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**WHOM SHOULD WE PUNISH, AND
HOW? RATIONAL INCENTIVES AND
CRIMINAL JUSTICE REFORM**

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Wythe Lecture, William & Mary Law School

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Whom Should We Punish, and How? Rational Incentives and Criminal Justice Reform

Keith N. Hylton*

February 2017

Wythe Lecture, William & Mary Law School

Abstract: This essay sets out a comprehensive account of rational punishment theory and examines its implications for criminal law reform. Specifically, what offenses should be subjected to criminal punishment, and how should we punish? Should we use prison sentences or fines, and where should we use them? Should some conduct be left to a form of market punishment through private lawsuits? Should fines be used to fund the criminal justice system? The answers I offer address some of the most important public policy issues of the moment, such as mass incarceration and the use of fines to finance law enforcement. The framework of this paper is firmly grounded in rational deterrence policy, and yet points toward reforms that would soften or reduce the scope of criminal punishment.

Keywords: deterrence theory, criminal punishment, criminal incentives, sentencing, economics of criminal law, criminal law reform, public choice, drug legalization, price fixing, criminal fine revenue

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Economics and criminal law have long been viewed as odd partners. Economics stresses rationality, and has been referred to at times as the science or study of rational choice.¹ Criminal law, by contrast, often applies to subjects who do not appear to behave rationally.² Criminals are thought to behave impulsively and there is even genetic evidence suggesting a tendency toward impulsiveness among convicted violent criminals.³ One recent study suggests that the propensity toward criminality is strongly related to one's psychological ability to postpone gratification, an ability that appears to be formed early in life.⁴

People who are suspicious about the application of economics, or more generally a "rational incentives framework," to crime probably would fear that such a framework would generate ineffective punishments by doing a poor job of taking into account the weak link between rationality and the behavior of criminals.⁵ One possible shortcoming is that the rationality model might lead to the imposition of outrageous punishments, such as those proposed by Bentham,⁶ to make sure that the punishment system catches the attention of potential criminals. Alternatively, the rationality framework might generate harsh punishments to make up for the risk of non-detection of criminal activity.⁷ Another possible distortion, in the opposite direction, is that a

¹ See, e.g., RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 3 (3d ed. 1986).

² On the reasons for this perception, see Robert D. Cooter, *Lapses, Conflict, and Akrasia in Torts and Crimes: Towards an Economic Theory of the Will*, 11 INT'L REV. L. & ECON. 149, 149-50 (1991); Alon Harel, *Behavioural Analysis of Criminal Law: A Survey*, 2 BERGEN J. CRIM. L. & CRIM. JUST. 32, 34-35 (2014); Rebecca Hollander-Blumoff, *Crime, Punishment, and the Psychology of Self-Control*, 61 EMORY L.J. 501, 504-05 (2012); Richard H. McAdams & Thomas S. Ulen, *Behavioral Criminal Law and Economics*, in 3 CRIMINAL LAW AND ECONOMICS 403, 413-26 (Nuno Garoupa ed., 2d ed. 2009).

³ On genetics and criminal behavior, see, e.g., Andy Coghlan, 'Impulsivity Gene' Found in Violent Offenders, NEW SCIENTIST (Dec. 23, 2010), <https://www.newscientist.com/article/dn19903-impulsivity-gene-found-in-violent-offenders/>; *Genes and Behavior: Next Candidate*, ECONOMIST (Nov. 1, 2014), <http://www.economist.com/news/science-and-technology/21629223-more-evidence-certain-versions-some-genes-can-encourage-violence-next>; Adrian Rain, *The Criminal Mind: Advances in Genetics and Neuroscience are Revolutionizing our Understanding of Violent Behavior*, WALL ST. J., Apr. 26, 2013, <http://www.wsj.com/articles/SB10001424127887323335404578444682892520530>.

⁴ See Robert M. Sapolsky, *A Criminal Trait in the Refusal to Wait?: 'Time Discounting' by Children may Predict Trouble Ahead*, WALL ST. J., Nov. 5, 2016, <https://www.wsj.com/articles/a-criminal-trait-in-the-refusal-to-wait-1478107218> (finding highest probability of future criminal behavior in children who cannot wait to receive a marshmallow).

⁵ Paul H. Robinson & John M. Darley, *Does Criminal Law Deter? A Behavioural Science Investigation*, 24 OXFORD J. LEGAL STUD. 173, 178-82 (2004).

⁶ On Bentham's unusual and perhaps outrageous punishments, see JEREMY BENTHAM, *THE RATIONALE OF PUNISHMENT* 60-61 (Richard Smith ed. & trans., London, R. Heward 1830).

⁷ A long-standing policy in the deterrence literature is that fines or damages should be multiplied by the inverse of the probability of detection to prevent deterrence from being diluted by the likelihood of non-detection. For discussion of this policy, see Keith N. Hylton & Thomas J. Miceli, *Should Tort Damages be Multiplied?*, 21 J.L. ECON. & ORG. 388, 388-91 (2005). The inverse probability multiplier policy lends support to harsh punishments for crimes that are difficult to detect. Gary Becker, in his seminal economic analysis of punishment, noted that his economic model offered a positive account for harsh punishments used in the past, when enforcement capabilities were limited. See Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169, 184 (1968) ("There was a tendency during the eighteenth and nineteenth centuries in Anglo-Saxon countries, and even today in many Communist and underdeveloped countries, to punish those convicted of criminal offenses rather severely, at the same time that the probability of capture and conviction was set at rather low values. A promising explanation of this tendency is that an increased probability of conviction obviously absorbs public and private resources in the form of more policemen, judges, juries, and so forth."). Because of this aspect of his article, Becker's policy has sometimes been compared to a "boil him in oil" approach to enforcement. See Alon Harel,

rationality framework might counsel in favor of weak punishments, or no punishments at all, on the theory that it makes no sense to punish a criminal after the crime has been committed, because the crime is a sunk cost in relation to society's welfare after it has occurred.⁸

This essay sets out a comprehensive account of rational punishment theory and spells out its implications for criminal law reform. Specifically, what offenses should be subjected to criminal punishment, and how should we punish? Should we use prison sentences or fines, and where should we use them? Should some conduct be left to a form of market punishment through private lawsuits? Should fines be used to fund the criminal justice system?⁹

The answers I offer address some of the most important public policy issues of the moment, such as mass incarceration and the use of fines to finance law enforcement. The Department of Justice, in its report on Ferguson, Missouri, concluded that the unfair use of fines as a method of financing the local criminal justice system violated civil right laws,¹⁰ in addition to giving rise to anti-police protests during 2015.¹¹ The issues are broader, however, than reflected in the current unrest over criminal law enforcement. In antitrust, a topic that generates few if any street protests, there is a current problem of multiple punishments and even multiple prison sentences

Criminal Law as an Efficiency-Enhancing Device: The Contribution of Gary Becker, in FOUNDATIONAL TEXTS IN MODERN CRIMINAL LAW 297, 308 (Markus D. Dubber ed., 2014).

⁸ To elaborate, if there were no deterrent effect from punishment, it would be irrational to punish. This is connected to the reasoning of the chain store paradox. Reinhard Selten, *The Chain Store Paradox*, 9 THEORY & DECISION 127, 131-32 (1978). On the last day of earth, according to the paradox, it would be irrational to punish because there could not be a deterrent effect. Reasoning backward, it would not make sense to punish the day before the last day, and the day before that, and so on. Showing an awareness of this paradox, and rejecting utilitarianism as an approach to punishment, Immanuel Kant argued that on the last day of earth, the last murderer sitting in prison should be executed:

Even if a civil society were to be dissolved by the consent of all its members (e.g., if a people inhabiting an island decided to separate and disperse throughout the world), the last murderer remaining in the prison would first have to be executed, so that each has done to him what his deeds deserve and blood guilt does not cling to the people for not having insisted upon this punishment; for otherwise the people can be regarded as collaborators in this public violation of justice.

IMMANUEL KANT, THE METAPHYSICS OF MORALS 106 (Mary Gregor ed. & trans., Cambridge Univ. Press 1996) (1797).

⁹ On fees imposed to finance the criminal justice system, see MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 154-55 (2010) (describing the recent practice of charging newly released prisoners the wide-ranging costs associated with their incarceration); *Developments in the Law—Policing*, 128 HARV. L. REV. 1706, 1727-33 (2015) [hereinafter *Developments*] (listing usage fees, for-profit probation supervision, and civil forfeiture among the various mechanisms used to finance the criminal justice system).

¹⁰ CIVIL RIGHTS DIV., U.S. DEP'T OF JUSTICE, INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 15 (2015), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf.

¹¹ *Id.* at 27; see also Press Release, U.S. Dep't of Justice, Justice Department Announces Findings of Two Civil Rights Investigations in Ferguson, Missouri (Mar. 4, 2015), <https://www.justice.gov/opa/pr/justice-department-announces-findings-two-civil-rights-investigations-ferguson-missouri>.

imposed on firms and employees who violate the competition laws.¹² Presently there are calls to bring some rationality and coordination to global antitrust enforcement.¹³

The problems at the heart of the current unrest over criminal law enforcement and concerns raised in antitrust require a reexamination of some of the same fundamental issues. A reform plan should be broad enough to address both sets of complaints. However, a reexamination of fundamental issues requires a theoretical framework capable of addressing such issues. My aim is to offer such a framework, mainly by unifying some disparate approaches that already exist in the literature. The framework of this paper is firmly grounded in rational deterrence policy, and yet points toward reforms that would soften or reduce the scope of criminal punishment. Specifically, the suggested reforms would oust criminal law from the regulation of many market exchanges (e.g., marijuana sales), sharply limit the use of prison as a form of punishment, and place stringent conditions on the use of fines to finance law enforcement.

This paper's framework integrates the standard model of rational criminal deterrence, which had its first flowering in 1764 through the work of Beccaria,¹⁴ and with public choice theory,¹⁵ which emphasizes the incentives of enforcement agents.¹⁶ The standard model on its own implies optimal limits, often overlooked, for the scope of criminal law enforcement. Part of the contribution of this paper's framework is in identifying optimal scope limitations implied by standard deterrence theory. Public choice theory reinforces and adds to these limitations, helps explain anomalous features of law enforcement (such as the occasional hobbling of enforcement agents by corruption), and offers reasons for policing the optimal scope limitations to ensure that self-interested enforcement agents do not push the scope of criminal law beyond its optimal boundaries.

One of the goals of the rational incentives framework is to take criminal law policy-theorizing away from arguments that point to the essential nature of the offender, an argument that easily drifts into theories of genetic or cultural determinism. Such theories are often unhelpful as guides to state policy, especially in the area of criminal law. The rational incentives framework views criminals and non-criminals as essentially the same, and controlled by the same incentives to seek advantage for themselves. It is the goal of the state first to ensure that the incentives set up by the offender's environment, including the law, do not encourage socially undesirable

¹² Richard A. Posner, *Antitrust in the New Economy*, 68 ANTITRUST L.J. 925, 940 (2001); John Terzaken & Pieter Huizing, *How Much is Too Much? A Call for Global Principles to Guide the Punishment of International Cartels*, 27 ANTITRUST MAG. 53, 53 (2013); Spencer W. Waller, *The Incoherence of Punishment in Antitrust*, 78 CHI-KENT L. REV. 207, 207-08 (2003).

¹³ See, e.g., Terzaken & Huizing, *supra* note 13.

¹⁴ CESARE BECCARIA, ON CRIMES AND PUNISHMENTS 43 (Henry Paolucci ed., Prentice Hall 1963) (1764).

¹⁵ For a survey of public choice theory by one of its founders, see Gordon Tullock, *Public Choice*, in 6 STEVEN N. DURLAUF & LAWRENCE E. BLUME, THE NEW PALGRAVE: A DICTIONARY OF ECONOMICS 722-27 (2d ed. 2008). One aspect of public choice theory, rent-seeking, is core to this analysis. The rent-seeking literature is thought to have originated with Gordon Tullock. Gordon Tullock, *The Welfare Costs of Tariffs, Monopolies, and Theft*, 5 WESTERN ECON. J. 224, 231-32 (1967).

¹⁶ Keith N. Hylton & Vikramaditya Khanna, *A Public Choice Theory of Criminal Procedure*, 15 SUP. CT. ECON. REV. 61, 72-78 (2007).

behavior. In every instance where such behavior is observed, this framework starts with the presumption that it can be attributed to rational incentives.

Rational Deterrence Policy and Crime

The rational model of punishment has been around for quite a long time.¹⁷ I will make no effort here to rehash the theory in detail. Instead, I will briefly review the theory and move directly into its application.

The rational incentives framework began with Beccaria and Bentham and stressed the elimination of the prospect of gain to the criminal.¹⁸ While this is not a surprising proposition, their arguments began a revolution in thinking on criminal law enforcement. Beccaria single-handedly introduced Enlightenment thinking into law enforcement policy. Like other Enlightenment thinkers, Beccaria dispensed with notions that normative judgments should be determined by tradition or references to what seemed appropriate based on the Old Testament. He replaced this traditional mode of thinking, in the area of criminal law jurisprudence, with a rational incentives model that posited that the purpose of punishment is to deter crime. Punishment should therefore aim to take the gain out of crime, but not more than the level required to eliminate the gain.¹⁹ Harsher punishments, in Beccaria's view, worsened crime by inducing correspondingly harsh views on the part of the public and of potential criminals too.²⁰

The mechanism by which harsh punishments would coarsen criminals was not clear in Beccaria's account. Beccaria suggested that harsh punishments reflected a set of unforgiving norms adopted within society, and that those norms infected the punished as much as the punishers. Under this theory, criminals, seeing that they would be dealt with harshly, would find no reason to be lenient toward their victims. Each victim, in a sense, represented the state that promised to torture them, and therefore could be treated badly as a matter of reciprocal dealing. Punishment, in Beccaria's framework, therefore included a component that sought to educate the punished and to inculcate a type of civic virtue.

Bentham continued with Beccaria's project but merged it with a theory of preferences and a sharper focus on incentives. Bentham gave more thought to the types of punishment necessary to eliminate the prospect of gain.²¹ For example, given the impulsiveness and low rationality of criminals, Bentham thought it important to have punishments that were "characteristic" of the crime itself – so that a rapist, for example, would face the prospect of castration, or a thief the prospect of having his hands cut off.²² Bentham also introduced the theory of marginal

¹⁷ For a brief history, see Keith N. Hylton, *Punitive Damages and the Economic Theory of Penalties*, 87 GEO L. J. 421, 425-27 (1998).

¹⁸ See, e.g., BECCARIA, *supra* note 15; JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 166 (J. H. Burns & H. L. A. Hart eds., Clarendon Press 1996) (1789).

¹⁹ Hylton, *supra* note 17, at 425-26.

²⁰ See BECCARIA, *supra* note 14, at 43-44.

²¹ Hylton, *supra* note 18, at 426-27.

²² See BENTHAM, *supra* note 6, at 76-93 (suggesting deformation and mutilation as possible punishments); *id.* at 60-61 (suggesting punishment of the "offending member"-e.g.-"[i]n punishing the crime of forgery the hand of the offender may be transixed by an iron instrument fashioned like a pen").

deterrence as a justification for moderating punishments.²³ Under this theory, punishments should be moderated to the level necessary to eliminate the gain, because otherwise the punishment itself could induce more destructive behavior. For example, if the punishment for purse snatching and murder were the same (execution), a purse snatcher who believed that he would be executed would choose to murder his victim to make it easier to take the purse. The marginal deterrence theory offered an alternative to Beccaria's comparatively fuzzy educational theory of punishment, and one that generated specific implications for the level of punishment.

