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Criminal Law and Sociology

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Abstract and Keywords

This chapter examines the relationship between sociology and substantive criminal law and offers a new frame of analysis for understanding the role of sociology in criminal law. It begins with an overview of the existing sociology of criminal law and highlights the fundamental tensions between the two disciplines, with an emphasis on attempts to reconceptualize the relationship. It then treats sociology in criminal law as a new paradigm for a cross-fertilization of sociology and criminal law and illustrates this paradigm by looking at the case of the diminished responsibility of offenders. This new paradigm is then further developed through a close analysis of sexual abuse offenses which concern the diminished responsibility of victims.

Keywords: sociology, criminal law, diminished responsibility, offenders, sexual abuse, victims

I. Introduction to Criminal Law and Sociology

[*]AS a phenomenon of significant social importance, criminal law has been a continuous point of interest for sociologists. Sociology and criminal law have many potential meeting points. However, within the rich tradition of sociological analysis of law, certain aspects of criminal law have drawn more attention than others. Criminal process and punishment have traditionally stood at the center of sociological attention, whereas the relationship between sociology and substantive criminal law has remained to a large extent underexplored.[1]

There are two main reasons for this lacuna. Sociologists are interested in law in action rather than law in the books. Most sociologists of the criminal justice system are interested in the power and effects of the criminal justice system and not in the minute

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details of criminal legal doctrine. From a sociological (p. 153) point of view, substantive criminal law and doctrine are mere rationalizations of the exertion of power. By the same token that sociologists of religion do not focus their research on theological dogma, so too sociologists of law have not devoted their attention to the study of legal doctrine. On the other side of the divide, from a traditional legal point of view, the contribution of sociological analyses to criminal doctrine may seem equally futile. The ethical and ontological presuppositions of substantive criminal law, first and foremost, the notions of moral agency, responsibility, and free will, seem incommensurable with the epistemological and ontological presuppositions of sociology as a science of social conditions and their effects. Sociology seeks causal explanations, whereas criminal law attributes responsibility. More specifically, substantive criminal law has traditionally rejected a priori any argument for diminished responsibility due to external social factors, such as class, ethnicity, or gender. Sociologically based arguments contradict criminal law's entrenched belief in autonomy and individual responsibility.

While the division of labor between sociologists and jurists continues to dominate the academic terrain,[2] two important shifts in the sociology of criminal law have complicated the relationship between these seemingly separate spheres of knowledge. First, sociologists have become growingly aware of the importance of the inner logic and dynamics of the legal sphere and its irreducibility to extra-legal sociological considerations. Secondly, both sociologists and lawyers have become growingly interested in the incorporation of sociological knowledge into substantive criminal law analysis. This changing focus may be described as a transition from an interest in the sociology *of* law to an interest in sociology *in* law.

In what follows, we seek to describe both these developments in the broader context of the sociology of criminal law, to point to the contributions and limitations of the current literature, and to offer a new frame of analysis for understanding the role of sociology in criminal law. Undoubtedly, the aim of this chapter is not to provide a comprehensive account of the field of sociology of criminal law. Rather, the chapter offers a critical reflection on the common portrayal of the relationship between these two fields and offers a new approach that may be of interest both to scholars of criminal law and to sociologists.

The chapter proceeds as follows: Section II provides an overview of the existing sociology of criminal law and presents the fundamental tensions between the two disciplines emphasizing attempts to reconceptualize their relationship. Section III offers *sociology in criminal law* as a new paradigm for a cross-fertilization of sociology and criminal law and focuses on the case of diminished responsibility of offenders (p. 154) to illustrate the new

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paradigm. Section IV develops the new paradigm through a close analysis of sexual abuse offences, which concern the diminished responsibility of victims.

II. Sociology and Criminal Law: Tensions and Possibilities

1. Sociology of criminal law beyond reductionism

Mainstream studies in sociology of criminal law observe law from an external point of view and explain law either through its social function or through its social power. Whether emphasizing social cohesion[3] or social conflict,[4] such accounts have positioned the phenomenon of criminal law as the object of sociological inquiry[5] and reflect upon criminal institutions "from the outside." The main line of questioning posed by traditional sociolegal accounts is: what are the social causes, effects, and functions of the criminal law system? Of course, dramatic differences exist among various writers within this tradition. One important axis of differentiating between theories is the level of sociological reductionism; namely, the extent to which scholars on one end of the spectrum understand criminal law merely as a reflection of the social order, or alternatively take seriously the semi-autonomous nature of law as a social system and consequently give greater weight to the internal logic and dynamics of the criminal legal system and criminal legal doctrine. Here we wish to highlight a gradual movement in contemporary scholarship to a more nuanced and less reductionist account of criminal law.

Characteristic of the reductionist analysis is the application of general social theory to the criminal law. The criminal legal system becomes yet another subject matter of sociological analysis. One school of sociologists and criminologists has addressed criminal law institutions as an important mechanism of social order, assessed their effectiveness, and offered ways to improve them.[6] A different, more (p. 155) critical school, has been much more skeptical about "crime control" theories. Inspired mainly by Marxist theory, critical scholars have shown how the seemingly unbiased operation of the crime control enterprise is better understood as a form of oppression by dominant social groups over the disadvantaged, and claimed that the seemingly natural social order should be acknowledged as a web of power relations.[7]

Whether favorable or critical of criminal institutions, mainstream Anglo-American sociology did not pay much attention to the specific content of criminal legal norms and

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ignored criminal law's internal normative structures. Guided by the apparent dichotomy between questions regarding the social effects of criminal law, and questions concerning the metaphysic of criminal justice,[8] sociologists naturally concentrated on the real effects of the criminal law, and most notably its punitive effects. This approach was intensified by the traditional Marxist identification of the legal system as part of the social super-structure. In this tradition, law is a legitimizing and rationalizing mechanism and no more than a social epiphenomenon. Most notably, this line of inquiry was and to a certain extent still is guided by general sociological questions concerning the distribution of power and its conceptualization through the axes of class, gender, race, and ethnicity.

The rise of Legal Realism in the first half of the twentieth century, joined by the "Law and Society" movement in the second half of the twentieth century, has greatly contributed to this line of study.[9] Sociologists of the criminal justice system, as well as a growing number of criminal lawyers, have been interested in the broader sociological context in which criminal law operates. One familiar direction has been the "gap studies," which have focused on the disparity between law on the books and law in action—that is, the gap between the letter of the law and legal enforcement.[10] Another direction has been to explore the interrelationship between criminal legal norms and social norms, beliefs, and attitudes.[11] For the most part, other than pointing to the obvious fact that legal norms as opposed to social norms are state-enforced, these studies did not include in-depth reflections on the exact (p. 156) relationship between the two kinds of norms. We return to this question, offering a more reflective approach, in what follows.

