THE ROLE OF CRIMINAL LAW IN POLICING CORPORATE MISCONDUCT

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I

INTRODUCTION

In the early 1990s, I spent a couple of years as Chief of the Criminal Division in the Office of the U.S. Attorney for the Southern District of New York. One of my principal responsibilities was to hear "appeals" from defense lawyers, usually, although not exclusively, in white collar crime cases. These lawyers felt that their clients should not be indicted, or that the plea offer they had received from the prosecutor in charge of the case was unduly severe. Sometimes their arguments were essentially factual contentions that the government had the wrong take on the evidence—that the soon-to-be defendants were simply not guilty of the conduct that the investigators and line prosecutors believed they had committed. In these cases, the defense lawyers hoped that a more experienced (or at least different) prosecutor would appreciate the weaknesses in the government's case. More commonly, however, the appeals were addressed to prosecutorial discretion—even if the government could not be persuaded to see the client as innocent, perhaps the more experienced prosecutor could be made to see that the scarce resources of the Department of Justice should not be wasted on this particular, purely technical violation.

It was rather common, in such discussions, for defense counsel to assert that, properly understood, the pending matter was "really not a criminal case," or was "really a civil matter." I have made the argument myself, when representing clients in criminal investigations. It always struck me as somewhat surprising that, while the two sides usually disagreed about whether the assertion was true about the matter in hand, everyone in the room acted as if we knew, and more or less agreed about, what the assertion meant.

What surprised me about that, I suppose, is that the assertion seemed to have no legal content whatsoever. As a general proposition, the distinction between criminal matters and civil matters is largely formal, and concerns the procedures to be applied in adjudicating a particular case. The question being addressed in those meetings was whether the case at hand—which was not yet a judicial "matter" of any sort—would *become* a criminal matter, and it would become one if I (or, after further appeal, my boss, the U.S. Attorney) said it

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would.[1] Nor did the specific legal standards for proving a criminal charge, in the kinds of cases that most often led to these discussions, often differ very much from those that might be applicable in a civil suit arising from the same transactions. There are situations in the law in which they do: For example, a plaintiff in a civil wrongful death case arising from an auto accident may succeed in establishing liability based on the ordinary negligence of a driver, while a prosecutor charging a crime may need to establish gross negligence or even recklessness. However, in cases arising under the securities laws, and under many other regulatory regimes, there is often no distinction between what the prosecutor would have to prove to establish a crime and what the relevant administrative agency or a private plaintiff would have to prove to show civil liability.[2] Nevertheless, "this is really only a civil case, not a criminal case" seems to be an intelligible argument for defense lawyers to make to prosecutors, in that prosecutors hearing it seem to understand what is meant, and are able to apply some sort of standard to determine whether the argument has merit.

Of course, what is really being argued is an "ought" proposition, rather than an "is" proposition: "You *should not* treat this as a criminal matter; civil remedies are more appropriate." But that does not resolve my perplexity. Lawyers engaged in such discussions often speak as if they have in mind some more-or-less objective paradigm of what kinds of cases "should" be treated as criminal cases. Unfortunately, in my experience, that paradigm generally remained un-

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1. Technically, of course, it would become a criminal case if the *grand jury* decided it would become one, but in the discussions to which I refer neither prosecutors nor defense lawyers pretend that the effective decision is made by anyone other than the prosecutor.

2. Take securities law as an example. In the Supreme Court's most recent criminal securities decision, *United States* v. *O'Hagan*, 117 S. Ct. 2199 (1997), the Court notes that the imposition of criminal liability in the case is proper because of the "two sturdy safeguards [that] Congress has provided regarding scienter." *Id.* at 2214. But these barriers between the criminal and the merely civil turn out to be something less than "sturdy." The first is that Congress has provided that only "willful" violations of Rule 10b-5 are criminal. This might be a useful distinction where the underlying civil securities violation might not involve scienter. *See, e.g.*, TSC Industries, Inc. v. Northway, Inc., 426 U.S. 438, 444 n.7 (1976) (leaving open whether § 14a requires scienter). The Court does not, alas, explain how the "willfulness" standard differs from the civil scienter standard for violations of Rule 10b-5. "Willful" here plainly does *not* require knowledge of the law one is violating, as it does in the criminal tax area, *cf.* Cheek v. United States, 498 U.S. 192 (1991), since the *second* "sturdy safeguard" is that imprisonment—but *not* criminal liability—is precluded if the defendant proves that he was ignorant of the law. The entire discussion of any distinction between criminal and civil violations appears to be something of an afterthought in *O'Hagan*. The discussion appears in the last paragraph of the discussion of the 10b-5 violations, and until that point the Court had totally ignored the distinction: The Court refers to O'Hagan as having been indicted for securities fraud "in violation of § 10(b) of the Securities Exchange Act of 1934. . . and SEC Rule 10b-5," omitting any reference to the portion of the statute that actually imposes criminal liability, § 32 of the Exchange Act, *codified at* 15 U.S.C. § 78ff(a). *O'Hagan*, 117 S. Ct. at 2205. The Court then goes on to consider whether the government's "misappropriation theory" states a crime under the language of § 10b and Rule 10b-5, quite as if they were criminal statutes, suggesting no distinction between the standards for civil and criminal liability, and citing civil and criminal cases indiscriminately. *See id.* at 2206-14.

In any event, the discussions to which I refer in the text did not turn on such issues. Where such issues were relevant, counsel argued that their clients simply did not come within the legal definition of the crime; the argument that the case was more properly relegated to civil remedies was always presented as an argument addressed to prosecutorial discretion, and assumed, at least *arguendo*, that a technical criminal violation could be proved.

expressed. The conversation would not typically follow a syllogistic form, in which counsel would say, "The agreed characteristics of a criminal matter are A, B, and C; in this case C is lacking; therefore, this is not truly a criminal matter." Rather, the arguments would appear to take the form of the minor premise of such a syllogism: "He didn't mean any harm;" "no one was actually injured;" "the so-called victims are big corporations who can sue if they really feel aggrieved;" "no public purpose would be served by a prosecution." Even if these arguments implied some normative characteristics of the "criminal matter," the implied major premise was usually left unstated. The discussion usually proceeded, in the best tradition of common-law-trained lawyers, on the basis of the particular facts of the case, with little attention to broad general principles of justice, and almost never went forward on the basis of formal deduction from agreed-upon first principles about the characteristics of a case that ought to be prosecuted criminally.

My purpose in this essay is to explore what it means or should mean to argue, in the context of business misconduct, that a matter is or is not genuinely a "criminal case." For if we are to figure out a distinctive role for criminal enforcement, among the range of remedies and responses to such misconduct, we will have to develop some understanding of what is distinctive about "criminal law." Although the title of this symposium refers to "corporate misconduct," I have interpreted that phrase to mean "misconduct in a corporate or business setting," rather than "misconduct by corporations." Thus, while this essay addresses issues of corporate responsibility, its primary attention is not to the question, "when if ever should corporations be held criminally liable for the acts of their agents?," but rather to the broader question, "when should criminal sanctions be applied to the bad acts of individuals (and corporations) in conducting their business affairs?" And while the symposium title also invokes the concept of deterrence, I will suggest that this is probably not the concept that best defines the unique role of criminal law as a governmental response to corporate or "white collar" wrongdoing.

Finally, it is worth asking whom we are addressing. Academic discussions of the role of criminal law have traditionally concerned the proper content of substantive criminal law. Accordingly, to the extent that such discussions have sought a practical effect in the world beyond academic debate, they have been implicitly addressed to courts and legislatures. Those who have opposed extension of criminal law beyond its historic boundaries have warned that overbroad statutes or judicial interpretations cannot be cured by the expectation that prosecutorial discretion will ensure that unjustly expansive criminal law will be applied only in appropriate cases.