This classical deterrence model has been at the core of rational punishment theory since the contributions of Beccaria and Bentham. By focusing on *gain elimination*, both theorists indicated that punishment authorities should attempt to individualize punishments to the characteristics of the offender. Both indicated that punishments should be more severe as the probability of detection declined. Both indicated that punishment should be more severe as the distance in time between offense (receipt of gain to the offender) and punishment increased. The differences were in fuzzier areas. Bentham stressed the psychology of offenders in the determination of an appropriate punishment. Beccaria stressed the educational function of punishment, and its concomitant need to uphold social norms of individual respect and mercy in operation.

The Classical Deterrence Theory of Beccaria and Bentham remains influential today. The major modern innovation in rational punishment thinking was Becker's theory of punishment in 1968.²⁴ Becker argued that the goal of punishment should be to *internalize the social costs* of criminal activity rather than to eliminate the gains. The reasons for switching to the internalization goal are several. Most importantly, the criminal justice system has expanded beyond common law crimes (e.g., murder, mayhem, rape, battery, burglary, theft)²⁵ to encompass many activities that are business practices and types of market exchange (e.g., drug selling). For such activities, according to Becker, internalization is the proper goal to seek in order to maximize social welfare. For activities that generally enhance society's welfare – that is, where the gains to society generally exceed the losses to victims – internalization would shift the losses to the source of the activity, and appropriately discourage the activity without necessarily shutting it down. For example, making a railroad pay for the losses imposed on victims of rail accidents would discourage some rail service while at the same time permitting it to continue where the benefits, as reflected by profits, were greater than the harms. The second reason to prefer internalization is that it works just as well as gain elimination wherever the latter goal would be preferable. Again, suppose railroads were inefficient, in the sense that the gains to society were less than the accident losses imposed on victims. Under internalization, rail service

²³ See BENTHAM, *supra* note 6, at 168 (asserting that "[w]here two offences come in competition, the punishment for the greater offence must be sufficient to induce a man to prefer the less."). For a more recent discussion on marginal deterrence theory, see generally George J. Stigler, *The Optimum Enforcement of Laws*, 78 J. POL. ECON. 526 (1970) (discussing the most recent updates on the marginal deterrence theory).

²⁴ Becker, *supra* note 7, at 169-70.

²⁵ On common law crimes generally, see 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 176-19 (Univ. Chi. Press 1976) (1768).

would be forced to shut down since the losses internalized would wipe out the profits of the railroads.

Becker's internalization approach implies, consistent with the Classical model, that the severity of punishment should vary inversely with the probability of detection. Thus, crimes that are unlikely to be detected should be punished more harshly, other things being equal. Becker's analysis implies, under certain conditions, that the ideal penalty can be determined by dividing the social loss due to the crime by the probability of detection.²⁶ The costs of enforcement can be minimized by reducing the amount of resources put into enforcement, thus lowering the probability of detection, and increasing the penalty. In stark terms, the Becker model implies that an optimal enforcement system might consist of a single enforcement agent who, unable to capture the vast majority of offenders, makes up for the shortfall in volume by imposing an extremely harsh penalty on each offender he catches. However, such a system would also have to incorporate marginal deterrence concerns to avoid encouraging criminals to choose the most harmful method of carrying out their crimes – that is, from making the crime fit the punishment.²⁷

Minimizing enforcement costs also provides the reason why imprisonment generally would not be the preferred method of punishment under the Becker model. Imprisonment is an especially costly form of punishment, and forfeits the labor of the convicted criminal while he serves his sentence. Resources could be saved by reducing the length of the sentence, or eliminating incarceration, and substituting a monetary penalty, or some other deterrent such as a system of probation and monitoring.

Speed and efficiency are prized under the internalization model. As long as social losses are internalized, there would be no apparent need to impose obstacles such as a high burden of proof for law enforcers. Since the goal of internalization is not to completely deter a particularly malicious activity, discovering the intentions of the offender is not important. There is no need to set up procedural obstacles for the purpose of separating the genuinely vicious from the merely awkward. Such obstacles would only increase the cost of enforcement without enhancing the accuracy of the enforcement system.

Neoclassical Deterrence Theory

An important step toward reconciling these alternative rational punishment frameworks was taken by Calabresi and Melamed,²⁸ and later by Posner.²⁹ In the Calabresi-Melamed-Posner framework, the gain elimination policy is ideal wherever the burden of transacting is low, so that the potential victim and the potential criminal could bargain over the transfer of some entitlement

²⁶ On the use of fines as punishment against risk-neutral agents, see A. Mitchell Polinsky & Steven Shavell, *Enforcement Costs and the Optimal Magnitude and Probability of Fines*, 35 J.L. & ECON. 133, 133-34 (1992) (determining the optimal fines to punish risk-neutral agents for committing harms by factoring in the chance of not being detected).

²⁷ On the marginal deterrence theory as an accompaniment to Becker's theory, see Stigler, *supra* note 23.

²⁸ Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1093-98 (1972).

²⁹ Richard A. Posner, *An Economic Theory of the Criminal Law*, 85 COLUM. L. REV. 1193, 1195 (1985).

from the victim to the offender. Thus, if a criminal wishes to gain ownership of the victim's car, the criminal could simply negotiate over the purchase with the victim. Where the burden of transacting is high, and the underlying transfer potentially welfare enhancing, then the loss internalization approach is preferable under this hybrid model, because it optimally regulates transfers by disincentivizing any transfer where the gain is less than the loss. Since this framework reconciles the Classical deterrence model with Becker, it may appropriately be referred to as the Neoclassical Deterrence Model.

As a positive theory of the common law, the Neoclassical model is far superior to either the complete deterrence (Beccaria, Bentham) or internalization (Becker) frameworks. Viewing tort law as a system of punishment, it clearly does not seek, as a general matter, to eliminate the entire gain from activities that generate torts.³⁰ If it did so, it would have shuttered many businesses such as railroads. Tort liability seeks instead to internalize losses. Adopting tort liability for accidents on the roads is consistent with the Neoclassical model because the underlying activities are socially beneficial and transaction costs prevent potential injurers and victims from allocating risks in advance. Criminal law, by contrast, appears to have complete deterrence as its goal, and this is also consistent with the Neoclassical model. The underlying activities are often not socially beneficial (such as robbery) and the offenses are often takings that in theory could have been arranged through a market transaction.³¹

The Neoclassical model suggests that internalization should be left to the tort system and complete deterrence to the criminal justice system.³² There are many reasons to believe that the tort system is a comparatively superior system for internalization. First, the tort system has an advantage in *motivating enforcers*: it enables victims to sue for losses, and one cannot be sure that public agents working in the criminal justice system will be equally motivated to internalize the losses of victims. Second, the tort system has an advantage in the *proof of loss*: it enables victims to use their own private information about their losses to prove the magnitude of loss in each instance. The public agents employed by the criminal justice system have no special information on the losses suffered by victims. Third, the criminal justice system is geared primarily toward *prohibition and preemption* and uses all of the machinery necessary for these ends. The process of apprehension and prosecution (including evidence gathering) is consistent with the general goal of preemption because it seeks to stop harms before they occur and to use extraordinary means to apprehend offenders. Offenders apprehended under the criminal justice system are sometimes apprehended before the offense occurs and subjected to harsh and intrusive discovery methods. Such an approach would be inappropriate when the state's goal is merely to internalize rather than preempt losses. Fourth, criminal law enforcement inevitably entails some degree of *public defamation* of suspected offenders, because of the nature of the

³⁰ However, gain elimination does appear to be the goal of tort law in the area of punitive damages. See Hylton, *supra* note 17, at 439.

³¹ Posner, *supra* note 29, at 1195-98.

³² At least in retrospect, taking the current allocation of enforcement as given, the Neoclassical model offers a rationalization. However, as a matter of initial design, the Neoclassical model seems to offer no prescription on the choice between public and private enforcement of law. The fact that offenders are often judgment-proof might provide a justification for public enforcement within the Neoclassical model. However, the judgment-proof problem provides a rather insecure foundation for public enforcement.

general category of offenses. To be labeled a “criminal suspect” is to be put in the same category as murderers, kidnappers, etc. Such publicly defamatory treatment of suspected offenders would be excessive in instances where the mere internalization of losses, while allowing the underlying activity giving rise to the loss to continue, is the accepted goal of enforcement.

Just as the tort system has a comparative advantage in internalizing losses, the criminal justice system has a comparative advantage in completely deterring socially harmful activity. First, the prohibitory and preemptive functions of punishment are often best carried out by the criminal enforcement system than by private litigation. Private plaintiffs are unlikely to take on the preemptive role because it is costly and because doing so would provide an unremunerative public good. The individually rational thing to do would be to free ride on the enforcement effort of others. The prohibitory and preemptive functions require investigation and crime detection efforts in many cases.³³ Private individuals would not have incentives to investigate crimes, and would free ride on the efforts of any private individuals who took on the burden of investigation and detection. Even victims of consummated crimes may be unable or unwilling to bring an action against the perpetrator: the victim could be dead or disabled, or fear retribution from the offender. For these reasons, the criminal justice system is preferable when the goal of enforcement is complete deterrence.

Public Choice and Criminal Law Enforcement

The Neoclassical model is incomplete as a positive theory of criminal law, and raises serious questions as a normative theory too. Its most significant flaw is its failure to incorporate the problem of *rent-seeking* – or, more generally, *public choice theory* – in the theory of optimal law enforcement.³⁴

A system of harsh punishments encourages rent-seeking (for example, bribe taking) on the part of law enforcement officials. A mundane account of rent-seeking in law enforcement was offered in a recent article in *The Economist* on corruption in Sierra Leone. The article begins:

At a busy intersection in downtown Freetown, motorbike-taxi drivers wait for customers. They pass the time telling tales of petty corruption. “Yesterday I was chased by two policemen,” says a young man, slouched forward on his bike seat. “They told me I was violating a law when I wasn’t, and confiscated my

³³ A. Mitchell Polinsky & Steven Shavell, *The Economic Theory of Public Enforcement of Law*, 38 J. ECON. LITERATURE 45, 46 (2000).

³⁴ On the public choice model of law enforcement, see David Friedman, *Why Not Hang Them All: The Virtues of Inefficient Punishment*, 107 J. POL. ECON. S259, S262-63 (1999); Hylton & Khanna, *supra* note 17; Keith N. Hylton & Vikramaditya S. Khanna, *Political Economy of Criminal Procedure*, in 3 ENCYCLOPEDIA OF LAW AND ECONOMICS 171-06 (Gerrit D. Geest ed., 2d ed. 2009). On public choice considerations and the enactment of criminal statutes, see Paul J. Larkin, *Public Choice Theory and Overcriminalization*, 36 HARV. J.L. & PUB. POL’Y 715, 735-37 (2013).

motorbike. I had to pay 100,000 leones (\$18) to get it back.” Two other drivers butt in, eager to trump his story with their own.³⁵

The experience of the motorbike driver should be predicted in a regime where law enforcement agents act rationally to maximize their income at opportune moments. The incentives for enforcement agents to behave in the same manner as do the police in Sierra Leone exist to some degree in every law enforcement regime.

Rent-seeking provides a direct mechanism by which unnecessarily harsh punishments can cause social welfare to decline – a view that is consistent with Beccaria’s arguments concerning the adverse effects of harsh punishment but never alluded to in his work. As the harshness of penalties increases, law enforcement agents have greater leverage with which to seek bribes, which can be demanded of the guilty and the innocent alike.

For example, if jaywalkers were subjected to the death penalty, an unnecessarily harsh punishment to deter such a crime, then law enforcement agents could threaten each jaywalker with execution, and in return for declining to arrest, demand an exorbitant payment as tribute. For the same reason, the criminal justice system must constrain the discretion of law enforcers, for otherwise each enforcer could target individuals for bribes, or could carry out their work at the behest of private individuals or groups.³⁶ These observations imply that the criminal justice system should be saddled with constraints to ensure that it is not used as a method of enrichment for enforcement agents, or as a method of predation among social factions.

This public choice perspective on criminal justice, which views law enforcement agents as self-interested utility maximizers, delivers implications that are opposite many of those of the internalization theory, and temper those of the Classical (or complete) deterrence model. Consider, for example, the number of enforcement agents. While the internalization approach would reduce the number of agents and substitute a more severe penalty to maintain deterrence, the public choice model would recommend retaining a sufficient number of agents to make bribery difficult to conceal.³⁷ Consider also the notion, from the internalization model, of reducing the probability of enforcement and increasing the penalty. Such a policy would make the problem of rent-seeking even greater because it would be far easier for an enforcement agent to threaten to impose an enormous fine against any individual he chose to target.

In comparison to the complete deterrence model, the public choice perspective provides a stronger and more consistent reason for moderating punishments than the norm-centered arguments of Beccaria. Setting punishments well above the minimum necessary to completely deter offensive conduct would exacerbate the rent-seeking problem. Hence, minimizing the

³⁵ *Corruption in Sierra Leone: Call it in*, *ECONOMIST* (Nov. 17, 2016), <http://www.economist.com/news/middle-east-and-africa/21710282-putting-technology-work-root-out-graft-call-it>.

³⁶ Hylton & Khanna, *supra* note 16, at 72-78.

³⁷ Obviously, bribery can be deterred by punishing agents who accept bribes. But it is unlikely that bribery can be eliminated in every setting. Agents’ rewards from bribery may be too high relative to the expected penalties to completely eliminate corruption in enforcement. See Sanja K. Ivkovic, *To Serve and Collect: Measuring Police Corruption*, 93 *J. CRIM. L. & CRIMINOLOGY* 593, 637 (2003) (noting the relatively low frequency of successful punishments against police officers engaging in lucrative bribes).

excess above the minimum necessary to completely deter – that is, taking the fat out of the penalty – and constraining official discretion can be seen as important tools for controlling the predatory incentives of enforcement agents. The rent-seeking model would impose a high burden of proof on the enforcement agent to minimize the agent’s discretion to punish.³⁸ The reasonable doubt rule, enshrined in *In Re Winship*³⁹ as the prosecutor’s burden of proof for a criminal conviction under the Due Process Clause, is a direct implication of the public choice model.⁴⁰

Under the public choice model, the degree of rent-seeking or corruption associated with criminal law enforcement should vary directly with two variables: *the degree of discretion given to enforcement agents and the punishment stakes for the offender*.⁴¹ As the degree of discretion increases, the enforcer has greater power to seek a bribe or to seek some end that favors a particular individual or group with which he is affiliated. As the punishment stakes increase, the enforcer is in a better position, other things equal, to demand a bribe, and the offenders (or others involved in the criminalized activity) are more likely to offer a bribe. Another factor that generates corruption is the difference between punishment stakes and the compensation of enforcers. As the monetary punishment stakes increase relative to the compensation of enforcers, the scope for mutually agreeable bribes increases.