The marginalization of substantive criminal law and criminal doctrine was partially revisited by neo-Marxists writers, who questioned previous attempts to reduce law to its material basis. From the 1970s onwards, scholars in this tradition have emphasized the relative autonomy of the criminal legal system and have given more weight to the sociological significance of legal authority[12] and the internal logic of the rule of law.[13] These scholars have argued that the ideals of substantive and procedural criminal law are not mere rationalizations but have real effects. Moreover, they are not mere reflections of existing power relations and may, at times, come into conflict with hegemonic power, even if their ultimate purpose and effect is to sustain the oppressive apparatus of state authority and the ruling classes.

Another related development, still in the 1970s, was the rise of the Critical Legal Studies (CLS) movement, which employed critical theory to deconstruct the very conceptions of criminal responsibility.[14] Though these writers operated mostly within law schools, and did not see themselves as sociologists, they were inspired by neo-Marxist theory and later on by post-modern philosophy. CLS writers have challenged the internal logic of criminal law doctrine and brought it under the scrutiny of social-critical assessment. Scholars in

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this tradition have gone beyond the familiar Marxist argument about the discrepancy between the legal ideal of equality and freedom, and the social reality of inequality and oppression. Through a symptomatic reading of legal materials, they have located the discrepancies and the contradictions within the legal texts themselves.[15]

2. From sociology of criminal law to sociology in criminal law

As mentioned, most sociological research applies sociological method and theory to the study of the criminal law system. A very different approach was developed in the 1970s by Michel Foucault whose work continues to exert influence in the field. One way of understanding Foucault's contribution is to highlight the manner in which he turned the tables on the sociology of criminal law and, more generally, on the relationship between the criminal law system and the human and social (p. 157) sciences. Rather than studying the criminal law system with human and social sciences, Foucault offered a critical analysis of the incorporation of social and human sciences into penal procedures as a new mechanism of knowledge/power, that is, a new power formation grounded in the emergence of new forms of knowledge including criminology, psychology, psychiatry, and sociology.[16]

Foucault's classic, *Discipline and Punish: The Birth of The Prison* reaches back to the penal reform at the turn of the nineteenth century and the writings and interventions of Cesare Beccaria, Jeremy Bentham, and their French colleagues of lesser repute. Inspired by Foucault, other scholars have offered similar accounts of more recent developments in the penal legal system. They have critically examined new modes of criminal punishment and rehabilitation,[17] new methods for police investigation[18] and the contemporary reality of courtroom procedures, and have critically characterized the criminal legal system as a sophisticated mechanism of social management, policing,[19] and governance.[20] One line of this scholarship, we seek to highlight here, is interested in the way sociology, along with other human sciences, has been uncritically incorporated into the criminal justice system and has given rise to new formations of knowledge/power.

With all his interest in the incorporation of the social sciences into the operation of the penal system, Foucault was highly aware of the tension between the internal logic of the law and the legal process, on the one hand, and the role of extra-legal formations of knowledge/power and their role in the penal system, on the other hand. In a telling passage, Foucault draws attention to this tension:

> The whole penal operation has taken on extra-juridical elements and has personnel. It will be said that there is nothing extraordinary in this, that it is part

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> of the destiny of law to absorb little by little elements that are alien to it. But what is odd about modern criminal justice is that, although it has taken on so many extra-juridical elements, it has done so not in order to be able to define them juridically and gradually to incorporate them into the actual power to punish; on the contrary, it has done so in order to make them function within the penal operation as non-juridical elements…Today, criminal justice functions and justifies itself (p. 158) only by this perpetual reference to something other than itself, by this unceasing inscription in non-juridical systems.[21]

For Foucault, the reliance of the penal system on non-juridical elements was of key importance. Interestingly, Foucault too adopts the notion of a division of labor between the legal and the non-legal system, even as the thrust of his argument is to point to their integration. Though Foucault was more aware than any previous scholar of the importance of the human and social sciences in the criminal legal system, he nevertheless insisted on their separation.

Without denying the truth of Foucault's insight, but rather viewing it as a starting point, we can frame a new research question concerning the relationship between criminal law and sociology: when, and under what conditions, can sociology be incorporated into the heart of the legal doctrine, not as an external, non-juridical element, but rather in the language of legal doctrine?

Recently, there have been interesting attempts to integrate sociological insight into criminal law, which are worth mentioning. One direction, explored by feminist scholars, has been to integrate critical sociology into criminal law doctrine—specifically in the area of sex offences. Radical feminism developed in two waves. The first wave introduced critical gender theory and offered a blunt critique of rape law.[22] The second wave relied on gender theory to offer constructive reforms of substantive criminal doctrines—mainly within pornography regulation.[23] The feminist approach aspired to move beyond the sociological description of gender inequality to a normative-legal judgment that aptly recognizes gender discrimination as a legal wrong. Despite considerable efforts, however, radical feminists have had more success in non-criminal areas (sexual harassment regulation) than with criminal law reform.

Another more recent direction proposes to revise existing criminal law doctrine by taking into account the socioeconomic background of the offender. These considerations, which in the past had a limited role within sentencing and no role in determining criminal responsibility, are currently under debate in scholarly literature. Richard Delgado, for example, argues that criminal law should recognize a special defense for offenders from impoverished socioeconomic backgrounds, which he refers to as the "Rotten Social Background" defense.[24] He has opined that under severe conditions of socioeconomic

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deprivation, offenders may lack the mental capacity to commit crimes (*mens rea*) and, in extreme cases, should be excused from criminal responsibility. Barbara Hudson has similarly advocated adopting a (p. 159) "hardship defense" for poor offenders,[25] and Marie-Eve Sylvestre has reflected upon the possibilities of rethinking criminal responsibility for poor offenders, inspired by the social theory of Pierre Bourdieu.[26]

The proposals to admit impoverished backgrounds as a criminal defense are novel in that they try to bridge the distinct discourses of sociology and substantive criminal law. They thus fundamentally break away from traditional legal conventions, and seek to broaden the horizon of the standard liberal imagination. As yet, however, these suggested reforms have not been adopted into positive criminal law. And there is good reason for this rejection. This line of argumentation imports social theory into criminal law without resolving the inherent tension between the two disciplines and worldviews. As mentioned, substantive criminal law and sociology endorse two different visions of the human subject. While substantive criminal law commonly assumes individual autonomy and human agency, sociological knowledge stresses the structural, cultural, and economic circumstances that determine human behavior. Current theory does not account for the discrepancy between these two subjects: it offers a novel methodology without revisiting the substantive presuppositions of sociolegal theory.

