness could be evidence of at least three different truths about that person. First, it might mean that the person was aware of, and sought to veil, the wrongfulness of her actions—that is, the concealment might be a badge of guilt. Second, it might mean that the person sought to evade the police, whether or not she believed her conduct to be wrongful at either the time of the conduct or at a later time of feared apprehension. Finally, it might mean that the person had reasons, such as embarrassment, a sense of privacy, or guarding intellectual property from competitors, to shield something about herself from others,¹⁴³ reasons that do not have to do with her, or anyone else's, conception of wrongfulness. If only one of these three forms of concealment connects to consciousness of wrongdoing, then a culpability framework will be overbroad if it treats all of them as the same.

To be sure, there are responses to these concerns. The law might be especially effective with those who internalize values and pause on the question whether to pursue conduct they believe to be subject to condemnation by others.¹⁴⁴ The study of white-collar crime has long assumed that the white-collar offender, among all criminal violators, is the most sensitive to the normative messages of the criminal law.¹⁴⁵ In the novel fraud case, we often are dealing with the most sensitive among that sensitive class: loopholers who structure their activities with one eye on norms in hopes of finding ways to achieve desired ends without being called out as norm violators. It is precisely that class of persons to whom we should want to say, "When in doubt, refrain."¹⁴⁶ Beyond deterrence, punishing norm-sensitive violators

¹⁴³ See, e.g., JULIE R. O'SULLIVAN, *FEDERAL WHITE COLLAR CRIME* 751–88 (2d ed. 2003) (describing law of insider trading as imposing disclosure obligations only on certain parties in limited circumstances).

¹⁴⁴ Kenneth G. Dau-Schmidt, *An Economic Analysis of the Criminal Law as a Preference-Shaping Policy*, 1990 DUKE L.J. 1, 27 ("From a preference-shaping perspective, it does no good to punish a person who does not have deviant preferences, either to shape his preferences or to provide an example for the general population.").

¹⁴⁵ See Sanford H. Kadish, *Some Observations on the Use of Criminal Sanctions in Enforcing Economic Regulations*, 30 U. CHI. L. REV. 423, 437 (1963) (observing deterrence works not just because of fear of getting caught but also because of desire not to violate law, especially among people who think of themselves as "respectable").

¹⁴⁶ The features of markets help somewhat here, where they otherwise present challenges for the criminal law. Fluidity in market norms, technologies, and behaviors makes

sends a message to others that their choices to obey normative signals are not leaving them exposed as “chumps” to be exploited by fellow market actors.¹⁴⁷ That is to say, punishing norm-sensitive actors enhances the trust that is essential for making markets work.¹⁴⁸ The actor who does not refrain in the face of these messages deserves blame for willfully disregarding the restraints that others bear in order that collective enterprises can succeed. Satisfying that desire for blame fortifies the allegiance of others to the law.¹⁴⁹

As for the problem of the legal system reading concealment erroneously, undoubtedly ambiguity in concealment leaves us with imperfect law. Inquiry into badges of guilt is *factual*, subject to the stringent requirements of proof in a criminal case. In the absence of proof beyond a reasonable doubt that a particular act of concealment demonstrates awareness of wrongfulness, a conclusion that the actor was so aware is unwarranted. But the presence of difficulty in a particular mens rea inquiry is not in itself reason to abandon that inquiry. There is good reason to think that legal actors are capable of distinguishing concealment that proves consciousness of wrongfulness from concealment that shows only fear of the police. Flight evidence is routinely presented to juries with an instruction that they must decide whether the defendant’s flight proves consciousness of guilt or something less (and irrelevant), like fear of arrest.¹⁵⁰ This is why, as we saw in Part

the task of locating criminal fault severely challenging. But the tendency of market participants to be especially sensitive to norms and reputational effects makes them more likely than the average offender to reflect on their own conduct, to worry about how it will be judged and sanctioned, to permit that worry to leak out in observable behavior, and to be responsive to the prospect of criminal condemnation. See WHEELER ET AL., *supra* note 49, at 136 (finding that judges sentencing white-collar offenders believe their sentences are especially likely to be publicized and such publicity “is both a minimum prerequisite for deterrence and an important source of pressure on judges to incarcerate white-collar offenders”). By contrast, a program of punishment that paid insufficient attention to individual blameworthiness might squander the preference-shaping power that the criminal law has in market contexts. See Dau-Schmidt, *supra* note 144, at 25–27 (finding that criminal law’s focus on intent can and does move individual preferences away from undesirable behavior); see also Lynch, *supra* note 83, at 49–50 (arguing white-collar offenses should be punished criminally when “the moral wrong in the act[s] can be made clear to the general public” because offenses are “of a sort that partake of paradigmatic notions of ‘manifest criminality’”).

¹⁴⁷ See Dan M. Kahan, *The Logic of Reciprocity: Trust, Collective Action, and Law*, 102 MICH. L. REV. 71, 99 (2003) (discussing contexts where sanctioning norm violators improves trust and those where it does not).

¹⁴⁸ See HART, *supra* note 21, at 50 (arguing that criminal sanctions against noncompliant actors assure compliant actors that their compliance is not foolish).

¹⁴⁹ See PAUL H. ROBINSON & MICHAEL T. CAHILL, *LAW WITHOUT JUSTICE* 21–23 (2006) (analyzing cost of deviating from just desert punishment, including possibility that law will lose its moral force).

¹⁵⁰ See, e.g., *United States v. Amuso*, 21 F.3d 1251, 1258–59 (2d Cir. 1994) (finding it proper for jury to consider whether flight evidence established defendant’s consciousness

III, mere passive nondisclosure usually does not establish consciousness of wrongdoing.¹⁵¹ For concealment to tell the factfinder something significant about mental state, it must evidence that the actor devoted some thought to the normative significance of her behavior.

The hardest cases to get right involve not benign or passive concealment but rather actors who engage in conduct either with mixed motives or with uncertainty about whether their conduct is wrongful. For the actor with mixed motives, we probably would want to pursue the general approach of the criminal law to such problems. If it could be determined that one purpose for the concealment was to mask conduct believed to be wrongful, then that would be a sufficient basis to conclude that the actor was conscious of wrongdoing, even if the actor also had other reasons to conceal.¹⁵² For the actor who is uncertain about wrongfulness but decides to conceal in an abundance of caution, we might choose the strategy of willful blindness. We could say that a person who has reason to believe her conduct might be wrongful, has the resources to seek an ex ante determination from the legal system about wrongfulness, and chooses not to expend those resources to get that answer for fear that doing so will place her in a position in which she no longer can pursue the conduct, is a person who is bent on wrongdoing. She is not differently situated for purposes of blame from the actor who is certain of wrongfulness.¹⁵³ This approach would

of guilt, or rather, as defendant claimed, indicated his desire to avoid spillover prejudice in joint trial with codefendants). For an example of this distinction in a novel fraud case, see *United States v. D'Amato*, 39 F.3d 1249, 1259–60 (2d Cir. 1994), where the court reversed a conviction in a mail fraud case in which a company falsely documented payments for the defendant's lobbying efforts because the defendant assisted in disguising his services at the request of the client corporation, not with the intent of injuring it.

¹⁵¹ See *supra* text accompanying notes 79–84.

¹⁵² Cf. *United States v. Pimentel*, 346 F.3d 285, 295–96 (2d Cir. 2003) (holding that to prove defendant committed murder for purpose of “maintaining or increasing” position in racketeering enterprise, under 18 U.S.C. § 1959 (2000), government need not prove that statutory motive was sole or even dominant motive for homicide).

¹⁵³ See *United States v. Heredia*, 429 F.3d 820, 828 (9th Cir. 2005) (finding willful ignorance instruction erroneous where defendant “actually suspected she might be involved in criminal activity, but the record does not show that she deliberately avoided confirming the suspicion to provide herself with a defense”); Douglas N. Husak & Craig A. Callender, *Willful Ignorance, Knowledge, and the “Equal Culpability” Thesis: A Study of the Deeper Significance of the Principle of Legality*, 1994 WIS. L. REV. 29, 41 (arguing willful ignorance is moral equivalent of knowledge if defendant suspects relevant facts are true; has good reason for suspicion; fails to pursue reliable, quick, and ordinary measures to determine truth; and has conscious desire to remain ignorant in order to avoid blame); see also William H. Simon, *Wrongs of Ignorance and Ambiguity: Lawyer Responsibility for Collective Misconduct*, 22 YALE J. ON REG. 1, 2–3 (2005) (noting deliberate ignorance is growing problem in organizational wrongdoing and that in response, regulatory measures increasingly seek to promote transparency). With such a rule, we would be attempting to channel actors' conduct into the legal system ex ante. The success of such a strategy depends on the effectiveness of incentives that operate on gatekeepers (professionals who advise primary

make particular sense for an area of criminal law that is specially concerned with those who operate on the margins of the law.