The incentive to bribe an enforcement agent who has discretionary authority will inevitably be limited by the offender’s ability to protect himself from predatory demands from the enforcement agent. Suppose the offender wishes to continue in some potentially unlawful enterprise, but must pay a continuing bribe to avoid apprehension. If the enforcement agent’s discretion to demand bribes were unlimited, what would keep the agent from demanding all of the wealth of the offender? The risk of being revealed by the offender as an unfaithful enforcement agent is one potential limit, but this may be insufficient – the offender’s desire to operate in secrecy may prevent him from publicly disclosing his bribery of the agent. A more likely outcome is that the offender responds with force to protect his wealth or the earnings from his unlawful enterprise. Thus, as discretion expands and the differential between punishment stakes and enforcer compensation increases, one should observe both an increase in the incentives for bribery and other forms of rent-seeking, and an increase in the coercive force potential of offenders. Such an increase may lead to an “arms race” in coercive force between enforcement agents and offenders, resulting in excessive arms held by offenders and the militarization of enforcement agents.⁴²

Rent-seeking in enforcement distorts enforcement incentives and undermines the deterrent effect of law enforcement. Corrupted enforcement agents may target innocent individuals for punishment and at the same time avoid apprehending the guilty. This approach to law enforcement reduces the differential in the expected penalty faced by innocent and guilty actors,

³⁸ Hylton & Khanna, *supra* note 16, at 68-72 (discussing public choice theory of reasonable doubt rule).

³⁹ 397 U.S. 358, 361-64 (1970).

⁴⁰ Hylton & Khanna, *supra* note 16, at 68-72.

⁴¹ Friedman, *supra* note 34, at S267-68; Hylton & Khanna, *supra* note 16, at 104-06.

⁴² RADLEY BALKO, *RISE OF THE WARRIOR COP: THE MILITARIZATION OF AMERICA'S POLICE FORCES* 33 (2013).

and thereby weakens the incentive to comply with the law, generating more crime.⁴³ In addition, as such distortions become more common, individuals will have greater incentives to bribe agents to avoid being punished arbitrarily. Thus, rent-seeking leads to greater costs from crime and at the same, costlier enforcement activity by corrupted agents.

Because of the costs of corruption, penalties should be moderated and the discretion of enforcers circumscribed. These suggestions are borne out in the law in the U.S. Prison sentences for many crimes, such as burglary, and could be set considerably higher and still remain consistent with the complete deterrence goal.⁴⁴ That they have not been set as high as the internalization model would recommend may reflect a general awareness of the adverse consequences of unnecessarily severe punishments. Several criminal procedure rules appear to be designed to limit prosecutorial discretion, and this can easily be explained by public choice considerations.⁴⁵

The worrisome implications of enforcement discretion have been on display in many countries, especially China. There, individual police officers have had the nearly unfettered power, until recently, to incarcerate individuals, without a criminal conviction, in re-education camps within the *laojiao* system⁴⁶ – the parallel and larger *laogai* system of camps housing criminal convicts.⁴⁷ The unfettered discretion to assign individuals into the *laojiao* system gave each police officer the power to demand bribes from individuals who wished to avoid being imprisoned. The Chinese government recently imposed restrictions on this discretion, limiting the officer's power to incarcerate to a few types of offenders, such as drug addicts.⁴⁸ This limitation may not be effective because provincial governments may not ensure perfect compliance with the central government's orders, and, more importantly, police officers retain the discretion to determine whether an individual falls within one of the permitted categories for imprisonment in the *laojiao* system.

In June 2016, the prime minister of Bangladesh, responding to a spate of terrorist murders, ordered his police to pursue individuals suspected of terrorist sympathies, leading to over 10,000 arrests.⁴⁹ Some speculated that aside from the benefit to the prime minister from incarcerating political opponents, one important reason for such a broad order was to enable the police to collect bribes. The average bribe to free an individual after an arrest was between \$102 - \$255, and up to \$1,250 could be charged to free a member of the local Islamist political party, Jamaat-

⁴³ Hylton & Khanna, *supra* note 16, at 81 (discussing deterrence under corrupt enforcement).

⁴⁴ Richard P. Adelstein, *Institutional Function and Evolution in the Criminal Process*, 76 NW. U. L. REV. 1, 41 (1981).

⁴⁵ Hylton and Khanna, *supra* note 16, at 84-88 (using public choice model to explain reasonable doubt rule, double jeopardy, ex post facto prohibition, void for vagueness doctrine, and other rules of criminal procedure).

⁴⁶ On the *laojiao* system, see, e.g., *Labour Camps: Demanding Justice*, ECONOMIST (Sept. 1, 2012), <http://www.economist.com/node/21561937>.

⁴⁷ Minami Funakoshi, *China's 'Re-Education Through Labor' System: The View from Within*, ATLANTIC (Feb. 6, 2013), <https://www.theatlantic.com/international/archive/2013/02/chinas-re-education-through-labor-system-the-view-from-within/272913/>.

⁴⁸ See, e.g., *Labour Camps: Long Overdue*, ECONOMIST (Jan. 12, 2013), <http://www.economist.com/news/china/21569448-government-says-it-will-reform-its-system-labour-camps-long-overdue>.

⁴⁹ See *Mass Arrests in Bangladesh: Round up the Usual Suspects*, ECONOMIST, June 18, 2016, at 37.

e-Islami.⁵⁰ Since the average police pay was only \$250 per month,⁵¹ an officer could earn as much as a half-year's salary by arresting a Jamaat activist.

Types of Punishment Regime

Criminal offenses can be broken up into three categories: *common law crimes*, *unlawful unilateral or coordinated business conduct*, and *unlawful market exchanges*. The common law crimes consist of the familiar subjects of criminal law: murder, rape, battery, and robbery.⁵² The second category, consisting of unlawful business conduct, is exemplified by the Sherman Act, which prohibits price fixing cartels and monopolistic conduct.⁵³ However, criminal prosecutions under the Sherman Act have been limited to price fixing cartels.⁵⁴ The third category consists of market exchanges that the state prohibits, such as usurious transactions,⁵⁵ sales of illegal drugs,⁵⁶ sales of renewable tissue and organs,⁵⁷ and prostitution.⁵⁸

The alternative to criminal law enforcement is private enforcement through the tort system. A decision on the scope of criminal law is in essence a decision on the boundary between criminal law and tort law. To define this boundary one must first isolate the features that distinguish criminal law from tort law. There are two essential distinctions that I will recognize in this framework. The first is that criminal law generally seeks to completely deter or prohibit, while tort law seeks primarily to internalize harms. These are default positions, to be sure; criminal

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² See BLACKSTONE, *supra* note 25.

⁵³ The Sherman Antitrust Act of 1890, 15 U.S.C. §§ 1-7 (2012).

⁵⁴ *Criminal Program Update 2015*, U.S. DEP'T JUSTICE, <https://www.justice.gov/atr/division-update/2015/criminal-program-update>, (last visited Feb. 26, 2017).

⁵⁵ See, e.g., 12 U.S.C. § 86 (2012) (providing that the entire interest is forfeited in the event that the interest rate exceeds the limits outlined in section 85 of the title); MASS. GEN. LAWS ch. 271, § 49 (2017) (prohibiting the charging, taking, or receiving of more than twenty percent of the loan in interest and fees in exchange for a loan); N.Y. PENAL LAW § 190.45 (McKinney 2017) (prohibiting the knowing possession of usurious loan records); 18 PA. AND CONS. STAT. ANN. § 4806.3 (West 2016) (prohibiting as a felony engaging or conspiring to commit criminal usury).

⁵⁶ See, e.g., 21 U.S.C. § 841 (2012) (prohibiting drug trafficking); *id.* at § 844 (2012) (prohibiting drug possession within federal jurisdictions); 720 ILL. COMP. STAT. ANN. 570/401 (LexisNexis 2017) (prohibiting the manufacturing or delivering of a controlled substance); MASS. GEN. LAWS ch. 94C, § 32E (2017) (prohibiting the trafficking of marijuana, cocaine, heroin, morphine, and opium); N.Y. PENAL LAW § 220.43 (McKinney 2017) (prohibiting as a first-degree felony the knowing and unlawful distribution of two ounces or more of controlled substances).

⁵⁷ See, e.g., 42 U.S.C. § 274e (2012) (prohibiting the sale of human organs within interstate or foreign commerce); CAL. PENAL CODE § 367f (West 2017) (prohibiting the sale of human organs); GA. CODE ANN. § 16-12-160 (West 2017) (prohibiting the sale of human body parts as a felony); IND. CODE § 35-46-5-1 (West 2016) (prohibiting the sale of human organs, including the kidney, liver, heart, lung, bone marrow, bone, pancreas, or skin, as a felony); MASS. GEN. LAWS ch. 113A, § 16 (2017) (prohibiting the sale of body parts).

⁵⁸ See, e.g., 18 U.S.C. § 2421 (2012) (prohibiting the transportation of individuals within interstate or foreign commerce with the intent to engage in prostitution); MASS. GEN. LAWS ch. 272, § 53A (2017) (prohibiting engaging in sexual conduct with another for a fee); 18 PA. STAT. AND CONS. STAT. ANN. § 5902 (West 2016) (prohibiting persons from engaging in sexual activity as a business or otherwise loitering in public view to be hired for sexual purposes); TENN. CODE ANN. § 39-13-513 (West 2016) (prohibiting engaging in prostitution as a Class A misdemeanor).

law in some special applications seeks to internalize harms (criminal fines for price fixing),⁵⁹ while tort law in special applications aims to completely deter (punitive damages).⁶⁰ The second essential distinction is that criminal law assumes the involvement of public enforcement agents, at the apprehension stage of enforcement at least, while tort law operates largely through private enforcement efforts.

Punishment, like the scope of the law, can be broken down into general categories. The most general division is between prison sentences and monetary penalties. The category of monetary penalties can be broken down further into monetary penalties imposed by the state and private damages awards given to plaintiffs. For simplicity, I will say there are three main types of punishment: prison sentences, fines, and damages to victims. In theory, at least, exposure of a crime is a separate punishment by itself. If a government investigates and determines that an individual or firm committed a crime, the naming and public identification of the offender can be considered a form of punishment to the extent that it harms reputation and exposes the offender to retaliation and private lawsuits.⁶¹

A narrow criminal punishment system would limit the scope of criminal prohibitions to just the common law crimes, and limit the harshest punishment, prison sentences, to the same category. The broadest criminal punishment system would criminalize activities in all three categories of offense and impose prison sentences as the presumptive punishment across the board. Several variations exist between these two poles. How should one choose the right variation of both the scope of criminal prohibitions and the harshness of punishment?

Consider, for example, the optimal scope of criminal prohibitions. As the scope broadens from the first category (common law crimes) to the third category (market activities), the factors that encourage rent-seeking are more likely to be observed. The gap between punishment stakes and the compensation of enforcers widens. In addition, the degree of discretion exercised by enforcers generally increases as the scope broadens from the first to the third category. This implies that the cost of criminal law enforcement generally increases, because of rent-seeking, as the scope increases – again, expanding beyond common law crimes outward to incorporate market activity. Given this increase in cost, the benefit to society from enforcing must increase at a faster rate to justify the expansion in scope on social welfare grounds.

The Case for Limiting the Scope of Criminal Law

⁵⁹ For a discussion of internalization and antitrust penalties, see KEITH N. HYLTON, *ANTITRUST LAW: ECONOMIC THEORY AND COMMON LAW EVOLUTION* 43-52 (2003).

⁶⁰ On punitive damages and prohibition, see David D. Haddock, Fred S. McChesney & Menahem Spiegel, *An Ordinary Economic Rationale for Extraordinary Legal Sanctions*, 78 CAL. L. REV. 1, 17-21 (1990); Hylton, *supra* note 18, at 439-40.

⁶¹ Michael L. Denger, D. Jarrett Arp, *Does our Multifaceted Enforcement System Promote Sound Competition Policy?*, 15 ANTITRUST 41, 42-43 (2001) (outlining various civil “follow-up” actions against criminal antitrust violators); Dan M. Kahan & Eric A. Posner, *Shaming White-Collar Criminals: A Proposal for Reform of the Federal Sentencing Guidelines*, 42 J.L. & ECON. 365, 368-72 (1999) (proposing the inclusion of public shaming as a punishment to white-collar crimes due to the associated reputational harm).

Taking the first category (common law crimes) as the most basic, the scope of prohibitions could range from category one (common law crimes), to categories “one plus two” (common law crimes plus business activities), to categories “one plus two plus three” (common law crimes plus business activities plus market exchanges). This framework implicitly rules out the possibility of a regime in which category three actions (market exchanges) were unlawful while category one actions (e.g., murder) were lawful. Although such a regime is suggested as possible in this framework, it would both violate the basic premises of the Classical and Neoclassical punishment models and be inconsistent with any of the legal systems ever observed. Most legal systems start with prohibitions of the most harmful crimes and gradually expand to prohibit a broader range of potentially harmful conduct.⁶²

I will take it as given that the criminal law should and will continue to apply to the standard common law crimes (category one). The policy reasons for adopting this position are suggested by the theory surveyed earlier in this paper. These are crimes that can be viewed as efforts to bypass markets (or consensual exchange) and the law should generally seek to eliminate the prospect of gain from such behavior. As technology changes, the specific actions falling under the category of common law crimes will naturally expand to include modern variations of ancient crimes, such as cybertheft.⁶³

I contend that the boundary of criminal law should end with the category of common law crimes and their modern variants. The general presumption should be that criminal law does not extend to market exchanges, such as consensual adult prostitution, or to unlawful commercial conduct, such as price fixing, unrelated to the basic set of common law crimes.

Markets and Criminal Law

First, consider the space of market exchanges. Criminal law should be ousted from this space. To be clear, this means that the state should not apply its criminal prohibitions to voluntary market exchanges between rational adults, such as prostitution, usury, or drug transactions.⁶⁴ This is not to say that no law should operate at all;⁶⁵ tort law, for example, should continue to regulate. But as a general rule criminal law should not prohibit market exchanges.

⁶² OLIVER W. HOLMES, THE COMMON LAW 1-38 (1881).

⁶³ See, e.g., 18 U.S.C. § 1343 (2012) (prohibiting fraudulent schemes to obtain money or property through the use of wire, radio or television transmissions in interstate or foreign commerce); CO. REV. STAT. ANN. § 18-5.5-102 (West 2016) (defining as a computer crime accessing any computer, computer network, or computer system with the intent to commit a theft); OR. REV. STAT. ANN. § 164.377 (West 2016) (prohibiting computer crimes, including theft via use of a computer, computer system or computer network); 18 PA. AND CONS. STAT. ANN. § 7611 (West 2016) (defining the offense of unlawful use of a computer as accessing any computer, computer system, computer network, computer software, computer program, computer database, World Wide Web site or telecommunication device with the intent to defraud).

⁶⁴ Obviously, this argument does not apply to market exchanges that do not consist exclusively of rational adults, such as child prostitution. Criminal prohibition should continue to apply to such transactions on the ground that at least one of the parties is unable to be a competent party to the contract. The purchaser who takes advantage of a party who is incompetent to form a contract can be subjected to criminal punishment under this policy.

⁶⁵ What if the participants in a criminalized market prefer that the market remain criminalized? For example, if the participants, through bribery, have made suitable arrangements with enforcement agents, they may prefer that the market remain criminalized. However, this is unpersuasive as an argument for criminalization, because it is little

Why? Consider, for example, the sale of an item by a seller to a willing buyer – for example, the sale of marijuana. If we view the *seller* as the violator of the law, then the basis for completely deterring his conduct, following the Classical model, is difficult to find. In the typical common law crime (e.g., robbery), the offender takes an action that harms the victim. The seller of marijuana, however, takes no action that *harms* his purchaser; indeed, he satisfies a desire of the purchaser. Of course the purchaser pays for the marijuana, and perhaps that can be considered the harm suffered. But the purchaser pays only because the benefit he perceives from consumption is greater than the price he pays, so his ultimate perception is that he gains on net from the transaction. Since there is no net harm imposed on the purchaser, there is no utilitarian basis for completely deterring the seller’s conduct.