I do not question the importance of those discussions, or the correctness of those warnings. I would merely point out that they have been ignored. As Professor Coffee has recognized, the likelihood that courts or legislatures will be

moved to show restraint in the expansion of criminal law is more or less nil.[3] His suggestion that the United States Sentencing Commission might leap into the breach and develop a new jurisprudence of limited enforcement,[4] however, has so far not elicited much response.[5] I prefer to address my remarks primarily to the prosecutors, investigators, and administrative agencies charged with enforcing the laws in question. Whether it is wise or just to rely on prosecutorial discretion to compensate for overly expansive criminal laws, that is in fact what we do in the United States today. While I am not at all sure how good a job prosecutors are doing, for better or worse it is primarily in the offices of law enforcement officials that the question of the proper role of criminal sanctions is being addressed in government on an everyday basis. If academics hope to have an effect on the law in this area, we must talk to the people who are actively engaged in the debate, and who are making the critical decisions.

II

THE BLURRING OF THE CIVIL/CRIMINAL DISTINCTION

The question of the proper role of criminal law in society, particularly with regard to the enforcement of norms governing business, is a very old topic. The modern debate is largely driven by the rise of the regulatory state, which imposed new substantive norms on economic activity and developed a range of novel procedures and remedies to enforce them. Edwin Sutherland, who invented the concept of "white collar crime," questioned the distinction between criminal and civil remedies in defining his subject, pointedly noting that much of the corporate misconduct he catalogued had been dealt with by administrative procedures and fines, and not by the criminal charges and incarceration utilized against traditional offenders.[6] Sutherland's sociological analysis tended to treat the prevalence of administrative remedies as evidence of the power of the business classes to protect themselves from the full force of the criminal sanctions utilized against others.[7] His implicit prescription was for increased

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3. *See* John C. Coffee, Jr., *Does "Unlawful" Mean "Criminal"?: Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. REV. 193, 246 (1991).

4. *See id*. at 243-46.

5. The Commission's few modest efforts to resist the trend to over-criminalization and over-punishment have run into political flack. The Commission's effort to roll back the 100-to-1 crack-to-cocaine ratio was rebuffed in Congress. Closer to our subject, the Commission has expressed its concern that the draconian money laundering guidelines are being applied in a broader range of cases than anticipated, but it apparently does not intend to propose any modification of those guidelines—and commentators have suggested that any such proposals "undoubtedly would face an uphill battle given intense opposition from the Department of Justice." *Sentencing Commission Finds Disparities in Sentences for Money Laundering*, 61 CR. L. 1566, 1566 (1997); *see also* UNITED STATES SENTENCING COMM'N, SENTENCING POLICY FOR MONEY LAUNDERING OFFENSES, INCLUDING COMMENTS ON DEPARTMENT OF JUSTICE REPORT (1997).

6. *See generally* EDWIN H. SUTHERLAND, WHITE COLLAR CRIME (1983) [hereinafter WHITE COLLAR CRIME]; Edwin H. Sutherland, *White Collar Criminality*, 5 AM. SOC. REV. 1 (1940) [hereinafter *Criminality*]; *see also* Stanton Wheeler, *White Collar Crime: History of an Idea*, *in* 4 ENCYCLOPAEDIA OF CRIME AND JUSTICE 1652 (1983).

7. *See, e.g.*, SUTHERLAND, WHITE COLLAR CRIME, *supra* note 6.

criminal prosecution of the commercial offenses he treated, regardless of their legal status. Legal philosophers have been more inclined to see the administrative state as threatening ever-expanding criminal sanctions against businesses, rather than as creating softer alternatives to criminal sanctions. Henry Hart, for example, undertook to defend the traditional boundaries of the criminal law by explicating its distinctive nature, criticizing what he found to be the over-expansion of criminal law into regulatory and business matters.[8]

In recent years, we have heard still more about the blurring of the distinction between civil and criminal law. Once again, there seem to be two components to the decreasing clarity of the distinction: the growth of punitive and "quasi-criminal" remedies that are formally treated as "civil," and the substantive expansion of the domain of criminal law in the corporate area. As in the past, the need for careful regulation of business practices, and for new remedies to deal with perceived abuses, has generated a legal creativity that leads some to question the procedural distinctiveness of the criminal law as empty or ideologically-manipulated formalism, and others to perceive a threat to liberty both from the expansion of criminal punishment and from the authorization of punitive civil sanctions without the stringent safeguards of criminal procedure.

A. The Growth of the Punitive Civil Remedy

The traditional rough distinction between criminal and civil matters has been that criminal actions are brought by the sovereign to punish and deter violations of social norms, while civil actions are brought by private parties (or occasionally by the government in a proprietary or administrative capacity) to compensate those who have suffered damage or to prevent harms from occurring. One of the most striking legal developments of recent years has been the increased reliance of the state on "civil" remedies that have a punitive purpose.[9] Many of the most recent developments on this front have been specifically related to corporate misconduct. Examples include the expansion of the power of regulatory agencies to seek or even to impose civil fines,[10] and the expanding use of punitive damages or private "whistleblower" actions in connection with allegations of government contracting and program fraud.[11] But it is worth noting that the trend to punitive civil sanctions has extended

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8. *See* Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401, 417-22 (Summer 1958); *see also* HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION (1968).

9. *See generally* Kenneth Mann, *Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law*, 101 YALE L.J. 1795 (1992). There is an enormous and growing literature on this subject; the leading sources can be found in the footnotes of Carol Steiker, *Foreword: Punishment and Procedure: Punishment Theory and the Criminal-Civil Procedural Divide*, 85 GEO. L.J. 775 (1997).

10. See, for example, the provisions of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"), codified at 12 U.S.C. § 1818(i) (1994), and the Insider Trading Sanctions Act of 1984, codified at 15 U.S.C. § 78u-1 (1994).

11. *See, e.g.*, Note, *The False Claims Act,* Qui Tam *Relators, and the Government: Which Is the Real Party to the Action?*, 43 STAN. L. REV. 1061 (1991) (discussing false claims act and *qui tam* actions in particular).

well beyond the white collar area. Indeed, in many ways, the catalyzing development that has focused increased legislative and judicial attention on non-traditional criminal sanctions has come from outside the business crime area: the rapidly increasing use of the civil forfeiture remedy in a variety of contexts.[12] The expanded use of forfeiture in turn stems from another development that was not originally directed primarily at white collar crime: the enactment of the RICO statute.[13]

As of 1970, forfeiture was a little-known curiosity of the narcotics and customs laws, with a pedigree extending to common-law "deodands" and, some would say, to biblical practices,[14] but with very limited practical significance in law enforcement. The drafters of RICO revived interest in the use of property confiscation as a criminal punishment, by providing for forfeiture of a convicted RICO defendant's interest in the corrupted "enterprise"[15] and, later, of the proceeds of RICO offenses.[16] RICO's forfeitures were most innovative precisely in that they were not denominated as *in rem* civil remedies, as previous American forfeiture provisions had been, but as *in personam* criminal punishments, imposed only (but automatically) as a consequence of criminal conviction. But the renewed interest in forfeiture as a device to "take the profit out of crime" led to rapid expansion of forfeiture remedies. This new interest in forfeiture began in the traditional area of narcotics, with expanded criminal and civil forfeiture provisions and vastly increased enforcement efforts. Soon, however, via the "money laundering" link between the world of drug dealers and the world of "corporate misconduct," the forfeiture remedy came to be applicable to a variety of white collar offenses.[17]

At the same time, RICO also contributed to the growth of civil remedies for criminal conduct by creating its own civil cause of action.[18] By creating a treble-damages remedy for violation of its broad and amorphous provisions, and by authorizing governmental injunctive actions as well, RICO unleashed new potential for private and governmental "civil" enforcement of the criminal laws. Of particular importance, RICO in effect created a private federal cause of action, with the alluring treble damage remedy, for violations of the mail and wire fraud statutes, thus expanding the civil remedies available in various business fraud contexts, with results that have been widely catalogued (and variously celebrated and deplored).