In what follows we offer an outline of a new sociolegal theory to accompany the new methodology of *sociology in criminal law*. The new theory translates sociological insights into the normative context of legal analysis and bridges the explanatory objective of social theory with the normative interest of criminal law. We proceed by exploring four paradigmatic cases in which criminal law has already incorporated sociological insight into substantive criminal doctrine. In contrast to the previously mentioned accounts, which seek to promote a normative ideal by imposing social concerns onto criminal law doctrine, our attempt is to explore the manner in which existing law already recognizes the impact of social norms on criminal responsibility. The cases are: cultural defense, provocation, Battered Woman Syndrome (BWS), and sexual abuse offenses. In all four cases, we show how sociological insight was integrated into criminal law only through the translation of descriptive sociological categories into normative categories such as cultural norms. Basic sociological categories: ethnicity, gender, and class have been translated into the legal context of cultural norms (rather than ethnic discrimination), family norms (rather than gender inequality), and the normative power of bureaucratic authority (rather than class domination). In all these cases, the social norms pertain to well-defined groups of individuals who act within prescribed social roles and within the confinement of social institutions: cultural groups, the family, and bureaucratic institutions. (p. 160)

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III. From Social Power to the Power of Norms: The Case of Diminished Responsibility of Offenders

This section of the chapter explores novel developments in criminal law theory and doctrine in which criminal law recognizes, albeit under very limited conditions, the imprint of social conditions on human action. We seek to highlight the integration of sociological insight into criminal accountability in order to further the dialogue between sociology and criminal law. The emphasis here is on dialogue—rather than on the more common and one-sided sociological analysis of criminal law. Any such one-sided treatment would, by definition, reduce criminal law to the logic of sociological inquiry. The aim here, quite to the contrary, is to explore the way criminal law offers its own account and its own understanding of "the social,"[27] which then may be compared and contrasted with more conventional sociological frameworks. However, our proposal is not to return to a "formalist" account of criminal law, one that maintains the autonomy of the legal system and its independence from other social systems. On the contrary, we are interested in the extent to which criminal law is heavily influenced by extra-legal normative and cognitive frameworks but, nevertheless, requires for their incorporation a process of translation.[28]

Specifically, we are interested in cases of "diminished responsibility" where the underlying impediment to full autonomy is not merely psychological but sociological. Diminished responsibility is a broad and varied legal category.[29] Most commonly, it is used to preclude liability for first-degree murder, or to reduce other degrees of murder to manslaughter. Diminished responsibility is often classified as a subcategory of mental defense, self-defense, necessary evil, and loss of control, when general circumstances do not amount to a full defense. There are other, more specific, cases that are conceptually equivalent, including provocation, BWS, infanticide, and, in some jurisdictions, mercy killing. Obviously, not all cases of diminished responsibility concern social norms and many of the cases focus on mental (p. 161) defects. Our interest is in those cases in which the two work in tandem, that is, in cases in which social norms exert psychological effects.

We thus focus on recent developments in criminal law doctrine in which the presumption of agency, central to criminal law, has been relaxed due to the pressure of social conditions. In these exceptional contexts, criminal law acknowledges the power of social conditions to affect freedom of will, and the agent is considered to be only partially in control of—and consequently responsible for—her actions. These situations are

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exceptional and highly circumscribed. Our question is when, and under which circumstances, is criminal law doctrine willing to incorporate social conditions and sociological insight into its understanding of human action?

Indeed, not all social conditions or social forces are equal under the law. Let us compare and contrast the differences between the following defenses all of which appeal to the mitigating power of social forces: “My socio-economic background,” “my religion,” or “my culture” “led me to do it.” Of the three, the first has no standing under substantive criminal law. It implies a direct influence of social forces on freedom of will. The second, in contrast, can be recognized as a defense (most commonly through constitutional law) but only because it challenges the legitimacy of criminal prohibition, and precisely because it does not question freedom of will. Whereas the third, the so-called “cultural defense,” has a more ambivalent standing.[30] Of the three, it may serve as a paradigm for exploring the extent to which substantive criminal law acknowledges the effect of external social forces on the freedom of the will. The latter question is of interest to us here.

For social conditions and forces to be recognized under criminal law, they must be translated into a language that is commensurable with substantive criminal law. In other words, a translation of descriptive sociological categories such as ethnicity, into normative categories such as cultural norms, must take place. Our analysis shows that such recognition can occur only if two cumulative requirements are met. First, the social condition must have the character of a social norm and the power it exerts should be normative. Secondly, the social condition must have a clear psychological effect and the power it exerts should be normative, so that the action follows from an internal normative commitment rather than from an external social pressure. Criminal law, in these cases, could recognize that an internalized social norm has weakened and limited, though never quite eliminated, the individual’s free will. We explore each of these requirements in turn.

Typically, social conditions, even those that may have moral implications, have no normative standing under criminal law. This is one consequence of the positivistic account of the modern state’s monopoly. The state has a monopoly not only over the legitimate use of power but, at least as importantly, aspires to exclusivity over the power to bestow legitimacy, that is, the power to declare norms as binding. (p. 162) Social norms that are not state-sanctioned are, under the positivist account, legally invalid, and those that contradict state norms constitute legal transgressions. In reality, however, this positivistic account does not exhaust criminal law’s normative horizon. Occasionally, social norms have a privileged position within the legal system even if they do not arise from within the legal system.[31]

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The most apparent case is religion but as we shall see there are others. Religion is a case in which the legal system incorporates social norms and in which social norms may be respected by criminal law. Undoubtedly, religion is a social norm despite the fact that we tend to identify freedom of religion in the liberal tradition with an individual belief system. Nonetheless, religion makes little sense outside its social context, and it is only through the commitment of the individual to a socially recognized norm that religion is recognized by state law.

While there is no “religious defense” per se, religion can be protected through constitutional law, and criminal legislation violating the constitutional right of freedom will be nullified in countries that have constitutional review. Nevertheless, religious norms are not always recognized by the state and often religious norms that violate criminal prohibitions are denied legal standing. Furthermore, legal systems widely differ in the manner in which they manage such conflicts. The point here is not that criminal law generally recognizes religious norms but, rather, that in comparison to other social forces, religious norms are more likely to receive legal protection. To the extent that they actually do, it is because they are not merely social forces but social norms, the normativity of which is recognized by the state as legitimately competing with its own. Our discussion of religious norms is only important when compared to other social conditions and forces that lack normative appeal. While the latter are not and cannot be incorporated into criminal law without violating the principle of free choice and individual autonomy, the former are not merely powerful causes of behavior but are also legitimate reasons for action. Under certain circumstances they may shape the will without entirely negating it.

