Does "Unlawful" Mean "Criminal"?: Reflections on the Disappearing Tort/Crime Distinction in American Law

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INTRODUCTION

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?¹

Professor Henry M. Hart, Jr.

My thesis is simple and can be reduced to four assertions. First, the dominant development in substantive federal criminal law over the last decade has been the disappearance of any clearly definable line between civil and criminal law. Second, this blurring of the border between tort and crime predictably will result in injustice, and ultimately will weaken the efficacy of the criminal law as an instrument of social control. Third, to define the proper sphere of the criminal law, one must explain how its purposes and methods differ from those of tort law. Although it is easy to identify distinguishing characteristics of the criminal law—e.g., the greater role of intent in the criminal law, the relative unimportance of actual harm to the victim, the special character of incarceration as a sanction, and the criminal law's greater reliance on public enforcement²—none of these is ultimately decisive. Rather, the factor that most distinguishes the criminal law is its operation as a system of moral education and socialization. The criminal law is obeyed not simply because there is a legal threat underlying it, but because the pub-

¹ © 1991 John C. Coffee, Jr.
* Adolf A. Berle Professor of Law, Columbia University Law School.
² Hart, The Aims of the Criminal Law, 23 Law & Contemp. Probs., Winter 1958, at 401, 431. Professor Hart, the principal founder of the Legal Process school, went on to add in a tone bordering on scorn:

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 [sic] to first base in working out what that something is. From beginning to end, there is scarcely a single opinion by any member of the Court which confronts the question in a fashion which deserves intellectual respect.

lic perceives its norms to be legitimate and deserving of compliance. 3 Far more than tort law, the criminal law is a system for public communication of values. As a result, the criminal law often and necessarily displays a deliberate disdain for the utility of the criminalized conduct to the defendant. Thus, while tort law seeks to balance private benefits and public costs, criminal law does not (or does so only by way of special affirmative defenses), possibly because balancing would undercut the moral rhetoric of the criminal law. Characteristically, tort law prices, while criminal law prohibits. 4

The fourth and final assertion of this Article is that implementation of the crime/tort distinction is today feasible only at the sentencing stage. Neither legislative action nor constitutional challenge is likely to reverse the encroachment of the criminal law upon areas previously thought civil in character. But, at the sentencing stage, courts can draw a line between the enforcement of norms that were intended to price and those intended to prohibit. Indeed, because a sensible implementation of the crime/tort distinction requires a close retrospective evaluation of the defendant’s conduct, sentencing may be the only juncture where the distinction can be feasibly preserved.

None of these assertions can be proven in a dispositive manner; nor will this Article attempt to do so. But, given the plausibility of these assertions, their implications need to be examined and assessed. In particular, the distinction between pricing and prohibiting carries several important implications for the structure of criminal justice. First, it sets boundaries by implying that the criminal law should generally not be used when society is unprepared to disregard the social utility of the defendant’s behavior—that is, when it prefers to “price” the behavior in question in order to force internalization of social costs. Thus, more specifically, it suggests that criminal liability for negligence is generally inappropriate. Second, once it is recognized that society generally intends to prohibit behavior through the criminal law, it follows that there cannot be an “optimal” rate of crime that is to be attained by pricing the subject behavior. As a result, Learned Hand’s famous rule for determining tort liability does not properly apply to criminal

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3 The limited empirical evidence supports this claim. See T. Tyler, Why People Obey the Law (1990) (using survey research to find that the public complies with the criminal law based not on its deterrent threat, but its moral legitimacy).

4 I recognize, of course, that most crimes involving specific victims are also torts. There is thus an inherent overlap between tort law and criminal law in terms of subject matter. Moreover, tort law sometimes seeks to deter by imposing punitive damages, which clearly are intended to prohibit, rather than price. Usually, tort law does so based on a sense that the community’s moral standards have been egregiously violated. My claim then is not that tort law only prices and criminal law only prohibits, but that each has a dominant tendency that explains much of its institutional and doctrinal structure.
TORT/CrIME DISTINCTION

Although some economists, most notably Gary Becker, have advanced such a "pricing" model of the criminal law, the rival view implied by this pricing/prohibiting distinction is that only enforcement costs justify allowing the "optimal" rate of crime to exceed zero—at least with respect to the "true" crimes that society wishes to prohibit, not price. Because society has refused on moral grounds to recognize the legitimacy of the benefit to the defendant in these cases, then by definition the benefits of the crime to the individual can never exceed the costs it imposes on society. Thus, the criminal law threatens the defendant with a much sharper, more discontinuous jump in the costs that the defendant will incur for its violation than does tort law, because the criminal law has little reason to fear overdeterrence (that is, the chilling of socially valuable behavior) within its appropriate domain.

Fundamental as the distinction between pricing and prohibiting misbehavior may be, there are still cases that fall on the borderline. Chief among these is the problem of corporate criminal liability. Essentially, corporate criminal liability (at least as recognized in the United States) is a species of vicarious criminal liability; that is, the principal is held liable for the acts of its agent—even when the principal makes a substantial good faith attempt to monitor the agent and prevent the illegality. Conceptually, vicarious criminal liability for failing to prevent the agent from acting illegally seems a form

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5 See United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947). The Hand formula can be stated as an obligation to invest in precautions up to the point where the marginal costs to the actor equal the marginal benefits to the victims in terms of reduced expected losses.


7 This point has been made well by Professor Dau-Schmidt. See Dau-Schmidt, An Economic Analysis of the Criminal Law as a Preference-Shaping Policy, 1990 Duke L.J. 1, 11-13. Professor Dau-Schmidt argues that the difference between pricing and prohibiting is that the criminal law uses a social welfare function that gives no weight to the criminal benefits expected by the defendant.

8 At the federal level, corporations are criminally liable for any act, committed by an employee in the course of such person's employment that is intended to benefit the corporation. This doctrine dates back to New York Central & Hudson River R.R. Co. v. United States, 212 U.S. 481 (1909). See also United States v. Hilton Hotels Corp., 467 F.2d 1000 (9th Cir. 1972); Commonwealth v. Beneficial Finance Co., 360 Mass. 188, 275 N.E.2d 33 (1971) (adopting broad theory of vicarious corporate criminal liability for acts of an agent as a matter of common law). In contrast, under the Model Penal Code, it is generally necessary for the prosecution to show that "the commission of the offense was authorized, requested, commanded or performed by . . . a high managerial agent acting in behalf of the corporation within the scope of his office or employment." See Model Penal Code § 2.07(1)(c) (Proposed Official Draft 1964). For a discussion of how this latter, more restrictive, doctrine of corporate criminal liability has been interpreted, see Brickey, Rethinking Corporate Criminal Liability Under the Model Penal Code, 19 Rutgers L.J. 593 (1988).
of behavior that should be priced, rather than prohibited. This is because society must make a judgment about the appropriate amount of behavior (i.e., preventive monitoring) to demand and cannot take a simple all-or-nothing position. Once it is conceded that some level of monitoring could be excessive, then the cost to the corporation must be compared to the benefit to society. Essentially, a pricing policy does this, focusing presumably on the gravity of the social harm involved.

This observation does not deny that in other cases corporations might have "intended" the crime (at least to the extent that senior officials encouraged, tolerated, or ratified it). Nonetheless, the point remains that to the extent that the role of corporate criminal liability is to encourage the principal to monitor its agents, the criminal law is inevitably caught up in the problem of pricing. To be sure, the law is not pricing the value of the illegal benefit to the defendant, but rather the cost of preventing the crime to the principal. Still, the analysis is much the same because private costs (i.e., monitoring expenditures) and public benefits (i.e., the deterrent benefits of crime suppression) are subject to a trade-off.

The bottom line is that the criminal law seems to be expanding into a variety of areas where it is infeasible or even irrational to ignore the costs of law compliance. Yet, both Congress and state legislatures have shown little interest in slowing this trend; nor is there much possibility that the Supreme Court will place constitutional limits on crime definition (as Professor Hart had hoped). As a result, the only decisionmakers who can attempt in a coherent way to determine when the criminal law should price and when it should prohibit are those who make sentencing policy and judgments. Uniquely, the sentencing stage affords a perspective from which nuances too subtle or fact-specific to be defined in advance by legislation can be examined retrospectively and in detail. In the case of the corporation, for example, it becomes possible to consider whether the corporate defendant simply failed to monitor a reckless agent adequately or whether it pressured its agents into criminal misconduct.

The difference between pricing and prohibiting misbehavior involves much more than the question of penalty levels. Ultimately, the law's focus should also shift. From a pricing perspective, the critical determination is the setting of the penalty that brings public and private costs into balance.

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9 For example, if Corporation X spends $1 million annually on law compliance programs, but still fails to detect an agent who commits a crime that is motivated by both corporate and personal ends, its monitoring expenditures may well exceed the benefit actually realized by society, and indeed should then be seen as an additional social cost.

10 See Hart, supra note 1, at 431.

11 It should be underscored at the outset that the claim that some forms of misconduct—particularly some forms of corporate misconduct—should be priced, not prohibited, does not mean that penalty levels should be low. High prices are often necessary to force a party to internalize the costs it imposes on others, particularly when the risk of detection was low.
However, from a prohibitory perspective, the central decision is the framing of the legal standard. As Professor Cooter has shown, once expected penalties are raised to a prohibitory level, individuals become extremely responsive to changes in the legal standard, while under a pricing system, individuals respond to the price, not the legal standard. Thus, this Article’s normative assertion that the criminal law should generally prohibit, not price, requires one to specify carefully the legal terrain within which such a policy is to be pursued. The mere fact that conduct is in violation of a known and valid legal standard is insufficient, because sometimes society may wish only to price such violations. The structure of this Article reflects this concern; Part I essentially argues that the criminal law has been over-extended precisely to the extent that it is being applied to behavior that society must necessarily price. Ultimately, pricing is necessary on moral as well as economic grounds when sufficiently clear partitions cannot be erected between the unlawful behavior and closely related lawful behavior to justify a prohibitory policy. Unfortunately, this condition holds true throughout much of the “white collar” criminal context.

Other commentators have started at the same point as this Article, recognizing that the criminal law is not simply a pricing system. Even among “law and economics” scholars, several have recognized at least the plausibility of the position that the benefit to the defendant from criminal behavior should be disallowed in public policy decisionmaking. Yet, they have not followed this idea through clearly as a map of the tort/crime distinction. Correspondingly, our leading criminal law scholars—among them Henry Hart, Sanford Kadish, and Herbert Packer—have periodically warned of the danger of “overcriminalization”: namely, excessive reliance on the criminal sanction, particularly with respect to behavior that is not inherently morally culpable. But one cannot meaningfully use the term “overcriminalization” without first defining the boundaries within which the criminal sanction may appropriately be used, and to answer this latter question only by saying that the behavior must be “blameworthy” simply uses an adjective in lieu of a theory.

The prior literature on “overcriminalization” has had a variety of specific targets, depending largely on the particular development that troubled the particular critic. Thus, Herbert Packer was principally concerned with “victimless crimes;” Sanford Kadish, with the use of the criminal sanction to

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12 Cooter, Prices and Sanctions, 84 COLUM. L. REV. 1523 (1984); see also infra notes 129-31 and accompanying text.
enforce economic regulations,\textsuperscript{15} and Henry Hart, with the increased tendency of criminal statutes to impose strict liability or vicarious responsibility.\textsuperscript{16} In common, however, all three agreed that a basic “method” distinguished the criminal law. As they saw it, the principal elements of this method were advance legislative specification of the conduct proscribed, strict construction of ambiguous terms, an emphasis on the defendant’s state of mind (or “mens rea”), and a close linkage between the criminal law and behavior deemed morally culpable by the general community. They argued that any substantial deviation from that “method” threatened the criminal law’s legitimacy. In truth, these standards had not always been faithfully observed, but this Article will argue that the rate of the departures from these norms seems plainly to have accelerated over the last decade.

Three trends, in particular, stand out. First, the federal law of “white collar” crime now seems to be 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.\textsuperscript{17} Second, a trend is evident toward the diminution of the mental element (or “mens rea”) in crime, particularly in many regulatory offenses.\textsuperscript{18} Third, although the criminal law has long compromised its adherence to the “method” of the criminal law by also recognizing a special category of subcriminal offenses—often called “public welfare offenses”—in which strict liability could be combined with modest penalties, the last decade has witnessed the unraveling of this uneasy compromise, because the traditional public welfare offenses—now set forth in administrative regulations—have been upgraded to felony status. This Article will refer to this last trend as the “technicalization” of

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\item\textsuperscript{16} Hart, \textit{supra} note 1. Professor Hart argues that in the context of strict liability offenses, “there can be no moral justification” for condemning and punishing one who is blameless. \textit{Id.} at 422.
\item\textsuperscript{17} The leading example of this trend is supplied by recently enacted 18 U.S.C. § 1346 (1988), which invites federal courts to consider any breach of a fiduciary duty or other confidential relationship as a violation of the mail and wire fraud statutes. \textit{See infra} notes 45-50 and accompanying text. This new legislative enactment is, however, simply a continuation of a long-standing tradition of case-by-case judicial lawmaking under the mail and wire fraud statutes. \textit{See infra} notes 28-54 and accompanying text.

\item\textsuperscript{18} \textit{See infra} notes 65-77 and accompanying text.
\item\textsuperscript{19} \textit{See} Sayre, \textit{Public Welfare Offenses}, 33 COLUM. L. REV. 55, 55 (1933) (citing the sale of adulterated foods and violations of liquor and narcotic controls as examples of public welfare offenses that create liability “without regard to the mind or intent of the actor”).
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crime and will combine departures from most of the above-described elements that characterize the criminal law's "method."

The upshot of these trends is that the criminal law seems much closer to being used interchangeably with civil remedies. Sometimes, identically phrased statutes are applicable to the same conduct—one authorizing civil penalties, the other authorizing criminal sanctions. More often, the criminal law is extended to reach behavior previously thought only civilly actionable. Either way, this practice of defining the criminal law to reach all civil law violations in a particular field of law in order to gain additional deterrence may distort the underlying legal standard. What needs to be more clearly recognized is the variety of ways in which such distortion can occur. For example, some civil law standards may be aspirational in character (e.g., the rule that attorneys should avoid any "appearance of impropriety"). Other standards may frame prophylactic rules, which prevent the possibility of misconduct, but involve no element of culpability. Some recent writers in the "law and economics" tradition have theorized that society may have a particular "transaction structure" for dealing with different areas of social behavior, sometimes using rules that would trigger only civil liability and at other times using rules whose violation would be criminally prosecuted. Thus, overlaying the criminal law on the civil law may disrupt these transaction structures. Still, provocative as this concept of "transaction structure" is, it has remained an underdeveloped idea, which requires a fuller account of why society should prefer the structure of the civil law over that of the criminal law.

20 See, e.g., United States v. Ward, 448 U.S. 242, 249-51 (1980) (permitting imposition of civil penalty under environmental statute although the civil statute was virtually identical in its wording to a longstanding criminal statute). Effectively, Ward implies that the legislature can choose to characterize misconduct as either civil or criminal in nature, or both—thereby giving enforcement officials the option of proceeding civilly or criminally (or sometimes both).

21 Although there have been recent cases in which violations of ethical or fiduciary standards have been successfully criminally prosecuted, see United States v. Bronston, 658 F.2d 920 (2d Cir. 1981), it is interesting to note that the American Law Institute's recent Restatement, RESTATEMENT OF THE LAW GOVERNING LAWYERS (Tent. Draft No. 2, 1990) concludes that "criminal sanctions are inappropriate as remedies for lawyer conflict of interest." Id. at 85.

22 One such rule is § 16(b) of the Securities Exchange Act, 15 U.S.C. § 78(p)(b) (1988), which requires corporate insiders to disgorge to their corporation profits realized through short-swing trading in the corporation's securities. In order to eliminate the temptations faced by corporate insiders, the statute does not require proof of either possession of inside information or an intent to defraud. No criminal penalty is authorized for violations of § 16(b), which is intended to be enforced strictly by private civil suit.