The problem of ambiguity in an actor's concealment therefore is more likely to cause the law of fraud to be underbroad than overbroad. *Mens rea* is, and will ever be, underinclusive; by making punishment depend on mental state, which is imperfectly discoverable, the criminal law ensures that many people who are at fault go unpunished.¹⁵⁴ Alas, the problem of underbreadth is not limited to evidentiary obstacles. It is also structural in the concept of consciousness of wrongdoing. By requiring that an actor have some sensitivity to norms before we will impose punishment for novel behavior, we might be absolving the actor who has no regard for social norms, a quality we might both see as blameworthy and want to discourage. To add to the concern, after worrying about how to thwart the innovative loopholer, we might end up creating another loopholer's target: Don't conceal and you'll get away with it.

Again, there are some responses. One cannot charge this liability methodology with permitting actors to engage in normative exceptionalism without having a basis independent of consciousness of wrongdoing for identifying wrongfulness in a novel case. The actor outside the scope of this methodology is not the person who disagrees with or does not subscribe to prevailing norms; it is the actor who is oblivious to norms. If norms are not clear enough for the legal system previously to have recognized them, and there is no evidence that the actor saw them and chose to disregard them, how do we know they exist? What could cause us to say that such a person might be getting away with something that we would want to punish?

Concern about underbreadth tends to envision a type of brazen actor who is less problematic for fraud law than the innovative loopholer. Actors who do not reflect on their behavior and who seek to cover their tracks can be expected to commit frauds that do not leave close questions about culpability because the behavior has been clearly and previously specified as fraud. The novel case involves the violator who *alters* her conduct for the purpose of outfoxing the regulator. By definition, such persons recognize the existence of normative obligations, so they could not be among a class of morally

actors *ex ante* about permissibility of behavior), a subject beyond the scope of this Article. See, e.g., John C. Coffee, Jr., *What Caused Enron? A Capsule Social and Economic History of the 1990s*, 89 CORNELL L. REV. 269, 287–302 (2004) (examining why auditors and other gatekeepers failed to prevent 1990s' corporate accounting misconduct).

¹⁵⁴ See DRESSLER, *supra* note 33, § 10.03, at 118 (describing *mens rea* requirement as underinclusive because it is difficult to prove beyond reasonable doubt).

obdurate fraud perpetrators.¹⁵⁵ In addition, market sanctions might go a long way toward controlling the brazen and flagrant actor.

In the end, the argument that the law substantively determines what counts as fraud, in defining the *actus reus* of the crime, by basing fraud liability on consciousness of wrongdoing appears weak. Even at the level of highly abstract consequentialist reasoning, a program of seeking market norms through the mind of the individual actor seems quite difficult and prone to errors. Undoubtedly, the complications would multiply, perhaps exponentially, if we took the time (and space) to work out in detail how such a program might operate on the ground in particular contexts (e.g., the regulation of securities markets). In any event, there is another and more powerful reason for skepticism: bad fit. The consequentialist account has to force itself awkwardly onto a body of positive law that is backward-looking, has arisen from a group of concerns largely about notice and individual justice in criminal adjudication, and nowhere appears to advertise itself as concerned with efficient regulation. All of this should leave us doubting that the consciousness-of-wrongdoing concept could be successfully defended as a regulatory strategy for producing efficient markets.

B. Consciousness of Wrongdoing as Culpability

1. Notice as Fault

An alternative normative account of consciousness of wrongdoing starts, perhaps more naturally, with the question of why—given two actors who engaged in the same act—we would think that the actor who “knew that what she was doing was wrong” had done something worse than the actor who did not travel through that step in her practical reasoning. The reason is that choosing to pursue a particular course of conduct while appreciating that society has condemned that behavior is worse than pursuing the same conduct without considering how society would view it (or at least while thinking society would not disapprove of it). The norm-sensitive actor *is* at greater fault. Insistence upon notice does not just embody commitments that restrain state action. It also is a principle of criminal responsibility.¹⁵⁶

To see this point, we need to delve a bit deeper into the legality ideal. The network of principles and doctrines connected to legality

¹⁵⁵ See Kahan, *supra* note 16, at 140 (“Even the loopholer is aware that her conduct conflicts with the moral norms that determine criminal law, or else it would never occur to her that there was a need to search out a means of evading punishment for her behavior.”).

¹⁵⁶ Cf. Barbara E. Armacost, *Qualified Immunity: Ignorance Excused*, 51 VAND. L. REV. 583, 605–17 (1998) (supplying similar description of how notice functions in civil liability context).

are generally understood to divide into two categories of concerns: treating the individual actor fairly (usually described as the requirement of “fair notice”) and ensuring principled and evenhanded enforcement practices by restraining state actors. The basis for insisting upon fair notice, and thus the guidance for assessing what notice is “fair,” is surprisingly elusive. Political commitment to the idea is so deep (though it dates only from the eighteenth century and did not take firm root until the twentieth)¹⁵⁷ that it is taken as an *a priori* feature of our legal system.¹⁵⁸

I will sketch four kinds of reasons for caring about notice and explain why I find the fourth to be most persuasive and to fit best with the problem of how to explain consciousness of wrongdoing in fraud law. First, there are instrumental reasons. Cesare Beccaria insisted upon “fixed and immutable laws” because they afford “personal security,” allow individuals to “calculate precisely the ill consequences of a misdeed,” and permit citizens to “judge for themselves the prospect of their own liberty.”¹⁵⁹ What is good about individuals in a liberal society being empowered, through the provision of full *ex ante* knowledge of consequences, to choose whether or not to violate the law? Presumably, it makes the law work better. Fully informed people will choose to avoid bad consequences by complying with the law. This account of notice is unrelated to individual liberty or right. It is simply about deterrence and its instrumental benefits to state and society.

Second, there are justifications based in individual autonomy. H.L.A. Hart concluded that the distribution of criminal punishment on fair and fairly stated terms provides the individual with the “opportunity to choose between keeping the law required for society’s protection or paying the penalty.”¹⁶⁰ The law’s “choosing system,” Hart

¹⁵⁷ See Jeffries, *supra* note 20, at 193 nn.11–15 (tracing development of *ex post* judicial crime creation in United States); see also Lawrence Preuss, *Punishment by Analogy in National Socialist Penal Law*, 26 J. AM. INST. CRIM. L. & CRIMINOLOGY 847, 849 n.13 (1935–1936) (“Despite its Latin dress, the principle [*nullum crimen, nulla poena sin lege*] was unknown to the Roman law.”); *id.* (noting that in German law, principle came from French revolutionary philosophy and criminalist Anselm von Feuerbach).

¹⁵⁸ See FRANCIS A. ALLEN, *THE HABITS OF LEGALITY: CRIMINAL JUSTICE AND THE RULE OF LAW* 14 (1996) (noting principle is “so obvious as to be hardly interesting” but is “deceptively simple”); 1 LAFAYE, *supra* note 51, § 2.1(f), at 117 (“[I]t is . . . *unfair* . . . to make [an individual] guess at his peril as to what a court will hold in a new situation never before encountered by the courts.” (emphasis added)); *id.* § 2.4(c), at 164 (“An element of *unfairness* may be present if the construction given the statute is one which could not have been reasonably anticipated.” (emphasis added)).

¹⁵⁹ BECCARIA, *supra* note 25, at 12–13.

¹⁶⁰ HART, *supra* note 21, at 22–23; see also Robert S. Summers, *The Ideal Socio-Legal Order: Its “Rule of Law” Dimensions*, 1 RATIO JURIS 154, 160 (1988) (claiming punishment without notice “undermines the preconditions of informed choice and planning” and

said, is meant to provide individuals with both choice and predictability, by “presenting them with reasons for exercising choice in the direction of obedience, but leaving them to choose.”¹⁶¹ Such a system “distributes its coercive sanctions in a way that reflects this *respect for the individual*.”¹⁶² Some of Hart’s account echoes Beccaria, but he goes further with the idea of “respect for” rather than *control* of the individual.