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12. *See, e.g.*, LEONARD W. LEVY, A LICENSE TO STEAL: FORFEITURE OF PROPERTY (1996).

13. *See generally* Gerard E. Lynch, *RICO: The Crime of Being a Criminal, Parts I & II*, 87 COLUM. L. REV. 661 (1987) [hereinafter Lynch, *Parts I & II*]; Gerard E. Lynch, *RICO: The Crime of Being a Criminal, Parts III & IV*, 87 COLUM. L. REV. 920 (1987) [hereinafter Lynch, *Parts III & IV*].

14. For a discussion of these early roots of forfeiture law, see LEVY, *supra* note 12, at 1-20.

15. Organized Crime Control Act of 1970, tit. IX, Pub. L. 91-452, 84 Stat. 941 (1970), *codified at* 18 U.S.C. § 1963(a)(1)-(2) (1994).

16. *See* Comprehensive Crime Control Act of 1984, Pub. L. 98-473, § 302, 98 Stat. 1837, 2040-44 (1984), *codified at* 18 U.S.C. § 1963(a)(3) (1994); United States v. Russello, 464 U.S. 16 (1983).

17. *See* 18 U.S.C. §§ 1956, 1957 (1994).

18. *See id.* § 1964.

These developments inevitably brought perplexed judicial attention to the question of the boundary between the criminal and the civil. In the forfeiture area, the attention was overtly doctrinal, and focused largely on procedural issues. Modern civil narcotics forfeitures are, in effect and intent, punitive. Although some aspects of the forfeiture regime serve traditionally civil and *in rem* purposes—the forfeiture of dangerous contraband (for example, the narcotics themselves) and of simple instrumentalities of crime (for example, drug paraphernalia or laboratory equipment) serves the preventative public health purpose of taking potentially harmful objects out of circulation, or at least out of the hands of those who would misuse them—the primary focus of recent forfeiture initiatives has been on cash and valuable property (cars, real estate) that cannot readily be seen as dangerous, and the overt purpose has been to hit drug dealers where it hurts, by confiscating their property, including, but not limited to, the proceeds of their crimes. The punitive nature of these actions has led those whose property is subject to forfeiture to complain that the action should be subject to the same procedural rights that, under the Constitution, protect criminal defendants: protections such as an enhanced standard of proof and the prohibitions against cruel and unusual punishment and double jeopardy.[19] The courts, with some wavering, have tended to reject these arguments, adhering to a relatively formalistic treatment of civil forfeiture as "remedial."

Civil RICO also led courts and commentators to question the distinction between crime and tortious behavior, though here the judicial role was less overtly doctrinal. The appellate courts tended to welcome RICO criminal cases, brought by prosecutors against corrupt public officials, violent organized crime figures, and drug dealers, and even against major white collar offenders, and to interpret the statute broadly in favor of the government when criminal cases came before them.[20] (Notably, the first several RICO cases to come before the Supreme Court, all involving criminal prosecutions, were decided—unanimously—in favor of broad, literal readings of the statute.)[21] Civil RICO suits, on the other hand, were treated with distinct disfavor, as courts attempted to develop limiting readings of the statute to curtail a flood of civil litigation. (And, as the Supreme Court in turn developed closer familiarity with civil RICO cases, that Court too became more cautious in interpreting the statute.[22])

There is a distinct oddity here, from the standpoint of traditional distinctions between criminal and civil law: Historically, we have expected the criminal law to be narrower and more precise than the law of civil wrongs, but in interpreting RICO, the courts have been distinctly more comfortable with broad interpretations in criminal cases, and correspondingly more hostile to civil applications. Indeed, this reversal of the traditional relationship is now exempli-

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19. *See, e.g.*, Austin v. United States, 509 U.S. 602 (1993); Ursery v. United States, 116 S. Ct. 2135 (1996); Bennis v. Michigan, 116 S. Ct. 994 (1996).

20. *See generally* Lynch, *Parts I & II*, *supra* note 13, at 695-713.

21. *See* United States v. Turkette, 452 U.S. 576 (1981); *Russello*, 464 U.S. at 16.

22. *See, e.g.*, Reves v. Ernst & Young, 507 U.S. 170 (1993); H.J., Inc. v. Northwestern Bell, 492 U.S. 229 (1989).

fied in the language of the statute itself: Securities law violations remain RICO "predicate acts" that can be the basis of a criminal RICO indictment, but since 1995 private civil plaintiffs may only bring RICO actions in securities cases in extremely limited circumstances.[23]

In the light of these enormously visible uses of civil remedies in a punitive manner, and the judicial controversies about them, lawyers and scholars began to recognize that there were in fact a wide range of civil remedies that paralleled features of criminal law enforcement. The venerable institution of punitive damages in private tort actions was expressly designed to go beyond the usual compensatory goal of tort law, serving the ordinarily "criminal" purposes of punishing and deterring wrongdoers. Treble damages actions, and certain forms of liquidated damages[24] might be seen as providing enhanced or more realistic compensation in areas where the costs and difficulties of litigation under the "American rule" by which even victorious parties bear their own legal costs. They also serve a significant deterrent or punitive purpose, however, by enlisting injured parties as "private attorneys general" to enforce public norms, and by imposing economic pain on lawbreakers beyond that required to compensate injured parties. Even the defining paradigmatic sanction of the criminal law—deprivation of liberty by imprisonment—is available in certain contexts nevertheless understood as civil, primarily in the enforcement of judicial orders by "civil" contempt.

Moreover, the administrative state imposes all sorts of remedies, utilizing administrative process subject to judicial review, or lawsuits brought under rules of civil procedure, which look suspiciously like criminal punishments. Agencies administer deportation and denaturalization proceedings for those who violate immigration laws; debar businesses from governmental contracts for violating civil rights or procurement laws; require disgorgement of profits obtained in violation of the securities laws; rescind the licenses of doctors, lawyers, securities professionals, and various other practitioners of trades, for criminal misconduct or for violations of the specific regulations governing their businesses; even impose fines—difficult to distinguish in any way from those imposed as a result of criminal process—on violators of administrative regulations.

Finally, even areas that might seem firmly within the criminal law regime, courts have been tempted to reclassify certain remedies, or apply civil sanctions in aid of specifically criminal law enforcement. We have been told, for example, that pretrial detention of criminal defendants is not really criminal or punitive in nature, but a kind of "administrative" or "remedial" action.[25] The traditional civil procedure for the commitment of the dangerous mentally ill for

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23. *See* 18 U.S.C. § 1964(c) (1994), as amended by Pub. L. 104-67, tit. I, §107, 109 Stat. 758 (1995). *Cf*. 18 U.S.C. § 1961(1)(D) (1994) ("any offense involving ... fraud in the sale of securities" may be a RICO predicate act).

24. *See, e.g.*, United States v. Halper, 490 U.S. 435, 445-46 (1989) (discussing liquidation function of statutory damages under False Claims Act).

25. United States v. Salerno, 481 U.S. 739, 746-48 (1987).

treatment has been expanded to, in effect, extend the incarceration of dangerous (but apparently neither ill nor treatable) sexual offenders beyond the expiration of their criminal punishment, again in a putatively noncriminal way.[26]

Some of these practices are longstanding aspects of the common law, others are as "new" as the New Deal administrative state, and a few are more recent innovations. Some have been utilized more aggressively in recent years, or have been put to new uses; others have simply come to fresh notice, as precursors of or models for newer remedies. All of them, however, can be classified as situations in which "civil" remedies, invoking procedures with fewer protections for defendants and lower burdens of proof, can be utilized for the punishment and deterrence of violators of general laws, at the instance of private party victims or of the state, leading to the imposition of significant penalties, including the formal deprivation of liberty and property—in short, for purposes and using modalities that once might well have been thought of as distinctively "criminal."