23 See Kleverick, Legal Theory, supra note 13, at 907-08; Coleman, Crime, Kickers, and Transaction Structures, in NOMOS XXVII: CRIMINAL JUSTICE, supra note 13, at 313.
In overview, the two principal claims made by this Article exist in some obvious tension. If true, the first claim—that the criminal law is more a system of socialization than of pricing—makes the second predictable: namely, that the criminal sanction is increasingly being used by regulators as a preferred enforcement tool without regard to the traditional limitations on its use. Almost by definition, a system for socialization will be put to new uses, as authorities attempt to harness its educational power. Thus, the very success of the criminal law as a socializing force implies the erosion of the traditional point at which the tenuous crime/tort distinction had been maintained. Indeed, traditional libertarians—such as Hart, Kadish, and Packer—have been criticized on this ground by sociologists, who have argued that the social standards of blameworthiness necessarily evolve over time along with other social attitudes. These critics have found the “over-criminalization” thesis to be empty of content, because of its failure to recognize the interactive, reciprocal relationship between the content of the criminal law and the public’s perception of what conduct is blameworthy. In their view, the public learns what is blameworthy in large part from what is punished.

Undoubtedly, there is some merit in this argument. Obviously, new problems may arise for which the criminal law is the most effective instrument, but which involve behavior not historically considered blameworthy. Modern technology, the growth of an information-based economy, and the rise of the regulatory state make it increasingly difficult to maintain that only the common law’s traditional crimes merit the criminal sanction. In fact, historically, the criminal law has never been static or frozen within a common law mold, but has constantly evolved. This has been especially true within the field of “white collar” crime. Even the first modern “white collar” offenses to be criminally prosecuted—price-fixing, tax fraud, securities fraud, and, later, foreign bribery—were “regulatory” crimes in the sense that they had not been traditionally considered blameworthy. In short, the line between malum in se and malum prohibitum has been crossed many times and largely discredited. Today, to rule out worker safety, toxic dumping, or environmental pollution as necessarily beyond the scope of the criminal law requires one to defend an antiquarian definition of blameworthiness.

But where does this leave us? Those following in the footsteps of Hart, Kadish and Packer have a powerful rejoinder: if the criminal law is over-


25 See id.

used, it will lose its distinctive stigma. While conceding that the criminal law is a system of socialization, they would reply that for precisely that reason it must be used parsimoniously. Once everything wrongful is made criminal, society's ability to reserve special condemnation for some forms of misconduct is either lost or simply reduced to a matter of prosecutorial discretion. Still, valid as this response is, it does not answer fully the criticism that the traditional criminal law scholar's focus on blameworthiness is anachronistic because it freezes the criminal law's necessary evolution, like a fly in amber.

If so, what alternative is left? What substitute bulwark can prevent the criminal law from sprawling over the landscape of the civil law? One answer is to update the notion of blameworthiness, looking not only to historical notions of culpability, but to well-established industry and professional standards whose violation has been associated with culpability within that narrower community. Another answer is to focus on the temporal relationship of the civil and criminal law. At some point, a civil standard can become so deeply rooted and internalized within an industry or professional community that its violation becomes blameworthy, even if it was not originally so. Insider trading may supply such an example, where the norm has long since become internalized within the industry. The relationship of the civil and criminal law here is sequentially interactive: the civil law experiments with a standard, but at some point it may "harden" into a community standard that the criminal law can enforce. At that point, it may be appropriate to prohibit, rather than price, at least if society believes that the defendant's conduct lacks any colorable social utility.

But who makes these determinations? Ideally, the legislature should, but there is little prospect that it will; nor is it properly positioned to compare varying degrees of culpability. Thus, a “second best” answer is a sentencing commission, which in drafting sentencing guidelines should attempt to separate those instances when society should price from those when it should prohibit. Only an administrative agency can both make such determinations on a continuing and provisional basis and also attempt to determine the correct “price” when pricing is appropriate.

A roadmap of this Article is in order. Part I will advance this Article's positive claim that the line between the civil and criminal law has blurred. Part II will consider the rationales for separating the civil and criminal law, and Part III will address the implementation of a means for preserving the tort/crime distinction.

I. THE BLURRING OF THE BORDER

Three distinct subarguments will be made in this section. First, the criminal sanction has been applied broadly, and sometimes thoughtlessly, to a broad range of essentially civil obligations, some of which were intended as aspirational standards and others which are inherently open-ended and evolving in character. Second, there has also been a retreat from the tradi-
tional "method" of the criminal law, as the role of mens rea has been diminished and that of vicarious liability expanded. Third, a transition is evident in the characteristic "white collar" prosecution. Prosecutions increasingly tend to be less for violations of a statutory standard than for failures to comply with administrative regulations. Characteristically, these regulations resemble what an earlier era called "public welfare offenses," but with two differences: (1) substantial criminal sentences are authorized, and (2) the sheer volume of regulations that are now potentially enforceable through criminal prosecution means that the criminal sanction has penetrated much further into everyday life.

A. Criminalizing the Civil Law

Short of a doctrinal treatise or a major empirical study, no article could hope to demonstrate the degree to which the criminal law has encroached upon formerly "civil" areas of the law. What can be done, however, is to illustrate this trend by examining changes in some areas that had seemed quintessentially civil in character. For example, few legal categories seem inherently less "criminal" in character than the civil law applicable to fiduciary duties or to the use of economic duress in negotiations. Yet, both areas have, to an uncertain extent, been subjected to the reach of the criminal law. This section will use these two areas as case studies to illustrate how overlaying the criminal law on the civil law may distort the latter.

1. The Criminalization of Fiduciary Duties

The federal mail and wire fraud statutes supply the most obvious example of the criminal law being overlaid on civil law standards. By the mid-1960s, federal courts had accepted the principle that the term "scheme to defraud" (which is the critical element in both the mail and wire fraud statutes) required neither that there be any pecuniary or property loss to the victim nor that the purpose of the scheme be contrary to state or federal law. Rather, it was sufficient that a victim was defrauded of an "intangible right," such as the duty of public officials to provide "honest and faithful" services. The contours of this "intangible right" theory have always been

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27 What can be measured, however, is the increased use of the criminal sanction at the federal level as a mechanism for regulating business behavior. White collar criminal prosecutions rose from eight percent of the total number of federal criminal prosecutions in 1970 to 24% in 1983. See K. BRICKEY, CORPORATE AND WHITE COLLAR CRIME: CASES AND MATERIALS XXV (1990).

28 For a review of the evolution of mail fraud as the preferred prosecutorial weapon in these cases, see Coffee, From Tort to Crime: Some Reflections on the Criminalization of Fiduciary Duties and the Problematic Line Between Law and Ethics, 19 AM. CRIM. L. REV. 117 (1981). The fiduciary breach theory is not the only way in which the mail fraud statute has been expanded. At common law, an omission is fraudulent only when there is a duty to speak (such as where a fiduciary relationship exists). But federal prosecutors read the mail and wire fraud statutes to require disclosure of all material facts, even when
uncertain, in part because the governing standard was the ineffable principle of "fair play." As several courts said in explaining the boundaries of the intangible rights theory of mail fraud:

Law puts its imprimatur on . . . accepted moral standards and condemns conduct which fails to match the reflection of moral uprightness, of fundamental honesty, fair play and right dealing in the general and business life of members of society.

Despite the fulsome prose in these decisions, their underlying facts usually involved bribes or kickbacks, either to public officials or to purchasing agents of private businesses. During the 1970s, however, prosecutors began to exploit the latent potential in the "intangible rights" theory by prosecuting cases that truly involved only a deprivation of such a claimed right. A bizarre series of decisions followed. In United States v. Condolon, the victims were young women, who had been deceived into providing sexual favors for the defendant who had misrepresented his status as a talent scout. In United States v. Lounderman, the victims were defrauded of the intangible right to privacy when defendants tricked the telephone company into revealing their addresses.

Still, the decisions that had the greatest impact were those that seemed to criminalize any knowing failure to disclose a conflict of interest by a person subject to a fiduciary duty. As late as 1976, the Second Circuit in a decision by Judge Henry Friendly suggested that the "intangible rights" doctrine applied only to public officials and not to private fiduciaries. However, at the beginning of the 1980s, the Second Circuit overrode his thoughtful distinction. In United States v. Bronston, it upheld the conviction of a lawyer who secretly represented one client while his law firm represented a rival contender for a public franchise. Bronston was a watershed decision,

no such duty exists. Thus, in one pending case, the senior executives of General Development Corporation were indicted for failing to disclose to their potential customers that their resort homes were overpriced in comparison to their competitors. See United States v. Brown, Cr. 90-176-Cr. (S.D. Fla. 1990). Taken literally, this theory exposes most salesmen to indictment, even without a material misrepresentation.

29 Coffee, supra note 28, at 127.
30 Blachly v. United States, 380 F.2d 665, 671 (5th Cir. 1967), quoted in United States v. Keane, 522 F.2d 534, 545 (7th Cir.), cert. denied, 424 U.S. 976 (1976); see also United States v. States, 488 F.2d 761, 764 (8th Cir. 1973) (quoting Blachly). One of the first decisions to use this fair play standard was Gregory v. United States, 253 F.2d 104, 109 (5th Cir. 1958).
31 600 F.2d 7 (4th Cir. 1979).
32 576 F.2d 1383, 1387 (9th Cir. 1978).
because no bribes or kickbacks were involved, and the evidence did not demonstrate that the defendant had actually used his fiduciary position to injure the firm's client. After Bronston, all that seemed necessary to support a mail fraud conviction was a knowing and undisclosed breach of a fiduciary standard. These decisions seemingly turned the mail and wire fraud statutes into mandatory disclosure statutes that required all public officials and private fiduciaries to disclose any conflict of interest to which they were subject.36

The highwater mark of this theory of liability came in the mid-1980s, when federal prosecutors successfully used it to reach not only self-dealing conduct by corporate officials against the interests of the corporation, but also actions by corporate officials that were intended to benefit the firm, but had not been adequately disclosed to the board or shareholders. In United States v. Siegel37 and United States v. Weiss,38 corporate officers who created off-book slush funds in order to facilitate questionable corporate payments were convicted of fraud, even though they did not misappropriate any funds. Indeed, in Weiss, the subordinate had acted pursuant to direct instructions from his superiors to establish the secret fund. In a strong dissent in Siegel, Judge Ralph Winter observed that this new construction redefined the crime of fraud by judicial fiat: "In effect, a new crime—corporate improprieties—which entails neither fraud nor even a victim, has been created."

A long-time professor of corporate law, Judge Winter understood the basic distinction between the duty of loyalty and the duty of care, which the rest of the panel seems to have missed in Siegel and Weiss. In both cases, the defendants may have violated their duty of care, but they did not engage in self-dealing in any form. As a practical matter, they probably faced relatively little prospect of civil liability, because the duty of care has historically not been strictly enforced. The bottom line then is ironic: the criminal law has been cantilevered out beyond the civil law as defendants have been convicted of a federal felony on facts that would have been unlikely to support civil liability in a derivative suit.

This line of cases came to a screeching, but temporary, halt in 1987 when the Supreme Court decided, in McNally v. United States,40 that the mail

36 See, e.g., United States v. Margiotta, 688 F.2d 108 (2d Cir. 1982) (upholding conviction of defendant, a Republican Party chairman, for failing to disclose conflict of interest resulting from commissions received by others from insurance policies), cert. denied, 461 U.S. 913 (1983).

37 717 F.2d 9 (2d Cir. 1983). Despite several recent Supreme Court decisions limiting the scope of the intangible rights theory, Siegel was recently cited by the Second Circuit as authority for the proposition that a shareholder's "right to control" corporate officers and to receive disclosure of wrongdoing was within the scope of the mail fraud statute. See United States v. Wallach, 935 F.2d 445, 463, 465 (2d Cir. 1991).


39 Siegel, 717 F.2d at 24 (Winter, J., dissenting).

fraud statute did not reach schemes to deprive victims of the intangible right of honest services, but only schemes to obtain money or property. For a time, *McNally* seemed a major obstacle to the continuing growth of a judge-made law of white collar crime. Then, two things happened. First, the Supreme Court announced in *Carpenter v. United States* that confidential business information could amount to a form of intangible property. Under this theory, it upheld Foster Winans's conviction for using data obtained through his employment as a Wall Street Journal reporter to engage in insider trading. Understandable as this result was, the theory adopted—i.e., that an employee may not use confidential business information acquired during his employment—is extremely open-ended. For example, what happens when an employee changes firms? Arguably, his use of information acquired while working for one employer for the benefit of a subsequent employer might be said to deprive the former of confidential business information. Yet, if this theory is carried even part way to the limits of its logic, then the employee's mobility and, indeed, his own human capital would be substantially restricted. The irony here is that the civil law had always sought to disfavor constraints on employee mobility by declining to enforce covenants not to compete, except to a very limited extent.

Thus, *Carpenter* may illustrate an occasion on which the extension of the criminal law into a previously civil law domain effects the policy underlying substantive civil law. No longer do employers have only very limited power to restrict their employee's mobility, because the employee's transfer of information incident to a change of employment could trigger criminal liability or, more likely, a civil RICO action. More generally, *Carpenter* threatened to trivialize *McNally* by allowing prosecutors simply to relabel what they had indicted, before *McNally*, as a deprivation of an intangible "right" as a deprivation of intangible "property." To a limited extent, this has in fact happened.

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44 The Fifth Circuit adopted a "constructive trust" theory under which the receipt of kickbacks by employees cheated the employer out of its property right to the payments; under common law the agent should have turned them over to the employer. *See* United States v. Little, 889 F.2d 1367 (5th Cir. 1989); United States v. Matt, 838 F.2d 1356 (5th Cir. 1988) (holding information to be a tangible property right); United States v. Richerson, 833 F.2d 1147 (5th Cir. 1987). In other circuits, a complicated jurisprudence has developed over what interests rise to the level of a property right. *See* United States v. Schwartz,
The second post-\textit{McNally} development was even more important: in 1988, Congress enacted a statutory definition of the critical term, "scheme to defraud."\textsuperscript{45} New section 1346 defines this term to include any "scheme or artifice to defraud another of the intangible right of honest services."\textsuperscript{46} At a stroke, this language may criminalize any violation of fiduciary duties or the law of agency. The expansion of section 1346 then supplies a paradigm of the criminal law being overlaid unthinkingly on top of the civil law, without serious consideration being given to whether the civil law standard in question should be backed by the special threat of the criminal law.

How have courts and prosecutors responded to this extension of the criminal law's scope? The early evidence is that they have read section 1346 even more broadly than its language would seem to permit, reaching all cases that were within the scope of the pre-\textit{McNally} case law. In the recent RICO prosecutions of commodities brokers on the Chicago Mercantile Exchange ("CME"), the prosecutors charged the defendants under section 1346 with breaching their duty to maintain the "honest functioning of the marketplace."\textsuperscript{47} This view that section 1346 simply supplies a charter for continued judicial lawmaking\textsuperscript{48} ignores the counterargument that the statute's language requires that its "intangible right of honest services" be tied down to some definable common law or statutory right. Where do "rights to honest services" come from? Are they discovered by federal judges based on principles of fair play? Or, must they already exist in the common law of the


\textsuperscript{47} See United States v. Bailin, No. 89-668, n.14 (N.D. Ill., July 17, 1990). The Government eventually amended the indictment to allege a scheme "to defraud the investing public of its rights to the honest services of traders in the execution of orders in the marketplace of the CME." Defendants challenged this revision as well on the additional ground that floor brokers on the CME owed no fiduciary duty in the abstract to the "investing public," but it was upheld.

\textsuperscript{48} See also United States v. Mosky, No. 89-669 (N.D. Ill. Mar. 12, 1990) (LEXIS, Genfed library, Dist file) (ruling that predigating a violation of section 1346 on the deprivation of intangible rights does not violate the Constitution's ex post facto clause).
jurisdiction whose law applies to the transaction in question? To date, the only federal courts to face these questions have preferred the expansive view that section 1346 authorizes them to continue to "condemn conduct which fails to match the reflection of moral uprightness, of fundamental honesty, fair play and right dealing in the general and business life of members of society."

What is wrong with such an approach? As a matter of civil law, the short answer is relatively little. Courts constantly create or discover new torts. However, as a matter of criminal law, this approach should be unacceptable, for several reasons. First, in traditional constitutional terms, it denies fair notice, invites arbitrary and discriminatory enforcement, and violates the separation of powers principle that has traditionally denied federal courts the power to make common law crimes. However, in terms of this Article's concerns, the vocabulary of constitutional law does not adequately express the full dimensions of the problems inherent in broadly criminalizing civil law standards. The basic problem is that tort law standards often display a soft-edged quality that is consistent with their evolutionary and often aspirational character. For example, Cardozo wrote: "A trustee is held to something stricter than the morals of the marketplace. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior." And often this should be the standard expected of the fiduciary. But, precisely because such a standard can neither be realized fully nor even be defined with specificity in advance, it should not be criminalized. Aspirational standards imply that there will be shortfalls in performance, and this in turn means that to criminalize such a standard is to ignore the prudential constraint that criminal laws should be capable of even and general enforceability.