The trouble with Hart’s account is that if the point of notice is to promote individual flourishing and autonomy, then notice is an odd way to explain a practice of criminal punishment. It is contradictory to maintain that we punish a person who has violated the law in the face of notice—that is, *reduce* that person’s liberty—in order to promote the violator’s liberty. Notice does make a set of choices clearer for the individual, but what choices make up that set? Not more satisfying choices than those that existed before the state criminalized something. Even the clearest process of criminalization involves the state taking something away. The taking is usually in the name of liberty, but *that* liberty is the liberty of others to live in a society free of the prohibited behavior, which is another aspect of liberty altogether.

Third, there are justifications for notice that do not have to do with the individual at all. Others have said the fair notice requirement in the criminal law is just another way of advancing the other component of the legality principle: constraining the state from wielding power arbitrarily, unequally, or capriciously. Herbert Packer concluded that notice “is necessary in order to secure evenhandedness in the administration of justice and to eliminate the oppressive and arbitrary exercise of official discretion.”¹⁶³ Packer found that criminal cases in which notice concerns were prominent almost never involved defendants who actually deserved sympathy on notice grounds; almost always, the accused had been bent on wronging others in ways the law had ample cause to punish.¹⁶⁴ The concern in notice cases, he found, was not about the individual at bar but about enforcers: “[I]f we let you do this, how do we know you won’t use it as a justification for

“disregards the limits of human responsibility and is therefore both unfair and an affront to human dignity”), *quoted in* ALLEN, *supra* note 158, at 15; ALLEN, *supra* note 158, at 15 (suggesting one purpose of fair notice “is to ensure opportunities for [community’s] members to avoid criminal sanctions by adapting their conduct to the law’s requirements”); *id.* at 98 (noting purpose of clarity in law is “to strengthen the capacities of citizens for self-direction”).

¹⁶¹ HART, *supra* note 21, at 44.

¹⁶² *Id.* at 49 (emphasis added).

¹⁶³ HERBERT L. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 80 (1968).

¹⁶⁴ *Id.* at 84–85.

doing something we wouldn't want you to do?"¹⁶⁵ John Calvin Jeffries, Jr., reached similar conclusions in his study of the legality principle.¹⁶⁶ These accounts are persuasive as far as they go, but they also do not supply an affirmative justification for a practice of punishment. At most, they justify—in the name of an independent value related to control of the state—a side constraint on punishment that is otherwise justifiable. We are still left with the question of what could make the actor who pursues conduct in the face of awareness of wrongdoing a better candidate for punishment than the actor who pursues the same conduct in the absence of such cognition.

A fourth justification for caring about notice would see notice as giving rise to fault. Consider our specific problem. The presence of badges of fraud in a novel fraud case might display moral fault. Concealment and other forms of hiding can be designed to help one avoid the disapproval of others and the consequences of such disapproval. A person who anticipated such disapproval is blameworthy because she exercised a choice to disregard shared constraints and obligations—what we might call the price of admission for engaging in a particular market or commercial activity—in order to pursue her self-interest by means of unfair advantage.¹⁶⁷ She is all the more blame-

¹⁶⁵ *Id.* at 85. Accounts such as these sometimes invoke the example of the 1930s law of National Socialist Germany, which was based on a program to replace the "fetishistic fanaticism" of the legality principle with a "higher and more powerful legal truth—*nullum crimen sine poena*." Preuss, *supra* note 157, at 848. The archetypal such law was the following chilling statute:

Whoever commits an action which the law declares to be punishable or which is deserving of punishment according to the fundamental idea of a penal law and the sound perception of the people, shall be punished. If no determinate penal law is directly applicable to the action, it shall be punished according to the law, the basic idea of which fits it best.

Id. at 847 (quoting Gesetz zur Änderung des Strafgesetzbuchs, June 28, 1935, RGBl. I at 839).

¹⁶⁶ See Jeffries, *supra* note 20, at 232, 245 (noting that generalizing question of fair notice beyond case at bar helps "prevent individualized, ad hoc declarations of criminality," which threaten "both the general values of regularity and evenhandedness in the administration of justice and our more specific societal commitment to equality before the law"); see also Husak & Callender, *supra* note 153, at 58–61 (stating that legality problem with basing criminal liability on willful blindness is not notice (*willfully* blind defendant cannot claim surprise) but possibility that political pressures will determine which individuals are subject to doctrine of willful ignorance, as has occurred in context of drug prosecutions). Jeffries, unlike Packer, retains a place for individual rights. See Jeffries, *supra* note 20, at 211 ("Punishment for conduct that the average citizen would have had no reason to avoid is unfair and constitutionally impermissible.").

¹⁶⁷ See, e.g., DRESSLER, *supra* note 33, § 2.03[c], at 16 ("Retributivists believe that punishment is justified when it is deserved. It is deserved when the wrongdoer freely chooses to violate society's rules."); Alan C. Michaels, *Acceptance: The Missing Mental State*, 71 S. CAL. L. REV. 953, 967 (1998) ("What makes the knowing actor morally culpable is her action *connected with* her knowledge. . . . The fact that she caused the harm, *and* that

worthy because she took steps to make it more difficult for others to discover the truth about her and thus to impose the judgment she deserved, together with its consequences.

Affirmative fault requirements and negative constraints connected to the legality principle collapse into one inquiry. It can be unfair to punish the person whose only notice was a *constructive* notice determined by an adjudicator's ex post assessment of prevailing morality; that person may not have acted as a fully "choosing being" in pursuing conduct later determined to be harmful to others. If a person pursues conduct under *actual* notice of its potential for wronging others, however, that person has not just wronged others but has also *chosen* to wrong them. The choosing, conscious wrongdoer both violates a *conduct* principle (people should not choose to wrong others) and is undeserving of the protections of a *political* principle (the state should not punish people who do not mean to wrong others).¹⁶⁸ To be sure, as a matter of character, sensitivity to social norms is a laudatory quality in relation to ignorance or callousness toward norms. But that is an observation about ex ante character, not an evaluation of particular *behavior* through application of the criminal law ex post. It is perfectly consistent with the character observation to maintain that the actor who disregards a norm she *perceives* is more blameworthy than the actor who does not knowingly disregard the same norm.

One might object that contemplation of wrongfulness is not part of criminal responsibility, which ordinarily attaches to even the most impulsive actors, provided they meet the minimal requirement of *capacity* to appreciate wrongfulness.¹⁶⁹ That argument, however, may

knowledge that she would cause the harm was not sufficient to stop her from acting, render the action culpable.").

¹⁶⁸ In explaining the nature of the insanity defense in criminal law, Sir James Fitzjames Stephen wrote, "[T]he power to abstain from a given act is an element of responsibility for it." 2 STEPHEN, *supra* note 38, at 183.

¹⁶⁹ The *M'Naghten* standard holds that the defendant cannot be convicted if, at the time he committed the act, "[he] was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did *not know he was doing what was wrong*." *M'Naghten's Case*, (1843) 8 Eng. Rep. 718, 722 (H.L.) (emphasis added), *quoted in* 1 LAFAVE, *supra* note 51, § 7.2(a), at 527. Similarly, the American Law Institute's (ALI) test holds that the defendant is not guilty "if at the time of [his] conduct as a result of mental disease or defect he lacks substantial capacity either to *appreciate the criminality [wrongfulness] of his conduct* or to conform his conduct to the requirements of law." *Id.* § 7.5(a), at 557 (emphasis added) (alterations in original). In parallel to problems this Article has discussed, the ALI, in fashioning its insanity doctrine, left undecided whether the responsible actor need appreciate only the "wrongfulness" of her conduct or more specifically its "criminality." *Id.* § 7.5(a) & n.2, at 557–58. Courts have similarly divided on whether "wrong" under the *M'Naghten* standard means morally wrong or illegal. *Id.* § 7.2(b), at 538; 2 STEPHEN, *supra*

be stronger as a matter of doctrine than theory. Knowledge of wrongfulness, if broadened to encompass constructive knowledge, is best understood as a necessary but not sufficient condition of criminal responsibility. With some crimes, objective wrongfulness and subjective awareness of wrongfulness are the same thing. Paradigm cases are ones outside the field of white-collar crime, such as core violent crimes including homicide.¹⁷⁰

Of course, it need not be the case that consciousness of wrongdoing's position in the law of fraud serves only one value connected to the legality ideal. Consciousness of wrongdoing may have to do with *both* fault *and* restraining the state. Consider the relationship between consciousness of wrongdoing and the impossibility doctrine. By turning on the violator's conception of her own wrongdoing as the point of last resort in culpability analysis, the consciousness-of-wrongdoing methodology seems to contradict the maxim that pure legal impossibility is a defense.¹⁷¹ We do not punish people for a general desire or intention to break the law.¹⁷² But if we decide a close case in the end by concluding that an open-textured prohibition, such as an antifraud statute, applies to someone's conduct because she had the mental state of being aware that she was engaged in wrongdoing, we may be turning that open-textured prohibition into an offense of "intent to be a criminal."