These developments have led to obvious questions about the need for any distinctive "criminal" law at all, particularly in the area of business or corporate misconduct. If civil procedures which are usually thought of as easier to employ than the formally difficult and defendant-protective procedures of the criminal system, can constitutionally be utilized to impose punishments on norm violators, why would we ever resort to criminal punishment? Whatever answers might be given in the area of violent street crimes, corporate wrongdoing seems particularly susceptible to these new or newly-discovered civil forms of action.

B. Applicability of Punitive Sanctions to Business Crimes

Corporate misconduct appears to be a particularly suitable area for the application of punitive civil sanctions for three reasons: monetary sanctions are appropriate, corporate plaintiffs are relatively abundant, and specialized agencies exist to facilitate public enforcement where that is necessary.

1. *The Appropriateness of Monetary Sanctions.* First, corporate or business crime seems especially amenable to treatment by the financial sanctions that are most readily shifted to a civil or administrative regime. While we may still have some compunction about "civil" or "administrative" imprisonment (though even this inhibition may be eroding a bit),[27] we seem to have little problem allowing administrative agencies or courts operating under civil rules to fine individuals or businesses, deprive them of valuable business licenses or opportunities, or forfeit their property. Absent a specific need for incarceration as a remedy, therefore, the substitution of civil sanctions for

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26. Kansas v. Hendricks, 117 S. Ct. 2072 (1997). At the same time, restitution to victims of wrongful conduct, previously the hallmark of the civil tort regime, has become an important adjunct to criminal sentencing proceedings, further blurring the distinctly punitive nature of the criminal sentence. *See, e.g.*, 18 U.S.C. §§ 3663, 3663A, 3664 (1994).

27. *See supra* notes 25, 26, and accompanying text.

criminal offenders would seem to raise few legal or political objections. But the use of incarceration for non-violent white collar offenders has always been controversial.

Imprisonment does not serve the same vital incapacitationist purpose for business criminals that it does for certain classes of violent criminals, whose isolation may be required for the public safety. Because such crimes are typically committed for financial gain, by people who often have significant economic resources, the use of fines has seemed to many an adequate deterrent. Whether retributory justice demands imprisonment for such offenders is a closer question. The logic of the *lex talionis* seems to recommend fines as a metaphorically apt punishment for crimes of property. Many have claimed, however, that equity demands that our most onerous and stigmatic punishment not be withheld from those with economic power and social status, when it is so freely applied to the poor and the powerless, often for equally nonviolent offenses. While this point of view seems to have triumphed with the adoption of the federal sentencing guidelines, which require much more imprisonment of white collar offenders, there are some signs that the public, becoming restive under the expensive burden of prison operation as crime rates and public fear begin to diminish, may be ready to reassess the value of incarceration of the nonviolent.[28] Whenever imprisonment is, for whatever reason, thought inappropriate or unnecessary, the question will arise whether the criminal system needs to be invoked at all. Especially in the case of corporations, which can be punished only by financial deprivations, why bother to invoke criminal law if punitive civil sanctions can readily provide equivalent punishment?

2. *The Relative Abundance of Corporate Plaintiffs*. Second, the harm imposed by business crime is typically (though, of course, not always) compensable to the victims. Frauds committed among business enterprises, or by business enterprises against the consuming public or the government, leave plenty of aggrieved potential plaintiffs. These plaintiffs will often have adequate means and incentive to seek civil redress. Why waste money on a law enforcement apparatus, where potential private attorneys general abound? There are, or course, obstacles to effective use of the civil compensation system, such as the costs of litigation to private plaintiffs, or the small claims of individual consumers, that may make such litigation uneconomic for victims. But solutions to these problems have been developed in the civil law, and could be more widely used: Fee-shifting, treble and punitive damages, and the availability of class action remedies or contingent fee arrangements might serve

28. Recent prison memoirs by white collar offenders advance the traditional liberal position that the imprisonment of such non-violent criminals is costly, inhumane and unnecessary. *See, e.g.*, SOL WACHTLER, AFTER THE MADNESS: A JUDGE'S OWN PRISON MEMOIR (1997); JOSEPH F. TIMILTY & JACK THOMAS, PRISON JOURNAL: AN IRREVERENT LOOK AT LIFE ON THE INSIDE (1997). The press has begun to question the paradox of falling crime rates and rising prison expenditures. *See, e.g.*, Fox Butterfield, *Punitive Damages: Crime Keeps on Falling, but Prisons Keep on Filling*, N.Y. TIMES, Sept. 28, 1997, at D1.

not only to increase the likelihood of fair compensation but also to improve and privatize punishment and deterrence.

3. *Specialized Agencies for Public Enforcement.* Third, where there does appear to be a need for public enforcement, specialized administrative enforcement agencies often already exist, and exercise considerable authority and expertise. Why leave significant aspects of securities, environmental or tax enforcement, for example, to generalist criminal prosecutors, who usually know little about the technicalities of the regulatory regime, and who may for that reason underenforce significant norms whose importance is not apparent to non-experts, or over-enthusiastically pursue claims that appear quixotic, excessive, or even perverse to specialized agencies?

Professor Mann expressly cites the desirability of closer coordination of civil and criminal enforcement bureaucracies as a potential advantage and necessary consequence of greater reliance on civil remedies (especially if courts apply double jeopardy principles in such a way that action in one forum may inhibit subsequent action in the other).[29] Such coordination may be more difficult than it appears, however. Administrative agencies may be insensitive to the special demands of the criminal process, and may be frustrated with prosecutors' reluctance to pursue cases that seem to the administrators a significant part of their enforcement program but that fail to meet prosecutors' criteria for imposing criminal punishment or for likely success before juries.[30] Prosecutors, in turn, may have greater enthusiasm about violations that bear traditional indicia of criminality such as secretive behavior, or the detection of which challenges traditional law enforcement skills.[31] These coordination issues could be greatly simplified if we simply reduced our reliance on an already overburdened criminal justice bureaucracy to pursue business offenses, and transferred most of that responsibility directly to the regulatory agencies themselves, with enhanced powers to impose punishment via administrative or civil processes.

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29. *See* Mann, *supra* note 9, at 1866-67. Since this paper was written and delivered, the Supreme Court has substantially eliminated any concern (or hope) that the Double Jeopardy Clause would inhibit parallel or successive civil and criminal penalties. *See* United States v. Hudson, 118 S. Ct. 488 (1997).

30. One highly public airing of such a dispute occurred in the late days of the Bush Administration, when congressional Democrats, fed largely by sources in the EPA, bitterly attacked the record of the Justice Department in prosecuting environmental crimes. *See, e.g.*, John H. Cushman, *Justice Dept. is Criticized over Environmental Cases*, N.Y. TIMES, Oct. 30, 1992, at A16.

31. Prosecutors, in my experience, have a particular fondness for insider trading cases. Such cases typically present the full panoply of surreptitious behavior, including secret payoffs for information, covert meetings, and pseudonymous accounts, that both present an enjoyable challenge to the traditional investigative skills of law enforcement officials and constitute satisfying evidence of consciousness of guilt once unraveled. One does not have to accept economic theories that defend such activities as harmless, however, to wonder whether these corrupt behaviors constitute the most significant threats to the integrity of the securities markets. Whatever a regulator might see as the most dangerous violations, prosecutors are unlikely to choose violations for criminal attention if they appear overly technical and lack the jury appeal of conduct that manifests behavioral similarities to traditional crimes.