Civil standards are sometimes experimental, and on occasion courts retreat from prior high-water marks. Within the corporate context, courts in recent years have announced major new rules of fiduciary duty and have

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49 Read as written, section 1346 requires that there be some duty of honest services, which presumably would arise under some other body of law (state or federal). Courts, however, appear to be reading it simply to reverse McNally and allow continued judicial lawmaking. See cases cited infra notes 52-54.

50 Blachly v. United States, 380 F.2d 665, 671 (5th Cir. 1967).


53 See Singer v. Magnavox, 380 A.2d 969 (Del. 1977); Donahue v. Rodd Electrotype
sometimes later retreated from these positions.\textsuperscript{54} If one accepts the premise that blameworthiness should be a prerequisite for the justified use of the criminal sanction, it is difficult to reconcile this premise with the idea that new and sometimes novel civil standards could carry criminal penalties. In addition, criminalizing fiduciary duties might halt (or at least retard) this process of lawmaking, as courts would predictably become more conservative in their willingness to announce new duties if they believed severe penalties automatically followed from noncompliance.

The precision with which a legal standard speaks logically depends on the purpose to which the standard will be put. Because the tort law is primarily concerned with compensation and loss allocation, rather than outright deterrence, it has less need to give precise notice of where its strictures begin and end. Phrased more generally, when society's objective is only to "price" behavior, it may be fair to give only an approximate notice of where the point is at which the actor will be asked to internalize the costs it imposes on others. Thus, tort law rules often (and perhaps characteristically) are expressed in fuzzy and indeterminate language (such as the "reasonable person" standard) that does not give rise to "bright line" standards (as the criminal law characteristically requires). Put simply, both tort standards and many ethical rules do not mean to place a clear stop sign in front of the actor, which says "go no further," rather, they say that if you do go further, your behavior may be costly to you because you must compensate those who are injured by your conduct. In contrast, the criminal law threatens exemplary penalties and so must speak with greater precision. The difference is between saying "Proceed at Your Own Risk" and "Halt."

2. The Hobbs Act\textsuperscript{55}

Can it be criminal to breach a contract? On its face, the idea sounds absurd. Holmes's famous statement that the obligation created by a contract was to perform or pay damages seemed to recognize that the payment of damages discharged the obligation.\textsuperscript{56} Proponents of the efficient breach theory argue that it is desirable that contracts be breached when the breach will create value.\textsuperscript{57} We need not enter this debate, but only note it to understand

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\textsuperscript{56} Holmes, \textit{The Path of the Law}, 10 \textit{Harv. L. Rev.} 457, 462 (1897) ("The duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it,—and nothing else.").

the significance of this next development: under some recent decisions, a breach of contract could be criminal.

To be sure, no decision has said this squarely, nor is one likely to, but uncertainty already has been created. The source of this uncertainty is a series of recent decisions that read the Hobbs Act to criminalize the extortion of property from a person by placing that person in "fear of economic loss." The Hobbs Act defines extortion as the "obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." The term "fear" has recently been given an expansive judicial interpretation to include actions or threats which place another in fear of economic loss. This so-called economic duress theory has not yet been pushed to the degree that the "intangible rights" theory of mail fraud has, but this may mean only that we are at an earlier moment in the evolution of still another new theory of white collar crime.

Consider then the degree to which much of commercial life could be reached by this theory. Suppose that in the construction industry, a subcontractor is under a fixed-price contract to complete a phase of a skyscraper—for example, the basic plumbing—without which further construction is impossible. It has contracted to complete the job for $5,000,000, but it now demands a price of $10,000,000, because it knows the general contractor faces costly delays if it fails to perform. Not surprisingly, contract law provides a restitutionary remedy for the general contractor if it pays this added amount under the circumstances. But even if this behavior amounts to a form of economic extortion, should it be deemed a felony under the Hobbs Act? No case has yet clearly dealt with such a fact pattern, but the theory of fear of economic loss covers this case just as much as the more common case of the labor leader who, unless given a payoff, will call a strike.

Why should the criminal law not reach such a fact pattern? One reason may be that it is very hard to differentiate the case in which the subcontractor is seeking to extort from the case in which it has truly encountered force majeure or other unexpected difficulties, the cost of which it is entitled to pass on to the general contractor. Too much depends on subjective motivations, because the defendant's actions are equivocal—that is, they could be consistent with either criminality or innocuous behavior. When equivocal conduct is criminalized, defendants may effectively be punished more for their intentions than for their conduct. A second reason may be that contractual breaches, even of this special kind, are endemic and would arguably

58 See United States v. Kattar, 840 F.2d 118, 124 (1st Cir. 1988); United States v. Covino, 837 F.2d 65, 68 (2d Cir. 1988).
60 Kattar, 840 F.2d at 124; Covino, 837 F.2d at 68.
overload the criminal justice system. Again, criminalization would violate the prudential side constraint that the use of the criminal sanction is appropriate only when the norm can be evenly and generally enforced. A third reason is that civil remedies are more likely to be adequate in this context because there is less risk of nondetection. Ultimately, however, there may be an overshadowing reason for declining to criminalize: the behavior in question—i.e., use of economic duress—may have social utility. If so, society should price, rather than prohibit, the behavior in question (through means such as punitive damages).

Some courts have tried to place limits on this economic duress theory of extortion, but these limits do not address the real problem—namely, that sometimes it is legitimate to use economic threats. To determine when it is and when it is not, a court must engage in a retrospective factual evaluation and delicate line drawing, both of which exist in uneasy tension at best with the ideal of fair notice. Once again, the development of this “fear of economic loss” theory of extortion illustrates an idea being expanded to the limits of its logic—and beyond. Again, the piecemeal development of an idea in the classic case-by-case method of the common law proves inappropriate for the criminal law because it creates great uncertainty, leaving few bright lines that individuals may approach safely.

B. The Diminution of Mens Rea

American criminal law scholarship has always placed the issue of mens rea at center stage. Its greatest achievement—the Model Penal Code—creates a presumption that mens rea applies to every material element in the crime, unless the statute clearly indicates otherwise. In Morissette v. United States, the Supreme Court seemed to give such a presumption a quasi-constitutional gloss:

The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil. A relation between some mental ele-

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62 Of course, the counterargument is that, after criminalization, the rate of such defaults would decline.

63 The victims of economic extortion know that they have been injured and typically have access to the legal system; in contrast, a crime such as insider trading has a low probability of detection and, arguably, many scattered victims who cannot take collective action.

64 See United States v. Garcia, 907 F.2d 380, 382 (2d Cir. 1990); United States v. Capo, 817 F.2d 947, 951 (2d Cir. 1987).

65 MODEL PENAL CODE § 2.02(3) (Official Draft 1962).

ment and punishment for a harmful act is almost as instinctive as the child's familiar exculpatory 'But I didn't mean to'.

More recently, in *Liparota v. United States*, the Court reaffirmed this presumption, at least with respect to those elements in the crime that establish moral blameworthiness. Simultaneously, however, *Liparota* acknowledged that an exception to this generalization existed for "public welfare offenses." Reviewing its prior decisions on *mens rea*, the Court explained that in those cases in which it had upheld the omission of a mental element, the statute "rendered criminal a type of conduct that a reasonable person should know is subject to stringent public regulation and may seriously threaten the community's health or safety."

This language frames a central question: what is the scope of this exception for public welfare offenses? Lower courts have read the *Liparota* exception as limited to cases in which the risks created by the defendants' conduct "may be presumed to be regulated because of their inherent danger." As an example, the *Liparota* Court cited *United States v. Freed*, a case in which the Court upheld a conviction for illegal possession of unregistered hand grenades, notwithstanding the defendant's claim (and the trial court's failure to instruct the jury) that he could be convicted only if he had knowledge that the hand grenades were unregistered. Both *Liparota* and *Freed* thus involved defendants who claimed lack of knowledge of the applicable regulations; but Liparota won, and Freed lost. Seemingly, the obvious public safety factor present in *Freed* was not present in *Liparota*, which involved only the unauthorized use of food stamps and not a deadly weapon.

If public safety is the deciding test, the possibility arises that many environmental statutes, which commonly require permits before various conduct (e.g., the disposal of waste, the filling-in of wetlands, etc.) may be engaged in, will fall on the strict liability side of the line. Here, the circuit courts of

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67 *Id.* at 250-51.
68 *471 U.S. 419* (1985) (requiring government to show that defendant knew that he acquired or used food stamps in a manner not authorized by statute or regulations).
69 In *United States v. Yermian*, 468 U.S. 63 (1984), the Court held that *mens rea* need not be proven with respect to a jurisdictional element. *Yermian* may give rise to a labelling game as to what elements in a statute are merely jurisdictional, but the subsequent decision in *Liparota* shows that the Court remains loyal to the principles of *Morissette*.
70 *471 U.S. at 433*.
73 In *Freed*, the statute made it a crime "to receive or possess a firearm which is not registered [to] him." *401 U.S. at 604* (quoting *26 U.S.C. § 5861 (Supp. V 1964)*).
appeal have recently divided.\textsuperscript{74} In \textit{United States v. Hoflin},\textsuperscript{75} the defendant was convicted of aiding and abetting the illegal disposal of hazardous waste in violation of the Resource Conservation Recovery Act (RCRA).\textsuperscript{76} What had the defendant done? While Director of Public Works for the town of Ocean Shores, Washington, he had authorized the disposal of leftover road paint by burial on property adjoining the town's sewage treatment plant. After testing, the Environmental Protection Agency ("EPA") determined that the paint fell within the class of hazardous waste for which the EPA requires a disposal permit. Hoflin's defense was that he did not know the town lacked such a permit and that, therefore, the trial judge was required to instruct the jury that to convict Hoflin it had to find that he knew either that the town lacked the requisite permit or was acting in violation of one. Rejecting this claim, the Ninth Circuit found that the statute need not be read to require knowledge of the lack of a permit.\textsuperscript{77}

\textsuperscript{74} Compare \textit{United States v. Johnson & Towers, Inc.}, 741 F.2d 662 (3d Cir. 1984) with \textit{United States v. Hoflin}, 880 F.2d 1033 (9th Cir. 1989) and \textit{United States v. Neville Chemical Co.}, 888 F.2d 130 (9th Cir. 1989). For a similar division as to whether the defendant must realize that the waste was hazardous, compare \textit{United States v. Sellers}, 926 F.2d 410, 414-16 (4th Cir. 1991) (jury need not be charged to find that defendant knew waste was hazardous) with \textit{United States v. Dee}, 912 F.2d 741, 745-46 (4th Cir. 1990) (contra).

\textsuperscript{75} 880 F.2d 1033 (9th Cir. 1989), cert. denied, 110 S. Ct. 1143 (1990).

\textsuperscript{76} 42 U.S.C. §§ 6901-87 (1988). The criminal provision at issue in \textit{Hoflin} was section 6928(d), which provides for criminal penalties for disposal of hazardous wastes without an EPA permit or in knowing violation of an existing permit. \textit{See infra} note \textsuperscript{77}.

\textsuperscript{77} Section 6928(d) provides:

\begin{quote}
Any person who —

(2) \textit{knowingly} treats, stores or disposes of any hazardous waste identified or listed under subchapter either —

(A) without having obtained a permit under Section 6925 of this title . . . ; or

(B) in knowing violation of any material condition or requirement of such permit;

shall, upon conviction, be subject to [fines, imprisonment, or both] (emphasis added).
\end{quote}

The statutory anomaly in § 6928(d) is that it uses the \textit{mens rea} term "knowing" or "knowingly" twice. This could be read, as the \textit{Hoflin} court found, to mean that no \textit{mens rea} requirement existed with regard to the failure to obtain a permit under § 6928(d)(2)(A). Alternatively, the statute could be read, as in \textit{Liparota}, to use the first reference to "knowingly" to modify all subsequent elements of the crime. In \textit{United States v. Johnson & Towers, Inc.}, 741 F.2d 662 (3d Cir. 1984), the Third Circuit adopted this latter reading, even before \textit{Liparota}. While there is a statutory basis for the result in \textit{Hoflin}, the decision in \textit{Sellers} that the jury need not find that the defendant knew the waste to be hazardous in order to convict seems considerably more extreme, but symptomatic. Sellers specifically requested a jury charge "that the defendant knew or reasonably should have known that the substance was waste and that the waste could be harmful to persons or the environment if . . . improperly disposed of." 926 F.2d at 415. Yet, the Fifth Circuit, citing \textit{Freed}, ruled that once the defendant knew what the disposed material was, he was "imputed with the knowledge that it may be regulated by public health
On a policy level, such a decision can be defended if one reads the burial of excess paint in Hoflin to be conduct equivalent to the possession of hand grenades in Freed. Yet, common sense tells us that the average citizen knows hand grenades are dangerous (and therefore presumptively regulated), but has no similar reaction to disposing of ordinary paint, which the average person has encountered and used much of his or her life. Burying paint becomes "hazardous" only once we apply that label to it, not from ordinary human experience. In short, the presumption that danger-invites-regulation is reasonable in one case, but not in the other.

Ultimately, the only factor truly suggesting "blameworthy" conduct on the defendant's part was the knowledge (or lack thereof) that an EPA permit was lacking. Thus, the mental element that the Hoflin court read out of the statute was the lone connection between "blameworthiness" and the criminal sanction. In contrast, a defendant in possession of a quantity of hand grenades is at least presumptively involved in "blameworthy" conduct simply based on possession. The line between Freed and Liparota then is not simply the presence or absence of a threat to the public safety, but the existence of factors corroborating blameworthiness in one and their absence in the other. Part II will return to the significance of this linkage between some minimal element of blameworthy conduct and the use of criminal sanctions, but the immediate point is that because many regulatory statutes involve conduct creating some threat to the public safety, a theory may be on the verge of judicial acceptance that effectively severs this linkage between blameworthiness and criminal punishment.

C. Vicarious Responsibility

Generally, in American criminal law, individuals are criminally liable only for conduct that: (1) they direct or participate in; (2) they otherwise aid or abet; or (3) with respect to which they conspire. Corporate officers, however, now appear to face an additional form of vicarious liability. In United States v. Park, the Supreme Court upheld the imposition of criminal liability upon "corporate employees who have 'a responsible share in the furtherance of the transaction,' " even when the corporate officer took action to prevent the violation. Lower federal courts have extended this principle to

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79 Id. at 670.
80 Id. at 663-64. Defendant Park was the chief executive officer of a supermarket chain having 36,000 employees and 874 retail outlets. Rodent contamination was found in its Baltimore warehouse, thereby violating the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 331(k). Park had received a prior notice from the FDA that contamination had been found, instructed his vice president for legal affairs to investigate, and later was informed him that the Baltimore division vice president was "taking corrective action."
apply, even when it has appeared that subordinate employees had purposely failed to follow the superior’s orders or that the officer took significant corrective action that could not be implemented in time because of a labor strike.

Park’s "responsible share" theory was announced in the context of a strict liability statute, whose uncompromising harshness the Court actually relaxed marginally by recognizing an "objective impossibility" defense. Both legislation and subsequent decisions seem to be extending Park’s standard of vicarious liability both to other "public welfare" statutes and, more questionably, to statutes requiring higher mens rea levels. This expansion of the Park doctrine has particular significance in light of new and proposed "reckless endangerment" statutes. Under one environmental statute, a defendant can receive fifteen years in prison for "knowing endangerment" that creates a risk of "serious bodily injury." Although the mens rea level here of "knowing" is certainly adequate to satisfy traditional civil libertarian concerns, Park’s "responsible share" concept broadens the scope of potential


81 See, e.g., United States v. Starr, 535 F.2d 512 (9th Cir. 1976).


83 421 U.S. at 673.

84 Originally, the responsible corporate officer doctrine was limited to strict liability offenses. See Zarky, The Responsible Corporate Officer Doctrine, 5 Toxics L. Rep. (BNA) 983, 989-90 (Jan. 9, 1991); Comment, Limits on Individual Accountability for Corporate Crime, 67 MARQ. L. REV. 604, 618 n.85 (1985). In several recent criminal cases, however, courts have charged the jury that they may convict responsible corporate officers, seemingly on a strict liability basis, even where the statute expressly required a knowing, reckless or negligent level of mens rea. See Zarky, supra, at 989-90.