One might argue that the harm to the victim can be found in the victim’s failure to realize the harm he imposes on himself by consuming marijuana. This *self-imposed harm* theory assumes that the purchaser fails to correctly perceive his own utility, and whether it has improved or deteriorated after consumption of marijuana. However, if this is a valid basis for treating the sale of marijuana as an imposition of harm by the seller on the purchaser, then the same basis can be relied on to treat the sale of many other products or services as a net harm to the purchaser. Individuals who sell directly to consumers fatty foods, or foods with a high sugar content, could be convicted under the criminal law and imprisoned under the same theory.

Further, prohibiting a market on the theory that consumers in the market impose harm on themselves fails to consider the harms that would result from prohibition. Prohibiting a market does not make the market disappear. Transactions continue, hidden from public view.⁶⁶ Underground markets are likely to result in much greater harms suffered by purchasers than would open markets capable of being regulated and governed by legal rules. Underground drug markets are more likely to include contaminated products.⁶⁷ Similarly, criminalized sex markets are more likely to involve coercion.⁶⁸

more than a rationalization for regulating entry to uphold the prices of incumbent suppliers. One case that may seem to provide a counterargument is the decriminalization of prostitution in Zimbabwe in 2016. See *Why Some Prostitutes Would Rather their Jobs Were Illegal: Decriminalizing the Sex Trade in Zimbabwe*, ECONOMIST (Jan. 5, 2017), <http://www.economist.com/news/middle-east-and-africa/21713866-less-stigma-more-competition-decriminalising-sex-trade-zimbabwe>. Older prostitutes complained that the market was flooded after decriminalization by younger prostitutes who drove prices down to extremely low levels. However, this appears to be an unusual case reflecting the extreme poverty resulting from the mismanagement of Zimbabwe’s economy by Robert Mugabe, driving many young women into the market for prostitution. The Zimbabwe example also reflects a failure to appropriately regulate the decriminalized prostitution market – for example, by requiring registration or taking other steps to prevent coercion.

⁶⁶ Steven Wisotsky, *Exposing the War on Cocaine: The Futility and Destructiveness of Prohibition*, 1983 WIS. L. REV. 1305, 1314-19 (summarizing the various estimates of the size of the illegal black market for cocaine).

⁶⁷ See, e.g., *Dangers Caused by the Prohibition Law*, UKCIA, <http://www.ukcia.org/culture/effects/law2.php> (last visited Feb. 19, 2017) (“Perhaps one of the greatest dangers posed by prohibition is the uncertain nature of the commercial supply. Most cannabis in the UK is supplied by a massive and unregulated industry.”).

⁶⁸ See Scott Cunningham & Manisha Shah, *Decriminalizing Indoor Prostitution: Implications for Sexual Violence and Public Health* 1 (Nat’l Bureau of Econ. Research, Working Paper No. 20281, 2014), <http://www.nber.org/papers/w20281.pdf> (“Not surprisingly, we find that decriminalization increased the size of the indoor market. However, we also find that decriminalization caused both forcible rape offenses and gonorrhea

Another argument for treating the sale of marijuana as a harm imposed by the seller would point to *externalities*, that is, harms that fall on third parties. The purchaser of marijuana is likely to work less effectively,⁶⁹ or to drive under the influence – all activities that may impose a risk of harm on others.⁷⁰ This argument, like the preceding one, has a nearly unlimited scope of application. One could argue, for example, that a person who enters into a consensual amorous relationship with another may be so distracted and absorbed by infatuation that he is unable to work productively, or to competently manage an automobile on the roads. By the same reasoning, one could impose a criminal prohibition on all amorous relationships. As for the evidence, there is little to suggest that marijuana imposes an unusual risk on users or third parties compared to legal and potentially harmful substances such as alcohol.⁷¹

Admittedly, there is some degree of external harm that might justify criminal prohibition of a market. But this should be observed only under rare conditions. In the vast majority of cases, it should be sufficient to apply the criminal prohibition directly to the conduct that generates injury. For example, consider a drug that causes consumers to commit acts of violence. It should be possible, in most cases, to provide a sufficient deterrent by punishing offenders for committing the violent acts rather than the consumption of the drug. Punishing consumers for the mere act of consuming the drug would be a justifiable preemptive policy only if consumption of the drug led consumers to immediately commit violent acts without any process of decision making on their parts, and consumers were unable to determine in advance that the drug would have such an effect. However, if consumers could determine in advance that the drug would cause them to commit violent acts, then imposing sufficient penalties for commission of the acts, when under the influence of the drug, would deter either consumption of the drug or the commission of violent acts after consumption. The instances in which it would be necessary for

incidence to decline for the overall population. Our synthetic control model finds 824 fewer reported rape offenses (31 percent decrease) and 1,035 fewer cases of female gonorrhea (39 percent decrease) from 2004 to 2009.”).

⁶⁹ See, e.g., Roxanne Kahmsi, *How Safe is Recreational Marijuana?*, SCI. AM. (June 1, 2013),

<https://www.scientificamerican.com/article/how-safe-recreational-marijuana/> (“Marijuana also temporarily impairs an array of mental abilities, especially memory and attention. Dozens of studies have shown, for example, that people under the influence of marijuana perform worse on tests of working memory, which is the ability to temporarily hold and manipulate information in one’s mind. Participants in these studies have greater difficulty remembering and reciting short lists of numerals and random words. Research has further revealed that cannabis blunts concentration, weakens motor coordination and interferes with the ability to quickly scan one’s surroundings for obstacles.”)

⁷⁰ *Id.* (“In driving-simulation and closed-course studies, people on marijuana are slower to hit the brakes and worse at safely changing lanes. Investigators still debate, however, at what point these impairments translate to more traffic accidents.”).

⁷¹ On marijuana compared to alcohol, see Ruth Weissenborn & David J. Nutt, *Popular Intoxicants: What Lessons can be Learned from the Last 40 Years of Alcohol and Cannabis Regulation?*, 26 J. PSYCHOPHARMACOLOGY 213, 218 (2012) (concluding that a “direct comparison of alcohol and cannabis showed that alcohol was considered to be more than twice as harmful as cannabis to [individual] users, and five times more harmful as cannabis to others (society).”). In addition, a 2009 review published in the British Columbia Mental Health and Addictions Journal estimated that health-related costs per user are eight times higher for drinkers of alcoholic beverages than they are for those who use cannabis, and are more than 40 times higher for tobacco smokers. Gerald Thomas & Chris Davis, *Comparing Risk of Harm and Costs to Society*, 5 B.C. MENTAL HEALTH & ADDICTIONS J. 11, 13 (2009) (“In terms of [health-related] costs per user: Tobacco-related health costs are over \$800 per user, alcohol-related health costs are much lower at \$165 per user, and cannabis-related health costs are the lowest at \$20 per user.”).

deterrence purposes to punish consumers for the mere act of consumption should be extremely rare.

Nothing in this argument suggests that it would be undesirable for the state to impose harsher penalties on harmful acts committed under the influence of drugs. Indeed, it may be desirable to do so, provided that the penalty is triggered by the harmful act rather than the mere consumption of the drug. In the cases where the drug impairs the consumer's ability to think rationally or to discern right from wrong after consumption, it may be advisable for deterrence purposes to increase the penalty for commission of crimes under the influence to induce the consumer to take the penalty into account in the period of full rationality before consuming the drug. Any specific level of deterrence of harmful acts associated with the consumption of a drug should be achievable by punishing the harmful acts themselves rather than the consumption of the drug. The punishment geared to violent acts alters the terms of trade in a manner that would discourage the violence-prone from consuming the drug without affecting the consumption incentives of the nonviolent. Indeed, imposing the penalty on consumption rather than the harmful act could perversely increase the frequency of harmful acts if the violence-prone are prevalent among the consumers with the greatest demand for the drug.

Now consider the *purchaser* of marijuana as the violator of the law. The only basis for prohibiting the simple act of purchase (or consumption) would be the belief that the purchaser is hurting himself unknowingly – as if the purchaser had acquired poison falsely labeled as a painkiller. However, there is no basis within the utilitarian punishment framework for using the criminal laws to punish someone for unknowingly hurting himself. The Neoclassical model of punishment requires a division between areas of activity where harms are generated as an unintentional byproduct of legitimate activities and areas of activity where crimes result from the intentional imposition of harm. A buyer of marijuana, however, in no sense intentionally imposes harm on anyone; any harm he imposes by the mere act of purchase or consumption would be on himself alone, and unintentional. Under the rationale that such unknowing infliction of self-harm could justify criminal punishment, the state could as easily punish people who purchase and consume too much butter, or drink too much soda.

As noted earlier, a secondary basis for limiting the use of criminal law can be found in the process of apprehension and punishment. Criminal enforcement often involves preemptive efforts, such as surveillance, and harsh methods of apprehension. However, if the activity is one that enhances welfare generally, such preemptive effort and accompanying intrusive enforcement methods would be undesirable. The goal of preemption itself is undesirable, so the enforcement methods associated with preemption would also be undesirable.

Public Choice and Scope Considerations

In addition to the generally weak basis for deterrence in the case of a consensual market transaction, the case for criminal prohibition is further weakened, if not entirely vitiated, by the public choice issues generated by criminal enforcement in this context. To enforce a prohibition against market transactions, such as marijuana sales, law enforcement agents must be prepared to intervene in the transaction between a willing buyer and seller, and proceed to apprehend and

punish one or both of the parties. If the parties are aware of this, they will attempt to arrange their transaction away from the watchful eye of the enforcement agent. If the enforcement agent merely stands in the public square and looks for transactions, he will never see any, because individuals will arrange their transactions in private venues away from public view.

Recognizing that transactions will take place in privacy, the state, to enforce the criminal law, will demand the right to pierce the private sphere to observe potentially unlawful transactions and to find violations of the law. This effort immediately puts the state at odds with the individual and sacrifices autonomy, privacy, freedom of association, and other desirable traits of a relatively free and open society to the enforcement goals of criminal prohibition. To enforce the law, the state will have to monitor the private conduct of individuals, to listen in on their private conversations, and to follow them into their private meeting spaces. Such surveillance may be justifiable under certain conditions, but it should be viewed as an evil which must be embraced only to prevent a much greater evil from occurring. However, the rather negligible evil associated with the consumption of substances such as marijuana is insufficient to justify the surveillance of individuals.

To the extent that profiling based on data is just an especially efficient form of surveillance, this argument applies just as well to such actuarial methods of surveillance.⁷² There is no reason to believe that surveillance is inherently harmful to social welfare. The relevant inquiry is whether the benefits of surveillance justify its costs to society, and that will depend on its purpose (as well as effects) in particular instances. In many market exchange settings, the benefits of surveillance – whether through direct observation or through profiling based on data – will not justify the costs.⁷³

Moreover, surveillance itself is necessarily a discretionary activity of enforcers. This is so because enforcement agents cannot monitor everyone. Unless the state adopts a blanket policy of surveillance, law enforcers will have to choose to monitor some individuals and not others.

⁷² For a critique of the use of profiling in enforcement, see BERNARD E. HARCOURT, *AGAINST PREDICTION: PROFILING, POLICING, AND PUNISHING IN AN ACTUARIAL AGE* 122-25 (2007).

⁷³ Although not central to this analysis, the effects of profiling or selective enforcement may not be beneficial. A policy of targeting a specific subpopulation for enforcement could generate a “substitution effect” by reducing the perceived penalty to the non-targeted population. The same policy might also have an undesirable scale effect by imposing a risk of punishment on all members of the targeted group. See Hylton & Khanna, *supra* note 16, at 81 (using *A* to refer to the advantaged – for example, white – group and *B* to refer to the disadvantaged or targeted group, the authors argue: “Now, in our scenario, group *A* members are under-deterred because they are facing low expected sanctions for engaging in undesirable activities. The deterrent effect on group *B* members would also be reduced because they are now punished whether they have been ‘good’ or ‘bad.’ In other words, the incentive to comply with the law is reduced for group *B* members because the payoffs from compliance and noncompliance have gotten closer.”). For a similar argument, see Bernard E. Harcourt, *Rethinking Racial Profiling: A Critique of the Economics, Civil Liberties, and Constitutional Literature, and of Criminal Profiling More Generally*, 71 U. CHI. L. REV. 1275, 1282 (2004) (arguing that profiling targeting blacks might make whites less fearful of punishment for violating the law, generating more crime); Yoram Margalioth & Tomer Blumkin, *Targeting the Majority: Redesigning Racial Profiling*, 24 YALE L. & POL’Y R. 317, 318 (2006). At present, there are no empirical articles demonstrating the hypothesized substitution effect in actual law enforcement settings. However, some experimental social science research suggests such an effect could exist. See Amy A. Hackney & Jack Glaser, *Reverse Deterrence in Racial Profiling: Increased Transgressions by Nonprofiled Whites*, 37 L. & HUM. BEHAV. 348, 350-51 (2013) (detailing experiment with students suggesting reverse deterrence effect of racially targeted monitoring).

These decisions will inevitably be political in nature, leading to charges of bias and unfairness. Willing transactions between buyers and sellers are likely to take place in almost every community of the state. Enforcers, however, might be reluctant to aggressively pursue potential violations within their own communities, because of the ostracism such action might bring. Once the decision to monitor is viewed as at least partly political, the potential for the unequal treatment and abuse of potential offenders becomes clear.

If the state were to avoid the unfairness charge by monitoring everyone, then matters could be much worse – as Edward Snowden famously intimated after revealing U.S. government surveillance methods and then fleeing to Moscow.⁷⁴ A state that monitors everyone gathers up evidence that can be used to charge almost anyone with a violation of the law, or at least a violation of the public’s expectations of honest and upstanding conduct. For example, even the most diligent employees sometimes loaf off on the job. A surveillance system that gathered all such evidence would put everyone at risk of punishment or at least public embarrassment. Enforcement agents would then be in a position to demand bribes from individuals to avoid punishment or public shame, or to arbitrarily punish.⁷⁵

In addition to the risks associated with unchecked enforcement discretion, the danger of imposing criminal law on market transactions such as the sale of marijuana is that the punishment stakes will increase with the demand on the market. If the product is highly desirable, then purchasers will offer large sums for the product, and the bids for the product will be large enough to cover the cost of compromising enforcement agents. As the market value of the banned substance increases, the level of corruption within the enforcement body will tend to increase too. Outsiders may view enforcement agents as corrupt, or backward, when in fact, they have been put to a task that is almost rationally infeasible.

Ready examples of the disabling effect of corruption on law enforcement are observed in foreign countries. Law enforcement in Mexico is seriously weakened by corruption induced by the illegal markets for drugs – both in the market there and in the U.S. A recent report suggests that half a dozen of the country’s thirty-one states have become ungovernable because of organized crime connected to the drug trade.⁷⁶ In September 2014, forty-three student teachers were killed, presumably by members of drug gangs; reports suggest that the teachers were handed over to the gangs by local police officers.⁷⁷ In July 2015, a drug gang chief, El Chapo, rode out of a maximum-security Mexican prison on a motorcycle through an illuminated, ventilated, mile-

⁷⁴ Barton Gellman, *Edward Snowden, After Months of NSA Revelations, Says his Mission’s Accomplished*, WASH. POST, Dec. 23, 2013, https://www.washingtonpost.com/world/national-security/edward-snowden-after-months-of-nsa-revelations-says-his-missions-accomplished/2013/12/23/49fc36de-6c1c-11e3-a523-fe73f0ff6b8d_story.html?utm_term=.71224ecb3e98.