C. Theoretical Questions Raised by Punitive Civil Sanctions

The availability of civil enforcement regimes with significant powers, then, raises significant questions about what sort of role criminal law can play in deterring and preventing misconduct of all sorts, but especially business and corporate misconduct of a financial or regulatory nature. To some civil libertarians, these questions are threatening: The substitution of civil for criminal remedies, from this perspective, amounts to making it easier for the state to inflict punitive harm on individuals. Others, more optimistically, see the expansion of civil penalties as beneficial to liberty, by permitting the less random imposition of generally lesser penalties, rather than relying for deterrence on the occasional, somewhat arbitrary, imposition of excessively severe penalties. But these may be seen as empirical questions or matters of detail, rather than questions of principle. If civil sanctions turn out to be imposed too often or too easily or too unfairly, nothing prevents us from adjusting the levels of punishment or the resources assigned to investigating agencies, or from devising more protective procedural rules, without resort to the label or the traditional accouterments of the "criminal" law.

As Carol Steiker has insightfully pointed out, the kinds of questions that have been raised by the expansion of punitive civil regimes arise from a common philosophical vantage, which in effect poses an intellectual as well as practical challenge to the uniqueness of criminal law.[32] Steiker argues, correctly in my opinion, that the increasing dominance of consequentialist thinking, and in particular of economic analysis of law, constitutes the intellectual underpinning of the preference for civil punitive sanctions. If what we are seeking is primarily a means of reducing the frequency of acts that have harmful consequences—of deterring and controlling crime—then the choice between criminal and civil modalities is essentially a matter of efficiency. Civil modes of punishment will generally be preferable, from this perspective, being cheaper in two respects: (1) Typically, they impose lesser punishments, with punishment being seen, in classic utilitarian fashion, as a harm or disutility to society, justified only by a net gain resulting from deterrence of other more harmful acts; and (2) criminal punishment, given the need for greater certainty of fact-finding and security against error as the stakes rise, is more expensive and burdensome to administer. Wherever possible, moreover, private civil enforcement will be preferred by the efficiency-minded to the erection of governmental bureaucracies, though in some circumstances difficulties of detection or other inefficiencies of private action may justify or require public enforcement.

On this view of the problem, presumably, a radical distinction between civil and criminal forms of procedure is at least odd, and probably foolish. Any distinction between criminal and civil punishment is largely one of degree. All of the remedies we have reviewed share a common purpose: the deterrence and remedy of violations of substantive regulations and norms of conduct. Two

32. *See* Steiker, *supra* note 9, at 784-791.

rough qualities denominate the zone of the "criminal": the responsibility of the state, rather than private parties, for enforcement of the norm, and the relative severity of the sanctions. Thus, from the economic perspective, the traditional category of the criminal largely reflects a pragmatic judgment that some norms cannot be efficiently policed by private actions brought by the aggrieved party, requiring some collective responsibility if the harmful behavior is to be efficiently reduced to an acceptable level. The same uncertainties of enforcement generate a need for higher sanctions to deter misconduct, which in turn generates a need for special, more stringent protections against erroneous invocation of the sanction.

Under modern conditions, this simple binary division breaks down, as well (from this perspective) it should. The growth of specialized state regulatory organs makes state intervention far more ordinary than in the days of the common law of crimes, and makes possible the control of at least some sorts of harmful behavior by lower, more regularly applied sanctions. Where state intervention can be more subtle and efficient than simply hanging and imprisoning violators, a wider range of conduct can be controlled, and controlled more efficiently. Since the alternative punishments are generally less harsh, they can be imposed by less stringent procedures, without creating debilitating public insecurity about the prospect of erroneous or pretextual imposition of drastic harm. In such a world, the conclusion that state regulation and enforcement is called for does not imply the necessity of resorting to inefficient and cruel punishments; substitution of gentler, more scientifically calibrated deterrents by expert regulators is a natural and beneficial development, of particular utility in the area of legitimate economic activity that in any event needs a fair amount of state regulation.

It would appear, as Professor Mann argues, that the procedures to be applied in different kinds of cases should be determined from a functional perspective.[33] Some violations of administrative regulations impose modest harms, and call for modest correctives. There is no due process objection to dealing with such cases by traditional civil procedures; where the deprivation is slight, less process is due.[34] Other violations, however, are quite harmful, and the sanctions imposed—loss of livelihood, deprivation of substantial property, deportation—are accordingly serious. The procedures for adjudicating such charges need to be stringent, to protect against error. But there is no special reason to call such procedures "criminal," or to have only two sharply differentiated sets of procedures; we could have a range of procedures, each calibrated to the particular function being served and the seriousness of the deprivation.

Correspondingly, some conduct traditionally dealt with as "criminal" imposes very little harm and calls for trivial punishment. The fact that such behavior was identified and prohibited before the rise of the specialized administrative agency, and is prohibited by general legislative enactment rather than

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33. *See* Mann, *supra* note 9, at 1870-71.
34. *See* Mathews v. Eldridge, 424 U.S. 319 (1976).

administrative regulation, should not control the procedures used to enforce these norms. Thus, there is nothing wrong with the creation of more efficient (and, by the standards of criminal procedure, less fair) administrative tribunals to deal with minor traffic offenses, lesser "quality-of-life" violations, or even minor common law crimes like simple assault and petty property offenses that will not generate severe sanctions.

The "efficient deterrence" perspective is not limited to academic intellectuals of the law and economics persuasion. Much of the expansion of civil punitive remedies—and certainly the emblematic expansion of forfeiture—has been the result not of academic economic theory, but of the (equally, though less self-consciously) consequentialist logic of practical politicians seeking cheap and effective responses to dramatic increases in crime. Governmental decisionmakers confronting radical public discontent with perceived and actual decreases in public safety have understandably sought expedients to reduce crime, increase punishment, and simplify and expedite the procedures by which sanctions are imposed. To the extent that courts have resisted straightforward attempts to increase the availability of criminal punishment or decrease procedural protections for defendants, civil remedies that offer to accomplish the same goals by making a formalistic end-run around the criminal process have become more attractive. The pragmatic consequentialism of crime reduction is always a powerful force in politics, and in recent years, that perspective has dominated the political debate.

In short, the theoretical as well as practical appeal of civil punishments is their promise of cheaper and more swiftly imposed deterrents. To the extent the most severe sanctions—capital punishment, imprisonment—are required for deterrent or other purposes, civil liberties concerns may limit the diversion of cases to civil and administrative mechanisms that are less protective of defendants. But where deterrence can be achieved by financial exactions, as will usually be the case in business misconduct, a model of sanctions that is primarily directed at creating incentives for private actors to comply with regulations will inevitably suggest de-emphasizing the bulky rituals of criminal law in favor of more streamlined, modern, efficient administrative remedies.

There is, however, another aspect to the blurring of the lines between civil and criminal law, and, those who have called attention to that issue tend to have a rather different perspective on the problem.