Also, the Clean Water Act, 33 U.S.C. § 1251, et seq., codifies the "responsible officer doctrine" by defining the term "person" to include "any responsible corporate officer." 33 U.S.C. § 1319(c)(6). The Clean Air Act contains a similar provision. 42 U.S.C. § 7413(c)(3). Under both statutes, however, discharges are rendered unlawful only if the defendant acted "negligently" or "knowingly." See 33 U.S.C. § 1319(c)(1). Properly construed, this means that corporate officers can be convicted for their corporation’s violations, but only if they have the requisite mens rea. See United States v. Cattle King Packing Co., 793 F.2d 232, 240-41 (10th Cir.), cert. denied, 479 U.S. 985 (1986). Nonetheless, courts have repeatedly given a responsible corporate officer charge without charging the jury as to the defendant’s necessary state of mind. See Zarky, supra, at 989-93 (discussing unreported cases). For other recent cases, see United States v. Frezzo Bros., 602 F.2d 1123, 1130 n.11 (3d Cir. 1979) (extending vicarious liability to the Federal Water Pollution Control Act); United States v. Sexton Cove Estates, Inc., 526 F.2d 1293, 1300 n.19 (5th Cir. 1976); State v. Kailua Auto Wreckers, Inc., 62 Haw. 222, 615 P.2d 730 (1980). Park has also been followed with respect to the assessment of civil penalties against corporate officers. See United States v. Hodges X-Ray, Inc., 759 F.2d 557 (6th Cir. 1985).

defendants so as arguably to make anyone within the corporate hierarchy with power to correct or mitigate the risk liable if they have knowledge of it. Is, for example, a vice president for public relations liable where he or she has knowledge and might conceivably have influenced the chief executive officer to change a practice? Similar liability is possible under an OSHA statute that forbids employers willfully to violate a mandated health or safety standard that causes the death of a worker.\textsuperscript{86} Although the statutory focus is on the employer, \textit{Park} could be read to expand the class of persons liable so as to reach all “responsible” managers within the firm.\textsuperscript{87}

In 1990, California actually enacted such a broadly inclusive statute.\textsuperscript{88} Under it, both the corporation and any “manager with respect to a product, facility, equipment, process, place of employment or business practice” is criminally liable if the manager has constructive knowledge of “a serious concealed danger” and fails to warn the appropriate regulatory agency \textit{and} affected employees within fifteen days.\textsuperscript{89} The California statute thus combines a negligence level of \textit{mens rea} with \textit{Park}’s broadened responsibility and then imposes liability essentially for an omission: failing to report the danger and warn employees within an abbreviated time period. Such breadth may shock traditional civil libertarians, but it could be the wave of the future.

D. \textit{The “Technicalization” of Crime}

Regulatory violations that involve no mental element and pose strict liability have long been known to the criminal law. Nearly sixty years ago,

\textsuperscript{86} See 29 U.S.C. § 666(e) (1988). At present, the OSHA statute authorizes a maximum sentence of only six months imprisonment for a first offender and thus arguably qualifies as a public welfare offense. However, under a pending Senate bill, this statute would be expanded to reach any willful violation causing “serious bodily injury.” Also, the penalty would be increased from six months to five years (for a first offense) and ten years (for a second). \textit{See} Pickholtz, \textit{The Increasing Criminalization of Business Conduct: An Overview}, 11 BUS. LAW. UPDATE, Jan.-Feb. 1991, at 8-9.

\textsuperscript{87} In United States v. Johnson & Towers, Inc., 741 F.2d 662, 664-65 (3d Cir. 1984), the Third Circuit said that necessary knowledge of an element of a crime could be inferred from proof that a defendant employee had a “responsible position with the corporate defendant.” \textit{Id.} This notion of vicarious knowledge seems to derive from \textit{Park}.

\textsuperscript{88} \textit{See} California Corporate Criminal Liability Act of 1989 (adding § 387 to the California Penal Code).

\textsuperscript{89} \textit{Id.} Under § 387(a)(1), the defendant must have “actual knowledge” of the “concealed danger.” However, § 387(b)(3) then defines “actual knowledge” to include possession of “information that would convince a reasonable person in the circumstances in which the manager is situated that the serious concealed danger exists.” Section 387(b)(1) defines “manager” as broadly as did \textit{Park} by including all persons possessing “management authority in . . . [the] business” and “significant responsibility for any aspect of a business which includes actual authority for the safety of a product or business practice or for the conduct of research or testing in connection with a product or business practice.”
Professor Francis Sayre catalogued the occasions on which legislatures and courts had dispensed with *mens rea*, naming this special class of criminal prosecutions "public welfare offenses."\(^9\) Tracing the history of such offenses back before the Civil War in the United States and even earlier in England, he found their common denominator to be an attempt to protect the public health and safety by attaching light penalties (usually small fines) to police regulations.\(^9\) Typically, the offenses so criminalized involved the sale of adulterated food or alcohol and narcotics violations where mere possession was deemed sufficient to establish liability.\(^9\) Although Sayre approved of the creation of such a special category of offenses involving no showing of personal culpability, he was emphatic that the doctrine neither should be extended to "true crimes" nor should justify more than *de minimus* levels of punishment, because "[t]o do so would sap the vitality of the criminal law."\(^9\)

Since the mid-1980s, American law has experienced a little noticed explosion in the use of public welfare offenses. By one estimate, there are over 300,000 federal regulations that may be enforced criminally.\(^9\) Over the last three years, the federal government has prosecuted more than 400 cases involving environmental crimes, resulting in cumulative prison sentences of nearly 300 years.\(^9\) The total fines annually imposed in environmental crime cases rose from $3.6 million in 1987 to over $12 million in 1989.\(^9\) With the advent of sentencing guidelines, prison terms for environmental crime have become both more likely and longer, with the presumptive benchmark for a

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\(^9\) Sayre finds the earliest American decisions upholding such offenses to be *Barnes v. State*, 19 Conn. 397 (1849) and *Commonwealth v. Boynton*, 84 Mass. (2 Allen) 160 (1861).

\(^9\) Even at the time Sayre wrote, he noted that in a few cases public welfare offenses had been prosecuted as felonies, but he disapproved of such prosecutions. Sayre, *supra* note 19, at 72; *see* State v. Lindberg, 125 Wash. 51, 59, 215 P. 41, 45 (1923).

\(^9\) Sayre, *supra* note 19, at 84.


\(^9\) See Schmidt, *Company on Trial for Injuries on Job*, N.Y. Times, Aug. 20, 1990, at A10, col. 4. Statistics vary, but the pattern is clear. According to another recent survey, the number of persons jailed for federal environmental crimes was 90 over the last five years. However, the number of such indictments rose from 40 in 1983 to 134 in 1990. *See* Gold, *Increasingly, Prison Term is the Price for Polluters*, N.Y. Times, Feb. 15, 1991, at B6, col. 3.

\(^9\) See Arkin, *Crime Against the Environment*, N.Y.L.J., Aug. 9, 1990, at 3, col. 1. (citing Environmental Protection Agency, 4 OFFICE OF CRIMINAL ENFORCEMENT BULLETIN 3 (Mar. 1990)). The EPA data also show a 130% increase over the last four years in federal environmental criminal cases initiated. *Id.*
felony conviction now estimated at two years in prison. Indeed, as Stanley Arkin, one of the most experienced defense counsel in this area, has observed: "Remarkably, the environmental guidelines almost always call for a sentence exceeding the statutory maximum, thereby forcing a court to sentence the offender to the maximum penalty prescribed by the relevant statute."98

Obviously, environmental crime is important, and knowing violations—such as falsification of records or willful endangerment—are serious offenses that do not merit leniency. But, the typical environmental offense involves the mishandling of toxic substances, and recent decisions have reduced or eliminated the role of mens rea in these statutes, while also applying Park's doctrine that corporate officers who have a "responsible relation" to the performance of the statutory obligations are liable under them.99 As a result, the traditional public welfare offense has now been coupled with felony level penalties. While the defendant in Park was only fined, corporate executives in an equivalent position in the future may face years in prison.

This process is only beginning. Although the Environmental Protection Agency has been notably aggressive in referring violations for criminal prosecution, other agencies with similar statutory authority have been much less ready to make criminal referrals.100 In time, these more hesitant agencies seem likely to respond to public pressure and follow the EPA's lead. Recently, the SEC has begun to make criminal referrals in stock parking cases, which at bottom involve record-keeping and reporting violations having little, if any, relationship to the public health or safety.101 Exxon has

97 For this estimate from Kevin A. Gaynor, a Washington attorney specializing in the field, see Stipp, Toxic Turpitude: Environmental Crime Can Land Executives in Prison These Days, Wall St. J., Sept. 10, 1990, at 1, col. 1. While not all (or probably even most) sentences for environmental crimes are received by corporate executives, one survey shows that corporate officers were sentenced to 39 years' imprisonment (and almost $7 million in fines) in environmental cases in 1988. See Seymour, Civil and Criminal Liability of Corporate Officers Under Federal Environmental Laws, 20 Env't Rep. (BNA) 337 (June 9, 1989).

98 Arkin, supra note 96, at 23.

99 See supra notes 78-87.

100 OSHA has referred only 42 cases for criminal prosecution in its 18 year existence. Of these 14 were prosecuted, and only one resulted in a prison sentence (of 45 days). See Schmidt, supra note 95.

101 See United States v. Regan, Fed. Sec. L. Rep. (CCH) ¶ 94,481 (S.D.N.Y. 1989) (prosecution of Princeton Newport partners), aff'd in part and rev'd in part, 937 F.2d 823 (2d Cir. 1991). The conviction for conspiracy to commit securities fraud was upheld, while the convictions on the tax counts were reversed. "Stock parking" can be prosecuted as a violation of either the SEC's bookkeeping rules, its margin rules, or, if the acquisition exceeds five percent of a class of equity securities, its rules under the Williams Act. The definition of what constitutes "stock parking" has evolved rapidly in recent years. See Coffee, Developing Law on Stock Parking, Bidder Disclosure, N.Y.L.J., Sept. 11, 1989, at 39, col. 5.
been indicted in connection with the Valdez oil spill for entrusting control of
a vessel to a person that it allegedly knew or should have known to have
been an alcoholic.\textsuperscript{102} Finally, the recent indictment of Eastern Airlines and
several of its employees for failure to follow correct maintenance and safety
procedures, as required by Federal Aviation Administration regulations,
opens a vast horizon of potential criminal prosecutions.\textsuperscript{103} As with stock
parking prosecutions, the actual behavior involves falsification of the company's
own business records. At this point, there are few, if any, federal
regulations that could not potentially support a federal criminal prosecution
under one theory or another.\textsuperscript{104}

In fairness, the federal government's attempt to use criminal sanctions in
traditionally civil areas—such as stock parking—has met with some judicial
resistance. During the last year, the Second Circuit has reversed several
securities fraud convictions in marginal cases, but affirmed others where the
evidence of intent was clearer.\textsuperscript{105} Still, these decisions lack any clear ration-

\textsuperscript{102} See United States v. Exxon Corp., No. A90-015 (D. Alaska Apr. 9, 1990) (charging
violations of the Clean Water Act, 33 U.S.C. §§ 407, 411, the Migratory Bird Treaty Act,
and the Dangerous Cargo Act, 46 U.S.C. § 3718(b)). Most of these offenses can be
characterized as "public welfare offenses."

\textsuperscript{103} Eastern Airlines and nine of its managers were indicted on July 25, 1990 by a
federal grand jury in Brooklyn for allegedly routinely ignoring airplane repairs and
maintenance and falsifying reports to the Federal Aviation Administration to make it
appear that the work was done properly. See Weiner, Eastern Airlines Indicted In
Scheme over Maintenance, N.Y. Times, July 29, 1990, at AI, col. 6. Among the alleged
violations were a failure to drain water from fuel tanks, installation of defective cockpit
gauges, and improper maintenance of landing gear, radar and automatic pilots. Id.
While filing false reports with a federal agency has long been a felony under 18 U.S.C.
§ 1001 and thus presents no new conceptual issue, an indictment for failure to perform
required maintenance does represent a new departure in the continuing criminalization of
civil norms. As a precedent in terms of prosecutorial behavior, it opens up the prospect
that other failures to comply with due care or ministerial standards will be treated as
 felonies.

\textsuperscript{104} Under 18 U.S.C. § 371 (1976), any conspiracy to "defraud the United States" is a
felony. This language has been read to cover any conspiracy intended to frustrate the
lawful operation of government or impede the functioning of a federal agency, such as by
violating an administrative rule, even though the rule violated was not itself enforced by
criminal penalties. See, e.g., United States v. Johnson, 383 U.S. 169, 172 (1966); see also
Goldstein, Conspiracy To Defraud the United States, 68 YALE L.J. 405 (1959). Hence,
virtually any federal administrative regulation can potentially be criminally enforced
under this theory.

\textsuperscript{105} During 1991, the Second Circuit reversed the "stock parking" convictions of John
Mulheren, James Sherwin (vice chairman of GAF Corporation), and GAF Corporation,
but it affirmed the securities fraud convictions of Paul Bilzerian and the Princeton
Newport partners (while in the last case reversing the tax fraud convictions of the
Princeton Newport partners). See United States v. GAF Corp., 928 F.2d 1253 (2d Cir.
1991); United States v. Bilzerian, 926 F.2d 1285 (2d Cir. 1991); United States v. Regan,
ale and tend to depend on specific ad hoc judicial theories that seem in some cases driven by a need to justify reversal on as narrow a ground as possible. Conceivably, the phenomenon of judicial nullification is at work in some of these cases, but such a process is at best an inconsistent, sometime thing.

E. An Initial Summary: The Uncertain Cost/Benefit Calculus

Public concern about a newly perceived social problem—the environment, worker safety, child neglect, etc.—seems to trigger a recurring social response: namely, an almost reflexive resort to criminal prosecution, either through the enactment of new legislation or the use of old standby theories that have great elasticity. Increasingly, criminal liability may be imposed based only on negligence or even on a strict liability basis. The premise appears to be that if a problem is important enough, the partial elimination of 

\[ \text{mens rea} \]

and the use of vicarious responsibility are justified.106 No doubt, the criminal sanction does provide additional deterrence, but what are the costs of resorting to strict liability and vicarious responsibility as instruments of social control? This will be a theme of Part II, but one aspect of this problem deserves special mention in view of the apparent escalation of public welfare offenses into felonies.

If the disposal of toxic wastes, securities fraud, the filling-in of wetlands, the failure to conduct aircraft maintenance, and the causing of workplace injuries become crimes that can be regularly indicted on the basis of negligence or less, society as a whole may be made safer, but a substantial population of the American workforce (both at white collar and blue collar levels) becomes potentially entangled with the criminal law. Today, most individuals can plan their affairs so as to avoid any realistic risk of coming within a zone where criminal sanctions might apply to their conduct. Few individuals have reason to fear prosecution for murder, robbery, rape, extortion or any of the other traditional common law crimes. Even the more contemporary, white collar crimes—price fixing, bribery, insider trading, etc.—can be easily avoided by those who wish to minimize their risk of criminal liability. At most, these statutes pose problems for individuals who wish to approach the line but who find that no bright line exists. In contrast, modern industrial society inevitably creates toxic wastes that must be disposed of by someone. Similarly, workplace injuries are, to a degree, inevitable. As a result, some individuals must engage in legitimate professional activities that are


106 No limit appears to exist on the crimes for which a strict liability solution strike some as justified. For the recently expressed view that the problem of science fraud has become a major national problem and therefore may justify a strict liability statute which would hold laboratory supervisors liable for fraud committed by subordinates, see O'Reilly, More Gold and More Fleece: Improving the Legal Sanctions Against Medical Research Fraud, 42 ADMIN. L. REV. 393 (1990).
regulated by criminal sanctions; to this extent, they become unavoidably "entangled" with the criminal law. That is, they cannot plan their affairs so as to be free from the risk that a retrospective evaluation of their conduct, often under the uncertain standard of negligence, will find that they fell short of the legally mandated standard. Ultimately, if the new trend toward greater use of public welfare offenses continues, it will mean a more pervasive use of the criminal sanction, a use that intrudes further into the mainstream of American life and into the everyday life of its citizens than has ever been attempted before.