⁷⁵ The same critique can be offered of a “random profiling” or random surveillance method. For such a proposal, see HARCOURT, *supra* note 72, at 1329-32.

⁷⁶ *Bello: Ciudad Juarez Trembles Again*, ECONOMIST, Oct. 27, 2016, at 31.

⁷⁷ Tracy Wilkinson, *New Report Raises Chilling Possibility that Mystery of 43 Mexican Students’ Disappearance Will Never Be Solved*, L.A. TIMES, Apr. 25, 2016, <http://www.latimes.com/world/mexico-americas/la-fg-mexico-students-20160425-story.html>.

long tunnel dug from under his cell.⁷⁸ Roughly seventy-five percent of murders in Mexico go unsolved, while at the same time ninety percent of convictions are based on confessions, many procured through beatings and torture.⁷⁹

The general picture of criminal law enforcement in Mexico confirms some of the most ominous predictions of the public choice model of criminal law. Enforcement agents often work at the behest of criminal gangs, and shift blame away from gang members to innocent individuals. As a consequence, the deterrent value of law enforcement has been compromised. Murders go unsolved, while innocents are accused of committing them. Chiefs of drug gangs do not go to prison, or they leave prison on their own terms at a time of their choosing. Individuals who upset powerful gangs can be served up to them, for torture or murder, by the police.

One important feature of Mexican law enforcement is the enormous gap between the punishment stakes and the compensation of enforcers. The average pay of Mexican police officers is \$350 per month.⁸⁰ The drug market is a hugely valuable business largely driven by demand of consumers in the U.S. The Mexican state is no match on economic grounds for the powerful market forces on the side of the drug gangs. These market forces have penetrated the criminal law enforcement process at all levels in Mexico.⁸¹

Law enforcement agents receive higher wages in the U.S. (\$4,400 per month)⁸² than in Mexico, and thus the differential between punishment stakes and enforcer compensation is not as wide in the U.S. as in Mexico. Still, the same corruption issues inherent to any system that attempts to use the criminal law enforcement process to suppress a market are observed in the U.S. These issues sit in the background of a controversial study of police enforcement in America that concluded that efforts to racially diversify police forces led to more crime.⁸³ The connection between crime and racial diversity asserted by the author, John Lott, was a causal one in which racial diversification led to an intellectually less competent police force, which in turn led to more crime. The precise mechanism behind this causal relationship is not stated clearly in Lott's article. Moreover, although Lott's regression analysis attempts to control for the reverse causality problem – that is, that attempts to racially diversify police departments may be caused

⁷⁸ *Mexican Drug Lord's Brazen Tunnel Escape*, CBS NEWS, <http://www.cbsnews.com/pictures/drug-lord-joaquin-el-chapos-prison-tunnel-escape/> (last visited Feb. 19, 2017) (displaying numerous pictures of "El Chapo's" elaborate escape tunnel).

⁷⁹ *Criminal Justice in Mexico: Trials and Errors*, ECONOMIST, June 18, 2016, at 34.

⁸⁰ *Organized Crime in Mexico: Under the Volcano*, ECONOMIST (Oct. 14, 2010), <http://www.economist.com/node/17249102>.

⁸¹ For an illuminating account, see *Mexico Corruption Report*, GAN BUS. ANTI-CORRUPTION PORTAL, <http://www.business-anti-corruption.com/country-profiles/mexico> (last visited Feb. 25, 2017) ("Corruption is a significant risk for companies operating in Mexico. Bribery is widespread in the country's judiciary and police, and business registration processes, including getting construction permits and licenses, are negatively influenced by corruption."); *Mexican Police v. U.S. Police*, COPBLOCK (Nov. 5, 2011), <http://www.copblock.org/9835/mexican-police-vs-u-s-police/> ("The one thing that all the cops and soldiers have in common is that they are corrupt to one degree or another. Many are bought and paid for by the cartels. In some cases, the entire police force is in the pocket of the cartel.").

⁸² On average police pay in the U.S., see *Financial Stability and Benefits*, DISCOVERPOLICING.COM, http://discoverpolicing.org/why_policing/?fa=financial_stability (last visited Feb. 25, 2017).

⁸³ John R. Lott, Jr., *Does a Helping Hand put Others at Risk? Affirmative Action, Police Departments, and Crime*, 38 ECON. INQUIRY 239, 248-49 (2000).

by crime rather than being a cause of crime – one cannot be sure that the causation problem was adequately addressed. Putting the causation question aside, the mechanism suggested by the study is that a police officer who could not add a series of numbers as quickly as another would be more likely to excuse criminal conduct or fail to recognize violations of the law. However, Lott’s regression analysis does not draw directly on test score data, relying instead on measures of the percentage of police officers identified as minorities as independent variables.⁸⁴

The public choice perspective provides an alternative explanation for Lott’s results, and one that does not tend toward racism. In urban areas with large minority populations, new officers hired to racially diversify the police force would be drawn directly from the populations where much of the criminal activity takes place. These new, relatively low-wage recruits would be especially vulnerable to bribes from criminal gangs operating in the same areas, just as the local Mexican police officers appear to be now. They would sometimes have connections of family and friendship with members of the drug gangs. As a result, the new officers would tend to be more vulnerable to corruption, because of their relatively low compensation and social connections among the population of offenders. In addition, the new officers would tend to have better information on the actual risk associated with a particular criminal suspect and the potentially negative consequences of incarceration, another factor that might lead to a more conservative approach to enforcement. These incentives could easily generate the patterns in the data reported by Lott, without having any relationship with the intellectual competence of the new officers. Indeed, from this perspective one might find, among the recruits, an inverse relationship between measured cognitive skills and reluctance to accept a bribe to forgo taking enforcement action when the costs of such action would exceed the benefits.

In addition to efforts to avoid enforcement leading in turn to surveillance, applying criminal law to market activities induces participants in the market to resort to coercive force. One reason is because the criminalization of market activity induces participants, unable to enforce their agreements by legal means, to use force to administer agreements.⁸⁵ The same actors may use force to protect their markets from entry by rivals.⁸⁶ Specialization in the use of force becomes an important skill that will be demanded by participants in other illegal activities too. Over time, drug markets become populated with individuals who are especially suited to the use of force. Through this process, criminalization produces the very violence that generates calls for continued criminalization. Unsurprisingly, expansions of illegal drugs markets are associated with rising crime, but this is because of a reverse causation process in which the criminalization of drugs markets induces criminal involvement, which in turn generates crime. In Detroit, murders grew quickly as the heroin market expanded within the city in the 1970s. But this is probably not because heroin makes people murderous or especially violent, indeed it is

⁸⁴ *Id.* at 256 tbl.VI.

⁸⁵ Daniel Flores, *Violence and Law Enforcement in Markets for Illegal Goods*, 48 INT’L REV. L. & ECON. 77, 78 (2016) (“Similarly, Burrus (1999) says that drug dealers engage in violent activities for the following reasons: to protect themselves against theft because they carry drugs and cash; to convince their clients to pay their debts; and mainly to gain larger market shares.”).

⁸⁶ *Id.*

categorized as a depressant.⁸⁷ The penetration and expansion of the market for heroin brought in criminal gangs that specialized in the use of force to protect markets and enforce agreements. Those same gangs used bribery and infiltration to hobble the Detroit police force.

Some have charged that ousting criminal law from the market for marijuana would not be without significant costs. Marijuana has been called a gateway to more harmful drugs. However, the record on legalization has not supported this long-standing critique of legalization. Portugal, for example, decriminalized the possession of all drugs for personal use in 2001.⁸⁸ At present, lifetime marijuana use is *lower* in Portugal than in the European Union generally, and the use of other drugs (illicit in other countries) has been falling.⁸⁹ The rate of HIV infection from the use of infected needles has plummeted in Portugal.⁹⁰ While Portugal may not be representative of every country that chooses to oust criminal law from the market for marijuana, it stands as evidence that decriminalization does not necessarily lead to greater or more harmful use, and the costs associated with such use. In the United States, the recent wave of state level decriminalization reforms⁹¹ have not been followed by a general increase in marijuana use, and recent data show a decline among young teens.⁹² An empirical examination of the effect of state marijuana legalizations taking effect in 2012 and 2014 (in Colorado, Washington, Alaska, and Oregon) finds no evidence of a significant impact on drug use, crime, traffic safety, teen educational achievement, or public health.⁹³

Business Conduct

What about unfair or potentially harmful business conduct, such as price fixing or monopolization? The Sherman Act authorizes courts to imprison violators for up to ten years.⁹⁴ In practice, antitrust enforcers pursue prison sentences only for price fixers, and convicted price fixers serve roughly two years in prison.⁹⁵

First, consider the case for punishment under the Classical and Neoclassical deterrence models. Under the Classical model, the purpose of punishment is to completely deter. To completely deter the price fixer, the state would have to eliminate all of the profits from price fixing. This would be an efficient policy if the price fixer's conduct includes no economically efficient features. Because of the possibility that it could, Becker recommended an approach that

⁸⁷ See, e.g., *Prescription and Over-the-Counter Medications*, NAT'L INST. DRUG ABUSE, <https://www.drugabuse.gov/publications/drugfacts/prescription-over-counter-medications> (last updated Nov. 2015); *The Three Main Categories of Drugs*, CEIDA, <http://www.ceida.net.au/drugs.asp> (last visited Feb. 25, 2017).

⁸⁸ *Drugs in Europe: Not Mind-stretching Enough*, ECONOMIST, June 18, 2016, at 55.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ On decriminalization of marijuana in the U.S., see *States that have Decriminalized*, NORML, <http://norml.org/aboutmarijuana/item/states-that-have-decriminalized> (last visited Feb. 26, 2017) (listing the states that have decriminalized marijuana in the U.S. as of December 2016).

⁹² *Teen Substance Use Shows Promising Decline*, NAT'L INST. DRUG ABUSE (Dec. 13, 2016), <https://www.drugabuse.gov/news-events/news-releases/2016/12/teen-substance-use-shows-promising-decline>.

⁹³ Angela Dills, Sietse Goffard & Jeffrey Miron, *Dose of Reality: The Effect of State Marijuana Legalizations*, 799 CATO INST. POL'Y ANALYSIS 7, 15-25 (2016).

⁹⁴ 15 U.S.C. § 1 (2012).

⁹⁵ *Criminal Program Update 2015*, *supra* note 54.

internalizes the losses from price fixing. Under Becker's approach, price fixers should be completely deterred when and only when their conduct included no efficient features.⁹⁶ It is important to note that the policy under consideration is to deter price fixing, not selling in general. The previous example, which considered drug transactions, involved a policy to shutter an entire market.

Although price fixing without any efficient features reduces society's welfare, some price fixing may include efficient features. For example, a group of firms might share an efficient technological process, but only if there is an agreement not to engage in fierce price cutting. The decision to share the technology would enable differentiated firms to survive and continue to provide a variety of products to the market. James Duke's "Tobacco Trust" was formed in precisely this fashion: Duke used a technological innovation in cigarette production to force prices down, and then compelled rivals to join his cartel based on the same production model.⁹⁷

Given the possibility of efficient price fixing, and especially given that the broader crime of monopolization often includes efficient features (consider, for example, Microsoft's technological integration of Internet Explorer with its operating system),⁹⁸ the case in antitrust for criminal prohibition rather than internalization through private lawsuits is weak. The default legal regime for antitrust to be placed under is the tort system, not the criminal justice system.

Even in the likely majority case of inefficient price fixing, the case for criminal prohibition is weak. The Classical model recommends complete deterrence of acts that harm victims, which are takings of a sort. In the price fixing context, the purchaser is not harmed on net by the transaction. The purchaser gains on net from the transaction, but just not as much as he would have gained in a competitive market. The reason price fixing is inefficient is not because of the component of harm suffered by purchasers – a component that is smaller than the purchaser's gross gain – but because of the potential gain some potential consumers could have received had the price been set at the competitive level. In other words, price fixing is inefficient or reduces social welfare, only because it denies some potential consumers a benefit that they would have received under a counterfactual hypothetical world of perfect competition. We have no way of determining the identities of these denied beneficiaries. The arguments here are illustrated in the diagram below, which shows the position of consumers and potential consumers (the individuals who would have purchased the good if the price had not been fixed above the competitive level, that is, fixed at P_F rather than set at the competitive level P_C). The area labeled "net gain" shows the net welfare of the consumers, which is positive. The area labeled "benefit denied" shows the forgone gain to potential consumers. Since the activity of the price fixer does not impose a net harm on consumers, it should not be prohibited through the criminal laws. The proper model is internalization of harm through private liability.

⁹⁶ Becker, *supra* note 7, at 198-99.

⁹⁷ ALLAN M. BRANDT, THE CIGARETTE CENTURY: THE RISE, FALL, AND DEADLY PERSISTENCE OF THE PRODUCT THAT DEFINED AMERICA 26-29 (2007).

⁹⁸ *Windows 8 Integration*, MICROSOFT, [https://msdn.microsoft.com/en-us/library/hh781490\(v=vs.85\).aspx](https://msdn.microsoft.com/en-us/library/hh781490(v=vs.85).aspx) (last visited Feb. 26, 2017) (listing the various benefits of "the tight integration of Windows 8 and Internet Explorer 10," including flip ahead browsing, link previews, and streaming media with Play To).

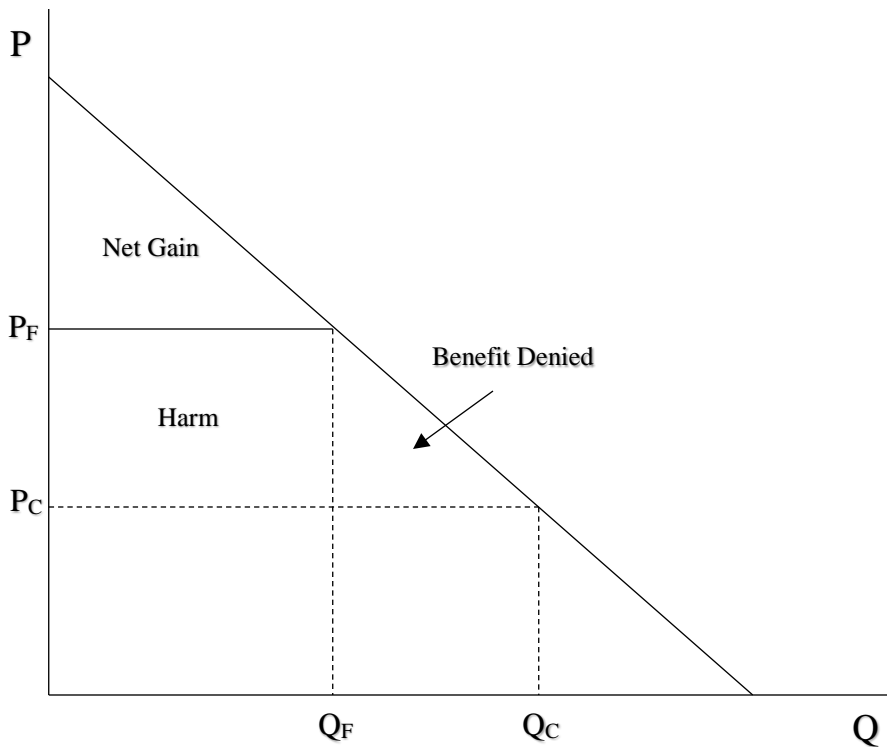


Figure 2: Society's welfare and price fixing

The case for prohibiting price fixing is noticeably different from the reason we prohibit robbery. Robbery is undesirable because it clearly imposes a substantial net harm on the victim relative to the hypothetical world in which he was not robbed, and we have no trouble identifying the victim; we are considering the very same individual in both the real (robbed) and counterfactual (not robbed) scenarios. In the price fixing case, no consumer suffers a net harm; that is, no consumer is in a worse off position than in the counterfactual in which he did not enter into the transaction. Price fixing is prohibited only because of the potential gain denied to a class of unidentifiable potential consumers. But to deny someone an unpromised gain is not the same thing as imposing a direct harm on him.