D. The Expanding Domain of Criminal Law

While the expansion of civil or regulatory alternatives to traditional criminal law has reduced the primacy of criminal justice as a vehicle for imposing punitive remedies for the most serious misconduct, the same period has seen a marked expansion of the criminal law itself, to cover ever-wider areas of conduct that might once have been subject only to social disapproval or to civil sanctions. This trend too has reduced the uniqueness of criminal law, and increased the overlap between civil and criminal regimes, not by permitting the

incursion of civil remedies into areas traditionally criminal, but by encouraging the imposition of criminal remedies on conduct for which they were previously unavailable. The classic academic expositors (and critics) of this trend have been Herbert Packer, Sanford Kadish, and John Coffee.[35]

Some of this expansion has been legislative in nature. Legislatures, concerned about the perceived weakness of administrative regimes, have put criminal sanctions behind administrative regulations governing everything from interstate trucking to the distribution of food stamps to the regulation of the environment.[36] More recently, Congress has also moved to create new and broadly defined criminal liability, under the rubric of "money laundering," for financial transactions that in some cases were previously unregulated.[37] Meanwhile, Congress, and the sentencing commission it created to systematize criminal punishment, have significantly increased the *de jure* and *de facto* levels of punishment for violations in many areas, including the provision of severe sanctions for some of these innovative and sometimes poorly defined crimes.[38]

Prosecutors and courts, moreover, have utilized the broad discretion created by the criminalization of regulatory misconduct or by the vague terms of some criminal statutes, to change the terms in which certain forms of misbehavior are seen, and the consequences that attach to violations. The exemplary stories here largely involve the federal mail fraud statute and the securities laws. Professor Coffee (along with a number of dissenting judges) has repeatedly called attention to the way in which the concept of fraud has grown to incorporate violations of amorphous fiduciary duties that might previously have been the occasion for civil liability—or perhaps for no liability at all. Vague prohibitions of "schemes to defraud" or "conspiracies to defraud the United States" have been used to put criminal penalties behind duties arising under intellectual property law,[39] employment contracts,[40] codes of legal ethics,[41] the

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35. *See, e.g.*, PACKER, *supra* note 8; Sanford Kadish, *Some Observations on the Use of Criminal Sanctions in the Enforcement of Economic Regulations*, 30 U. CHI. L. REV. 423 (1963); John C. Coffee, Jr., *From Tort to Crime: Some Reflections on the Criminalization of Fiduciary Breaches and the Problematic Line Between Law and Ethics*, 19 AM. CRIM. L. REV. 117 (1981); John C. Coffee, Jr., *The Metastasis of Mail Fraud: The Continuing Story of the Evolution of a White Collar Crime*, 21 AM. CRIM. L. REV. 1 (1983). Professor Coffee's response to Kenneth Mann's powerful explanation of the increasing significance of civil and regulatory remedies beautifully frames the difference between these two perspectives on the increasing overlap between civil and criminal law. *See* John C. Coffee, Jr., *Paradigms Lost: The Blurring of the Criminal and Civil Law Models—And What Can Be Done About It*, 101 YALE L.J. 1875 (1992) [hereinafter *Paradigms Lost*].

36. *See, e.g.*, 49 U.S.C. § 521(a)(6) (1994) (violations of regulations governing motor carriers); 7 U.S.C. § 2024 (1994) (misuse of foodstamps in violation of regulations); 42 U.S.C. § 7413(c) (1994) (air pollution); 33 U.S.C. § 1319(c) (1994) (water pollution). All of these statutes provide criminal sanctions for the violation not only of specific regulatory statutes, but also of the even more technical administrative regulations issued pursuant to those statutes. This is the trend that largely concerned Packer and Kadish.

37. *See, e.g.*, 18 U.S.C. §§ 1956, 1957 (1994); 31 U.S.C. § 5322 (1994).

38. The maximum penalties for the exceedingly broad and poorly defined money-laudering offense created by 18 U.S.C. § 1956, for example, include imprisonment for up to 20 years, and the sentencing guidelines under that statute are correspondingly harsh. *See* U.S. SENTENCING GUIDELINES MANUAL § 2S1.1 (1995).

39. *See, e.g.*, Carpenter v. United States, 484 U.S. 19 (1987).

customary obligations of political party leaders,[42] the (possibly non-existent) fiduciary duties of insurance companies to re-insurers,[43] and congressional restrictions on foreign aid.[44]

As with the expansion of civil punitive remedies, the growing range of criminal penalties has a particular impact on white collar offenses. Violent street crime, and the various black-market vice industries, have long been the object of reasonably clear laws, and innovative substantive criminal legislation addressed to these problems has primarily been a matter of enhancing punishments or expanding federal jurisdiction,[45] rather than expanding the range of criminally prohibited conduct.[46] The expansions of criminal liability that have concerned academic commentators, however, have largely affected business crime, for in the past the conduct of corporate executives—unlike that of street hoodlums, drug dealers, and the like—had been either left unregulated or governed primarily by civil regimes.

Moreover, criminal law has expanded not only by reaching into new substantive areas, or by covering conduct at the borderline of legality, but has also expanded by weakening some traditional prerequisites to criminal conviction. Movement in this area has not been unidirectional; during the same period, new defenses, from battered-spouse syndrome to cultural difference defenses, have been propounded with greater or lesser acceptance. While these defenses have outraged some commentators, both academic and popular,[47] the proponents and critics of their use are clearly concerned with the question of moral responsibility—those who would acquit the battered wife who kills her husband in his sleep typically believe that she is not to be blamed for her conduct, while those who would uphold traditional limits on self-defense in this context argue that her conduct was morally unacceptable. While these cultural and psychological defenses may be more common in cases of violent crime, some developments in the business crime context also show a new emphasis on blame. The Supreme Court in recent terms has shown a greater receptivity to the mistake of law defense, a less novel argument against criminal liability that in the past has met with little acceptance in Anglo-American law.[48]

Notwithstanding these developments, however, the more dominant and longer-standing trend in our century has been the erosion of *mens rea* requirements. This period has seen the dramatic growth of strict liability offenses (and

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40. *See, e.g.*, United States v. Von Barta, 635 F.2d 999 (2d Cir. 1980).

41. *See, e.g.*, United States v. Bronston, 658 F.2d 920 (2d Cir. 1981).

42. *See, e.g.*, United States v. Margiotta, 688 F.2d 108 (2d Cir. 1982).

43. *See, e.g.*, United States v. Brennan, 938 F. Supp. 1111 (E.D.N.Y. 1996).

44. *See, e.g.*, United States v. North, 708 F.Supp. 375 (D.D.C. 1988).

45. *See, e.g.*, 18 U.S.C. §§ 2119 (carjacking); 922(q) (gun-free school zones, declared unconstitutional in *United States v. Lopez*, 514 U.S. 549 (1985)), 18 U.S.C. § 2261 (1994) (domestic violence).

46. One exception to this generalization has been the reform and expansion of the law of rape.

47. For an example that fits in both categories, see generally ALAN M. DERSHOWITZ, THE ABUSE EXCUSE: AND OTHER COP-OUTS, SOB STORIES, AND EVASIONS OF RESPONSIBILITY (1994).

48. *See, e.g.*, Cheek v. United States, 498 U.S. 192 (1991); Ratzlaf v. United States, 510 U.S. 135 (1994).

their close cousin, liability for negligence) in American criminal law, and such offenses have found a particular home in the kind of regulatory criminal statutes that have the greatest impact in corporate settings. Corporate liability itself, a relatively recent phenomenon, tends to detach punishment from moral culpability. Not only does a corporation, as an artificial entity, lack any *mens* of its own, but the standard of vicarious liability for corporations has broadened in ways that make even a metaphorical corporate "*mens rea*" elusive: When corporations are held liable for the acts of relatively low-level managers, even acting in violation of express corporate policy, it becomes difficult to sustain the idea that "the corporation" as an entity is blameworthy in any way that is easily analogized to the intentional actions of a natural person.

As with the expansion of civil remedies, these developments have stemmed in part from a consequentialist pragmatism on the part of legislatures, prosecutors, and courts. If behavior is perceived as harmful, prohibition seems a ready response. And if the behavior, once prohibited, nevertheless persists, the equally ready answer is to escalate the punishment—from civil or administrative remedies to criminal ones, from misdemeanors to felonies, from low sentences to high, from discretionary punishments to mandatory ones. If the bad guys "get away with" harmful acts by finding "loopholes" in statutes that failed to foresee and prohibit the particular conduct committed, just broaden the statutory language, or better yet, stretch the interpretation of the statute to cover the conduct and avoid creating the loophole (and the need for subsequent legislation to fill it) in the first place.