Several replies are predictable to this claim that there is a social loss in defining the criminal law so that individuals cannot safely avoid its application. Liberals may claim that the traditionally limited use of the criminal sanction was class-biased and that a more pervasive use of it simply corrects that imbalance. Economists may argue that the affected individuals will only demand a "risk premium" in the labor market and, having received one, cannot later complain when the risk for which they were compensated arises. Others may conclude that the anxiety imposed on such employees, while regrettable, is necessary, because it is small in comparison to the lives saved, injuries averted, and other social benefits realized from generating greater deterrence. This may be true, but the cost/benefit calculus is a complex and indeterminate one that depends upon a comparison of marginal gain (in terms of injuries averted) in comparison to other law enforcement strategies (such as greater use of corporate liability or civil penalties) that have not yet been utilized fully. Moreover, on the cost side of the ledger, one must consider not simply the consequences to those actually prosecuted, but the anxiety created within the potential class of criminal defendants. To the extent that liability is imposed for omissions (i.e., failure to detect and correct dangerous conditions), such fear will affect a broad class of employees, most of whom will never be prosecuted or even threatened with prosecution. In addition, there is a cost to civil libertarian values, because statutes that apply broadly can never be enforced evenly. Hence, some instances of "targeting" or selective prosecutions (based on whatever criteria influence the individual prosecutor) become predictable. These costs would be more tolerable if the conduct involved were inherently blameworthy, but negligence, like death and taxes, is inevitable.

Ultimately, much depends on how we define the purposes of the criminal law. If its purpose is simply to prevent crime, the costs of the broad use of the criminal sanction against corporate managers to deter pollution, negligence-caused injuries, or other social harms may be justified. But if we

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107 This argument depends on whether ex ante compensation is always adequate to compensate for ex post injuries. Robert Nozick makes an argument that even full compensation for injury is not adequate when it creates fear within a broader class than those actually injured. See infra note 115 and accompanying text. This analogy seems to fit closely the problem of threatening thousands of executives with criminal liability for negligence but actually prosecuting only a few.
define the criminal law’s purposes more broadly—for example, as to “liberate” society from fear, or to enable the realization of human potential—these broader goals may be seriously compromised by a pervasive use of the criminal sanction against individuals who cannot escape its potential threat. Pursued single-mindedly, a purely negative definition of the criminal law’s purposes that asserts that the criminal law’s only goal is the prevention of crime ultimately ends up, as Herbert Packer wrote, “creating an environment in which all are safe but none is free.”

II. The Rationale for the Tort/Crime Distinction

Generalizations about the difference between crimes and torts usually oversimplify. The standard “black letter” law distinction is a good illustration of this tendency. It holds that crimes represent injuries to society generally, while torts involve only private interests. Although this public/private distinction dates back at least to Blackstone, it is a distinction without a difference. Roscoe Pound stated the most important objection: events that cause private injuries also cause public ones, because public injuries are usually only private injuries writ large. For example, an individual’s private interest in the enforcement of a contract can also be described as the collective, public interest in the security of transactions. The problem with the public/private distinction, then, is that private and public injuries are correlative, with the result, as Henry Hart said, “that society is interested also in the due fulfillment of contracts and the avoidance of traffic accidents and most of the other stuff of civil litigation.”

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109 H. Packer, supra note 108, at 65. This same point can be articulated in terms of Robert Nozick’s concerns; see infra notes 143-45, that those threatened but not injured, are denied adequate compensation by the civil law. Here, those who must fear criminal prosecution for negligence, but cannot avoid entanglement with the criminal law, are the analogs in Nozick’s population that fear injury.

110 For a discussion and critique of this view, see Drane & Neal, On Moral Justification for the Tort/Crime Distinction, 68 Calif. L. Rev. 398, 402-03 (1980).

111 See 3 W. Blackstone, Commentaries* 2 (1768).


113 Hart, supra note 1, at 403. There is also an historical problem with the public/private distinction. Put simply, the line between torts and crimes did not always exist. Prior to the 12th century, the English criminal law was largely oriented toward securing private compensation for victims and their families; guilt for most offenses, including any forms of homicide, could be discharged by making a payment to them. See 2 F. Pollock & F. Maitland, The History of English Law 448-67 (2d ed. 1968). This state of affairs changed dramatically after the Norman Conquest, but the motor force behind the new doctrinal development that any breach of the “King’s Peace” was a criminal offense against the crown seems to have been the King’s desire to expand his criminal jurisdiction as a means of enhancing his power, revenues, and patronage. Because the fines and forfeitures resulting from expanded criminal jurisdiction went into
Still, a kernel of an idea lurks in this distinction. Sometimes there are public values that would be injured if criminal behavior were treated only as tortious conduct for which the victim must be made whole through compensation. Perhaps the clearest example of the insufficiency of compensation is provided by the crime of rape.\textsuperscript{114} If compensation alone were the remedy, not only would potential victims feel fear for which they would not be compensated (because they were not attacked),\textsuperscript{115} but a distinct symbolic injury would also remain: sexual inequality would be symbolically reinforced by a legal rule that effectively entitled men to use women against their will in return for judicially determined compensation. In Calabresi and Melamed's language, property and inalienability rules would have been collapsed into a liability rule.\textsuperscript{116} In their analysis, all legal rules can be grouped into one of three categories: (1) liability rules, which entitle one to trespass on the rights of others so long as one pays judicially determined compensation; (2) property rules, which require that the trespasser buy the right to trespass on another's rights from the holder of the property right; and (3) inalienability rules under which the trespass is prohibited even with the victim's consent. Thus, to "price" rape would effectively convert an inalienability rule into a liability rule.

This concern about collapsing all legal rules into liability rules is shared by many within the standard "law and economics" school, but they insist on finding an efficiency justification for their concern. From their perspective, both tort and criminal law are simply means of controlling externalities. Under Judge Posner's view, the special role of the criminal law is to channel transactions into the marketplace, rather than rely on the courts to assess liability and determine damages.\textsuperscript{117} From his perspective, the advantage of the criminal law is that it encourages voluntary transactions in the marketplace. Thus, while Posner is restating essentially Calabresi and Melamed's property rule/liability rule distinction, he grounds the distinction in the superiority of the market over judicially determined compensation.\textsuperscript{118} Similarly, Shavell explains the importance of intent and the lesser relevance of actual harm to the criminal law in terms of their relationship to the royal purse (and not the victim's), the 12th century divorce of criminal law from tort law can be seen as largely a wealth transfer from crime victims to the crown.

\textsuperscript{114} For the contrary view that asserts an "economic basis" for the criminality of rape, see Posner, \textit{An Economic Theory of the Criminal Law}, 85 COLUM. L. REV. 1193, 1198-99 (1985).

\textsuperscript{115} This is Robert Nozick's point. See R. NOZICK, infra notes 143-45 and accompanying text.

\textsuperscript{116} Calabresi & Melamed, \textit{Property Rules, Liability Rules and Inalienability: One View of the Cathedral}, 85 HARV. L. REV. 1089 (1972). They argue that society imposes criminal penalties with high expected values exceeding the damages to prevent defendants from converting property and inalienability rules into liability rules.

\textsuperscript{117} Posner, \textit{supra} note 114.

\textsuperscript{118} Id. at 1195-96. Note, however, that under Posner's view of rape, it is a property rule (and not an inalienability rule) that would be collapsed into a liability rule.
One who intends harm is more likely to achieve it (and escape apprehension), he argues, and so needs to be threatened by a higher expected penalty. These arguments have been disputed by others and need not be pursued further here. Instead, the focus of this section will be on those rationales for the tort/crime distinction that are not grounded on allocative efficiency.

A. The Criminal Law as a System of Moral Education

The counterview that the criminal law is shaped by nonefficiency considerations usually begins from the premise that the criminal law has a unique "educational role," within which it is one of the primary socializing forces within society. More recently, this view has been rediscovered and articulated in economic terms as a claim that the criminal law is, ultimately, a social instrument for shaping preferences as much as opportunities. Provocative as this view is, one must be careful here not to overstate the criminal law's capacity. Whether it can truly shape preferences is debatable; crimes of theft, violence, and sexual exploitation have been with us for millennia. Similarly, despite decades of criminal prosecutions for income tax evasion, few have learned to "prefer" paying taxes, although most have learned that the consequences of deliberate evasion can include prison. Taken seriously, the idea of the law engaging in "preference-shaping" has a vaguely totalitarian sound; one thinks of "Clockwork Orange" and state-engineered brainwashing. Thus, it seems more accurate to speak of the "educational" role of the criminal law, to say that one learns what the public morality is, even if one does not fully internalize it. Here, empirical evidence is available to support the proposition that the criminal law is very effective at teaching citizens what the contours of the public morality are.

The primacy of the educational or socializing role of the criminal law is hardly a new idea. Herbert Packer wrote that the real impact of the legal "threat" underlying the criminal law was "to create patterns of conforming behavior and thereby to reduce the number of occasions on which the choice of a criminal act presents itself." Deterrence, he suggested, should be "more broadly conceived as a complex psychological phenomenon meant

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119 Shavell, supra note 13, at 1248. Attempts are punished, he argues, even though they result in no harm, because they raise the expected value for criminal punishment. Id. at 1250.

120 See, e.g., Dau-Schmidt, supra note 7, at 13.


122 See Dau-Schmidt, supra note 7; see also T. TYLER, supra note 3.

123 T. TYLER, supra note 3; Ball & Friedman, supra note 24, at 220.

124 H. PACKER, supra note 108, at 43.
primarily to create and reinforce the conscious morality and the unconscious habitual controls of the law-abiding."\[125\]

Starting from this premise that the criminal law is a powerful socializing force, one can attempt to explain some of the most distinctive doctrinal facts about the criminal law, including the central role of intent, the limited relevance of harm to the victim, and the use of incarceration as the characteristic sanction of the criminal law. The importance of intent may lie in the ability of socializing forces to work better with respect to conscious behavior than unconscious behavior (although they can have a significant effect on the latter as well). Hence, the criminal law should arguably concentrate on volitional conduct and leave other legal forces to deal with negligence and nonvolitional conduct. The irrelevance of actual harm to the criminal law can be similarly explained on the ground that socializing forces focus on the actor, not on the victim; thus, it is a sufficient justification for punishment that the individual defendant will serve as an appropriate object lesson. Finally, prison is the distinctive sanction of the criminal law because it fulfills a pedagogical function that fines do not. Not only are prisons highly visible reminders of the deterrent threat of the law, but the use of imprisonment broadcasts a special communitarian message about the equality of all citizens before the law. Because of the wealth differences among offenders and the declining marginal utility of money, fines cannot communicate this message, and, when used as an alternative to imprisonment, may undercut it. The criminal law is then a uniquely effective medium for communicating a communitarian ethic. Alone, it tells members of an audience who may identify themselves as belonging to very different communities (in terms of wealth, race, etc.) that each is a citizen of the same society, subject to the same duties and punishment. The use of imprisonment can symbolize the equality of all before the law, and thus it affirms the existence of a single community.

Other models of the criminal law—economic, retributive, or rehabilitative—may also be able to account for these same distinctive doctrinal characteristics of the criminal law.\[126\] Accordingly, one can fairly ask whether this perspective that sees the criminal law as an instrument of moral socialization can better explain any institutional characteristics of criminal law and its administration. In several important respects, this perspective does provide explanations for institutional details that seem to elude other theories. First, why does the criminal law insist on prohibiting, rather than pricing? Second, why is tort law primarily compensatory in character, while criminal

\[125\] Id. at 65.

\[126\] For example, a rehabilitative model can justify the use of imprisonment as a medium for affording treatment. A retributive model easily can explain the significance of intent as measuring culpability. Economic theorists see intent as correlated to a higher probability of harm and hence a need for a higher expected penalty. See supra notes 118-20 and accompanying text.
law is primarily punitive? Third, why is the criminal law not privately enforced to a greater degree?

1. Prohibiting Versus Pricing

If we view the criminal law as largely a socializing system of moral propaganda, reasons come into focus that explain why its natural style is to prohibit rather than to price. The answer lies in the voice that such a system must use. First, it must be clear and unequivocal, and, second, it prefers to deal in moral absolutes. At least since Moses, the characteristic statement of the criminal law has been “Thou shalt not . . . .” Why? Arguably, such messages are more easily learned, internalized, and made habitual. In effect, they shape the citizens’ unconscious perceptions of the opportunities before them so that occasions for unlawful, but profitable, behavior that would be apparent to the amoral citizen are never truly apprehended by the law-abiding citizen. In contrast, pricing decisions cannot be made habitual and necessarily require conscious trade-offs. Moreover, they do nothing to reinforce a communitarian ethic or promote social bonding. To the contrary, the individual actor is inherently acting in a consciously self-regarding fashion. For example, if criminal law were to adopt Learned Hand’s rule for tort liability, individuals would be asked to determine if the marginal benefit to them from not taking additional precautions equalled or exceeded the marginal expected costs that their conduct imposed on others. One suspects that individuals would tend to exaggerate their own costs and discount others’ benefits; thus, by definition the decision would be self-interested.

When the law wishes to authorize pricing decisions, its language is characteristically soft-edged; it speaks of a rule of reason, of exercising due care under the circumstances, or of negligence. The criminal law seldom speaks in those terms. If it did, the command “Thou shalt not kill” would have appended to it the exception, “unless the marginal benefit to you exceeds the marginal cost to society.” The point then is simple: rhetoric counts. Certain styles of rhetoric are naturally associated with different kinds of legal rules. True commands, such as those stated by the criminal law, require an unequivocal tone and the use of moral absolutes. Not only does a communitarian ethic require moralistically unifying language, but the level of precision with which statements are deliberately phrased differs between the tort and criminal law. As Dean Colin Diver has recognized, precision is not a neutral concept.  

The optimal degree of precision with which a legal rule is stated depends on trade-offs among several factors. He suggests that the more “transparent” a rule is (that is, the clearer and more universally accepted are the meanings of the terms it uses), the more likely the rule is to

127 See Diver, The Optimal Precision of Administrative Rules, 93 YALE L.J. 65 (1983). Diver suggests three dimensions along which legal rules can be measured: (1) “transparency” (the clarity of the rule’s terms), (2) “accessibility” (the ease with which it can be applied to concrete fact patterns), and (3) “congruency” (the degree of congruence between the rule and the law’s underlying objectives). Id. at 66-71.
be either underinclusive or overinclusive. On such a continuum, criminal law and tort law are at opposite ends: the former's rules approach "transparency," but historically were often underinclusive. Thus, the law of theft struggled for a century to find a way to deal with embezzlement. Tort law, in contrast, is seldom underinclusive, but its rules are typically far from "transparent." Often, they require a retrospective and prolonged evaluation of the facts, which means that they also rank low in terms of "accessibility." As a result, such rules are incapable of performing a socializing function.

The distinction between pricing and prohibiting is closely related to a distinction that Professor Robert Cooter has drawn between "prices" and "sanctions." A key idea in Cooter's analysis is that a "sanction" (by which he means a penalty intended to prohibit rather than simply to price) inherently creates an abrupt, discontinuous jump in the costs the actor must incur when he violates the legal standard. In contrast, this abrupt jump disappears when a pricing system is used because prices are continuous and thus bring costs and benefits into balance. As a result, a modest increase in price levels will reduce significantly the level of violations of the legal standard, but a similar increase in sanction levels will have virtually no effect, because sanctions are already set at a level more than adequate to deter. When sanctions are used, the critical determination is not the price to set, but the standard of conduct to mandate, because behavior will be extremely responsive to even a small change in a legal standard that is backed by a highly punitive sanction.

Cooter uses this analysis to develop an operational rule to determine when a policy of prohibitory sanctions should be preferred to a pricing policy. Assuming that information is not costless and that lawmakers face uncertainty, he concludes that the central issue becomes the relative costs of information to lawmakers. He advises:

If lawmakers can identify socially desirable behavior, but are prone to error in assessing the costs of deviation from it, then sanctions are preferable to prices. However, if officials can accurately measure the external costs of behavior, but cannot accurately identify the socially desirable level of it, then prices are preferable to sanctions.

Although Cooter does not analyze the tort/crime distinction, his analysis supplies a utilitarian foundation on which it might be grounded. One can argue that in the case of torts, lawmakers have decided to follow a pricing policy, while the criminal law represents a sanctioning policy. If so, "excessive" fines are not a substantial problem, because sanctions were intended to establish a sharp, discontinuous jump in the penalties society imposes for "criminalized" conduct.