One could argue that the consumer who purchases from the price fixer is in a worse off position relative to the counterfactual in which the price fixer lowers his price to the competitive level. By the same reasoning, one could argue that the consumer is in a worse off position relative to the counterfactual consumer who purchases at a price of zero. However, the price will have to be set at a level that gives the seller a profit. Mutually beneficial transactions will occur at any price level above the competitive level and the level representing the consumer's maximum bid. To treat any consensual exchange that occurs at a price level above the competitive price as the equivalent of robbery is to ignore the difference between a consensual and nonconsensual transaction. Hence an analogy between robbery and a transaction that occurs at a price above the competitive level would have to be rejected as specious.

One might argue that criminal law enforcement for price fixing is still appropriate because of the low probability of detection in antitrust. But detection probabilities cannot, alone, provide a justification for applying the criminal law to an area of activity. First, the tort system is capable of regulating conduct even when detection probabilities are low; a low detection probability can be used as a basis for increasing damages in the tort system, through the imposition of punitive damages, and thereby offsetting the deterrence dilution to the low detection probability.⁹⁹ Second, there are many scenarios in the tort system where detection probabilities are low, but we do not point to them as reasons for criminal law enforcement. Most instances of defamation are probably never detected by victims. But no one has argued that this is a reason to extend criminal law into the defamation area.

As in the previous discussion of the criminalization of market activity, criminalization of business practices such as price fixing often entails the grant of substantial discretion to enforcers. Price fixing may seem to be an easy offense to define, but it is not. Antitrust law has had to grapple with whether the prohibition applies to horizontal price fixing alone, or whether it includes vertical price fixing too.¹⁰⁰ The criminal provisions of the Sherman Act have never been applied to vertical price fixing in the U.S. Still, cases have arisen where it is unclear whether the alleged price fixing should be characterized as horizontal or vertical.¹⁰¹ No-poaching agreements among employers would seem to be clear instances of price fixing, but the Department of Justice only recently announced, after years of investigations, that it would consider prosecuting criminally in this area.¹⁰²

Because of the discretion enforcers have in the area of price fixing, there will inevitably be instances where enforcers treat similar cases unequally. Take for example current Department of Justice activity on price fixing. The Department has generated enormous fine payments by pursuing foreign firms for cartels in which they participated in the last two decades.¹⁰³ At the same time, evidence has come to the Department that major domestic technology firms, such as Apple and Google, and other important domestic employers of software engineers, such as Disney and Pixar, have participated in “no poaching” agreements – that is, agreements not to hire

⁹⁹ Hylton, *supra* note 18, at 460-61; A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869, 874-75 (1998).

¹⁰⁰ *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 885-86 (2007) (holding that rule of reason analysis applies to vertical resale price maintenance agreements); *Doctor Miles Med. Co. v. John D. Park & Sons Co.*, 220 U.S. 373, 384-85 (1911) (finding vertical resale price maintenance agreements per se prohibited by the Sherman Act).

¹⁰¹ *United States v. Apple, Inc.*, 791 F.3d 290, 335 (2d Cir. 2015) (upholding the district court’s finding that Apple’s conduct in establishing vertical agreements with ebook publishers constituted horizontal price fixing in violation of the Sherman Act).

¹⁰² See Daniel G. Swanson, Jason Schwartz & Rod J. Stone, *DOJ Crackdown on Employee Recruiting and Compensation*, LAW360 (Dec. 5, 2016, 12:44 PM), <https://www.law360.com/articles/865254?sidebar=true>.

¹⁰³ On recent international antitrust enforcement and financial penalties imposed on foreign firms, see Ankur Kapoor et al., *Commentary: U.S. Criminal Antitrust Implicating Japanese at Alarming Rate*, NIKKEI ASIAN REVIEW (June 27, 2016, 2:30 PM), <http://asia.nikkei.com/Politics-Economy/Policy-Politics/Kapoor-and-Rosenthal-US-criminal-antitrust-implicating-Japanese-at-alarming-rate?page=1>.

employees away from one another.¹⁰⁴ These no-poaching agreement investigations have been treated as civil antitrust cases, even though the activity is at bottom the same as price fixing.¹⁰⁵

From the public choice perspective, the disparate treatment of foreign price fixing cartels and domestic no-poaching agreements in the high technology sector would be easily explainable. The factors of enforcer discretion and high offender stakes are present in this area of enforcement,¹⁰⁶ though probably to a lesser degree than in drug prohibition.

These arguments suggest that in the area of price fixing, the role of criminal law enforcers should be more limited than it is today. The presumption should be that this is an area of private enforcement through lawsuits, perhaps class actions brought on behalf of consumers or other victims of price fixing. Public enforcement agencies may be able to offer a benefit to society in the detection sphere. Public enforcement agencies can use the state's resources to investigate whether a price fixing cartel exists. However, after the public enforcement agency has discovered information on the existence of a cartel, the remaining work should be left to private class action attorneys. The state has no special advantage in determining the magnitude of the losses suffered by consumers, and criminal law has no special functional role to play in this area.

Because of the loss to potential consumers (the benefit denied), damages to actual consumers would generally be insufficient to internalize the total social harms suffered as the result of price fixing. There are several ways to remedy this problem. One approach would permit the state to impose a fine approximating the deadweight loss resulting from the cartel. Another approach would apply a multiplier to the compensatory damages award and permit the class action lawyers to take their compensation out of the amount awarded above the level required to fully compensate consumers. In each of these approaches the fine revenue in excess of the amount needed to compensate could be used to reward public law enforcers, as long as their efforts have contributed to uncovering the cartel. All of this is subject to the proviso that extraordinary methods of detection – such as phone tapping and invasions of property to search – should not be within the arsenal of investigatory methods used to discover evidence of price fixing.

The Case against Prison

The types of punishment identified within this framework vary from imprisonment, to monetary fines, to damages claims from victims, to public revelation. In terms of effect on potential offenders, these punishments vary according to the individual. Monetary fines or damages awards would have little effect on impecunious individuals, who would be unable to pay the fine or damages award. Similarly, public revelation of criminal behavior would have little effect on individuals who are not concerned with their reputations. Imprisonment is the most basic form

¹⁰⁴ Ryan Faughnder, *DreamWorks Animation, Disney Sued over Alleged No-Poaching Scheme*, L.A. TIMES, Sept. 8, 2014, <http://www.latimes.com/entertainment/envelope/cotown/la-et-ct-dwa-disney-sued-poaching-20140908-story.html>; Swanson, Schwartz & Stone, *supra* note 96.

¹⁰⁵ Swanson, Schwartz & Stone, *supra* note 96.

¹⁰⁶ High offender stakes, in this area, are revealed by lobbying expenditures. The technology sector has been an influential funding and lobbying force in recent years. See Ethan Baron, *Google Dominates Tech Sector Lobbying: Report*, SILICONBEAT (Sept. 22, 2016 at 5:48 PM), <http://www.siliconbeat.com/2016/09/22/google-dominates-tech-sector-lobbying-report/>.

of punishment because it is capable of imposing a harm on every individual offender, whether impoverished or unconcerned about reputation.¹⁰⁷

Perhaps because of this basic nature of imprisonment, it has been viewed as the most severe of the punishments typically imposed. However, the perceived severity of imprisonment, like the severity of monetary fines, depends on the characteristics of the convicted offender. Among offenders who would experience a high opportunity cost from prison, incarceration would be viewed as a severe punishment, and probably more severe than being forced to pay a fine equal to the forgone wages from being excluded from the labor market during the time of imprisonment. However, among offenders who would experience a low opportunity cost, imprisonment may not be viewed as a severe punishment. Of course, this statement assumes that imprisonment does not also include severe material deprivation or risk of harm. If imprisonment also includes severe material deprivation, as it often does in underdeveloped countries, then even criminals whose opportunity cost of imprisonment is low would not view imprisonment as a mild punishment.

Consider, for a moment, the view of an offender whose opportunity cost of imprisonment is low. For such an offender, the threat of imprisonment might not serve as a serious deterrent to unlawful conduct. Some anecdotal evidence suggests that for offenders whose environments are already dangerous and chaotic, prison may provide an escape from relatively harsh conditions.¹⁰⁸

¹⁰⁷ One traditional justification for using prison instead of fines is that criminals are often judgment-proof with respect to the penalties or damages judgments associated with a serious crime. Under this view, fines are preferable, because they are cheaper to administer, except when prison sentences are necessary to secure deterrence. A. Mitchell Polinsky & Steven Shavell, *The Optimal Use of Fines and Imprisonment*, 24 J. PUB. ECON. 89, 98 (1984).

¹⁰⁸ See Theodore Dalrymple, *Why Do Quite A Lot of Prisoners Prefer Life Inside to Life "on the out"? Former Prison Doctor Theodore Dalrymple Suspects it is because our Society is Producing Fewer Independent and Responsible Adults*, SOCIAL AFFAIRS UNIT (Apr. 29, 2008), <http://www.socialaffairsunit.org.uk/blog/archives/001773.php>. (“In addition, about a third of prisoners, according to my rough estimate, prefer life in prison to life outside . . . Why do quite a lot of prisoners prefer life inside to life ‘on the out’? Freedom is their enemy or at any rate their downfall. They do not know what to do with it. Impulsive, they do the first thing that comes into their head, which all too predictably leads to disaster. They feel safe in prison, not from their fellow-men, but from themselves. They are like de-railed trains that are put back on the tracks. Incapable of self-regulation, they nevertheless like routine, predictability and boundaries. These prison provides for them, often for the only time in their lives; they have never achieved them for themselves. Prison is for them a refuge from chaos, the nearest thing they will ever know to a spiritual retreat.”).

There are numerous stories of prisoners boasting of their living conditions. See, e.g., *Admitted Serial Killer Says He’s Looking Forward to ‘Retirement’ in Prison*, TRIBUNE MEDIA WIRE (Mar. 3, 2016, 1:41 PM), <http://wnep.com/2016/03/03/admitted-serial-killer-says-hes-looking-forward-to-retirement-in-prison/> (“Adams said he doesn’t want the death penalty, nor does he want to do his time in the rougher ‘gladiator’ prisons in California. Referring to prison in Virginia, he said, ‘it’s retirement... Three hots and a cot.’”); James Slack, *Prisoners who Boasted of Easy Life on Facebook Lose their Perks: Pair Face Extended Sentences after Justice Secretary Demands Authorities ‘Throw the Book’ at them*, DAILYMAIL.COM (Aug. 15, 2013, 6:51 PM), <http://www.dailymail.co.uk/news/article-2395197/Prisoners-boasted-easy-life-Facebook-lose-perks-Pair-face-extended-sentences-Justice-Secretary-demands-authorities-throw-book-them.html>; Murray Wardrop, *Gordon Ramsay: ‘I Can’t Believe how Easy Life is in British Prisons’*, TELEGRAPH, June 9, 2012, <http://www.telegraph.co.uk/foodanddrink/foodanddrinknews/9320916/Gordon-Ramsay-I-cant-believe-how-easy-life-is-in-British-prisons.html> (“Ramsay, 45, said he was astounded when he discovered convicted criminals were given five meal choices every night and constant access to television, video games and gym facilities. The restaurateur visited London’s Brixton Prison to film *Behind Bars*, a Channel 4 show in which he teaches 12 inmates

If the offender is also committed to crime as an avocation, prison may offer the offender a chance to learn new skills that aid him in the future in committing crimes.¹⁰⁹ For the foregoing reasons, imprisonment, far from being a deterrent, might appear to be an untroubling or even desirable option for some offenders.

Viewing prison in general economic terms, imprisonment becomes less of a deterrent as the price of time in prison falls relative to the price of time outside of prison. Once the relative price of prison time falls below unity, the threat of prison no longer deters. The relative price of prison could fall to such a level because conditions in prison are not perceived as worse than conditions outside, or because prison is perceived as a place where a criminal can develop skills in criminal activity or promote himself within a criminal organization.¹¹⁰ Prisons offer economies of scale and scope, or more appropriately agglomeration externalities, that enhance investments in crime as an avocation.¹¹¹

One might respond that any offender for whom imprisonment seems desirable should be forced to experience some type of material deprivation along with imprisonment to make the prospect of imprisonment less desirable. There are many difficulties with this proposed solution. Authorities would not know in advance how to distinguish offenders who prefer imprisonment from those who do not. Fearing material deprivation, no prisoner would admit to having a preference for imprisonment, or even that he viewed imprisonment as a light punishment. Such a policy might violate the constitutional constraint on cruel and unusual punishment, and would surely enhance the power of enforcement agents to demand bribes from offenders to avoid imprisonment. Probably because of these factors, the only type of deprivation commonly observed today in the U.S. is solitary confinement. But with the widespread dissemination of cheap forms of rapid communication by voice and video, solitary confinement is virtually impossible to administer today. A recent television news report included a substantial video

to cook and sell their Bad Boys' Bakery produce to businesses on the outside. However, he said he was disappointed with the prisoners' lack of work ethic, claiming the lax regime inside gave them no incentive to toil over a stove.”).¹⁰⁹ See, e.g., PAUL GENDREAU, CLAIRE GOGGIN & FRANCIS T. CULLEN, PUB. WORKS & GOV'T SERVS. CAN., THE EFFECTS OF PRISON SENTENCES ON RECIDIVISM 6-7 (2000), <https://www.publicsafety.gc.ca/cnt/tsrcs/pblctns/ffcts-prsn-sntncs-rcdvsm/ffcts-prsn-sntncs-rcdvsm-eng.pdf>.

¹¹⁰ See, e.g., DAVID SKARBEB, THE SOCIAL ORDER OF THE UNDERWORLD: HOW PRISON GANGS GOVERN THE AMERICAN PENAL SYSTEM 47-73 (2014) (describing functions of the prison gang); *Prison Gangs: Inside the Mind of a Gangmember, From a Correctional Officers Perspective*, PRISONOFFENDERS.COM, http://www.prisonoffenders.com/prison_gangs.html (last visited Feb. 26, 2017) (“Prison gangs have dangerous reputations and the deadlier a gang is known to be, the more evil it's members are expected to be. Prison gangs compete for the most dangerous of reputation. Members of prison gangs such as the Texas Syndicate and Mexican Mafia are expected to commit terrible crimes in the name of the organizations cut-throat reputations . . . Many prison offenders in gangs are institutionalized and lack any understanding about responsibility. Prison gang members who are used to being fed, clothed, and sheltered in prison are rarely able to walk a straight line once released. With little or no skills of surviving in a free society, prison gang members quickly return to the comforts of an institutionalized life. It is common to find ex-con gang members pan handling on the streets or resorting to crimes such as robbery, burglary or theft.”).