Unlike the growth of civil penalties, however, the intellectual debate about the growth of the criminal law—and even, to some extent, the popular version of that debate—has been less dominated by economic or utilitarian analysis. The tone of that debate has been, in large part, moral and retributionist.

The expansion of criminal remedies for white collar crime, remember, has not been universally decried. Sutherland, who was not a lawyer, did not limit his pioneering definition of "white collar crime" to actual criminal offenses. Rather, he explicitly applied the term to corporate violations of civil and regulatory norms that did not result in specifically criminal sanctions, and his famous list of corporate criminals indiscriminately mixed those who had been convicted of formally "criminal" violations and those who had been subjected to civil judgments or administrative orders.[49]

Sutherland, and a long line of populist and leftist criminologists following his lead,[50] asked why corporate misconduct, which (according to various not especially reliable estimates) causes economic and physical harm comparable in the aggregate to blue-collar offenses, and often more severe in particular cases, should be sanctioned in ways that seemed less rigorous or painful than the punishments imposed for simpler violations committed by poorer, less influen-

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49. SUTHERLAND, WHITE COLLAR CRIME, *supra* note 6, at 20-24, 29-55.

50. *See, e.g.*, JAMES W. COLEMAN, THE CRIMINAL ELITE: THE SOCIOLOGY OF WHITE COLLAR CRIME (1989); BARRY KRISBERG, CRIME AND PRIVILEGE: TOWARD A NEW CRIMINOLOGY (1975).

tial offenders. This question has echoed through legislative debates over the proper treatment of business and corporate offenders. If a corporate executive authorizes the illegal discharge of pollutants into the environment, is not she imposing or risking physical harm to her neighbor every bit as much as the brawler who punches him (and perhaps risking more serious harm to larger numbers of people)? If so, why should one go to jail in handcuffs for the crime of assault and the other (merely?) pay a fine after an administrative hearing?

The consequentialist analyst, of course, has a fairly straightforward answer. If the penalties for environmental offenses are too light, that can be remedied by increasing the applicable fines, or by scaling fines to available resources rather than setting them in absolute numbers. But the civil proceeding may be (at least in theory) far more swift and certain than the vagaries of criminal law, and the penalty imposed may in fact be more drastic, in hard economic terms. The loss of a license to do business, or debarment from employment in a particular industry, can impose an economic catastrophe far beyond the tangible costs of a short jail sentence, as can significant fines—especially if they are adjusted according to the wealth of the offender. Even accepting the factual premise of the populist critic—that the environmental offender has imposed more harm than the barroom bully—the defender of civil monetary sanctions may well argue that the white collar "criminal" can be more effectively punished without the use of the criminal process, while saving society the extravagant costs of maintaining a prisoner. If the point of punishment is the appropriate adjustment of incentives, a financial exaction may be sufficient to deter the environmental offender by reducing the incentive to increase profits by cutting corners on sage waste disposal. If a more physical punishment is necessary to counter the largely expressive benefits of assault (or to keep the incorrigibly thuggish isolated from the rest of us), so be it.

Unsurprisingly, this answer does not satisfy the populist. Part of the dissatisfaction stems from the suspicion that the theoretical response is not matched by the pragmatic reality. People fear that the fines are simply *not* high enough to vindicate the theoretical conditions supposed by the economist, or that powerful executives will escape punishment by dominating specialized regulatory agencies, or by retaining high-priced lawyers to frustrate low-visibility administrative proceedings. (The latter phenomenon is of course unknown to criminal proceedings, or perhaps excused in that setting by the public entertainment value of theatrical criminal trials.) But surely a large part of the populist's reluctance stems instead from the belief that defining conduct as criminal serves a distinct purpose that cannot be captured by a "mere" civil proceeding.

The special moral foundations of the criminal law are invoked by critics of the "indiscriminate" expansion of criminal sanctions as well as by supporters of aggressive criminal prosecution of corporate offenders. Conceding, for the most part, the populist's case for class equity, they caution that the principle of justice that requires treating like cases alike equally requires treating different cases differently. Other things being equal, the imposition of the same or greater harm may well call for the imposition of the same or greater punish-

ment. But degrees of culpability may well mean that other things are not equal. An environmental "assault" on one's neighbor may cause precisely the same physical injury as a direct physical blow. If the release of toxins is unintentional, however, is it not more properly analogized to, say, an automobile accident causing the same harm, than to an intentional attack? Is the element of intent satisfied if the polluter intentionally did something that violates an administrative regulation? Perhaps—but perhaps only if the polluter knew of the rule, and, even then, perhaps only where the purpose and significance of the rule are fairly evident, and the harmful consequences that can result from its violation reasonably foreseeable.

These questions do not matter to the traditional civil goal of determining who should bear the costs of the injuries created by pollution. They may not matter either if we are asking about deterrence—achieving an optimally low level of misbehavior. In either case, we may well believe that financial exactions against the polluter should not depend on findings about intentionality. In some circumstances, strict liability rules may well be the best devices to achieve the appropriate level of pollution. The argument that *mens rea* matters to the criminal law depends on invocation of something special about the criminal law.

Professor Coffee has suggested that the distinction between the criminal and the civil can be found in a distinction between sanctions that seek to "price" and those that seek to "prohibit" the disfavored behavior.[51] Surely he is onto something important. In Coffee's terms,

> [t]he legal system sometimes attempts not simply to force actors to internalize the social costs of their activities, but to deny any gain to the defendant from the activity. In such cases, the optimal level of the activity is judged to be zero because the activity is deemed to lack social utility in any form (even though it may produce utility for the actor). For example, the civil law only taxes most industrial polluters because it wants them to reduce their level of pollution—not to cease production altogether. In contrast, the criminal law typically wants to bar some activities entirely, for example, theft, rape, murder—and some forms of environmental pollution. This approach (which some call "total deterrence") sees the victim as having a moral right to be free of the defendant's conduct, regardless of its profitability or its greater utility to the defendant or society.[52]

I would suggest, however, that it is the last sentence of this paragraph that is ultimately doing the work. While the distinction between "priced" and "prohibited" conduct can be stated in economic terms, those terms neither quite capture the distinction, nor provide an intelligible reason why the distinction is being made. First of all, if we are thinking only in economic terms, it is by no means clear that we do in fact distinguish quite so sharply between pricing and prohibition. Take, for example, the distinction between faulty aircraft maintenance and terrorism. There is a superficial attraction to the idea that we want to "prohibit" terrorists from blowing up airplanes, while we are willing to "price" proper maintenance, by providing damage remedies or even civil ad-

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51. *See* Coffee, *Paradigms Lost*, *supra* note 35, at 1881-1886; *see generally*, Coffee, *supra* note 3.
52. Coffee, *Paradigms Lost*, *supra* note 35, at 1884.

ministrative fines, to encourage appropriate levels of care by airlines. And that appropriate level of care must be something short of a guarantee of absolute safety, since such a guarantee cannot be obtained without prohibitive costs, or causing the airlines "to cease [flying] altogether."

But this is not quite right. In economic terms, there is as surely an economically efficient level of terrorism as there is an efficient level of maintenance. Of course, we would like it if the level of terrorist activity were reduced to zero, but we would be equally happy about totally eliminating the risk of air disasters caused by maintenance errors. But just as we are ultimately willing to accept some number of accidental crashes because the cost of further reducing the risk outweighs the benefits, so we are unwilling to pay the price (in dollars for security devices, in inconvenience and loss of privacy for passengers, and in civil liberties for dissident groups that may include terrorists among their members) to completely eliminate the risk of terrorism.[53] The distinction between "pricing" and "prohibiting," then, is not a distinction between a limited disincentive designed to produce an optimal level of conduct and a radically higher penalty designed to reduce that conduct to zero; from an economic standpoint, the distinction seems one of degree only, recognizing that in some circumstances the optimal level of the behavior is very low, and the price needed to achieve that level may be very high.