Social norms that do not meet the standard of religious norms and that are not protected as such under the law, and specifically constitutional law, may nevertheless be recognized under substantive criminal law. One mechanism of their incorporation is by acknowledging their strong influence on the decision-making process of individuals, affecting their ability to exercise full agency over their actions. These cases are distinguishable from the common law doctrine of automatism and other cases of loss of volition in two important ways. First, these do not concern a complete loss of volition but a partial loss of control. Secondly, the reason for the loss is not physical or purely psychological, and has its origin not in the individual psyche but in strong social norms. These norms are not legally sanctioned and yet the law may take them into account. Nor are the social norms that we have in mind (p. 163) simply empirically identifiable patterns of behavior. Only to the extent that the law recognizes them as normatively binding may these patterns serve as grounds for attributing diminished responsibility. Our study shows that there are specific circumstances under which criminal law relaxes its basic model of the autonomous subject and considers a subject who acts under social influence

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and consequently does not act in full autonomy. These cases are not arbitrary and not all social conditions are recognized as having the power to diminish the autonomy of the legal subject. Furthermore, not all social norms have this transformative power.

One important set of cases are previously legally binding norms that have turned into social custom but have maintained some legal significance. They may be viewed as belonging to competing normative systems—competing with the state but, nevertheless, gaining certain recognition by criminal law. They compete with the state not only because they may propagate an alternative set of norms but because the alternative norms they offer are grounded not in individual consciousness or in a shapeless collective conscience, but rather in social institutions. These include family, religion, and other closely knit cultural groups and bureaucratic institutions.

A telling instance is the historical common law provocation defense. There are two elements of the traditional common law defense that should be emphasized. The first, which is still central in contemporary jurisprudence, concerns the loss of control of the wrongdoer over his actions. The provocation defense offers lenient treatment to murder accusations, because the wrongdoer was not in full control of his actions, that is, because he suffered from a weakening of the will. The defense recognizes, in other words, the possibility that the wrongdoer was taken over by a strong psychological impulse leading to the criminal action. The second element, which has been mostly, but not fully, eroded under contemporary jurisprudence, concerns the grounds for the provoked reaction. Under traditional common law jurisprudence, the defense was more likely to succeed if the criminal reaction was not only psychologically reasonable but was also based in a socially acceptable, normative motivation.

This requirement is most evident in the paradigmatic case of common law provocation—a husband accused of killing a rival adulterer. Historically, the husband would invite his rival to a duel, and though the duel was not legally sanctioned, the law would exonerate the husband from a murder accusation because it was clear that in protecting his honor the accused was abiding by a socially recognizable, though by no means legally sanctioned, norm. Today, emphasis is commonly given to the psychological affect[32] and not to the normative justification. But the notion that a defense may require more than merely a psychological ground has not disappeared. Indeed, the recent reform of the provocation defense in the United Kingdom and (p. 164) the establishment of the new “loss of control” defense rules out revenge—that is, a private seeking of justice as a legitimate ground for provocation. The following example suggests that whereas psychological distress in itself would not suffice as a defense, once it is backed by strong normative considerations, it may constitute a legally recognizable defense.

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Let us consider the case of BWS. Today we think of it as a psychological defense, but historically this was not the case,[33] and still today it should not be construed as a purely psychological defense. The origin of this defense lies in the reluctance of courts to convict a woman, who after repeated episodes of physical abuse from her spouse, decides to kill her predator. Women suffering from this condition are acquitted for murder even though the act was premeditated manslaughter and even if the act does not qualify as self-defense. While the defense is cast in psychological terms as a mental condition, it combines social norms in similar ways to the traditional provocation defense. The killing is legally wrong, but it evokes not only empathy, but also moral understanding—if not approval. Though the law cannot endorse vigilante acts, it does not turn a morally deaf ear to a woman who believes this is the only way she can escape her perpetrator.

If a battered woman is not fully accountable for her actions, this is not merely because she acted out of emotional distress. After all, legal expectations of people, even if they are under physical threat and emotional distress, is that they turn to the authorities and seek lawful protection. If the law does not have the same expectation from a battered woman, this is only because she has internalized a highly contestable, but nevertheless valid, social norm that commits her to remain in the household. This norm originates in the social system of patriarchy in which a woman was relegated to a subordinate status within the marriage and was "under oath to love, honor, and obey, and therefore obliged to do the husband's bidding."[34] While the duty to obey the husband and patriarchal norms in general are no longer valid as legal norms, criminal law recognizes their effect as social norms that may hinder a woman from leaving an abusive spousal relationship. Acknowledging the normative pressure preventing the woman from escaping, the law recognizes her diminished responsibility.

Comparing the old provocation defense and the battered woman defense is fraught with difficulties. But even if the differences outweigh the similarities, the differences themselves are revealing. The provocation defense in its historical origins was based on social norms that strengthened the accused's will to regain his honor so much so that his will could not be expected to bow before the positive law. (p. 165) The modern defense has moved from offensive to defensive. The battered woman's defense protects the offender as a victim of the circumstances and treats her with empathy and perhaps pity, whereas the provocation defense mitigated the responsibility of the offender as an aggressor. Furthermore, the force of social norms has undergone a psychological turn. From a (highly contestable) ethics of nobility, they have been rendered a psychological syndrome. As we see in the next section, the weakening of the will due to the internationalization of social norms is an important aspect of the contemporary incorporation of social norms into criminal law.

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To conclude this section, we return to the problem of cultural defense. It is a much less coherent category than either a religious defense, on the one hand, or a provocation or BWS defense, on the other. But to the extent that cultural defense has been recognized as a legal defense, it had to be more than a simple sociological fact about behavior patterns and had to satisfy these two conditions: (a) it should exert a normative force on the accused; and (b) it should evoke a psychological effect on the accused. A paradigm case of cultural defense is that of the Japanese woman who killed her two children after she learned that her husband had committed adultery.[35] Defending her actions, her lawyers argued that she had practiced an old Japanese tradition of "oyaku-shinju," or parent–child suicide through which she sought to purge the shame of her husband's infidelity. Once again, the defense was not based merely on psychological distress but rather on the internalization of a social norm that rendered her actions less controllable. The defendant received a lenient sentence—five years' probation and psychiatric counseling. It is unclear whether the court based its lenient sentencing on the cultural defense: what is undisputed and significant is that the court seriously considered the defense and admitted evidence pertaining to it.