128 Tigar, supra note 26, at 1454-60, 1471.
129 See Cooter, supra note 12.
130 Id. at 1524.
Although much in Cooter's analysis may be questioned,\(^{131}\) his focus on the relative information costs of using prices and sanctions makes one point very well. Society is better advised to use prices, not sanctions, when it has great difficulty in specifying the precise standard of precaution to be observed. This observation may help explain the historic reluctance of Anglo-American courts to criminalize negligence. Unquestionably, it would be infeasible for society to specify the precautions to be observed across a wide variety of contexts and by very different actors with the precision necessary to justify the use of sanctions. In contrast, pricing can be done retrospectively when a court determines whether to impose liability.

Cooter's analysis has an important point of contact with those traditional commentators on criminal law who emphasize blameworthiness as the criterion for criminal liability. As Cooter recognizes, lawmakers cannot ordinarily specify a standard of care without first measuring the external costs caused by deviations from it. In other words, Cooter's focus on the relative information costs of determining standards versus determining external costs seems pointless if, in order to determine the efficient standard, one must first determine the external costs attributable to a particular form of conduct. But Cooter's answer to this problem is that lawmakers can often look to community standards (either standards adopted within an industry or a profession or expressed in well-established moral norms) because such standards, having weathered the test of time or being the product of market forces, are presumptively efficient.

This suggestion that community standards are efficient and so may be enforced by sanctions that represent a discontinuous jump in threatened penalties can be simplified, with only minor distortion, into the claim that comm-

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\(^{131}\) Generally, Cooter gives little attention to the risk of nondetection. Rather, he seems to assume that the actor's private costs equal the social costs of his conduct. In general, this can be true only if the probability of detection approaches 100% or if the actor faces multiple damages that offset the margin by which the risk of apprehension falls below 100%. In all other cases, setting prices equal to the social costs of the actor's behavior will not work because at least on some occasions the actor can avoid payment of this price. Similarly, Cooter's analysis pays little attention to the compensatory aims of the law, which this Article views as the more basic reason for separating the civil and criminal law. Whereas damages in civil actions typically go to private plaintiffs, sanctions go to the state. As a result, recognizing that some rate of accidents is inevitable, lawmakers might prefer tort remedies to sanctions in order to achieve compensation. Not only is this explanation for the overlap of tort law with criminal law glossed over by the simple dichotomy of prices and sanctions, but none of the factors analyzed by Cooter can explain why tort law and criminal law do in fact overlap. Under his assumption, either prices or sanctions should work.

Finally, the institution of punitive damages seems inconsistent with viewing tort law as simply a system of prices. If an actor assumes that tort liability sets the price that when paid permits him to engage—purposely and intentionally—in the taxed activity, he will be sorely disappointed to learn that the deliberate character of his actions subjects him to liability for punitive damages.
community standards may be enforced by criminal statutes on efficiency grounds. Moreover, although Cooter does not focus on the offender’s own perceived utility from the crime, it is implicit from his analysis that his “sanctions” are intended to “prohibit”—that is, remove any incentive for the offender to engage in the unlawful activity to any degree.

The bottom line then is that from two very different perspectives (one focused on efficiency, the other on the educational and socializing roles of the criminal law) a common thread emerges that the criminal law normally intends to prohibit, not price. A positive model of the criminal law should start from that premise.

2. When Should the Criminal Law Price?

All arguments have their logical limits, and the claim that the criminal law should prohibit rather than price misbehavior has its doctrinal boundaries also. Normally, when we think of the criminal law, we visualize it punishing intentional actions willfully engaged in by the defendant. Yet, the criminal law also can be used to punish negligent acts, to impose strict liability, and to hold persons vicariously liable for the acts of others. In such circumstances, the statement that the criminal law should treat the defendant’s conduct as lacking social utility (and therefore should impose high penalties without concern for overdeterrence) makes little sense. The negligent defendant is frequently engaged in activities that have social utility and, indeed, is the same person with whom the law of torts regularly deals. Hence, to the extent that these forms of misbehavior are considered “crimes,” the law should “price” the misbehavior—that is, seek to force the defendant to internalize the costs it imposes on others.

This view that the law should “price” those forms of criminal liability that are essentially exceptions to the usual “method” of the criminal law has obvious relevance to the topic of corporate criminal liability. Arguably, the corporation is being held liable for acts of its agents that it may have sought to prevent. From this perspective, the only policy issue is how heavily the law should tax the corporation in order to induce it to monitor its agents more closely to prevent future illegality. So framed, it quickly becomes obvious that severe penalties to encourage monitoring are not necessarily cost justified. Economically, it would be irrational to spend one million dollars on monitoring to prevent losses of a much smaller amount. Inevitably, monitoring expenditures must be keyed to the size of the expected loss. In turn, this conclusion implies that in sentencing corporations courts should price the violation because ultimately what they are doing is encouraging preventive measures in much the same way that tort law does. Indeed, to the extent that the corporation already has state-of-the-art monitoring controls in place, low penalties would appear appropriate from this perspective, even if these controls demonstrably failed, because there would seem to be little more that society would wish the corporation to do to prevent illegality by its agents.
This analysis assumes, however, that the corporation is truly interested in monitoring its agents. In fact, if corporate penalties were greatly reduced to reflect the adoption of corporate compliance plans or other monitoring systems, corporations would rationally develop an interest in cosmetic monitoring—so that they could both benefit from illegal behavior and also incur only modest penalties, if apprehended. The arguments on both sides of this issue closely resemble the traditional economic analysis of strict liability versus a negligence-based system of tort law. Generally, economists recognize that under either a strict liability system (which vicarious corporate responsibility essentially amounts to) or a negligence system of liability, defendants will take precautions only up to the point where the expected legal liability equals the precaution and avoidance costs. The claimed superiority of a negligence system is that it achieves the same level of precaution as strict liability without making the corporation an insurer for acts by others that it cannot prevent.

The validity of this argument depends, however, on whether corporate criminal liability's only role is to induce the installation of monitoring controls to detect and prevent reckless agents from acting illegally. The alternative possibility is that corporate liability prevents others within the corporation from pressuring these same agents into illegality. The danger is that senior corporate officials could simultaneously pressure lower echelons, while also maintaining a plausible monitoring system for illegality. So long as the pressure to engage in crime marginally exceeded the preventive effect of the monitoring controls, these officials and shareholders could have the best of both worlds: the fruits of illegality with low corporate penalties.

Vicarious responsibility is also necessary because the corporation serves as a second best substitute when we cannot identify the real decisionmaker. Because feigned monitoring obviously has no social utility, its detection should justify harsh or “prohibitory” penalties, rather than pricing. But can courts distinguish real from feigned or cosmetic monitoring efforts? In principle, there are many ways to frustrate a monitoring system; covert signals from senior corporate management can send the implicit message throughout the organization that compliance with law is desirable, but increased profitability is mandatory. Extreme pressure for increased profits or reduced costs carries the message that it is up to the lower echelons to find the means necessary to achieve those goals. Public corporations in particular are complex organizations, and it is possible for them to send contradictory messages to those in their lower to middle echelons. Exposed to the remote threat of

132 See R. Posner, supra note 57, at § 6.5.
criminal prosecution and the clear and present threat of dismissal, lower echelon employees know to which message it is more in their interest to respond.

The bottom line is this: if there is evidence suggesting pressure to induce the criminal behavior from senior levels within the corporation or evidence that persons at such a level sought to thwart internal monitoring controls, then society should use penalties designed to prohibit, not price. In such cases, we are again confronting behavior that lacks social utility, not the question of how heavily to tax the corporation in order to induce monitoring. Above all, any indication that senior management had advance knowledge, or even a reckless awareness of a substantial possibility, of the crime should lead to a judicial conclusion that the crime was "intended" by the corporation or, in other words, that corporate liability should not be considered "vicarious," but intentional (and, therefore, the misbehavior should be prohibited and not priced). Where one draws this line can be debated, but it is noteworthy that neither the English law on corporate criminal liability nor the Model Penal Code adopts the federal rule under which the corporation is vicariously liable for illegal acts by any employee intended to benefit the corporation. Rather, both require the involvement of a more senior corporate official. Although it is unlikely that the federal rule will be modified, the involvement of a more senior corporate official should be the breakpoint at which sentencing policy shifts from a "pricing" approach to a "prohibitory" one, because it suggests that any monitoring efforts engaged in by the corporation were probably cosmetic.

3. Private Enforcement and the Criminal Law

Historically, early English criminal law was compensatory in character. Tort and crime were not clearly distinguishable, and the making of a tariff payment of the "bot" to the injured and the "wite" to the King could atone even for a homicide. Private enforcement at this time was the norm, and,

133 In my judgment, the line should be drawn in terms of whether a corporate official, who had equivalent or senior rank to those responsible for corporate monitoring activities in the relevant area, was implicated in the criminal behavior.

134 For a discussion of the federal rule, see supra note 8.

135 Under English law, the corporation is not normally criminally liable for the acts of its agents or employees, but only for those of agents possessing sufficient power and responsibility within the firm that they represent "alter egos" to the corporation. See L. H. LEIGH, THE CRIMINAL LIABILITY OF CORPORATIONS IN ENGLISH LAW 29-43 (1969). Some English decisions have asked whether the responsible individual whose conduct provided the basis for imputing liability to the corporation represented the "brains" of the organization. Id. at 37-38; see also John Henshall (Quarries) Ltd. v. Harvey [1965] 2 Q.B. 233.

The Model Penal Code essentially adopts a similar, but more expansive, view requiring only that a "high managerial agent" be involved in authorizing or ratifying the crime. See MODEL PENAL CODE § 2.07; see supra note 8.

in Great Britain, it persisted until relatively recently. The decline in private enforcement of the criminal law correlates closely with the criminal law's shift away from a compensatory character. The simple claim made in this section is that a system of law that seeks to prohibit, rather than to price, cannot rely on private enforcement for that purpose—without at least partially sacrificing the compensatory goals of the law. Arguably, such a sacrifice may be justified: the trade-off cannot be ignored, and it may explain why tort law and criminal law are institutionally segregated so that one focuses principally on compensation and the other principally on deterrence.

To understand this point, consider the case where the gains and losses from a crime are asymmetric, with the defendant's gains exceeding the victim's losses. For example, X's conduct injures Y to the extent of $500,000 but benefits X to the extent of $1,000,000. If we depend upon private enforcement, then, at least in a world of perfect information and low transaction costs, the plaintiff Y will recover $500,000. As a result, we will get pricing, but not prohibition. In short, private litigation produces only the standard Coasean solution under which the defendant would be able to negotiate in advance to engage in the misconduct.

Of course, variations can be envisioned under which private litigation might deter the criminal behavior. For example, punitive or multiple damages could be awarded that would both compensate and deter, and these civil penalties could be assessed in private litigation. The RICO statute is an example of such an approach.\footnote{\textsuperscript{137} See Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1964(c) (1988) (authorizing treble damage recovery to anyone injured in his business or property by a RICO violation).} If damages exceeding the actual loss can thus be awarded in private litigation, it might seem efficient to adopt a unitary proceeding that both assessed punishment and awarded damages, thereby reducing the private and public costs of multiple forums. But there are problems with this approach. First, high punitive damages, if privately enforced, would generate a perverse incentive to bring frivolous claims (at least if the claimant or his attorney could receive damages in excess of the actual loss—i.e., a windfall).\footnote{\textsuperscript{138} Certainly, this is the claim that the business community constantly makes about RICO.} In short, from this perspective, prosecutorial discretion is safer than relying on the self-interest of plaintiffs.

Arguably, this objection is insufficient, as one can easily imagine a system in which the plaintiff would keep only actual damages and the punitive component of the damages would go to the state. Still, problems again arise with even this variation: as the damages increase, the rational defendant will be less willing to settle and will expend more resources on the litigation. Meanwhile, the plaintiff's expected recovery remains unchanged, and so it will not increase its investment in the action correspondingly. Indeed, under a high enough multiple damages formula, the defendant could rationally be willing to spend more funds in defense of the litigation than the plaintiff could
expect to receive from it. The resulting differential in their respective willingness to fund the litigation is likely to reduce both the rate of plaintiff victories and the amount of compensation recovered. Because plaintiffs do not have unlimited resources, they would have to abandon their lawsuits or settle them more cheaply, in direct proportion to the extent that their expected gain declines in relation to the defendant’s expected loss.

To generalize, any asymmetry between the expected gain or loss to each side will have a distorting effect on the substantive outcomes that otherwise would have prevailed. As a result, the compensatory goals of the law will tend to be compromised once we introduce a punitive component into the civil law. One of two kinds of distortion can result. If the plaintiff gets the punitive damages, an incentive to bring weak claims arises, because these claims now can have a positive settlement value above the plaintiff’s costs. Conversely, if the punitive component (i.e., the damages above the compensatory level) goes to the state, plaintiffs will receive lower recoveries because the defendants will have a greater incentive to litigate.

These arguments that the compensatory and deterrent goals of the law do not mix well requires one more step before the case is fully made. In theory, even if private enforcement could not generate adequate deterrence for the reasons just discussed, public enforcement might seek both deterrence and compensation. For example, consider a system in which only the state is permitted to assert civil litigation—at least after a criminal prosecution has been commenced concerning the same conduct. Conceivably, such a single enforcer could pursue the entire recovery from the defendant (that is, both the fine and the civil damages). However, old problems would resurface in a new form under such a system because the public enforcer might not have as strong an incentive to pursue the private damages for victims as it would the state’s fine. In settlements, it might trade off the victim’s interests against the state’s. Again, the goal of compensation would be compromised. In addition, new problems would arise. First, private enforcement may benefit from the highly competitive legal marketplace that allows claimants to shop for legal services at the lowest cost. Ineffective lawyers probably survive longer in bureaucracies than in markets. Second, a state monopoly over legal enforcement also would create a nightmarish problem of rent-seeking. Because unlimited resources cannot be committed to legal enforcement, allocation decisions would have to be made. Predictably, interest groups would lobby for these scarce resources to be committed to the legal claims that benefit them.

Rent-seeking refers to the efforts of powerful interest groups to influence and shape legislation and administrative action to protect their special interests. For a summary of the literature, see Hovenkamp, Legislation, Well-Being and Public Choice, 57 U. Chi. L. Rev. 63, 85-89 (1990).

For example, tenants might wish to see fewer resources devoted to enforcing the claims of landlords; corporations might wish priority given to embezzlement cases; and frustrated job applicants, to discrimination claims. In short, all the problems with
The bottom line of this seemingly abstract analysis is that plausible efficiency arguments exist for segregating the compensatory and deterrent goals of the law into distinct legal institutions that play by different rules. The market environment in which private clients find private attorneys may be best for civil enforcement, while economies of scope and scale may make public enforcement the vastly superior mechanism by which to implement the criminal law. Hence, the current structure of institutional arrangements supports the claim that typically the criminal law prohibits, while civil law prices.

B. Normative Arguments

To this point, this section has argued that the criminal law generally seeks to prohibit, rather than price, and that this recognition is essential to a realistic positive model of the criminal law. But such arguments do not state the normative case for using the criminal law to prohibit, rather than to price. Such arguments can be advanced, however, from both a distributive justice standpoint and a libertarian perspective.

From the standpoint of distributive justice, a key point about the criminal law is that the price exacted from the defendant (i.e., the fine) goes to the state, not the victim. As a result, even if it were possible to price the criminal behavior so that defendants internalized the external costs they imposed on others, their victims would not receive compensation. Thus, an involuntary wealth transfer would result. Of course, one answer would be for the state to redistribute the fine to the crime victims, but the practical obstacles to such state-run redistribution are immense.

A second and even more intractable problem with the pricing of crime also involves the unavailability of compensation. In seeking to justify the institution of criminal punishment, Robert Nozick asks why forcing offend-

141 In essence, this is the Kaldor/Hicks definition of efficiency, but the usual objections to that definition apply here with the same force. See, e.g., Posner, The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication, 8 HOFSTRA L. REV. 487, 488-97 (1980) (describing Kaldor-Hicks's efficiency as allowing an involuntary taking, provided that the act creates wealth sufficient to compensate all parties). For example, economists have recently focused on the "rent-seeking" behavior that occurs in government as various groups lobby for the state's resources or protective legislation. See Hovenkamp, supra note 139, at 85-89. If such intense lobbying is normal and affects the allocation of state controlled resources, it would suggest that crime victims would lose to more powerful political forces that would also want this new wealth source (fines) used to their advantage.