¹¹¹ Internally, many prisons today appear to serve as criminal enterprise hubs, where different criminal gangs manage their operations both within and outside of the prison, and coordinate with other criminal organizations in the same or different lines of criminal activity. See, e.g., Skarbek, *supra* note 104; *Horror in the Jungle: Carnage at a Prison in the Amazon*, ECONOMIST, January 7, 2017, at 26 (“Guards often do little more than patrol the perimeters, leaving gangs free to manage far-flung criminal operations via mobile phones.”).

interview with a criminal serving a term in solitary confinement.¹¹² From his solitary cell, the prisoner had managed a series of prison protests across the country, an endeavor that required nearly continuous communication with other prisoners in different prisons.¹¹³

The argument advanced here – that prison is not necessarily a deterrent for every offender – should be distinguished from that presented in an article by Steven Levitt.¹¹⁴ He argued that the prospect of serving a prison term provided an effective constraint on the use of monetary fines. Any offender would know that he can always choose to refuse to pay the fine and serve a prison term instead. Thus, any time the monetary fine rose above the offender's assessment of the cost of imprisonment, he would choose imprisonment. My argument here is different, because I am saying that imprisonment by itself is not necessarily a deterrent to some offenders. For such offenders, imprisonment is equivalent to a fine of zero, or to a reward for commission of a crime.

The existence of potential criminals who do not view imprisonment as a deterrent requires a different view of punishment for such offenders. For the violent, or for the ones who would impose great harm on others, the incapacitation function becomes the sole justification for imprisonment. Such offenders cannot be deterred by ordinary imprisonment, so the only rational basis for imprisoning them is to prevent them from harming others. The category of offenders who would be likely to harm others in the future presumptively includes those who have already committed offenses that have harmed others – murder, rape, robbery, etc.¹¹⁵

For offenders who are both unlikely to be deterred by prison and unlikely to impose harm on others, the utilitarian basis for imprisonment is nonexistent. Such offenders should not be imprisoned. It might seem plausible to assume at first that few offenders would fall in this category, but that assumption would be unwarranted. Among the population of female prisoners, for example, there are many, probably the majority, who pose no substantial risk to others and for whom imprisonment has not proven itself a substantial deterrent. These offenders should be released from the prisons and put under some other form of regulation, such as probation. Among the population of drug offenders, both male and female, there are many who pose no substantial risk to others and for whom imprisonment is not a substantial deterrent. Since the criminal law should not control drug transactions generally, imprisonment would also be inappropriate for the nonviolent (or non-dangerous) drug offenders for whom imprisonment *is* a substantial deterrent.

What about offenders who would pay a significant amount to avoid prison? For the ones who are unlikely to harm others, the utilitarian case for imprisonment is weak. Consider, for

¹¹² Antonia Hylton, *We Spoke to the Inmate in Solitary Who Inspired a National Strike Against 'Modern-Day Slave Conditions'*, VICE NEWS (Oct. 3, 2016, 12:15 PM), <https://news.vice.com/topic/prison-strike> (telling story based on interview conducted over Skype with prisoner in solitary confinement).

¹¹³ *Id.*

¹¹⁴ Steven D. Levitt, *Incentive Compatibility Constraints as an Explanation for the Use of Prison Sentences Instead of Fines*, 17 INT'L REV. L. & ECON. 179, 180-81 (1997).

¹¹⁵ Not all forms of incapacitation are the same. Criminals who are dangerous and unlikely to be deterred should be held for incapacitation, but their conditions can be altered to reduce the likely harm to others outside of prison or in the future. Preventing the transmission of criminal activity skills might require policies to reduce interactions among certain groups of prisoners (e.g., skilled and unskilled).

example, a business executive who participated in a price fixing cartel. The motivation for participation was solely financial, and given this, a penalty that completely eliminates any financial gain should eliminate the incentive to engage in such conduct,¹¹⁶ and at the same time provide a fund for compensating victims.

These arguments suggest that among offenders who are unlikely to harm others, the state should try to determine whether prison would really serve as a deterrent, and whether alternative forms of discipline such as probation, rehabilitation programs, or monetary fines, can serve equally well as deterrents. Prison should not be used for non-harmful offenders unless it serves as a significantly more effective deterrent than less costly alternatives.

The foregoing arguments are all consistent with the Classical and Neoclassical models of law enforcement. If prison is not an effective deterrent – say because it provides nothing more than a safe resting period between bouts of criminal activity outside of prison – then it should not be used as a punishment unless it serves a socially valuable incapacitative role. From the perspective of the Classical model, the central question is whether prison sentences eliminate the gain from criminal activity. If prison fails to “take the profit out of crime,” which appears to be true in many cases, then it clearly fails the most basic aim of a punishment system. Moreover, if prisons serve as schools for the development of skills in areas of criminal conduct (e.g., burglary, robbery),¹¹⁷ then not only does the prison system fail to eliminate the gain to some criminal offenders, but it ensures that they will return to the same activity with more harmful potential in the future.

The Neoclassical model emphasizes the tradeoff between deterrence and the cost of law enforcement (including punishment), and implies that prison should not be used when less costly and equally effective alternatives are available. Prison is expensive: the average cost of holding a prisoner in the U.S. was \$31,286 in 2010, with a maximum of over \$60,000 in New York State.¹¹⁸ In addition, most prisoners would be able to contribute to the economy by working, so the loss of their contributions to the workforce, and to the household, should be included in the cost of imprisonment. The resources wasted by the prison system could be better used in many other areas, such as education or health care.

Public Choice and Prison

The public choice model provides an additional set of reasons for limiting the use of prisons. The prison system in the U.S. has created an industry that argues in favor of its maintenance and expansion. Public sector prison guards and private sector prisons have a strong interest in laws that impose imprisonment as punishment for violation.¹¹⁹ These groups lobby behind the scenes

¹¹⁶ On appropriate penalties for antitrust, see Keith N. Hylton, *Deterrence and Antitrust Punishment: Firms Versus Agents*, 100 IOWA L. REV. 2069, 2072 (2015)

¹¹⁷ GENDREAU, GOGGIN & CULLEN, *supra* note 103.

¹¹⁸ CHRISTIAN HENRICHSON & RUTH DELANEY, VERA INST. OF JUSTICE, THE PRICE OF PRISONS: WHAT INCARCERATION COSTS TAXPAYERS 9-10 (2012),

<http://archive.vera.org/sites/default/files/resources/downloads/price-of-prisons-updated-version-021914.pdf>.

¹¹⁹ On lobbying by public and private sector prisons for expanded sentences, see Ed Krayewski, *Are For-Profit Prisons, or Public Unions, the Biggest Lobby No One’s Talking About?*, REASON.COM (June 2, 2015 5:02 PM),

for expanded imprisonment and fund politicians who promise to increase prison sentences or to use prison more widely as punishment.

Because of the political power of public sector unions, any proposal to expand the use of imprisonment should be viewed with some degree of suspicion. Politicians depend on public sector unions for fundraising and for votes. Prisoners, on the other hand, do not present an effective voting or fundraising faction in opposition to the public sector unions. The general taxpaying public, which has no reason to closely monitor the connection between politicians' spending on prisons and support from public sector unions, also generally fails to provide a voting bloc in opposition to public sector prison-employee unions. The classic public choice failure observed by Mancur Olson emerges: a concentrated interest group gains excessive control over the public's use of resources.¹²⁰ As a result, prison use is expanded, and prison sentences extended, beyond the level appropriate for punishment.

Some evidence for the public choice model is suggested by the data on incarceration. As crime rates have fallen in the U.S. and in other countries, prison use has not fallen with them.¹²¹ This is because as the crime rate has fallen, legislators have at the same time lengthened sentences for less serious crimes and extended incarceration to a wider set of offenses. Of course, one could argue that this is at best incomplete evidence in favor of the public choice explanation because longer sentences should both increase the prison population and reduce the crime rate. The evidence of declining crime coupled with more extensive use of prisons could be attributed largely to the deterrent effect of prison sentences. To distinguish the public choice and deterrence accounts, one would have to identify specific types of prison expansion that could not be attributed to the deterrence function.

Probably the best evidence favoring the public choice model is the dramatic explosion since the 1980s in the number of women incarcerated. At present, the U.S. incarcerates women at a far greater frequency than other developed countries.¹²² Thailand and El Salvador are close,¹²³ but El Salvador's high female incarceration rate is due to the country's unusual policy of imprisoning women who get abortions.¹²⁴ Thailand's rate is close to the U.S., and it is due

<http://reason.com/blog/2015/06/02/are-for-profit-prisons-or-public-unions>. See also Evelyn Nieves, *California Examines Brutal, Deadly Prisons*, N.Y. TIMES, Nov. 7, 1998, <http://www.nytimes.com/1998/11/07/us/california-examines-brutal-deadly-prisons.html> (noting that the prison guards union in California is the second most powerful union after the California teachers union).

¹²⁰ MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* 141-48 (2d prtg. 1971).

¹²¹ See, e.g., COMM. ON CAUSES & CONSEQUENCES OF HIGH RATES OF INCARCERATION, *THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES* 27 (Jeremy Travis, Bruce Western & Steve Redburn eds., 2004), <https://www.nap.edu/read/18613/chapter/3#27>.

¹²² See Niall McCarthy, *No Country Incarcerates More Women than the U.S.*, STATISTA (Sept. 25, 2014), <https://www.statista.com/chart/2755/no-country-incarcerates-more-women-than-the-us/>.

¹²³ Aleks Kajstura & Russ Immarigeon, *States of Women's Incarceration: The Global Context*, PRISON POLICY INITIATIVE, <https://www.prisonpolicy.org/global/women/> (last visited Feb. 26, 2017).

¹²⁴ *Abortion in El Salvador: Miscarriage of Justice*, ECONOMIST (Dec. 1, 2016), <http://www.economist.com/news/international/21711033-where-miscarrying-can-mean-life-jail-miscarriage-justice>.

almost entirely to severe sentences given to women who sell drugs in an effort to escape poverty.¹²⁵

The explosion in the number of incarcerated women in the U.S. is shown in Figure 3. The women's incarceration rate grew dramatically over the 1980s and 1990s. The increase, from roughly 20 per 100,000 in 1980 to almost 140 per 100,000 in the mid-2000s, represents a scaling up by a factor of six in the incarceration rate of women over the last thirty years. The total population of women incarcerated has increased from 26,378 in 1980 to 215,332 in 2014, an increase of more than 700 percent.¹²⁶ These increases have resulted not because women have become more violent or criminalistic since the 1980s, but mostly because of drug laws that ensnare them, often for not much more than being associated with men who deal drugs.¹²⁷

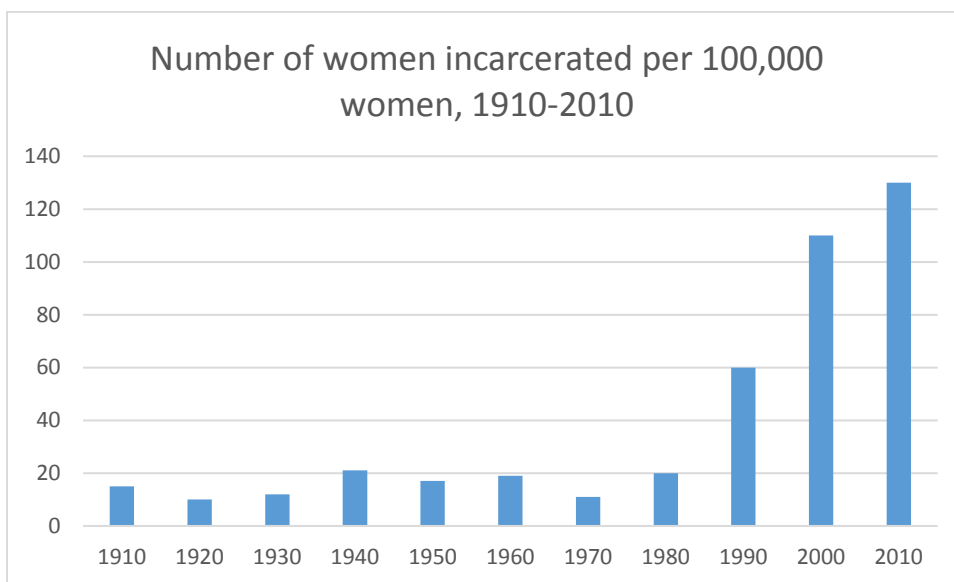


Figure 3: Women's Incarceration Rate in the United States

Source: https://www.prisonpolicy.org/graphs/women_rate_1910-2014.html

The massive increase in the number of incarcerated women in the U.S. imposes an enormous tax on society's welfare. Incarceration serves no substantial deterrence function in these cases because the women often are punished for being involved with men who violated the law. The

¹²⁵ *Thai Women Pay the Price of Drugs*, NATIONAL (June 24, 2014), <http://www.thenational.ae/world/southeast-asia/thai-women-pay-the-price-of-drugs>.

¹²⁶ SENTENCING PROJECT, FACT SHEET: INCARCERATED WOMEN AND GIRLS 1 (2015) [hereinafter SENTENCING PROJECT], <http://www.sentencingproject.org/wp-content/uploads/2016/02/Incarcerated-Women-and-Girls.pdf>.

¹²⁷ Valentina Zarya, *This Is Why Women Are the Fastest-Growing Prison Population*, FORTUNE (Dec. 10, 2015), <http://fortune.com/2015/12/10/prison-reform-women/>. For statistics on violence, gender, and incarceration, see SENTENCING PROJECT, *supra* note 119; SENTENCING PROJECT, WOMEN IN THE CRIMINAL JUSTICE SYSTEM: BRIEFING SHEETS (2007), <http://www.sentencingproject.org/wp-content/uploads/2016/01/Women-in-the-Criminal-Justice-System-Briefing-Sheets.pdf>.

great majority (over sixty percent) of them are incarcerated for nonviolent crimes,¹²⁸ and of the women convicted of violent crimes, the vast majority are for simple assaults, mostly against other women with whom they have had some prior relationship.¹²⁹ Mass imprisonment of women is especially harmful to society because the incarcerated women are prevented not only from working in the formal job sector, as is true of incarcerated men, but also from working informally by providing support to children.¹³⁰

Although this is only a preliminary look at the data, they suggest that the typical picture one has of a criminal – someone who leaps from the bushes to violently assault a law-abiding stranger – describes almost none of the women currently serving time in jail or prison in the U.S. The vast majority are incarcerated because of nonviolent crimes, or violence related to domestic or relation-based disputes. These sorts of violent crimes are unlikely ever to be substantially deterred through punishment; they often result from “heat of passion” moments when offenders are not thinking rationally about the consequences of their actions. The crime that has generally concerned the public, by contrast, is the sort that involves rational predatory conduct: holding people up for money, or rape; and since the conduct is rational, it appears capable of being deterred through punishment. This sort of rational predatory crime appears to be the exclusive preserve of men. The upshot is that the vast majority of women convicted of crimes could be given much milder prison sentences, or assigned to out-of-prison rehabilitation programs, without substantially effecting the deterrence of crime. That we have instead observed nearly exponential growth in the number of incarcerated women over the last four decades lends support to the public choice perspective on imprisonment.

Should Penalties Be Used to Finance Enforcement?