Nonetheless, it seems that cultural defense has not taken hold in the criminal law system in the same manner as BWS. This, in all likelihood, is not a coincidence but a predictable consequence of the growing attention that contemporary criminal law pays to the plight of victims and the growing suspicion with which it judges perpetrators. Though formally the battered woman is the accused, she is conceived of first and foremost as a victim. While it is difficult to predict the relaxation of the legal presumption of full autonomy, and the expansion of the integration of internalized social norms into the criminal law, one may predict that courts are more likely to apply the diminished responsibility defense to victims (or victims-turned-accused) than to perpetrators. Indeed, if thus far our examples focus on the weakening of the autonomy of the accused, our next example—offenses of sexual abuse in authority relations (SAR offenses)—is based on the weakening of the autonomy of the victim. (p. 166)

IV. Normative Power and Diminished Responsibility of Victims: The Case of Sexual Abuse in Authority Relations

The notion of individual autonomy underlies two distinct principles in modern criminal law: one principle concerns criminal *responsibility* and pertains to the autonomy of *offenders*, and a second principle concerns criminal *wrongdoing* and pertains to the

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autonomy of *victims*. These two aspects are interconnected, but it is useful to consider them apart for our present inquiry as they engage two different questions in the theory of the criminal law. First, what are the conditions for holding a person responsible for a criminal act? Secondly, what are the criteria for proscribing certain acts as criminal wrongs? Autonomy plays an important role in both cases. In the former, autonomy is a prerequisite for holding someone criminally responsible for a criminal act. Criminal law assumes that people are generally autonomous and responsible for their actions, but this supposition can be counterbalanced by certain exceptional circumstances—for example, insanity. In the latter case, offense to autonomy is the conception of wrongdoing underlying many criminal offenses. To sum up, the offender's conduct must violate the autonomy of the victim in order to be considered a criminal offense; the offender should be deemed autonomous in order to be criminally responsible. Our previous discussion engages three examples in which criminal law has relaxed the presumption of autonomy with regard to offenders. Our next example—SAR offences—pertains to the autonomy of victims. In SAR offenses, the legal system diminishes the assumption of autonomy of victims in an authority relation. Thus, these offenses provide a particularly telling instance of the contemporary inception of sociological insight into substantive criminal law doctrine, and are a good opportunity to investigate the terms under which the legal system is willing to modify its traditional perception of autonomy.

1. SAR offenses: the challenge to the traditional understanding of autonomy

Autonomy is a broad concept and the meaning of autonomy varies in different discourses—social, moral, popular, and philosophical. Within criminal law, autonomy has traditionally carried a distinct meaning that has produced a specific and quite rigid understanding of "offense to autonomy." Autonomy in criminal law is understood as a domain of self-rule and relates primarily to one's control over one's body and property.[36] Moreover, an offense against autonomy refers to situations in (p. 167) which one person (the offender) invades the domain of another person (the victim) without the latter's permission. The paradigmatic example of criminal breach of autonomy is physical violence directed against the victim's body (criminal assault). While some non-violent invasions—such as extortion or fraud—have been recognized as traditional offenses to autonomy, they were very limited additions to paradigmatic cases. In any event—the mainstream view of autonomy in criminal law excludes the influence of social conditions, social structure, or social patterns on individual autonomy, although such conditions undeniably affect human beings' ability to control and design their own lives. Criminalization of sex in authority relations marks an important development in this respect,[37] because it takes into account the social structure of authority when

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considering the victim's autonomy. We first present SAR offenses and then show how they reflect and enforce an unorthodox understanding of offense to autonomy in criminal law.

We use the term "SAR offenses" to connote a cluster of new sex offenses that prohibit sexual contact in relations such as those between an employer and employee, therapist and patient, or teacher and student. The criminalization of SAR is a contemporary trend in many legal systems, including the United States, Canada, and Israel. The problem of introducing sex into professional relationships is not new and has long given rise to various forms of non-criminal regulation.[38] Contemporary SAR offenses are unique among these different arrangements, however, for they criminalize sex in professional relationships as a new type of sex offense, on the assumption that such sex is often imposed—rather than freely chosen—by the subordinate.

SAR offenses share a common element: they proscribe sexual contact within a certain type of relationship in which one side holds a dominant position of power over the other side in the relationship.[39] Notwithstanding this imbalance of power, SAR offenses do not require an element of force or any other type of coercion traditionally recognized as offense to autonomy in the common law. A typical SAR provision proscribes sexual contact between a doctor/employer/teacher and a patient/employee/student, if the former has abused his authority to coerce the victim into sexual submission.[40] Courts have determined that proof of threats or fraud is not required for criminal charges and that "abuse of authority" is not (p. 168) limited to extortion.[41] Furthermore, certain SAR provisions contain categorical prohibitions of sex in these relationships and at times specify that consent by the victim is not a defense to a criminal charge.[42] Thus, unlike traditional rape law, which perceive the use of force, threat of force, fraud, or incompetence as exhaustive of non-consent and offense to autonomy,[43] SAR offenses proscribe sex even if the victim was not threatened or defrauded prior to the sexual act, and even if she cooperated rather than resisted the offender's sexual initiative. Hence, SAR offences challenge the conventional understanding of offense to autonomy in criminal law. A primary question—with an answer that has the potential to illuminate wider issues in the contemporary state of affairs between criminal law and sociology—is why do subordinates submit to authority figures' sexual requests, and what motivates criminal law's conception of such submission as wrongful, if no coercive measures have been used to persuade victims into submission.

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2. Current SAR understandings: psychology and sociology

The main assumption guiding judges, policymakers, and scholars is that subordinates will sometimes submit to sexual advances by authority figures even if they lack a genuine desire to do so, and even if no threats or force have been used to coerce them into submission. Legal practitioners and scholars have been guided by the intuition that such scenarios are wrongful and deserve criminalization, but they were also aware of the misfit between SAR offenses and traditional categories of offense to autonomy in criminal law. In their attempt to explain and justify SAR criminalization, scholars and practitioners have come up with two main lines of argument. One argument focuses on the victim's psychology. It describes the victim's position in terms of psychological vulnerability[44] and (p. 169) understands SAR offenses as prohibiting the offender—a professional authority figure—from taking advantage of the victim's fragile circumstances by sexually exploiting her. This line of argument is mainly prevalent in the context of therapy exploitation.

A different explanation, appearing in feminist or feminist-inspired scholarship, moves from psychology to sociology. It stresses the structural imbalance of power between authority figures and their subordinates as the core issue. Feminist accounts consider the stark disparity of power between employers and employees, for example, and point to the ability of employers to pressure subordinates into unwanted sex by relying on their control over the employee's livelihood (and without having to use threats or any other form of coercion). Radical feminists have long argued that criminal law should, normatively speaking, acknowledge the prominence of power structures in women's lives and recognize their controlling effects over women's autonomy. Feminist accounts thus perceive SAR criminalization as a desired and exemplary legal model, which aptly proscribes sexual abuse of power.[45] The power, according to the feminists, is gender power or economic power in status-like relationships (employer–employee or teacher–student); its dramatic effects have been finally acknowledged, rather than disregarded, by criminal law.