The defense of "pure" legal impossibility is a component of the legality principle.¹⁷³ Here the concern is about enforcers, not individuals. The actor who believes her conduct to be wrongful can hardly complain of unfair surprise when sanctions follow. The reason we do not punish people just for intending or desiring to break the law, no

note 38, at 167–68. Some worry about having a doctrine of insanity that runs counter to the criminal law's general position that all are responsible to know the law. See 2 STEPHEN, *supra* note 38, at 158 (quoting *M'Naghten's Case*, 8 Eng. Rep. at 723, discussing this concern). Others worry that a defendant might escape responsibility for a murder she knows is illegal just because she believes she is morally justified in the killing. 1 LAFAYE, *supra* note 51, §7.2(b), at 538–39. There is further puzzlement, in the event that wrongful means immoral, about whether morality is to be judged subjectively or objectively. *Id.*

¹⁷⁰ See Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401, 405 (1958) (defining crime as "conduct which, if duly shown to have taken place, will incur a formal and solemn pronouncement of the moral condemnation of the community"); *id.* at 413–14 (arguing that "knowledge of wrongfulness" can be assumed for crimes such as "murder and forcible rape and the obvious forms of theft").

¹⁷¹ See DRESSLER, *supra* note 33, § 27.07[D][2], at 400–01 (defining "legal impossibility" as meaning that individual cannot be guilty of crime he did not commit, even if he believes he committed it).

¹⁷² A common example is the putative statutory rapist who, believing that the age of consent is eighteen when it is actually sixteen, has intercourse with a partner he knows is seventeen years old. See *id.*

¹⁷³ See *id.* § 27.07[D][1], at 400.

matter how dangerous or blameworthy such thoughts might reveal them to be, is that such a practice would create unfettered enforcement discretion.¹⁷⁴ If the theory of impossibility presents a problem for reliance on badges of guilt, it is not that a person is not blameworthy for harming others through conduct that the person believes others would view as wrongful; the self-conscious wrongdoer has ample notice to be considered at fault.

The problem, rather, is that relying on individual conceptions of criminal fault may leave the law too amorphous and malleable. But the consciousness-of-wrongdoing inquiry is, at least in part, a *response* to the very concern that open texture in white-collar criminal prohibitions allows enforcers to be unprincipled. Because cases of innovative market crime challenge the system to mediate between legality-related imperatives and the need for adaptable law, an imperfect result is unavoidable. Something must substitute for the criminal law's default principle that punishment is impermissible in the absence of actual, statutory, *ex ante* notice—because the state simply cannot, and would not want to, fully describe the prohibited conduct *ex ante*.¹⁷⁵ The principle of legality may frown on a rule that measures culpability by a person's conception of her own blameworthiness. It would disfavor even more, however, a rule that disregarded consciousness of wrongdoing altogether in close cases and instead held people responsible exclusively on the basis of whether they meant to do what they were doing (to make a misleading statement, not to disclose a conflict of interest, and so on).¹⁷⁶

¹⁷⁴ Jeffries, *supra* note 20, at 217–18 (suggesting real concern about underspecified criminal prohibitions is not arbitrariness, but enabling purposeful discrimination by enforcers).

¹⁷⁵ While this proposition might seem unattractive, it is more candid and realistic than the sometimes absurd efforts of courts to argue that the common actor is truly on notice of, for example, what the federal judicial decisions have said counts as “honest services” fraud under 18 U.S.C. § 1346 (2000). See, e.g., *United States v. Rybicki*, 354 F.3d 124, 142 (2d Cir. 2003) (*en banc*) (holding that defendant's scheme to induce insurance adjusters to expedite claim settlement fell within definition of “honest services” fraud).

¹⁷⁶ The role of consciousness of wrongdoing in novel fraud cases may raise a problem for one account of the legality principle. See DAN-COHEN, *supra* note 4, at 64–67 (arguing legality problems may arise either with decision rules directed at enforcers or with conduct rules directed at public, and noting that “judicial gloss” can clarify decision rules without violating legality principle); Robinson, *supra* note 18, at 336, 368, 375–97 (distinguishing between legality-driven conduct rules (which assure fair warning) and legality-driven decision rules (which control enforcers)). On this account, conduct rules protect individuals from unfair surprise, while decision rules control the exercise of power by enforcers. Legality principles require simplicity and clarity only in conduct rules. Decision rules can be complex without threatening legality interests. The fault methodology we have described, however, involves *ex post* adjudication and defies attempts at clear statement, yet its relationship to legality is much about notice. In this context, we are not so much worried about enforcement discretion because it allows enforcers to choose *offenders* for discriminatory reasons, but because it can lead enforcers to choose *offenses* based on mis-

2. *Modified Mistake of Law*

There is another way to put the point that insistence upon notice in this context is about identifying the blameworthy actor. Recall our basic account of the nature of fraud. Fraud law is concerned with the crafty violator who operates in the shadow of the law, retains first-mover advantage over the regulator, and can be effectively controlled and punished only if there is flexibility in how the law is applied *ex post*. It refuses, therefore, to compromise on its open texture. But because such law is so malleable in the hands of *ex post* legal actors, it risks violating commitments connected to the legality principle, in particular the individual's right to fair notice and society's rejection of retroactive criminalization.

This serious tension can be managed only through an additional mechanism in fraud law that would sort potential violators into two groups: One is the devious loopholer who seeks to accomplish in substance the very wrong that existing fraud law proscribes, but through a novel arrangement that fraud law has not previously encountered; and the other is the well-meaning actor who is oblivious to any normative difficulty with her conduct and would be genuinely surprised by the appearance of legal sanction *ex post*. The requirement of consciousness of wrongdoing accomplishes this sorting, this account would argue, by affording a mistake of law defense to liability for the actor who was unaware that she was operating along the margins of illegality but denying such a defense for the actor who understood that she was within a zone of wrongfulness.

An obvious peril in this account would be the error of equating consciousness of wrongdoing with consciousness of illegality. If, on the one hand, illegality meant *ex ante*-specified illegality, then the law of fraud would be frozen to its preexisting limits and barred from adaptation (meaning that consciousness of wrongdoing would be no help for the problem of novel fraud). If, on the other hand, illegality meant the individual actor's belief about the law, then every actor would be the author of her own law of fraud. This would subvert settled thinking about mistake of law. Legal mistake is an excuse in some situations in which society has otherwise resolved *ex ante* the criminality of certain conduct. Characterizing the requirement of consciousness of wrongdoing as a form of mistake of law defense runs

taken judgments about wrongfulness, which is the same concern as the one about fair notice. Cf. Jeffries, *supra* note 20, at 218 (discussing relationship between notice requirement and control of discretion in enforcement). In novel fraud cases, notice can never be fully satisfied by conduct rules. These cases are a product of the social imperative to maintain open-textured prohibitions as a bulwark against innovative market crime.

head-on into one of the principles that justifies the law's denial of legal mistake as a general defense to criminal liability: Recognizing such a claim would permit each citizen to make her own law.¹⁷⁷

To avoid this trap, we might advance a mistake of law account for consciousness of wrongdoing that modifies the one Dan Kahan has offered to explain mistake of law doctrine in general. Kahan maintains that the mistake of law defense is afforded to persons whose conduct is not inherently blameworthy and falls along the margins of illegality (people who structure bank deposits, tax violators, and the like) but is denied to those whose behavior is obviously blameworthy (gun possessors, drug distributors, etc.).¹⁷⁸ Kahan describes an objective judicial inquiry in which legal actors decide *ex post* whether, according to prevailing social norms, a particular behavior is at the core of what society considers blameworthy, or rather along the margins of that category.

On its own terms, Kahan's account does not quite work for the problem of novel economic wrongdoing because it assumes that the distinction of merely regulatory versus morality-based criminal prohibitions is more obvious for courts, and less contestable, than it really is. For illustration, Kahan names tax evasion, securities fraud, and antitrust as regulatory areas where loopholing is entirely welcome.¹⁷⁹ But innovations designed to evade rules about financial disclosure, pricing agreements, or income reporting can often be characterized as fraud and deception carrying moral opprobrium. Not surprisingly, as positive law has described it, the doctrine of mistake of law is no defense to a charge of fraud, which is understood to be among the set of core offenses that tend to be highly resistant to claims of legal mistake.¹⁸⁰

¹⁷⁷ 1 LAFAYE, *supra* note 51, § 5.6(d), at 408–09 (arguing expansive mistake of law defense would undermine objectivity of legal rules). Of course, mistake of law is an excuse, not a justification. See DRESSLER, *supra* note 33, § 13.01[2], at 166–67 (arguing law could remain stable while still excusing actors who reasonably misunderstand it). The excused actor is making law of the case, not law for all purposes. Still, law of the case is law for *that* actor.