142 Obviously, some injuries strike us as uncompensable. Presumably, few would accept the damages paid under a wrongful death statute in return for their lives. If so, conduct causing such injuries again results in an involuntary wealth transfer. More importantly, rent-seeking behavior seems likely to interfere with any simple transfer of
ers to compensate their victims is not a sufficient response to a violation of a citizen's rights. From his extreme libertarian perspective, punishment is justifiable only when compensation will be inadequate. Nozick gives a surprising answer to his question: compensation will always be inadequate, he argues, for many forms of misconduct. Why? Because, he concludes, the possibility of such conduct creates fear, not only among the actual victims, but also among others who are potentially subject to similar victimization. This fear on the part of the potential victim who is not in fact injured cannot be compensated, Nozick argues, because no offender actually violated that person's rights. Hence, private compensation is always inadequate because of the existence of this class of uncompensated potential victims. As a result, the state is justified, he concludes, in establishing public institutions of criminal justice—at least with respect to those crimes that create a generalized sense of fear affecting persons other than actual victims.

Although Nozick uses his concept of a general state of fear to justify the existence of the criminal law, this concept also provides a normative foundation for the claim that the criminal law should prohibit and not price. If potential victims will not receive compensation for their fear, then a pricing system that tries only to force the offender to internalize the costs imposed on others seems destined to fail. For example, no system of pricing can hold the burglar liable for all future apartment dwellers who live in fear because of his crime. In short, once Nozick's category of "fear" is recognized as a legitimate variable that must be considered among the external harms that the price must cover, then, in Cooter's terminology, all "prices" would become "sanctions." To be sure, not all crimes produce fear in Nozick's sense, but this observation only raises a line-drawing problem that is best postponed until Part III.

C. The Debate over Overcriminalization

Probably the strongest proponents of the view that the criminal law is essentially as much a system of socialization as of prevention were the leaders of the Legal Process school. Today, this school is often viewed as being simply a normative counterreaction to the Legal Realist movement and the latter's allegedly excessive emphasis on the individual discretion possessed by judges and other lawmakers. While the Legal Realists stressed that by ordering and interpreting the relevant facts, the legal decisionmaker had de facto opportunities to reach an outcome consistent with his own value pref-

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144 Id. at 58-59.
145 Id. at 65-71.
146 See, e.g., Singer, Legal Realism Now, 76 CALIF. L. REV. 467, 507 (1988) ("[L]egal process thinkers reacted to legal realism by relying on majority rule as the sole uncontroversial principle left in the legal system.").
ferences, the Legal Process school emphasized instead the institutional con-
straints on decisionmaking. From the Legal Process perspective, issues
arose in "the context of some established and specific procedure of deci-
sion."147 The right answer to a question thus often depended on who was
answering, because "each agency of decision must take account always of its
own place in the institutional system and of what is necessary to maintain
the integrity and workability of the system as a whole."148 This is more a
theory of political science than of jurisprudence, and its concerns are less
with the moral foundations of the criminal law than with how the criminal
law fits within the overall institutional structure of democratic government.
From this starting point, Henry Hart, the intellectual father of the move-
ment, had little difficulty in describing the criminal law’s defining character:
"What distinguishes a criminal from a civil sanction and all that distin-
guishes it . . . is the judgment of community condemnation which accompa-
nies and justifies its imposition."149 Crime then, in this view, is conduct that,
onece proven, "will incur a formal and solemn pronouncement of the moral
condemnation of the community."150 Accordingly, it followed from this
first step that the scope of the criminal law should include only behavior that
the community as a whole would consider "blameworthy."

While Hart’s analysis would thus parallel Cooter’s in acknowledging the
relevance of community standards, Hart was not concerned with efficiency
and had at most a secondary concern with deterrence. For him, the criminal
law was illegitimate when utilitarian considerations (such as deterrability)
caused its sanctions to be used against persons whose conduct was not
blameworthy.151 Although Hart wrote before federal prosecutors began to
give priority to “white collar” criminal prosecutions, he was openly skeptical
of the use of criminal statutes to enforce economic regulations.152 In any
event, Hart’s themes were directly applied to the context of economic regula-
tions by an intellectual descendent, Professor Sanford Kadish. Writing
shortly after the 1960s price-fixing cases in which executives of major corpo-
rations were sent to prison for the first time, Kadish warned that the use of

147 Hart, supra note 1, at 402.
148 Id.
149 Id. at 404.
150 Id. at 405.
151 Id. at 422.
152 He expressly favored the “flexible and imaginative adoption of civil penalties to fit
particular regulatory problems [because of] the greater reasonableness of such penalties,
and their more ready enforceability.” Id. at 423. Writing in 1958, he concluded that,
even as of that date, “[t]here are more strict liability and other criminal statutes on the
books than investigators and prosecutors, with their existing staffs, can hope to
enforce. . . . Nor is there any pretense that most of them are seriously enforced.” Id. at
423.
criminal law simply to place a tax on disfavored behavior would rob the
criminal law of its distinctive force.\textsuperscript{153}

The central theme in both Hart’s and Kadish’s critiques was that the
criminal law would be devalued if it were to be used to express not society’s
moral revulsion, but merely its utilitarian preferences. This argument drew
a sharp retort from those who favored the increased use of the criminal law
against high-status offenders. Drawing on sociological studies, Professors
Ball and Friedman challenged the idea that the criminal law would lose its
unique status in the public’s mind simply because it was employed to penal-
ize behavior not historically thought to be “criminal” in nature.\textsuperscript{154} They
argued that the relationship between the criminal law and the public moral-
ity was interactive and reciprocal. Each affected the other, and, to a degree,
the public learned what was immoral from what was made criminal.\textsuperscript{155}

Although Ball and Friedman had only a limited data base upon which to
generalize at the time they wrote, subsequent events seem to confirm their
position. Each of the major “white collar” scandals of recent decades—the
price-fixing scandals in the electrical equipment industry of the 1960s, the
foreign payments scandal of the 1970s and the insider trading revelations of
the 1980s—shocked and aroused the American public. In general, the pub-
lit has shown little apprehension about the use of the criminal sanction in
these cases, but rather has applauded its use. No one who has followed the
media coverage of the Ivan Boesky or Michael Milken prosecutions can
doubt the attitude of the American public: it has wanted prison sentences
imposed—substantial ones. In part, this may simply reflect the public’s
enjoyment of the spectacle of the once mighty made humble, but the possi-
bility at least exists that those commentators who predicted an erosion in
respect for the criminal law if it was used to enforce economic regulations
have either overestimated the legal sophistication of the American public or
underestimated its appetite for bread and circuses. Possibly, the public is
more concerned about being victimized by the underlying offenses, or possi-
bly it simply does not believe that it will be at risk from such prosecutions.
Whatever the reason, the public may not share the legal profession’s unease
with strict liability offenses.

The problem with the Hart and Kadish overcriminalization thesis is then
that it tries to rest an essentially normative argument against overextension
of the criminal law on the debatable empirical claim that the public will lose
respect for the criminal law. In fact, the public’s image of the criminal law
in operation is probably shaped by the outcomes in a few high visibility
cases. In the antitrust scandals of the 1960s, the public was presented with
the spectacle of middle-echelon executives at General Electric, Westing-

\textsuperscript{153} See Kadish, Some Observations on the Use of Criminal Sanctions in Enforcing
Economic Regulations, 30 U. CHI. L. REV. 423, 424 (1963); see also Kadish, The Crisis of
Overcriminalization, 374 ANNALS 157 (1957).

\textsuperscript{154} See Ball & Friedman, supra note 24, at 206-07.

\textsuperscript{155} Id. at 209-14.
house and other major firms meeting clandestinely in motel rooms at night to fix prices; in the 1970s "questionable payments" controversy, payments that closely resembled bribes were made to major political and governmental leaders around the globe; and in the 1980s "insider trading" scandals, the public learned of briefcases stuffed with money moving among New York investment bankers, much as the cocaine industry moves money in Miami. Understandably, these cases looked to the public like criminal behavior. In contrast, the more marginal cases on which Part I of this Article focused, in which strict liability has been imposed or the criminal law has been overlaid on basically aspirational civil standards, have received little public attention.

Still, in the last analysis, there is no necessary contradiction between the Hart/Kadish view that overcriminalization will bring the law into disrespect and the Ball and Friedman view that the public learns what is immoral from what is prosecuted. Both could occur simultaneously, and this would simply represent an application of the psychologist's familiar principle of cognitive dissonance. That is, the public may react in both directions, lowering both its estimation of the criminal law and also its tolerance for the particular practice subjected to criminal prosecution. Ball and Friedman have focused only on the second transition in reporting that conduct that is criminally punished becomes conduct that the community thereafter deems immoral, and their research does not truly address whether there was also a concomitant erosion in respect for the law.

Even if a general decline in the community's respect for law does not result from increased use of the criminal sanction, this should not end the debate about overcriminalization. One flaw in Hart's conceptualization of the law's educational role is his reification of the community as a single, indivisible body of public opinion. American society is too large, diverse, and specialized for such a concept to be generally meaningful. Moreover, the "technicalization" of crime discussed earlier means that the broad mass of public opinion will never quite understand what the law required or why the behavior was illegal. However, it is not necessary to educate or socialize all of society. What Hart should have recognized is that the educational and socializing role of the criminal law focuses principally on specialized audiences within the broader society. While all of society cannot be educated as to the specialized requirements of the SEC, EPA, or OSHA, a relevant business or professional community can be. Sometimes this specialized community can be induced to internalize new community standards. For example, both price-fixing and insider trading represent crimes that, in my judgment, are today accepted as criminal by the relevant affected community. Conversely, when strict liability criminal statutes are used, it is less likely that the prohibited behavior will be internalized, and some possibility

156 "Stock parking," an area newly criminalized, supplies a good illustration. One doubts that 10% of the educated public could define what this crime entails. Indeed, there is no federal statute explicitly announcing under what circumstances stock parking will be illegal. See United States v. Corr, 543 F.2d 1042 (2d Cir. 1976).
exists that it will generate hostility and resistance. Thus, even if there is not a general erosion in public respect for law and even if there is increased general deterrence, the criminal law may fail in its principal socializing mission—making law compliance habitual within the relevant population of potential offenders.

Another way to express much the same point is to say that stigma is a scarce resource. Society does not have an unlimited capacity to express condemnation or to feel revulsion. A little noticed fact about the major modern episodes of “white collar” criminal prosecutions has been their presentation to the public as newly developed crises: a crisis of price-fixing in the 1960s, of illegal payments in the 1970s, and of insider trading in the 1980s. In fact, the behavior in question in each case was not particularly new. What the public was actually witnessing is more accurately described not as a crime wave, but as a prosecution wave. Nonetheless, from the public’s perspective, there was an urgency to these cases that justified the resort to the criminal sanction. In contrast, when the criminal law is applied to more mundane crimes on a continuing basis, the public may grow indifferent to whether the prosecution is civil or criminal in nature. At this point, Professor Hart’s fears will have been realized: the criminal law will have lost its distinctive character.

III. SEPARATING TORT FROM CRIME: TOWARD IMPLEMENTATION

Part I of this Article argued that the realm of the criminal law is expanding, as behavior that was once considered merely tortious or a regulatory violation is now prosecuted as a crime, often under statutes that provide for significant penalties but give only a diminished role to the defendant’s mental awareness of the factors establishing his culpability. The driving force behind this transition is two-fold. First, tortious conduct can impose enormous externalities upon society, and in some of the new areas where the criminal sanction is being used—worker safety, toxic dumping, securities fraud—existing tort and regulatory remedies are generally believed not to have produced adequate deterrence. Second, use of the criminal sanction is easy to defend on utilitarian grounds. It seems to work and is not significantly more costly than civil prosecutions. In short, public authorities get a bigger bang for the buck.

Part II then argued that this utilitarian justification for expansion of the criminal category threatens to conflict with the educational and socializing role of the criminal law. Still, there is no immutable line between crime and tort. Rather, this Article has suggested that the line depends primarily on whether society is willing to recognize social utility in the value that the criminal derives from the criminal behavior. If it does, the strategy should be to price, rather than to prohibit, in order to minimize the external costs.\footnote{To restate the distinction, if X, by defrauding Z of $100, can realize $200} Conversely, when society wishes to prohibit the behavior, it cannot
permit the offender to derive any benefits from the activity without under-
cuting the educational and socializing impact of the criminal law. Gener-
ally, society seeks to prohibit (rather than price) those activities that violate
fundamental community standards. Yet, over time, society can and does
decide that some activities, which formerly were only priced, should be pro-
hibited. Unlawful toxic dumping seems a clear example of a form of con-
duct where society's attitude has changed. Once this might have been seen
as simply a regulatory matter—a malum prohibitum offense in the language
of an earlier era—but today it is more likely to be viewed as behavior that
knowingly endangers human life. Community standards have changed, and
they will continue to do so.

Admittedly, substantial problems of implementation surround any
attempt to operationalize a distinction between pricing and prohibiting.
Two stand out: (1) the “real world” continuum of criminal behavior, rang-
ing from the trivial to the egregious, has few, if any, obvious partitions; thus,
an abrupt shift from a “pricing” policy of incremental cost increases to a
“prohibitory” policy of sharp, discontinuous jumps in penalty levels may
seem unjustified; and (2) the competence of juries to judge issues of social
utility seems highly questionable. Nonetheless, to shift from pricing to
prohibiting without framing some role for the jury as fact-finder might be
thought to trivialize the constitutional safeguards surrounding the trial
stage.

The most feasible answers to both these problems dovetail. Put simply,
the existence or non-existence of criminal intent supplies a traditional jury
issue that also furnishes the most practical breakpoint at which to shift from
pricing to prohibiting. To illustrate the kind of criminal intent on which the
jury should be asked to focus, it is useful to return to a case briefly noted
earlier: United States v. Sellers.158 In Sellers, the court refused to give a jury
instruction that required the jury to find that the defendant realized that his
disposal of waste substances “could be harmful to others or the envi-
ronment.”159 To be sure, such a level of mens rea is not constitutionally
required, but this focus on harm to others supplies a practical test, readily
comprehensible to a jury, for determining when the defendant’s conduct
knowingly lacks any claim to social utility (and hence should be subject to
“sanctions,” rather than “prices” in Professor Cooter’s terminology). Ide-
ally, criminal legislation might therefore distinguish two grades of the crime
of toxic dumping: the higher grade requiring a subjective perception by the
defendant of the serious risk of harm to others, and the lower grade not.
The former might be “prohibited,” and the latter “priced.”

overnight, society may wish to deprive X of all the benefit (through fines or civil
restitution). In such a case, it is prohibiting. If it seeks to cancel only the loss to Z, then
it is pricing.

158 See supra notes 74 and 77.
159 926 F.2d at 416.
Such an approach might be ideal, but it is also constitutionally permissible for the court to engage in this same inquiry at sentencing.\(^{160}\)

A. The Role of the Sentencing Commission

The line drawing problems in determining whether to price or to prohibit are obviously difficult, both because community standards may properly shift over time and because a retrospective factual examination of the particular case will frequently be necessary to see on which side of the line it should fall. Where does this leave us in terms of policy options? First, it suggests that the line between tort and crime cannot feasibly be constitutionalized. In any event, there is virtually no possibility that the Supreme Court would attempt to draw such a line. Recurrently, the Court has suggested that “a crime is anything which the legislature chooses to say it is.”\(^{161}\) It has upheld strict liability offenses,\(^{162}\) and has been unwilling even to treat “victimless” crimes involving consensual sexual conduct as beyond the legislature’s reach.\(^{163}\) Only in Lambert v. California\(^{164}\) did the Court suggest any limits on what the legislature could criminalize, and the more than three decades that have passed since that decision have confirmed Justice Frankfurter’s prediction in his dissent that the decision would “turn out to be an isolated deviation from the strong current of precedents—a derelict on the

\(^{160}\) Constitutionally, the sentencing court is not limited to the facts proven at trial, but may consider other factors, including even other uncharged crimes. See United States v. Grayson, 438 U.S. 41 (1978); Williams v. New York, 337 U.S. 241 (1949). Of course, due process safeguards should surround this process, but under the governing case law it may still remain relatively informal.