3. SAR offenses: abuse of authority, not power

The following analysis suggests that the psychological proposition and the social inequality proposition described previously are both misguided. SAR offenses indeed break away from the traditional liberal understanding of offense to autonomy, and feminists have been correct to point this out. This deviation, however, does not reflect a full-fledged acknowledgment of social power but rather a more selective and essentially discriminating attitude. This approach specifically pays attention to social *norms* (rather

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than social power) and acknowledges their effects over victims without, however, completely eliminating their autonomy.

In order to understand SAR offenses, we should look into the term *authority* that appears in SAR provisions.[46] The social structure of authority, and particularly the norm of obedience—which is prevalent in bureaucratic authority relations—is the (p. 170) social condition to which SAR criminalization responds. Authority most fundamentally is a position of power that allows certain institutions or people ("authority figures") to rule other people, direct their actions, and guide them. Authority, therefore, is a social phenomenon that may carry psychological effects but cannot be conceived of in purely psychological terms.

Furthermore, we should note several characteristics that designate authority as a unique type of social power. First, authority works through a routine of command and obedience, entailing a hierarchy between "the one who commands and the one who obeys."[47] Secondly, unlike other types of social power, authority does not rely on force or superiority but rather on legitimacy.[48] Thus, authority is an essentially normative order: subordinates follow authority figures because they perceive the entire authoritarian order as legitimate and binding, and not because force or economic power has been employed to coerce them into submission. It follows that although authority relations are hierarchical, this hierarchy is not equivalent to a disparity or imbalance of power. As Weber notes:

> We shall not speak of formal domination [i.e. authority] if a monopolistic position permits a person to exert economic power, that is, to dictate the terms of exchange to contractual partners. Taken by itself, this does not constitute authority any more than any kind of influence which is derived from some kind of superiority…[49]

We argue that SAR offenses are concerned with authority as a normative social order, rather than with imbalance in bargaining power or gender inequality. Undoubtedly, imbalance of power does exist in the relationships covered by SAR offenses, most notably employment relations; however, criminal law does not acknowledge this imbalance of power in itself. SAR offenses should not be understood as acknowledging class domination, economic inequality (even if structural), or gender domination. While SAR offenders are often males and the victims are typically females, gender is not the social category underlying SAR criminalization. Similarly, while SAR offenders typically have an economic advantage over SAR victims, economic inequality and disparity in bargaining power is not the social problem to which SAR offenses respond. Rather, SAR offences are attentive to social norms—and specifically the norm of obedience that is characteristic of bureaucratic authority relations.

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SAR offenses engage doctors, workplace supervisors, and university professors, all of whom are bureaucratic authority figures. Weber's groundwork study of authority illuminates the operation of bureaucratic authority in modern societies.[50] However, bureaucratic authority in the Weberian sense is not limited to state bureaucracy but encompasses every position of power (an "office" in Weberian (p. 171) terms) which is accorded to people by virtue of their profession or place in the hierarchy of an organization. In bureaucratic institutions and arenas, people are vested with authority on the basis of professional qualifications and authority is granted to achieve professional purposes. As a form of authority, bureaucratic authority allows its holders ("officeholders") to direct, lead, and guide others. Subordinates of bureaucratic authority figures—employees in the workplace, students at the university, or patients in the clinic or hospital—routinely follow their direction and orders. In other words, they follow a *norm of obedience* that is customary in bureaucratic institutions and arenas.

The assumption underlying SAR offenses is that subordinates in bureaucratic authority relations—who customarily follow the instruction of authority figures in the professional sphere—might also submit to *sexual* requests by these figures. On a purely informational level, subordinates know that professional authority does not extend to sexual matters and that in no way are they obliged to conform to sexual requests by a doctor, a workplace supervisor, or a teacher. Nonetheless, the criminal justice system is attentive to the psychological tendency of people to succumb, to concede, and to cave in to an authoritative demand by an authority figure. Whenever the criminal justice system identifies such cases of sexual compliance in professional relations, it proscribes them as an "abuse of authority" and punishes the authority figure for sexually abusing the victim.

The bureaucratic norm of obedience that leads subordinates into sexual submission is not a legal norm; it is a social norm. Bureaucratic authority is not a legal authority: people do not have a legal obligation to "obey" professional orders, unlike their legal duty—as citizens—to obey state law (the "rule of law"). Even if a legal duty of obedience in professional relations existed, this duty would surely not extend to sexual matters. SAR offenses acknowledge a social norm of obedience; this social norm is included and recognized because it is endemic to bureaucratic institutions that, as Weber points out, are indispensable to modern society.[51] Moreover, the bureaucratic norm of obedience is basically a legitimate norm—or even a desired norm. After all, in the normal course of affairs, this norm allows people to follow professional guidance. However, criminal law has identified a problematic side effect of the bureaucratic norm of obedience—its diffusion and extension beyond the professional sphere, to affect non-professional matters (sex). In these cases, the criminal justice system acknowledges the social norm as influencing the subordinate's sexual submission and as leading her into unwanted sex, hence breaching her sexual autonomy.

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SAR offenses are a revealing example of contemporary criminal law’s attempt to acknowledge social power but accord to it specific and limited weight. This limited acknowledgement in the case of SAR means that the social norm is recognized as diminishing, rather than eliminating, the sexual autonomy of the victim. (p. 172) SAR is proscribed as an offense to autonomy, but not a full offense to autonomy as with rape. Accordingly, the punishment is significantly lower than that for rape.[52] Criminal law acknowledges here something equivalent to diminished capacity with respect to the offender—the diminished autonomy of the victim. In that respect, a new word is introduced to capture this wrongdoing—sexual *abuse*—that implies consensual, yet not fully autonomous, sexual contact.

V. Conclusion

The proximity between criminal law and sociology is hardly questionable as both are interested in human beings and their interactions within society. Law in itself is a social phenomenon and the specific character, culture, and function of legal institutions is continuously being studied by sociologists as well as by some legal scholars. Nonetheless, criminal law and sociology have for many years held disparate—almost opposite—perceptions of the human subject. As this chapter shows, the tension between the legally autonomous agent and the socially constructed subject is most intense where substantive criminal norms are concerned and, specifically, with regard to the presumption of responsibility underlying the “general part” of the criminal code, and the assumption of autonomy underlying “true crimes.”