¹⁷⁸ Kahan, *supra* note 16, at 129–30.

¹⁷⁹ Kahan, *supra* note 6, at 101.

¹⁸⁰ See, e.g., *United States v. Hollis*, 971 F.2d 1441, 1451–52 (10th Cir. 1992) (holding that “willfully” requirement in bank fraud charge does not require that defendant be aware of specific law violated); Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625, 646 (1984) (describing factors “weigh[ing] against allowing” mistake of law, including offense being *malum in se* and charge being based on statutory provision). Fraud law does soften the rule against claims of legal mistake in one respect: Reliance on advice of counsel, if it establishes “good faith,” can negate the element of specific “intent to defraud,” though it cannot, itself, serve as a defense. *United States v. Peterson*, 101 F.3d 375, 381 (5th Cir. 1996); cf. *Hopkins v.*

Perhaps we could modify Kahan's account. The consciousness-of-wrongdoing methodology measures subjective awareness of wrongfulness case-by-case, not according to judges' views of prevailing norms. In mistake-of-law terms, the principle might be as follows: Actors who do not believe their actions risk violating the law (i.e., those who are not reckless as to illegality) should not be punished; they are not culpably engaged in the kind of loopholing that concerns fraud law. Fraud law could remain at least somewhat dynamic under such a principle, because illegality could be declared *ex post* whenever actors thought *ex ante* that such a declaration could be possible. But the cognitive state of risking illegality may not really (or at least not always) equate with the cognitive state of the dangerous loopholer, who may believe that she has devised a scheme that is entirely outside the framework or beyond the reach of the law. The loopholer who displays consciousness of wrongdoing knows she is violating the law's purpose but believes she is in compliance with its letter. She is not so much choosing to disregard a risk that her conduct will be adjudicated as fraud as she is choosing to disregard that her conduct is normatively wrong, while taking comfort that she will not suffer legal sanction.

That said, I have no categorical objection to an effort to fit consciousness of wrongdoing within the framework of legal mistake in criminal law. I believe that such an effort, however, may only be another, and less direct, means of stating the proposition I have described: Greater moral fault lies with the actor who pursues a course of conduct with awareness that it is socially wrongful than with the actor who performs the same act in the absence of such awareness. After all, exceptions to the general proposition that ignorance of the law is no excuse are all about why particular behavior is not blameworthy in the absence of knowledge of its implications.

3. *Intent to Defraud*

Whichever way we reach the conclusion that consciousness of wrongdoing is about fault, a problem remains: Standing alone, the claim proves much too much. An actor's belief in wrongfulness could not possibly work as a freestanding principle of criminal fault and responsibility because the principle would provide us with no means to distinguish the category of crime from the category of social transgression. Anything normatively wrongful could be treated as criminal. And a law of fraud that expanded only with reference to conscious-

State, 69 A.2d 456, 460 (Md. 1949) (holding that general rule is that advice of counsel, even if followed in good faith, is no defense to criminal action).

ness of wrongdoing could spiral outwards as actors anticipate more and more extensions of moving normative boundaries.

We need to tie the concept of notice-as-fault to the law of fraud, without the notice element swallowing up the law of fraud. Remember our problem: The law needs a means of resolving doubt about whether particular novel commercial behaviors belong within the standing category of wrongdoing called fraud. In the course of modernization, society has determined that (1) takings are wrong, (2) some takings are sufficiently wrong to warrant criminal treatment, and (3) takings can be equally wrongful whether accomplished directly (by means the law calls theft) or indirectly (by means the law calls fraud). The question for the law of criminal fraud is how to identify when an actual or attempted *indirect* taking is sufficiently wrongful to be treated criminally.

To ground the problem in doctrine, consider how culpability analysis operates in a fraud case. We begin, as in any criminal case, by asking whether the subject acted with the mental state required by the operative statute, such as knowledge, intent, or purpose. Criminal fraud laws, like most other important white-collar prohibitions, require a showing of "specific intent" (a purpose to defraud, to obstruct justice, to falsify government reports, etc.).¹⁸¹ In hard cases of innovative conduct, however, this level of inquiry does not sufficiently develop culpability to connect it fully to fault.¹⁸² If intention (or "purpose" in the Model Penal Code's formulation) means only to have a particular end as one's "conscious object,"¹⁸³ a rule turning solely on whether an actor had an objective to mislead will be overbroad.¹⁸⁴ Virtually all salespeople could be described as having a purpose to mislead. A person's "intent to defraud" can be described, at best, as the aim to achieve a *form* of deception that counts as a fraud. If what counts as a fraud can only be described in terms like "taking unfair advantage of another through deceit," then a requirement of "intent to defraud" begs the normative question of what kind of

¹⁸¹ See, e.g., *United States v. Little Dog*, 398 F.3d 1032, 1038–39 (8th Cir. 2005) (stating that obstruction of justice requires proof of specific intent to obstruct); *United States v. Tarallo*, 380 F.3d 1174, 1181 (9th Cir. 2004) (stating that mail fraud and securities fraud require proof of specific intent to defraud).

¹⁸² See WHEELER ET AL., *supra* note 49, at 93 (noting that, in judges' assessments of white-collar cases, "legal categories get expanded into the judges' moral assessment of the offender . . . through a simple extension of the legal culpability requirements. Was this person really aware that he or she was committing a crime? Was there real intent on the person's part?").

¹⁸³ See MODEL PENAL CODE § 2.02 (1980).

¹⁸⁴ See *id.* § 223.3 (defining theft prohibitions, in part, to cover person who "creates or reinforces a false impression" with "conscious object" of causing such result).

advantage-taking is unfair. It is not that *any* deception is fraud; it is that deception *past a point* is fraud.¹⁸⁵ To say that the defendant purposefully engaged in the behavior in which she engaged is tautological.¹⁸⁶ And in the absence of a normative theory for determining what counts as fraud, to say the defendant purposefully engaged in fraud is conclusory.

We need to complicate the picture of what fraud is in one further way. Even though deception and potential for harm orient us toward the relationship between offender and victim and mark out the conduct component of fraud,¹⁸⁷ still more is required to understand the essence of fraud. Suppose that a person induces a close friend to share a damaging secret by promising not to reveal it, all while secretly intending to publicize the secret. The person then discloses the friend's secret, harming her reputation and causing severe financial loss. We would be startled by the assertion that the person had committed a criminal fraud. The law of fraud applies only to certain relationships, and it applies on the basis of duties to behave certain ways that inhere in those relationships. Generally, we look to the law of fraud itself to learn which relationships and duties can give rise to claims of fraud. Fraud's development is an incremental, common law process. The case of the friend disclosing the secret would get nowhere in court because it looks nothing like any case previously recognized as a fraud. There must be some similarity and proximity of the novel case to the body of existing fraud law to get a discussion started about whether what we have is a fraud.¹⁸⁸

¹⁸⁵ See, e.g., *Chiarella v. United States*, 445 U.S. 222, 232 (1980) (“[N]ot every instance of financial unfairness constitutes fraudulent activity under [federal securities law].”).

¹⁸⁶ See Donald C. Langevoort, *Reflections on Scienter (and the Securities Fraud Case Against Martha Stewart That Never Happened)*, 10 LEWIS & CLARK L. REV. 1, 5–6 (2006) (arguing weight of authority holds that “scienter” required for securities fraud is not question of motive or purpose but simply *awareness* of falsity).

¹⁸⁷ See, e.g., 37 C.J.S. *Fraud* § 2 (1997) (stating that fraud “comprises all acts, omissions, and concealments involving a breach of legal or equitable duty and resulting in damage to another, or the taking of undue or unconscientious advantage of another”). Fraud has had many definitions and, as we have seen, even has defied definition. But we should not abandon the effort to understand its essential principles, even if breaking fraud into specified legal elements is not always possible. “To lay down a hard and fast rule of law, limiting all frauds by it, would be dangerous in the extreme; but to start with some clear and exact idea of fraud is absolutely necessary to the declaration of any required rule” 1 MELVILLE M. BIGELOW, *A TREATISE ON THE LAW OF FRAUD* 4 (1890).