\(^{161}\) Hart, supra note 1, at 432 (discussing Shevlin-Carpenter Co. v. Minnesota, 218 U.S. 57, 67-69 (1910) and United States v. Johnson, 221 U.S. 488, 497-98 (1911)).


\(^{163}\) Absent constitutional protection as a fundamental right, even consensual sexual conduct is within the scope of the state legislature’s power to criminalize. See, e.g., Bowers v. Hardwick, 478 U.S. 186 (1986) (upholding the constitutionality of a Georgia statute criminalizing sodomy).

\(^{164}\) 355 U.S. 225 (1957) (invalidating a Los Angeles felon-registration ordinance as applied to a person lacking actual knowledge of a duty to register); see also Robinson v. California, 370 U.S. 660, 667 (1962) (holding that the Eighth Amendment barred convicting a defendant based on “status” as a narcotics addict, based on the finding that such status may be “contracted innocently or involuntarily”). But cf. Powell v. Texas, 392 U.S. 514 (1968) (refusing to extend the reasoning in Robinson to protect a chronic alcoholic from punishment for public drunkenness). Powell seems for the present to signal that Robinson will not be extended to related areas.
waters of the law." Perhaps it should not be, but the momentum for change seems lacking.

If the courts will not draw a line between tort and crime, the legislature might still be asked to do so. But such an appeal seems even more likely to be unsuccessful. Criminal legislation is enacted for a variety of reasons: sometimes as an ad hoc, often hasty response to a perceived crisis; sometimes as an afterthought; sometimes as a means of dignifying the status of a federal agency so that knowing violations of its administrative rules can be criminally prosecuted. Whatever the reason, there is usually a constituency that wants criminalization, and seldom one that visibly opposes it. To oppose criminalization usually places an individual legislator in the exposed position of appearing not to consider the subject matter of the statute sufficiently serious to merit serious penalties. Such perceived insensitivity can be politically harmful, if not fatal. More importantly, any attempt to draw statutory lines that better distinguish "true" criminal behavior from merely tortious behavior would involve an effort of heroic complexity, and in all likelihood it would produce problems with which courts would struggle for decades. Not only would the charging and trial stages become more complex, but it is ultimately doubtful that satisfactory lines can be drawn in advance. Too many details matter, and hence a retrospective evaluation is necessary.

Another group that might be appealed to is prosecutors themselves. Prosecutorial guidelines could be adopted seeking to decriminalize negligent or strict liability offenses. Yet, for prosecutors to decide systematically not to prosecute what the legislature has deemed criminal is also a politically dangerous act, one that seems to undermine the legislature's position as the sovereign lawmaker. Thus, although such prosecutorial guidelines and policies would normally be lawful, they would undoubtedly draw criticism from the regulatory bodies whose enforcement powers would thereby be curtailed, as well as from their legislative allies.

In my judgment, this leaves one agency with an incentive to undertake systematically the task of determining when to price and when to prohibit a particular type of misconduct: the United States Sentencing Commission. Established by Congress in 1984 to draft presumptive sentencing guidelines, it cannot avoid this question without shirking its legislatively imposed duty. To be sure, the Commission cannot prevent the prosecution of offenses that do not amount to "true" crimes (under whatever criteria are

165 Lambert, 355 U.S. at 232 (Frankfurter, J., dissenting).
166 For the views of a proponent of prosecutorial guidelines, see Vorenberg, Decent Restraint of Prosecutorial Power, 94 HARV. L. REV. 1521 (1981); Vorenberg, Narrowing the Discretion of Criminal Justice Officials, 1976 DUKE L.J. 651.
167 Prosecutorial discretion not to charge has generally been recognized and held not to be judicially reviewable. See, e.g., Wayte v. United States, 470 U.S. 598, 607 (1985) ("[B]road [prosecutorial] discretion rests largely on the recognition that the decision to prosecute is particularly ill-suited to judicial review.").
used to draw that line), but it can ensure that such crimes are treated at sentencing like public welfare offenses. In truth, public welfare offenses have been a subterranean part of our law for over a century, but only in the last decade or so have substantial fines or criminal sentences been imposed for their violation. Recognizing that the world is imperfect and that a doctrinally pure distinction between crimes and torts will never be observed by lawmakers, the Sentencing Commission could still take as its task the implementation of Professor Cooter’s distinction between prices and sanctions.\textsuperscript{169} Thus, for behavior that society wishes only to tax, fines should be framed so as to force the actor to internalize costs, but for behavior that society wishes to prohibit, a deliberately sharp and discontinuous jump should be structured into the sentencing guidelines.

Not all cases fit this simple dichotomy of pricing versus prohibiting. For example, what should be done when the defendant (typically a corporation or a corporate officer) is placed on notice that it is not in compliance with some legal obligation and then seeks in good faith to bring itself into compliance—but fails? In one case, the president of a corporation that owned an open-air food storage warehouse was convicted for failing to correct a health problem caused by bird infestation, even though he directed the design and construction of an elaborate bird cage that would have adequately protected the facility.\textsuperscript{170} Unfortunately, a labor strike prevented the installation of the device, with the result that the problem remained uncorrected when health inspectors next visited the plant. On appeal, the Ninth Circuit affirmed the conviction, rejecting the “objective impossibility” defense established by Park\textsuperscript{171} and noted with apparent approval the prosecution’s argument that the firm always had the option of shutting down the business until the device was installed.\textsuperscript{172} Such a judicial response poses the basic question: does society value the productive capacity of this enterprise during the interim? Arguments can be made on both sides of this question, but the potential social loss from shutting down the firm and laying off its employees may be disproportionate to the harm realistically threatened by the offense. Such a

\textsuperscript{169} Some may object that such a project violates the separation of powers. Yet, the separation of powers claim, as applied to the United States Sentencing Commission, has already been rejected by the Supreme Court. See Mistretta v. United States, 488 U.S. 361 (1989). The narrower claim that it exceeds statutory authority is more debatable, but my thesis in this Article is only that the commission should be given such authority.

\textsuperscript{170} See United States v. Y. Hata & Co., 535 F.2d 508 (9th Cir. 1976).

\textsuperscript{171} United States v. Park, 421 U.S. 658 (1975).

\textsuperscript{172} 535 F.2d at 511 (holding that a corporation and its president were not powerless when they could “correct the violation, even by suspending the corporation’s food warehousing activity if necessary”); cf. Boomer v. Atlantic Cement Co., 26 N.Y.2d 219, 257 N.E.2d 870, 390 N.Y.S.2d 312 (1970) (conditioning the lifting of an injunction on the operation of a cement plant on the payment of damages to plaintiff, notwithstanding the court’s finding that the plant was indeed a nuisance).
case presents a paradigm of the pricing versus prohibiting dilemma and suggests that sometimes pricing is the more appropriate response.

B. *An Agenda for the Sentencing Commission*

An appropriate procedure would be to allow consideration of these questions at sentencing. Sentencing guidelines could respond in the following general ways:

1. **Strict Liability.** In principle, strict liability offenses should not result in incarceration or high financial penalties, unless the prosecution can show at sentencing that the individual acted with at least the minimum level of *mens rea* that American criminal law defines as "recklessness." Although regulatory authorities maintain with some truth that they prosecute only defendants, who, they believe, acted with actual knowledge, this issue is seldom resolved at trial, at least if the statute dispenses with *mens rea* toward the element in question. Absent legislation that appropriately frames this issue, it should still be resolved at sentencing (albeit with lesser formality and a lower burden of proof) before punishment above that appropriate for traditional public welfare offenses could be imposed.

2. **Fear.** Nozick's basic claim—that the criminal law is primarily justified by the noncompensable fear that some unlawful actions impose on others—deserves explicit recognition in any morally sophisticated system of sentencing. Its role should be that of an aggravating factor. Obviously, such a criteria distinguishes crimes, such as insider trading, from homicide. But what kinds of fear count? Community values probably answer this question and imply that fear of a financial loss is not the same as fear of injury or illness. Note, however, that the fear need not be directly attributable to a personal assault. Toxic dumping crimes, for example, may subject an even larger proportion of the citizenry to fears that they are drinking contami-

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173 *See Model Penal Code § 2.02(3) (requiring minimum culpability level of recklessness, unless specific statute otherwise provides). Under § 2.02(2)(c), "recklessness" is defined as "[conscious disregard of] a substantial and unjustifiable risk that the material element exists or will result from [the defendant's] conduct."

174 To some extent the sentencing guidelines for organizational offenders issued on May 1, 1991 by the U.S. Sentencing Commission achieve this result. Under § 8C2.4, the "base fine" is set at the greatest of (a) a specified amount from a table, (b) the pecuniary gain from the crime, or (c) under some circumstances, the pecuniary loss from the crime. In many cases, the pecuniary loss will vastly exceed the first two measures. Although the guidelines do not apply to environmental offenses, an obvious example of an instance in which the loss dwarfs all other measures is the Exxon Valdez disaster where Exxon received no gain but caused immense loss. Under § 8C2.4, however, a corporation's fine will be based on the "pecuniary loss from the offense caused by the organization, to the extent that the loss was caused intentionally, knowingly or recklessly." In short, pecuniary loss does not count for purposes of sentencing corporate offenders in cases of negligent or strict liability. Effectively, this means that the state is not taking a prohibitory approach to these offenses.
nated water. Similarly, crimes involving concealed exposure of workers to dangerous substances (e.g., asbestos) could fall under this same heading.

3. Industry Standards and Agency Rules. Hart’s approach can be faulted as backward-looking and anachronistic because it looks only to traditional moral standards. Perhaps unintentionally, it thus implicitly revives the discredited malum in se versus malum prohibitum distinction. Often, however, the regulatory rules imposed by an agency will have simply codified standards long recognized within an industry or other professional community. Significant departures from these standards may involve the same degree of culpability within that specialized group as departures from prevailing moral standards recognized universally within the larger community. In short, if the conduct would be seen as wholly unjustified by those within the field (who best understand it), it should be prohibited, not priced. Egregious departures from professional norms should not be excused simply because the rules involved were technical. In this light, consider again the pending indictment of Eastern Airlines for failure to conduct adequate maintenance on its planes.175 The gravity of such a crime can range from the trivial to the very serious. How should a court appraise it? While industry standards are never dispositive,176 they provide the most useful benchmark for measuring the culpability of such an offense. When well-established industry standards are violated, the court’s response should be the same as if the conduct violated fundamental community standards.

4. Corporate Crime. Corporate crime can be distinctive in several respects, but two respects bear special mention here. First, sometimes the corporation has failed to comply with a standard toward which it was making substantial progress, and, second, sometimes (but probably less often) the crime can be the consequence of a “rogue” employee acting contrary to specific instructions or corporate policy. The Y. Hata & Co. case,177 in which a strike prevented the corporate officer from installing the necessary bird cage around an open-air food storage warehouse, illustrates the first scenario. The court’s view that the business could have been shut down if compliance were otherwise physically impossible seems extreme, because it denies that there is any social value in the continued operation of the plant pending full compliance. While one can easily criticize the court’s decision, the more difficult question arrives at sentencing. Having rejected the defense, can the court still consider this same factor as a mitigating factor that reduces the fine? This Article’s answer would be yes, at least when the

175 See supra note 103.
176 See, e.g., The T.J. Hooper, 60 F.2d 737, 740 (1932). In holding that a tugboat operator had been negligent in not maintaining a radio on board his boat, Judge Learned Hand refused to be bound by industry standards, arguing that “in most cases reasonable prudence is in fact common prudence; but strictly it is never the measure; a whole [industry] may have unduly lagged in the adoption of new and available devices. . . . Courts must in the end say what is required.”
177 535 F.2d 508 (9th Cir. 1976); see supra note 170 and accompanying text.
crime is essentially a public welfare offense that should be priced, not prohibited. This conclusion rests, however, on the defendant's good faith in attempting to correct the problem. Once again, behavior that has social utility should be priced, not prohibited. Deliberate defiance, however, lacks such utility and should be prohibited because it undercuts the socializing role of the criminal law.

The second recurring element in corporate crime is the claim that a "rogue" employee was responsible. Often, this claim is overstated, because the so-called rogue may be responding to subtle (or not so subtle) intra-organization signals and pressures that place profit above law compliance. Indeed, middle managers are often almost fungible, with the result that the corporation can replace those employees who are caught with little harm to itself—if the fine will be modest so long as senior corporate personnel are not implicated. Nonetheless, it cannot be denied that cases arise in which a rogue employee does appear to have frustrated a good faith corporate attempt to comply with the law. In these cases, the corporation's culpability seems low, and a pricing approach would be appropriate, whose intent would be to induce the corporation to install improved monitoring controls.

The problem with this answer is that any corporation can adopt a compliance plan and it may be difficult for the prosecution to prove, except in the most egregious case, that it was cosmetically manipulated. When internal monitoring amounts to a sham, the conclusion seems obvious that it lacks social utility, and a prohibitory approach becomes appropriate. Thus, a sharp, discontinuous jump in corporate penalties is appropriate when there is evidence that senior corporate officials knew of, or "recklessly" tolerated, the criminal behavior or sought to outflank monitoring controls.

But how does one draft guidelines that distinguish "true" from "cosmetic" monitoring? One approach would be to grant a provisional sentencing credit for seemingly adequate monitoring controls, but then treat this credit as a suspended sentence which is forfeited if there is any repetition of the behavior (as evidenced by either subsequent civil or criminal findings during a period of corporate probation). Such an approach takes much of

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179 In United States v. Starr, 535 F.2d 512 (9th Cir. 1976), the evidence at least suggested that a disgruntled janitor frustrated the company's attempt to cure a rat infestation problem that eventually resulted in a criminal prosecution under § 301(k) of the Federal Food, Drug and Cosmetics Act (the same statute that was used in United States v. Park, 421 U.S. 658 (1975)).

180 I have elsewhere made a specific proposal to treat any sentencing credit for compliance plans or cooperation with the prosecution as a suspended sentence which would be imposed (following a probation revocation hearing) if the corporation were found to have violated a related legal standard during the period of probation. For example, if the criminal fine under a "prohibitory" policy would be $2,000,000 but under a "pricing" policy would be $500,000, the court under this proposal would impose a
the burden off the court by assuming that cosmetic monitoring will ultimately result in future violations, and the time to be punitive is at that future moment. Above all, corporate recidivism merits prohibition, not pricing.

CONCLUSION

Ultimately, appropriate sentencing policy is a function of one's theory of the criminal law. Those who view the criminal law as a "pricing" system can make a coherent case for their view that Sentencing Commission guidelines for corporate offenders are too high and that courts should reduce the sentences currently imposed on corporations by recognizing any of a variety of offsets or mitigating factors. In contrast, those who believe that the criminal law is intended to prohibit and not price can view high fines with equanimity and argue that if they are too severe corporations have only to obey the law to avoid them.

Although this Article has argued that the criminal law should normally prohibit, and not price, it has also recognized that the expansion of the criminal law into formerly civil areas of law and the increasing departures from the traditional "method" of the criminal law make it difficult to state this policy as an iron rule. An either/or choice is also unnecessary. Rather, pricing is appropriate precisely in those areas where the criminal law has relaxed its usual requirement of mens rea or has abandoned its normal hostility to vicarious responsibility. Clearly, corporate criminal responsibility straddles this line, and thus distinctions must be drawn that the current federal law of corporate criminal liability does not make.

How can these distinctions best be drawn? The sentencing determination today represents the only point in our criminal justice system where it remains feasible to preserve the distinction between "true" crimes and public welfare offenses. To say that this can be done is not to claim that such distinctions are today being drawn or will be in the near future. Procedural reform, clearer sentencing guidelines that are more focused on culpability factors, and numerous other steps would be desirable. Still, if the criminal law is not to be corrupted into simply a utilitarian instrument for administering legal threats, reform at the sentencing stage is the last, best hope.

$2,000,000 fine, but suspend $1,500,000 of it for the period of probation, subject to compliance with probation conditions requiring it not to engage in any regulatory violations of a related nature. See Coffee, "Carrot and Stick" Sentencing: Structuring Incentives for Organizational Defendants, 3 Fed. Sentencing Rep. 126, 128 (1990).

181 It should be emphasized that a pricing policy does not necessarily mean modest fines. The issue rather is the size of the costs to be internalized by the defendant. Lest my own position on the U.S. Sentencing Commission's guidelines for organizational offenders be misunderstood, I should clarify that I believe they grant an excessive credit for internal compliance programs. See Coffee, Big Corporations, Off the Hook, LEGAL TIMES, May 6, 1991, at 22.