Our study draws attention to this very tension as standing at the core of contemporary theoretical engagement of criminal law and sociology, as well as recent developments in criminal law itself. We suggest that in the final analysis substantive criminal law is neither fully alien to sociological insights nor plainly absorbs sociological data. Criminal law has not given up the ideal of autonomy but rather has revised its understanding of autonomy, to recognize, under certain circumstances, a new form of socially affected diminished autonomy. It remains to be seen whether additional criminal doctrines will factor in the influence of social norms—or perhaps have already done so—acknowledging the diminished autonomy of either offenders or victims. More fundamentally, the human subject reflected in and constituted by criminal law’s recent acknowledgment of social norms as guiding human action and interaction is emerging as a fruitful field for further investigation.

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References

Delgado, Richard, "Rotten Social Background: Should the Criminal Law Recognize a Defence of Severe Environmental Deprivation?," (1985) 3 *Law & Inequality* 9

Dubber, Markus D. and Valverde, Mariana (eds.), *Police and the Liberal State* (2008)

Durkheim, Émile, *The Division of Labor in Society* ([1893] transl. Lewis A. Coser, 1997)

Feeley, Malcolm and Simon, Jonathan, "The New Penology: Reflections on the Emerging Strategy of Corrections and its Implications," (1992) 30 *Criminology* 449

Foucault, Michel, *Discipline and Punish: the Birth of the Prison* ([1975] transl. Alan Sheridan, 1995)

Garland, David, *The Culture of Control—Crime and Social Order in Contemporary Society* (2001)

Hay, Douglas, "Property, Authority and Criminal Law," in Douglas Hay, Peter Linebaugh, and E. P. Thompson (eds.), *Albion's Fatal Tree* (1975)

Kelman, Mark, "Substantive Interpretation in the Criminal Law," (1981) 33 *Stanford LR* 59

Norrie, Alan, *Crime, Reason and History: A Critical Introduction to Criminal Law* (2001)

Rusche, Georg and Kirchheimer, Otto, *Punishment and Social Structure* (1939)

Sylvestre, Marie-Eve, "Rethinking Criminal Responsibility for Poor Offenders: Choice, Monstrosity, and the Logic of Practice," (2010) 55 *McGill LJ* 771

Thompson, E. P., "Whigs and Hunters," in Douglas Hay, Peter Linebaugh, and E. P. Thompson (eds.), *Albion's Fatal Tree* (1975)

Valverde, Mariana, *Diseases of the Will: Alcohol and the Dilemmas of Freedom* (1998)

Wells, Celia and Quick, Oliver, *Lacey, Wells and Quick: Reconstructing Criminal Law: Text and Materials* (2010)

Whitman, James Q., *Harsh Justice: Criminal Punishment and the Widening Divide between America and Europe* (2003)

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Notes:

(*) We wish to thank Daniel Ohana for commenting on an earlier draft of the chapter, and Chen Shidlovsky for excellent research assistance.

(1) As Lacey and Zedner point out "it is almost as rare to find a criminology text which concerns itself with the scope and nature of criminal law as it is to find a criminal law text which addresses criminological questions about crime." See Nicola Lacey and Lucia Zedner, "Legal Constructions of Crime," in Mike Maguire, Rod Morgan, and Robert Reiner (eds.), *The Oxford Handbook of Criminology* (2012), 159 ff.

(2) Lacey and Zedner (n. 1) 160–161 ff.

(3) Émile Durkheim, *The Division of Labor in Society* ([1893] transl. Lewis A. Coser, 1997); Martin Robertson, "The Evolution of Punishment," in Steven Lukes and Andrew Scull (eds.), *Durkheim and the Law* (1983).

(4) Georg Rusche and Otto Kirchheimer, *Punishment and Social Structure* (1939).

(5) See e.g. David Garland, "Sociological Perspectives on Punishment," (1991) 14 *Crime and Justice* 115 ff.

(6) See e.g. Nigel Walker, *Sentencing in a Rational Society* (1969); James Q. Wilson, *Thinking about Crime* (1975).

(7) For a useful summary of Marxist approaches to criminal punishment, see Garland (n. 5) 128–134 ff.; for an account of the influence of social and political forces on the legislative process of criminalization, see W. J. Stuntz, "The Pathological Politics of Criminal Law," (2001) 100 *Michigan LR* 505.

(8) Lacey and Zedner (n. 1) 163 ff: "there has been relatively little intersection between the normative theorizing undertaken by lawyers in respect to criminalization and that undertaken in critical criminology and criminal justice studies."

(9) Jerome H. Skolnick, "Legacies of Legal Realism: The Sociology of Criminal Law and Criminal Justice," (2012) 8 *Annual Review of Law and Social Science* 1 ff.

(10) See generally Nicola Lacey and Celia Wells, *Reconstructing Criminal Law: Text and Materials* (2nd ed., 1998), 62–90 ff.

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(11) See e.g. Paul Robinson “Criminalization Tensions: Empirical Desert, Changing Norms, and Rape Reform,” in R. A. Duff et al. (eds.), *The Structures of the Criminal Law* (2011).

(12) e.g. Douglas Hay, Peter Linebaugh, and E. P. Thompson (eds.), *Albion’s Fatal Tree* (1975).

(13) See esp. E. P. Thompson, *Whigs and Hunters: The Origins of the Black Act* (1975).

(14) For a useful and reflexive overview of critical studies of criminal law, see David Nelken, “Critical Criminal Law,” (1987) 14 *Journal of Law & Society* 105 ff.; Alan Norrie, *Crime, Reason and History: A Critical Introduction to Criminal Law* (2001).

(15) See among others, Mark Kelman, “Substantive Interpretation in the Criminal Law,” (1981) 33 *Stanford LR* 59 ff.; Bernard E. Harcourt, “The Collapse of the Harm Principle,” (1999) 90 *Journal of Crim. Law & Criminology* 109 ff.

(16) Michel Foucault, *Discipline and Punish: The Birth of the Prison* ([1975] transl. Alan Sheridan, 1995). For a critical appraisal of Foucault’s treatment of law, see Alan Hunt, *Foucault and Law: Towards a Sociology of Law as Governance* (1994). See also Mariana Valverde, “Specters of Foucault in Law and Society Scholarship,” (2010) 6 *Annual Review of Law and Social Science* 45 ff.

(17) Malcolm Feeley and Jonathan Simon, “The New Penology: Reflections on the Emerging Strategy of Corrections and its Implications,” (1992) 30 *Criminology* 449.

(18) Bernard H. Harcourt, *Against Prediction: Punishing and Policing in an Actuarial Age* (2007).

(19) Markus D. Dubber and Mariana Valverde (eds.), *Police and the Liberal State* (2008); Markus D. Dubber and Mariana Valverde (eds.), *The New Police Science: The Police Power in Domestic and International Governance* (2006).

(20) Jonathan Simon, *Governing Through Crime: How the War on Crime Transformed American Democracy and Created a Culture of Fear* (2007); David Garland, *The Culture of Control—Crime and Social Order in Contemporary Society* (2001); Mariana Valverde, *Diseases of the Will: Alcohol and the Dilemmas of Freedom* (1998).