¹⁸⁸ The Supreme Court's decision in *Chiarella*, 445 U.S. 222, is illustrative of how questions of duty and reasoning by analogy are at the threshold of problems of novel fraud. In *Chiarella*, the Court considered the case of an employee of a financial printer who learned the identities of acquisition targets at his workplace and then engaged in stock trades in order to profit on that inside information. *Id.* at 224. In holding that *Chiarella* did not commit securities fraud because he had no disclosure duty toward his trading counterparties, the Court did not inquire into *Chiarella*'s personal culpability. The Court determined

Two recent and important decisions of the Second Circuit considering the constitutionality of the “honest services” provision of the federal mail fraud statute¹⁸⁹ illustrate how questions of duty and mental state interact in the novel fraud case. In the first, *United States v. Handakas*,¹⁹⁰ the defendant was a public contractor who agreed to pay workers on a project a minimum wage, in compliance with state law, and then disregarded his obligation, pocketing his illegitimate savings.¹⁹¹ The *Handakas* court found the law unconstitutionally vague as applied to this case because the court could find no duty-based limitation on the statute that could cover the defendant’s conduct without converting every violation of a contractual obligation into a fraud.¹⁹² By contrast, the *Handakas* dissent maintained that crafting an all-purpose definition of duty was unnecessary to resolve the challenge to the statute because, among other relevant factors, the defendant actively concealed his conduct by falsifying records and funneling proceeds through fictitious entities, defeating any claim that he lacked notice.¹⁹³

In the second decision, *United States v. Rybicki*,¹⁹⁴ the court, sitting en banc, overruled *Handakas* and rejected a vagueness challenge to the same statute. The *Rybicki* defendants were personal injury lawyers who bribed insurance adjusters to prioritize settlement of their clients’ claims.¹⁹⁵ The adjusters’ employers barred them from accepting such payments, and the adjusters did not report the payments, giving rise to the claim that, with the defendant-attorneys’ help, the adjusters defrauded their employers of their “honest services.”¹⁹⁶ The *Rybicki* panel opinion had rejected the defendants’ vagueness challenge to the application of the mail fraud statute to their conduct on two principal grounds.¹⁹⁷ First, the defendants were “sophisticated attorneys who were presumptively aware that their

that Chiarella owed no such duty by concluding that (1) nondisclosure does not constitute fraud in the absence of a duty to disclose, and (2) a finding that Chiarella had a duty to disclose in this case would revolutionize the law of securities fraud by enacting a “parity-of-information rule” for securities trading. *Id.* at 233, 235.

¹⁸⁹ See 18 U.S.C. § 1346 (2000) (“[T]he term ‘scheme or artifice to defraud’ includes a scheme or artifice to deprive another of the intangible right of honest services.”). The related statute prohibits “devis[ing] or intending to devise any scheme or artifice to defraud” and mailing something in furtherance of such a scheme. *Id.* § 1341.

¹⁹⁰ 286 F.3d 92 (2d Cir. 2002).

¹⁹¹ *Id.* at 96–97.

¹⁹² *Id.* at 107.

¹⁹³ *Id.* at 116–17 (Feinberg, J., dissenting in part and concurring in part).

¹⁹⁴ 354 F.3d 124 (2d Cir. 2003) (en banc).

¹⁹⁵ *Id.* at 127, 144.

¹⁹⁶ *Id.* at 127–28. The Government did not seek to prove that the adjusters settled any claim for an inflated amount. *Id.* at 128.

¹⁹⁷ *United States v. Rybicki*, 287 F.3d 257, 264 (2d Cir. 2002).

payments to insurance adjusters to expedite claims created improper conflicts of interest for the adjusters with respect to their employers.”¹⁹⁸ Second, the defendants’ “efforts to avoid detection, such as omitting required information on [settlement statements filed with the state courts] and failing to record the bribes in any of their financial documentation, are indicative of consciousness of guilt, thereby negating [defendants’] claim that they had no notice their conduct was illegal.”¹⁹⁹ By contrast, the en banc court attempted to clarify the statute by abstracting an all-purpose test for the scope of duties.²⁰⁰ The duty-based approach fared worse than the panel’s culpability-based approach, both as a response to the notice concern and as a defense of the need for a broad, flexible statute to cover similar wrongs.

“Intent to defraud” means, roughly, “intent to go too far” in a situation in which there is a deception involving some cognizable relationship of duty and threat of harm. The culpable mental state of “intending to go too far” (actually, “*knowing* that one is going too far”)²⁰¹ can be found one of two ways. Either the law has clearly spec-

¹⁹⁸ *Id.*

¹⁹⁹ *Id.* (citations omitted).

²⁰⁰ *Rybicki*, 354 F.3d at 145–46. To make its case that the law is clear, the en banc majority fashioned (it said *distilled* from prior cases) a verbose rule:

[The statute prohibits] a scheme or artifice to use the mails or wires to enable an officer or employee of a private entity (or a person in a relationship that gives rise to a duty of loyalty comparable to that owed by employees to employers) purporting to act for and in the interests of his or her employer (or of the other person to whom the duty of loyalty is owed) secretly to act in his or her or the defendant’s own interests instead, accompanied by a material misrepresentation made or omission of information disclosed to the employer or other person.

Id. at 146–47. A concurring judge, seeking to cut down on the craftsmanship and pointing to the “plain language” of the statute, argued that “‘the intangible right to honest services’ can fairly be understood to mean a legally enforceable claim to have another person provide labor, skill, or advice without fraud or deception.” *Id.* at 153 (Raggi, J., concurring). This definition, while simpler, encompasses virtually any undisclosed breach with any kind of legal pedigree and is as broad as some definitions of fraud we saw in Part II. See *supra* notes 38–41 and accompanying text.

²⁰¹ See *AYRES & KLASS*, *supra* note 7, at 47–48 (suggesting that when courts say that “intent to deceive” is required for liability, they really mean knowledge of deception). That “intent” really means “knowledge” is a common feature of the criminal law. For most crimes, the actor need only have been aware of what she was doing, including attendant circumstances. See *Finkelstein*, *supra* note 142, at 911–12 (arguing that mental state with which prohibitory norm must be violated remains knowledge). This can be said even of specific intent crimes, if they are seen as requiring that the actor knew she was engaged in the prohibited conduct for the prohibited purpose. See *id.* (“Although the defendant [in a specific intent crime] must have a particular reason for acting, it is *not* the case that he must have had a particular reason for violating the prohibitory norm itself.”). A common example is the modern larceny statute. See, e.g., TEX. PENAL CODE ANN. § 31.03 (Vernon 2003) (“A person commits an offense if he unlawfully appropriates property *with intent to*

ified, *ex ante*, that a particular practice is fraudulent, in which case we charge the actor with constructively knowing that she is going too far, or the practice is novel to the law of fraud, in which case we ask whether the actor subjectively knew she was going too far. Consciousness of wrongdoing—knowledge that one is out of bounds—is a culpability requirement that is a necessary but not sufficient condition for fraud liability for novel behaviors. The reason to insist upon this additional component of culpability in novel cases is to ensure, consistent with the architecture of the law of serious crimes, that we punish only those actors whose blameworthiness is equivalent to that of actors who purposefully engage in conduct the law has previously specified as fraud. We equate the blameworthiness in a process of practical reasoning that considers and decides to disregard shared norms with the blameworthiness in purposefully doing something the law expressly forbids.

V

IMPLICATIONS

My primary ambition has been to illuminate the most interesting and challenging features of the law of fraud and to show why those features might have evolved. In this last Part, I will briefly suggest some implications of the preceding analysis for two questions: *Should* the law of fraud rely on consciousness of wrongdoing? And where might my analysis leave us on the higher-order question of distinguishing the proper roles of civil and criminal sanctioning of economic activity?

A. *Conduct Rule or Decision Rule?*

My analysis supports the existing law of fraud, at least modestly and perhaps more so. It seems indisputable that the methodology I have described in this Article, however mixed the theoretical case in its favor, is preferable to its feasible competitors as a response to the problem of novel fraud. Fixing fraud to a predetermined set of behaviors while developments in commercial relations quickly move past

deprive the owner of property." (emphasis added)). The specific intent provisions in such statutes require that the defendant have *been aware* or *foreseen* or *contemplated* that her conduct would cause some deprivation, not that she have desired to cause deprivation. Ordinarily the thief cares about acquisition, not deprivation *per se*. The standard culpability framework generally considers neither reasoning to ends nor motive. At most, it might contain certain more blameworthy (but often unstated) "desire states" (as distinguished from mere "belief states"), such as desire and callous indifference. See Kenneth W. Simons, *Rethinking Mental States*, 72 B.U. L. REV. 463, 464–68 (1992) (elucidating differences—which conventional mental state analysis conceals—between culpable desire, belief, and conduct).

the static law is undesirable. Put most simply, one cannot argue in any comprehensive way with modernization here. Surely we have it right as an advanced, liberal, other-regarding society in concluding that the wrong of taking is not limited to the naked grab. It is also beyond dispute that decoupling the law of fraud from the legality principle—permitting *ex post* criminalization of any behavior that happens to produce harm that outrages the populace at a particular moment—would be profoundly inconsistent with good ordering of a liberal society.