One of the most controversial features of the criminal justice system today is the use of fines to finance the criminal justice system. The U.S. Justice Department study of Ferguson, Missouri concluded that the local police force had used fines excessively in an effort to maximize revenues for the police department and local courts.¹³¹ The result of this system, according to the Justice Department, was that a largely white police force had used the law enforcement process as a means of transferring resources from a largely black local population to local police and courts.¹³² But this is not the only example of alleged “policing for profit.”¹³³ Civil forfeiture

¹²⁸ SENTENCING PROJECT, *supra* note 119.

¹²⁹ LAWRENCE A. GREENFELD & TRACY L. SNELL, U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, WOMEN OFFENDERS 3 (2000), <https://www.bjs.gov/content/pub/pdf/wo.pdf>. Moreover, forty percent of the women involved in violence were perceived by their victims to be under the influence of alcohol or drugs. *Id.*

¹³⁰ On numbers of children with incarcerated parents and trends over time, see LAUREN E. GLAZE & LAURA M. MARUSCHAK, U.S. DEP’T JUSTICE, BUREAU OF JUSTICE STATISTICS, PARENTS IN PRISON AND THEIR MINOR CHILDREN 5 (2010), <https://www.bjs.gov/content/pub/pdf/pptmc.pdf>. The data provided, which cover the period 1991 – 2007, suggest that the increase in incarcerated women is matched by an equivalent increase in the number of children with incarcerated mothers. More specifically, the seven-fold increase in the number of incarcerated women since 1980 is matched by a seven-fold increase in the number of children with incarcerated mothers. See SENTENCING PROJECT, FACTSHEET: WOMEN IN PRISON (2003), <https://www.prisonpolicy.org/scans/sp/1032.pdf>.

¹³¹ CIVIL RIGHTS DIV., *supra* note 11, at 9.

¹³² *Id.* at 62-70.

¹³³ *Developments*, *supra* note 9, at 1723.

statutes have given local police forces incentives to aggressively take property from individuals charged with violating the law.¹³⁴

How should such activities be viewed within this framework? The Neoclassical model offers a ready defense for using fines to fund law enforcement. In Becker's analysis, the ideal punishment compels the offender to bear the entire incremental harm suffered by society as a result of his conduct, which means that the offender should pay for the harm suffered by the victim and also the incremental enforcement costs borne by the state.¹³⁵ The reason is that enforcement costs are triggered by the offender's conduct. If enforcement naturally follows criminal actions, then the cost of enforcement is simply just another cost generated by criminal conduct.

It is important to note that the Becker model treats the enforcement decision as a mechanical or automatic one following any criminal act. If enforcement is not such a mechanical decision – for example, if it is carried out by an agent only after weighing the consequences of enforcement – then the mechanical assumption of the Becker model would be inappropriate. In this alternative view, it might be socially preferable to encourage the enforcement agent to take no action where the cost of enforcement far exceeds any potential gain in terms of deterrence.¹³⁶

This suggests one important potential limitation to the utilitarian justification for using criminal fines to finance enforcement. If the social value of the deterrence brought about by law enforcement is so small that the optimal decision is not to enforce the law, then forcing offenders to pay for the costs of enforcement activity would merely subsidize and further encourage wasteful law enforcement. An ideal system would cancel the subsidy.

The first reform proposal suggested by this model, then, is that the use of fines for financing criminal law enforcement should be limited to areas where the social value of deterrence through enforcement is substantial. Where the deterrence value of enforcement is questionable or minimal, fines should not be collected to finance enforcement activity.

What sorts of law enforcement would fall in the questionable or minimal value category? I have suggested several goods or service markets currently criminalized (e.g., marijuana, prostitution) from which criminal law should be ousted. In its place there should be some tax or liability system. This implies that criminal law enforcement has relatively low value as a deterrent in these areas. Thus, fines imposed for the purpose of financing the criminal justice system should not be permitted for offenses such as marijuana possession.

For offenses where there is a high deterrent value to enforcement, such as robbery, fines assessed to finance enforcement seem to be justifiable under the Becker model. They bring home to the criminal the full cost of his conduct. The goal of punishment in the area of common law crimes should be to completely deter the conduct by wiping out any gain to the offender. But this goal

¹³⁴ See, e.g., LEONARD W. LEVY, *A LICENSE TO STEAL: THE FORFEITURE OF PROPERTY* 1-2 (1996); Eric Blumenson & Eva Nilsen, *Policing for Profit: The Drug War's Hidden Economic Agenda*, 65 U. Chi. L. Rev. 35, 40 (1998).

¹³⁵ Becker, *supra* note 7, at 192-93.

¹³⁶ See Keith N. Hylton, *Welfare Implications of Costly Litigation under Strict Liability*, 4 AM. L. & ECON. REV. 18, 29 (2002).

merely establishes the floor for punishment. Nothing in the framework suggests that it would be inappropriate to enhance penalties to help fund the criminal justice system.

I have so far not considered the public choice perspective on using fines to finance enforcement. The public choice model indicates a second important limitation on the use of fines to finance the criminal justice system. Such fines tend to distort the actions of enforcement agents. Some enforcers may choose to target offenders to maximize fine revenue. Moreover, the use of fines as a revenue tool immediately generates questions of fairness in application. A police officer probably would not choose to use fines in a patently profit-maximizing manner against members of his own community. The risk of a discriminatory enforcement strategy is enhanced when fines are used in part as a source of revenue for enforcers.

Even judges might be affected by the use of fines as a source of revenue for the criminal justice system. If the fines are used in part to finance the courts as well as the police,¹³⁷ judges might consider the source of their support when examining a case that pits the word of a police officer against the word of an alleged offender. A judge might be inclined to lean in favor of the police officer, realizing that the cost of constraining a police officer's freedom to impose fines might be a reduction in the quality of the judge's own work environment or in the monetary resources available for judicial pay increases.

The public choice concerns raised so far do not require any theory of discriminatory intent to be viewed as potentially serious. Even if the police force and the judiciary are racially homogenous and of the same race as the local population, the use of fines as a revenue source could generate biases in enforcement and judging because of the pecuniary interest of officials within the criminal justice system. Introducing a substantial difference between the racial composition of the officers in the criminal justice system and the racial composition of the local population amplifies the risk of incentive biasing. If the officers are of one race and the local population is of another race, the officers may not live among and communicate frequently with members of the local population.¹³⁸ As a result, the officers may become relatively immune to the enforcement burdens perceived by local residents.

To blunt the incentives for discriminatory enforcement, fines collected to fund enforcement or justice system costs should be allocated to uses that do not immediately benefit enforcement agents and local judges. Criminal justice system officers should understand that the revenue from fines will be used to fund programs that are unrelated to their pecuniary interests, or possibly hostile to their interests. Money being fungible, it would not be a solution to the

¹³⁷ *Justice in Louisiana: The Ruin of Many a Poor Boy*, ECONOMIST (Mar. 10, 2016), <http://www.economist.com/news/united-states/21694525-crisis-louisianas-courts-emblematic-broader-pathologies-both-state-and> (“Not just public defenders but Louisiana’s sheriffs and prosecutors, and the courts themselves, subsist partly on fees, fines and bonds imposed largely at judges’ discretion, mostly on defendants who plead or are found guilty.”).

¹³⁸ Given residential segregation patterns in the U.S., the officers would be unlikely to live among the local population. See generally DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* (1998) (exploring residential segregation in the U.S. and its implications for crime and other social ills).

conflict of interest problem for the fine revenue to be used to pay for anything that might immediately reduce the expenses of the police force.

One simple solution would be to dedicate such revenue to funding criminal defense lawyers, or to job training and other educational programs for prisoners. Under such an allocation, no enforcement agent would impose fines with the intention of enriching himself or improving his own working conditions. If the fine revenue were used to support criminal defense lawyers, every criminal justice system official would know that when he imposes a fine, he is enhancing the likelihood that some offender, if not the one before him, would be able to have the charges against him examined in an adversarial process in court. If the fine revenue were used to support educational or job training in prison, every criminal justice system official would know that when he imposes a fine, he is enhancing the likelihood that some offender would exit the criminal justice system and become a productive member of society.¹³⁹

The fine revenue used to fund criminal defense need not be directed toward a state public defender's office as part of this reform. Indeed, there are reasons to question a general policy of using fine revenue to support a state agency of public defenders. For example, if a defendant is charged a fine for showing up late to court, sending the revenue from the fine to the public defender's office might harmfully distort the incentives of employees in the public defender's office. Some of the employees might realize that arriving late to court is a method of increasing the resources of the office. Public defenders have been criticized in the past for having weak incentives to zealously represent criminal defendants.¹⁴⁰ If fine revenue were directed toward the public defender's office, the weak incentives supposedly present already might be weakened further.

To avoid setting up perverse incentives for public defenders, the fine revenue should be made available to the public defender only if it cannot be attributed to some fault on the part of the public defender (such as negligently allowing his client to skip a hearing). An alternative would be to use the fine revenue to fund "legal defense vouchers" that would permit criminal defendants to pay for private lawyers. Private lawyers would have ordinary market-based incentives to develop reputations for excellent service. A voucher system would enhance incentives on the part of criminal defense lawyers to develop reputations as effective legal representatives of non-wealthy criminal defendants.

The problem of discriminatory enforcement incentives and monetary penalties is not limited to the regulation of street crime. Antitrust has generated a different version of the discriminatory enforcement problem. As noted earlier, the Department of Justice has taken in an increasing

¹³⁹ See, e.g., Cathryn A. Chappell, *Post-Secondary Correctional Education and Recidivism: A Meta-Analysis of Research Conducted 1990-1999*, 55 J. CORRECTIONAL EDUC. 148, 162 (2004); James S. Vacca, *Educated Prisoners are Less Likely to Return to Prison*, 55 J. CORRECTIONAL EDUC. 297, 297-99 (2004).

¹⁴⁰ See, e.g., EMILY WEST, INNOCENCE PROJECT, COURT FINDINGS OF INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS IN POST-CONVICTION APPEALS AMONG THE FIRST 255 DNA EXONERATION CASES 1 (2010), http://www.innocenceproject.org/wp-content/uploads/2016/05/Innocence_Project_IAC_Report.pdf (providing an empirical analysis supporting the claim that the lack of national standards for creating and funding public defender systems has left most states with underfunded systems, leading to overburdened and sometimes incompetent defense lawyers, and a lack of funding for the investigative process).

amount of revenue from antitrust fines,¹⁴¹ mostly imposed on foreign (specifically Asian) firms lately.¹⁴² At the same time, fines and prison sentences imposed on domestic firms for entering into “no-poaching agreements,” a form of market division, have been relatively light. These patterns have generated suggestions that antitrust enforcement is either discriminatory or deliberately structured in a manner that has had a discriminatory impact.¹⁴³ Responding to these suggestions, John M. Connor published an empirical evaluation in which he concludes that the evidence suggests that Asian antitrust violators have received *weaker* punishments on average than their European and American counterparts.¹⁴⁴ However, Connor’s own data offer some support to the discrimination hypothesis. While the ratio of fines on American to Asian price fixers is roughly 5 to 1 in his data,¹⁴⁵ the ratio of commerce associated with these parties is roughly 13 to 1,¹⁴⁶ suggesting discrimination against Asian violators if comparing penalties per dollar of commerce affected by the cartel.

Clearly a careful study of the discrimination hypothesis in antitrust enforcement is warranted. However, whatever the results of such a study would show, the point remains that the lure of fine revenue can distort enforcement incentives, and the distortion is likely to disfavor “out-group” potential offenders. This is the pattern preliminarily suggested by the Justice Department’s report on Ferguson and also by the data on international antitrust enforcement.

The antitrust penalties collected by the Justice Department, unlike those discussed in the Justice Department’s Ferguson Report, are not used to finance enforcement. The Antitrust Division of the Justice Department has a budget of roughly \$165 million.¹⁴⁷ The annual fine revenue in the Antitrust Division in the year 2015 was roughly \$3.6 billion.¹⁴⁸ The Antitrust Division is not an example of a cash-strapped enforcement agency seeking to fill holes in its budget through fines collected from low-level offenders. This suggests that the distortionary effects of fines are likely to be much less severe in the antitrust context. Still, the potential distortionary effect suggests a reason, aside from international comity issues, for limiting the reach of antitrust laws with respect to foreign conduct.

These issues in antitrust were at the heart of a dispute pitting, briefly, Judge Posner against the Department of Justice over the Department’s power to enforce the Sherman Act against foreign cartels. In *Motorola Mobility v. AU Optronics*,¹⁴⁹ Posner had initially read the relevant statute, the Foreign Trade and Antitrust Improvement Act, in a manner that severely constrained the

¹⁴¹ For statistics on antitrust fine revenue, see *Criminal Enforcement Trends Charts*, U.S. DEP’T JUSTICE, <https://www.justice.gov/atr/criminal-enforcement-fine-and-jail-charts> (last updated Jan. 30, 2017).

¹⁴² Kapoor et al., *supra* note 103.

¹⁴³ *Id.*

¹⁴⁴ JOHN M. CONNOR, CPI, ON THE ALLEGED DISPROPORTIONATE SENTENCING OF CARTEL MANAGERS 2-4 (2016), <https://www.competitionpolicyinternational.com/wp-content/uploads/2016/08/Cartel-Column-August-Full.pdf>.

¹⁴⁵ *Id.* at 5 tbl.2.

¹⁴⁶ *Id.* at 6 tbl.3.

¹⁴⁷ U.S. DEP’T JUSTICE, ANTITRUST DIVISION (ATR): FY 2016 BUDGET REQUEST AT A GLANCE, https://www.justice.gov/sites/default/files/jmd/pages/attachments/2015/01/30/19_bs_section_ii_chapter_-_atr.pdf (last visited March 4, 2017).

¹⁴⁸ *Criminal Enforcement Trends Charts*, *supra* note 141.

¹⁴⁹ 746 F.3d 842, 844 (7th Cir. 2014), *opinion vacated on reh’g* (July 1, 2014).

power of private victims and enforcement agents to use the Sherman Act against foreign cartels that had only an indirect effect on American commerce. Posner's initial *Motorola Mobility* opinion was vacated and in a later opinion Posner recognized a distinction between private parties and government enforcers giving the government broader power to sue foreign cartels with only an indirect effect.¹⁵⁰ Posner never discussed the public choice issues. His reason for granting greater power to the Department of Justice than to a private plaintiff is the theory that the Department would take comity issues into account while a private plaintiff would not. Unmentioned in his opinion is the greater likelihood that private suits would not be tainted by discriminatory incentives, since plaintiffs are seeking as much as possible in monetary damages and are therefore unlikely to shy away from suing any particular set of defendants, whether domestic or foreign. Such neutrality should be viewed as an important component of law enforcement.

Conclusion

Rational deterrence theory has been viewed with some skepticism in criminal law scholarship for its failure to recognize the degree to which criminals are motivated by irrational impulses, and this skepticism leads naturally to a view that rehabilitation and incapacitation are more important goals than deterrence.¹⁵¹ In this paper I have adhered to the rational deterrence model, setting it out with a bit more detail than usual and joining it with public choice theory. The framework leads to the conclusions that the scope of criminal law is far too broad today, the use of imprisonment excessive, and the levying of fines to finance enforcement in need of regulatory guidelines. However, this is not because offenders are not fully rational, or not fully capable of learning the rules and bringing them to bear on their own conduct. These conclusions follow from a close look at the function and purpose of deterrence, and a consideration of the rationality of enforcers.

¹⁵⁰ *Motorola Mobility LLC v. AU Optronics Corp.*, 775 F.3d 816, 819 (7th Cir. 2014).

¹⁵¹ See Robinson & Darley, *supra* note 5.