(21) Foucault (n. 16) 22 ff.

(22) Catharine MacKinnon, *Toward A Feminist Theory of the State* (1989), 171–183 ff.

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(23) Paul Brest and Anne Vandenberg, “Politics, Feminism and the Constitution: The Anti-Pornography Movement in Minneapolis,” (1987) 39 *Stanford LR* 607 ff.

(24) Richard Delgado, “Rotten Social Background: Should the Criminal Law Recognize a Defence of Severe Environmental Deprivation?,” (1985) 3 *Law & Inequality* 9 ff.

(25) Barbara Hudson, “Punishment, Poverty, and Responsibility: The Case for a Hardship Defence,” (1999) 8 *Society & Legal Studies* 583 ff.

(26) Marie-Eve Sylvestre, “Rethinking Criminal Responsibility for Poor Offenders: Choice, Monstrosity, and the Logic of Practice,” (2010) 55 *McGill LJ* 771 ff.

(27) Shai Lavi, “‘Turning the Tables on Law and…:’ A Jurisprudential Inquiry into Contemporary Legal Theory,” (2011) 96 *Cornell LR* 811 ff.

(28) Our approach may be compared and contrasted with Luhmann’s autopoietic system theory. For Luhmann, criminal law is cognitively open but maintains normative closure. Our model does not assume the normative closure of the legal system, but rather develops a model of normative translation. See Niklas Luhmann, *Law as a Social System* (2004). See also Gunther Teubner (ed.), *Autopoietic Law: A New Approach to Law and Society* (1988).

(29) See e.g. Henry F. Fradella, “From Insanity to Beyond Diminished Capacity: Mental Illness and Criminal Excuse in the Post Clark Era,” (2007) 18 *University of Florida Journal of Law & Public Policy* 7 ff.

(30) Compare Elaine M. Chiu, “Culture as Justification, Not Excuse,” (2006) 43 *American Crim. LR* 1317 ff.

(31) Compare Sally Engle Merry, “Legal Pluralism,” (1988) 22 *Law & Society Review* 869 ff.

(32) e.g. the Model Penal Code § 210.3 (1)(b) redefines the traditional provocation defense in terms of “extreme mental or emotional disturbance,” and yet requires that there will be a reasonable explanation or excuse for the state of mind.

(33) Marianne Constable, “Chicago Husband-Killing and the ‘New Unwritten Law’,” (2006) 124 *Triquarterly* 85 ff.

(34) American Law Institute, *Model Penal Code and Commentaries* (1985), 343 ff. (discussing the marital exemption of rape as grounded in the superior status of the husband, and the subordinate status of the wife, within marriage).

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(35) No. A-091133 (Los Angeles City Super. Ct. filed Apr. 24, 1985), cited in Spencer Sherman, “Legal Clash of Cultures,” *National LJ*, Aug. 5, 1985, at I.

(36) See e.g. Alan Brudner, “Agency and Welfare in the Penal Law,” in Alan Brudner, *The Unity of the Common Law—Studies in Hegelian Jurisprudence* (1995), 214 ff.

(37) Within academia, scholarly accounts have from time to time contested the exclusivity of the traditional categories of offense to autonomy, See e.g. Stephen Schulhofer, “Taking Sexual Autonomy Seriously—Rape, Law and Beyond,” (1992) 11 *Law & Philosophy* 35 ff. But in SAR offenses the challenge appears in effective legal practice, not only in theory.

(38) Sex between doctors and patients is proscribed in many jurisdictions under professional codes of conduct. Sexual offers or threats within employment supervisory relations are proscribed in the United States and elsewhere as sexual harassment under anti-discrimination (civil) laws.

(39) For a detailed analysis of SAR offenses and their theorization inspired by social theory of authority see Galia Schneebaum, “What is Wrong with Sex in Authority Relations? A Study in Law and Social Theory” 105 Journal of Criminal Law and Criminology (forthcoming, 2015).

(40) See e.g., Wyo. Stat. Ann. § 6-2-303(a)(vi), W.S. 1977. The Wyoming Code defines as second-degree sexual assault any case where “the actor is in a position of authority over the victim and uses this position of authority to cause the victim to submit.”

(41) e.g. the Israeli Penal Law proscribes the actor from having intercourse with a woman over the age of 18 within employment supervisory relations “by exploiting [his/her] authority in employment or in service.” The Israeli Supreme Court in interpreting this provision held that extortionate threats may be one (obvious) example of abuse of authority but do not exhaust the range of proscribed conduct. See DA 4790/04 *State of Israel v. Ben-Chaim*, IsrSC 60(1) 257 ff.

(42) See e.g., Idaho Code § 18-919(a). The Idaho Code specifies that:

> any person acting or holding himself out as a physician, surgeon, dentist, psychotherapist, chiropractor, nurse or other medical care provider as defined in this section, who engages in an act of sexual contact with a patient or client, is guilty of sexual exploitation by a medical care provider. For the purposes of this section, consent of the patient or client receiving medical care or treatment shall not be a defense.

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(43) See e.g. Sanford Kadish, Stephen Schulhofer, and Carol Steiker, *Criminal Law and Its Processes—Cases and Materials* (2007), 336–337 ff.

(44) See e.g. Stephen Schulhofer, *Unwanted Sex* (1998), 206–208, 227 ff.; Texas Penal Code Ann. § 22.011(b)(9) (speaking of patients within the doctor–patient relationship as "emotionally dependent").

(45) Michal Buchhandler-Raphael, "Sexual Abuse of Power," (2010) 21 *University of Florida Journal of Law and Public Policy* 77 ff.

(46) Certain SAR provisions use the term "authority." Others use terms such as "trust" ("abuse of trust"), "power" ("abuse of power"), or "dependency" ("abuse of dependency"). The argument presented here is that such offenses are all guided by a similar notion of abuse of authority, whether they explicitly use that term or some other related term.

(47) Hannah Arendt, "What is Authority?," in Hannah Arendt, *Between Past and Future* (1958), 93 ff.

(48) Max Weber, *Economy and Society: An Outline in Interpretive Sociology* ([1922] ed. Guenther Roth and Claus Wittich, 1978), 213 ff.

(49) Weber (n. 48) 214 ff.

(50) Weber (n. 48) 223 ff. Weber referred to bureaucracy as a modern form of authority which lies "at the root of every modern western state."

(51) Weber (n. 48) 224 ff.

(52) e.g. under the Israeli Penal Law, rape is punishable by 16 years' imprisonment, while the offense of SAR in employment supervisory relations is punishable by 3 years' imprisonment.

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