Of course, the observations in the preceding paragraph approach banality. The truth is that we lack a means, especially through *ex ante* legal formulation, of selecting for punishment all (and only) those takings or attempts to take that are as blameworthy and undesirable as the naked grabs. As long as the legal system lacks a practical means of determining, in the context of individual criminal adjudication, the precise contours of commercial norms and expectations, any methodology for examining novel fraud that is consistent with legality-related values is bound to be underinclusive (or, if you prefer, error-deflecting). In this light, consciousness of wrongdoing is an acceptable means for judges and prosecutors, who must apply open-textured prohibitions *ex post*, to identify what counts as fraud under conditions of uncertainty while adhering to fundamental principles of responsibility based in notice and blameworthiness. The methodology allows fraud law to be adaptive and also protects the legal system against the risk of mistake inherent in criminalizing behaviors solely in response to the harms they cause or the outrage they produce.

To settle on this position, however, we must confront a serious alternative: that something like the consciousness-of-wrongdoing requirement be inserted into *ex ante* conduct rules. We might think that doing so would improve on current practice by more strongly restraining prosecutors and judges (after all, nothing in current positive law, except perhaps lurking due process requirements, tells them they *must* attend to consciousness of wrongdoing) and by providing better notice to individuals about what the law of fraud aims to punish. This is more or less what English law has attempted to do through its element of “dishonesty.”²⁰² In a Model Penal Code–type (MPC) formulation, we might say fraud liability should attach where (1) an actor engages in a deception that reasonable market actors would recognize as a gross deviation from the standard of behavior expected in the context, and (2) the actor is aware that reasonable

²⁰² See *supra* Part III.C.

market actors would deem her deception to be a gross deviation from the standard of behavior expected in the context.²⁰³

For now, I do not see a decisive objection to this idea. However, such a move would launch a major project of law reform, and the ambitions (and constraints) of this Article do not permit serious pursuit of the project, with all of its forecasting complications. I will, however, name three reasons for caution.

First, there is the problem of juries. If we put consciousness of wrongdoing into fraud statutes, it would become an element of the offense on which juries would have to be charged and on which they would deliberate. Because juries are not repeat players like prosecutors and judges and because they face no obligation or pressure to explain their reasoning, we would risk substantial unevenness in the application of fraud law, especially if fraud rules included a step under which juries had to determine the content of a norm external to the actor's conduct. The MPC-type formulation might improve upon the English rule by focusing jurors on *market* norms, but not without substantial cost. Inevitably, jurors would face difficult inquiries into the practices of specialized markets with which they have limited familiarity, and criminal fraud trials would be dominated by contests over expert testimony.

Second, there is the possibility of undesirable behavioral consequences. Ironically, it is not clear how far we would want to go in providing notice that notice is required for fraud liability. We might only make fraud harder to detect by announcing that an actor can avoid sanction by stripping away any markers of consciousness of wrongdoing from her conduct. Of course, causing actors to abandon concealment efforts might not be a perverse effect at all, but a welcome one. Law that says, "Don't hide or you will be viewed with suspicion," might force actors to leave normatively questionable conduct exposed to others in ways that allow social or market sanctions (like refusal to transact or reputational harm) to operate.²⁰⁴ Such perverse incentives also may not be a serious worry because we already have fraud law that, if read properly, says that an actor's manifestation of

²⁰³ Many thanks to Stephen Morse for positing something like this formulation. The chief differences between the English "dishonesty" element and this Model Penal Code-type (MPC) rule would be that the English rule looks to general societal norms, while the MPC-type rule would look to market norms, and that the English rule reaches any conduct normatively "dishonest," while the MPC-type rule would reach only "gross deviations" from normative baselines.

²⁰⁴ This result, however, may not be unambiguously good. See Daylian M. Cain et al., *The Dirt on Coming Clean: Perverse Effects of Disclosing Conflicts of Interest*, 34 J. LEGAL STUD. 1, 3-4, 13-14 (2005) (setting out results of behavioral study finding that cognitive effect of requiring actors to disclose can be greater license for wrongdoing).

consciousness of wrongdoing makes punishment more likely. All the while, new fraud cases marked with badges of guilt keep coming along.

The lack of bad consequences could be a product of acoustic separation—the distinction between actors in the legal system, to whom rules about how to decide legal questions (decision rules) are addressed, and actors in society at large, to whom rules about how to behave (conduct rules) are addressed. Inquiry into consciousness of wrongdoing is an *ex post* function—a rule of decision, not conduct. In novel fraud cases, the conduct rule might be, “Don’t take unfair advantage of another person through deceit.” The decision rule would be, “Punish only those who took unfair advantage of others through deceit in a manner they knew to be contrary to prevailing norms.”²⁰⁵ Commercial actors might be only dimly aware (or not at all) that courts could later assess their conduct by looking for badges of guilt. Doctrine might be doing some of this work of avoiding undesirable consequences of too much notice. Filling out fraud’s conduct rules might undo that work.²⁰⁶

Third, there are questions about how much this kind of codification could accomplish. The fault methodology described here has true meaning only when applied to particular behaviors *ex post*. To say that the conduct rule of fraud is, for example, “Don’t take undue advantage of another through deceit in a manner the relevant community deems wrongful,” is not much more illuminating than saying that the conduct rule of fraud is, “Don’t defraud.” Both rules beg the question of whether a particular novel behavior belongs in the general category they describe. The MPC-type formulation just described might constrain prosecutors and courts better than current law—they would at least know they could not skip the *ex post* inquiry into consciousness of wrongdoing—but it is doubtful that it would tell market actors much more clearly what novel *behaviors* the law might punish,

²⁰⁵ As Meir Dan-Cohen explains, there is no perfect acoustic separation between conduct rules and decision rules. DAN-COHEN, *supra* note 4, at 41. Actors will always have some awareness of the standards by which a court might later evaluate their conduct, and they might alter their behavior on the basis of that knowledge. *Id.* at 42. But, as Dan-Cohen also urges, there will always be some separation when the class of actors and the class of adjudicators do not consist of the same people, because rules addressed to each class are not addressed to the other. *Id.* at 44–45.

²⁰⁶ See *id.* at 45 (noting that it is possible to speak of legal system as pursuing certain ends without assuming any conscious decision by legal actors to seek such ends). Dan-Cohen calls this a strategy of “selective transmission.” *Id.* Likewise, English law’s reposing of the dishonesty test with the jury, and reluctance to define dishonesty or treat it as a question of law, might evidence desire that it remain a decision rule and not spill over into the realm of conduct rules.

rather than just something about the legal system's *methodology* for assessing novel behaviors *ex post*.

Even this very rough sketch of the law reform project reveals its complexity. In any event, a useful experiment may be about to begin. If England chooses to enact its proposed fraud offense that incorporates "dishonesty" as an element, including its subjective component, we may learn much about how such a rule shapes the behavior of both commercial and legal actors.

For now, I would accept something like the status quo, perhaps in a more robust and self-conscious form. By means of retrospective, case-specific, and fact-bound decisions—generating principles by common law method—prosecutors in their charging decisions and judges in their review of convictions should insist on consciousness of wrongdoing as a condition of liability in cases of novel fraud. Their doing so across a range of cases best develops the law of fraud. Whether this inquiry is styled as concerning the sufficiency of the evidence of "intent to defraud" or the constitutionality of applying an open-textured fraud statute to a novel behavior in view of due process requirements is institutionally important and raises questions beyond the scope and constraints of this Article. However, the form of the inquiry does not much affect either its substance or its normative justification.

B. Civil vs. Criminal Sanctioning

Study of white-collar crime is particularly dominated by inquiry into when the state should punish wrongs in addition to requiring wrongdoers to compensate the injured, probably because in this context the criminal law polices property exchanges. If the wrongdoing involves a property exchange, the natural question is, why not just reverse the exchange or make it more costly than it is worth? Yet economics, relatively stripped of moral content, does not fit well with the moralistic architecture of the criminal law. This friction strongly pressures study of white-collar wrongdoing to locate, normatively, the proper distinctions between civil and criminal sanctioning.

Does my analysis of fraud add anything to this higher-order discussion? I think the contribution of the analysis is built into its substance. But let me first explain what my analysis does *not* do. For the project of sanctioning fraud, consider a matrix organized according to the means and purposes of sanctioning. Our means can be civil or criminal. Our purposes can be deterrence or punishment/compensation. We can use either or both means to accomplish either or both ends. Complete normative analysis needs to consider each of four quadrants: civil sanctioning to deter; criminal sanctioning to deter;

civil sanctioning to compensate; and criminal sanctioning to punish. My analysis does not speak to the first two quadrants; it does not address whether deterrence should be the goal in sanctioning fraud (not terribly controversial) and, if so, whether civil, criminal, or some combination of sanctions should be employed (plenty controversial). To conduct this analysis, we need to address many questions not treated in this Article, such as fraud perpetrators' tendency to be judgment-proof in relation to optimal sanctions; deep discounting by actors of the personal costs of forfeiting assets that they mostly obtained through the fraud itself; and indemnification and insurance.

My analysis also does not address, at least not purely normatively, whether punishment and compensation (or, perhaps better, desert) should be purposes of sanctioning fraud. I take as given that this is so, since it is such an indisputable and entrenched part of positive law. The account I have provided of consciousness of wrongdoing speaks only, but importantly, to whether we should choose criminal, civil, or some combination of sanctions for fraud *if* we have determined that desert is a reason to sanction fraud. The answer I have provided is that we should choose a combination of sanctions in which harmful deception is compensated up to the point at which the wrongdoer knowingly engages in wrongdoing, at which point harmful deception is punished.

Much of what has been said about the modern law of criminal fraud, at least in the federal courts, aligns its development with a broader problem in contemporary criminal law usually termed "overcriminalization"—the transformation of large swathes of conduct traditionally seen as only civil wrongs into crimes.²⁰⁷ On this account, what is most notable about the modern law of fraud is that it has extended its reach to new categories of actors, new settings of economic activity, and new relationships of duty.²⁰⁸ The expansion of

²⁰⁷ See Coffee, *Tort/Crime*, *supra* note 15, at 193–201 (describing dissolution of "any definable line between civil and criminal law" and suggesting that "crime/tort distinction is today feasible only at the sentencing stage"); Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703, 703–12 (2005) (providing federal, state, and local examples of overcriminalization and exploring its causes and costs); see also Kahan, *supra* note 5, at 400–02 (suggesting notice and individual autonomy are concerns only where conduct "sits on the boundary line between socially desirable and socially undesirable"); William J. Stuntz, *Self-Defeating Crimes*, 86 VA. L. REV. 1871, 1873, 1883–86 (2000) (noting that contested white-collar cases that go to trial, and in which boundaries of crime are central issue, are usually "marginal" ones). But see Stuart P. Green, *Moral Ambiguity in White Collar Crime*, 18 NOTRE DAME J.L. ETHICS & PUB. POL'Y 501, 519 (2004) ("Much of white collar crime involves conduct that is hard to define, hard to identify, and hard to prove; yet it is also some of the most harmful conduct our society faces.").

²⁰⁸ See John C. Coffee, Jr., *Modern Mail Fraud: The Restoration of the Public/Private Distinction*, 35 AM. CRIM. L. REV. 427, 427–28, 432–49 (1998) (documenting federal

fraud law is described along the dimension of the social activities it polices. This growth trend is said to risk a variety of undesirable consequences, including overdeterrence of economic activity and, in a self-defeating fashion, dilution of the communicative authority of the criminal law.²⁰⁹ The implied remedy is to redefine more narrowly the scope of duties with which fraud law is concerned.²¹⁰

The intuition that the law should proceed carefully in criminalizing commercial behavior is powerful, indeed so powerful that it has strongly influenced the law of fraud we *have*, not just the law of fraud we might be said to *need*. My account suggests that the criminal law of fraud does not reach into every possible realm of social activity that might accommodate it and into which prosecutors and courts decide to permit it to flow. The expansion of the criminal law of fraud is (at least when correctly applied) restrained by a principle of individual fault that permits the law to intervene in new social settings only if an actor has chosen to press forward with a course of conduct in the face of a clear signal that the behavior is wrong.²¹¹ For the most part, the

common law and statutory rise of intangible rights theory of fraud and its potential application to both public as well as private fiduciaries).

²⁰⁹ See, e.g., Coffee, *Tort/Crime*, *supra* note 15, at 193, 219–20 (describing weakened efficacy of criminal law and increasing difficulty of remaining within its boundaries in certain industries); Kadish, *supra* note 145, at 443–44 (discussing problems caused by expansion of criminality without culpability in economic crimes).

²¹⁰ See Coffee, *supra* note 208, at 449–63 (providing inventory of available options to limit scope of 18 U.S.C. § 1346 (2000) and suggesting construing § 1346 according to state law in private fiduciary cases but according to federal common law in public fiduciary cases); see also John C. Coffee, Jr., *Paradigms Lost: The Blurring of the Criminal and Civil Law Models—and What Can Be Done About It*, 101 YALE L.J. 875, 1892–93 (1992) (“[T]he steady encroachment of the criminal law upon fiduciary duties and ethical standards may be the most important and irreversible development in the substantive criminal law of this era.”); Coffee, *Tort/Crime*, *supra* note 15, at 197 (stating that “when sufficiently clear partitions cannot be erected between the unlawful behavior and closely related lawful behavior,” prohibitory policy should be abandoned and law should resort to pricing conduct); Hart, *supra* note 92, at 431 (“What sense does it make to insist upon procedural safeguards in criminal prosecutions if anything whatever can be made a crime in the first place?”); Stuntz, *supra* note 207, at 1886 (“[W]hite-collar crime is likely to come to seem increasingly trivial as the laws forbidding it become increasingly broad.”); Stuntz, *supra* note 102, at 57 (noting that over past thirty years, “white collar offenses, unlike traditional street crimes . . . [have expanded to] cover a vast range of conduct that neither Congress nor prosecutors could plausibly wish to punish”). The MPC drafters attempted to do this, at least partially, with their offense of “theft by deception” (the Code contains no offense of fraud *per se*). MODEL PENAL CODE § 223.3 (1980). The commentary to that provision, however, demonstrates the difficulty of defining fraud with reference to particular duties and relations; in many places, the commentary either gets mired in or abandons problems of variation among commercial contexts and expectations. *Id.* § 223.3 cmts. 1–3, at 179–200.

²¹¹ In terms of research implications, my account of fraud law makes clear that we do not know enough about three large questions: What would a complete historical account of fraud’s development in the Anglo-American legal tradition, as a concept of wrongdoing

criminal law adheres to this limitation, which arises from the criminal law's own architecture and the influence of that architecture on the professionals who administer it. Where the law does not adhere to it, it ought to.

CONCLUSION

Fraud can and should be better understood, both as a wrong and as a legal prohibition. It is in the nature of markets and human ingenuity to produce new iterations and technologies of economic predation. It is in the nature of law to confront such innovation with broad, principled directives about behavior, such as "Do not defraud," that clash with the law's own commands to the state about when punishment is permissible. The criminal law, somewhat quietly, has managed this tension by deciding novel cases on the basis of an actor's observable awareness of the wrongfulness of her actions. This mechanism is a coping device, not a means of settling the unending contest over novel fraud. Novelty never ceases; neither will doubt about criminality.

Fraud law's preoccupation with consciousness of wrongdoing could be a method for efficiently regulating markets or a basis to deem the individual actor blameworthy. The first explanation is too sweeping, does not pan out well in instrumental analysis, and fits poorly with the history and contours of positive law. The second fits much better with the development and shape of the positive law of fraud and with the theoretical structure of the criminal law. On this account, fraud's existing domain of actions, relations, and duties can be extended to encompass analogous but novel conduct only if the actor has actual notice of wrongfulness. If this account is accurate, the criminal law of fraud is more restrained than we might have thought, providing legal actors with a feasible, if imperfect, means of developing the law while adhering to legality-related values and confining criminal sanctions to cases of genuine individual blameworthiness. A clear view of criminal fraud law's culpability methods should be a starting point for discussion of how to order civil and criminal sanctioning of economic wrongs.

and as a body of doctrine, look like? What precisely is the nature of the problem for the state of regulatory subjects who adapt to, and remain ahead of, an evolving legal regime? And what more could be said, in terms of both analytical rigor and observation across legal subjects beyond the law of fraud, about the significance of the concept of consciousness of wrongdoing for legal and moral theory?