Second, the economic language obscures the moral point, comparing apples with oranges in a way that smuggles moral distinctions into what appears to be a purely economic discussion. When we talk about such "priced" wrongs as faulty maintenance (or in Professor Coffee's example, pollution), we tend to frame the described conduct broadly, to include not merely knowingly destructive acts or inefficiently negligent errors (deliberate imposition of harm on the neighbors to avoid required anti-pollution expense, inexcusably sloppy maintenance standards), but an entire category of economically productive activity (industrial production, flying). Unsurprisingly, we are then set up to decide that the benefits of the broad class of activity justify certain losses, so long as the costs of such losses are properly internalized by those benefiting from the activity—in short, if the inevitable losses are properly "priced." When we consider the terrorist example, however, we focus not on the transportation industry as a whole, or on the social benefits sought by the movements of which the terrorists form a fringe, but on a narrower class of activity, preselected on moral grounds. We then reach the unsurprising conclusion that *that* activity is to be prohibited rather than priced. But one could equally well argue that certain narrowly defined varieties of poor maintenance (permitting drunken mechanics to repair planes, falsifying inspection reports) are totally without social utility, and accordingly should be "prohibited," while arguing that risks of ter-

53. Judge Easterbrook's dictum that "the optimal amount of fraud is zero," is wrong, at least if optimal is taken in the usual economic sense. Ackerman v. Schwartz, 947 F.2d 841, 847 (7th Cir. 1991) (cited in Coffee, *supra* note 33, at 1885). As Becker long ago showed, it is perfectly rational to talk about optimal levels of crime in society. *See* Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968).

rorism are to be "priced" to society as a whole by taxing passengers who benefit from unencumbered travel and enhanced civil liberties to compensate the victims of the terrorist acts that inevitably result from our preference for convenient transportation, free speech, and privacy.

In short, the distinction between prohibition and pricing is, as Professor Coffee recognizes, ultimately a moral rather than economic distinction, made for moral rather than economic reasons. To "prohibit" rather than to "price" is not simply a distinction of degree, either of the price or of the level of deterrence being sought. To treat it as such is simultaneously to undervalue the moral significance of prohibition and to overstate the actual utilitarian goal being sought. On the one hand, if we treat criminal prohibition simply as "an abrupt, discontinuous increase in penalty levels,"[54] we are stripping the term of moral content, and eliminating any real conceptual distinction from price; the price is simply set at an extremely high level. On the other hand, the rhetorical thrust of the call for "total deterrence," like the political rhetoric of "wars" on crime, dramatically overstates the realistic utilitarian goals of deterrent strategies. In no realistic, economic sense are we trying to eliminate all prohibited acts, any more than we are trying to eliminate all negligent harm. If "negligence, like death and taxes, is inevitable,"[55] it is equally true that crime, like the poor, will always be with us.

"Prohibition" is a *moral* term, which refers more to the moral stance we take with respect to the activity than to the degree to which we penalize it or the practical importance of encouraging compliance. The violation of technical administrative rules may carry a heavier economic price than many activities that the criminal law clearly prohibits; society might prefer to tolerate higher levels of shoplifting (which is "prohibited") than of sloppy accounting practices by public corporations (which may be "priced"). The question, rather, is what we think of the person who deliberately chooses to arrogate to himself the benefits of the violation while being willing to pay the price. In the case of the true "price," we do not condemn the person who chooses to pay it and proceed, any more than we condemn the person who elects to avoid the price and forgo the conduct. In the case of the true "prohibition," we disapprove of the person who violates the rule, even if he is prepared to pay. The person who says, "a few days in jail is worth it to have finally taught that guy a lesson" is not simply engaging in "efficient breach" of the rules on assault. Rather, we regard such a person as preeminently a proper subject of criminal punishment.

54. Coffee, *supra* note 35, at 1885.
55. Coffee, *supra* note 3, at 220.

III

THE ROLE OF MORALITY IN THE CRIMINALIZATION OF CORPORATE MISCONDUCT

A. The Moral Bases of the Criminal Law

Identifying the special purpose that distinguishes criminal law from its various civil and administrative analogues as a moral one is hardly original. It is not even—at least outside the confines of a conference sponsored by an institute for law and *economic* policy—unfashionable. It is simply a reassertion of a traditional viewpoint, against the ever-present tendency of practical politicians to seek utilitarian goals, and the occasional tendency of certain schools of philosophy or policy analysis to elevate those goals to primacy as a matter of principle.

There is no question that criminal punishment is intended, in part, to serve the utilitarian purpose of reducing the amount of undesirable conduct, both by incapacitating offenders and by deterring others from further violations. But these purposes do not distinguish the criminal law from other forms of regulation. Licensing laws, for example, classically a prime example of the civil, regulatory, remedial regime, aim to "incapacitate" incompetent or untrustworthy persons from future employment in trades or professions for which they are unfit; barring corrupt or inadequate suppliers from government contracts prevents them from harming the public fisc; firing or impeaching guilty public officials incapacitates them from repeating their offenses.

More broadly, deterrence is a function of any system of sanctions. Raising the costs of undesirable conduct is no more distinctively an attribute of the criminal law than is subsidizing conduct we want to encourage. The law is filled with all sorts of incentives and disincentives to engage in conduct that we have decided to encourage or discourage, from cigarette taxes to reductions in welfare payments for those who fail to seek work to penalties for untimely performance of contracts. All such efforts aim to shape behavior by appealing to the calculating qualities of the persons subject to them, inducing them to perform or refrain from performing various actions. The penalties of the criminal law are one part of civil society's enormous apparatus of deterrence and encouragement, and those penalties are periodically adjusted when there is some feeling that the law needs to be made more effective. As discussed above, although criminal sanctions tend to be more severe, and thus to provide a more significant deterrent than civil sanctions, this is not always the case, and there are many situations in which various civil or administrative remedies may provide a more significant deterrent than criminal punishments even in absolute terms and certainly when discounted by the likelihood of application.

It is well known, however, that these utilitarian concerns are not the sole determinant of criminal punishments. As H.L.A. Hart reminded us, even those who reject retribution as a sufficient reason for punishment (as supported, for example by Kant or by some biblical texts) accept retributionist arguments as a

limitation on punishment.[56] Most contemporary secular theories of punishment, that is, would decline to impose punishment where there is no practical benefit to society to be gained by it; on the other hand, such theories also condemn punishment, even if it would produce a utilitarian benefit, where the recipient does not morally deserve punishment. Retributionist limitations are relevant to criminal punishment (as they are not to "pricing" sanctions), because criminal punishment is *about* blame. Punishing the inadvertent, nonnegligent polluter for deterrent or other utilitarian reasons raises the same kinds of questions as punishing the innocent children of criminals, questions that are not raised when the penalty attaching to such emissions is expressly denominated and treated as a noncriminal, regulatory cost of doing business.[57]

I would question, moreover, whether the word "deterrence," with its connotations of cost/benefit calculation, best captures even the distinctive contribution of criminal punishment toward reducing the incidence of behaviors subject to criminal punishment. I do not doubt that human actors often expressly, and even more often implicitly, calculate the costs and benefits of their actions. And it is reasonable to think that in the context of white collar or corporate misbehavior, such calculation is more common than it may be in other areas subject to the criminal law. After all, such crime is by definition carried out in the economic arena, where the pursuit of financial profit and the calculation of the costs and risks of choices is characteristic. Mail fraud, unlike murder, is not commonly a crime of blinding passion.

It is questionable, however, whether existing criminal sanctions actually constitute a rational deterrent to most forms of corporate misbehavior. The financial stakes in many business transactions are extremely high, and the costs of failure may loom large for managers. Perhaps more importantly, for those tempted to violate regulations, the benefits of the violation and the costs of playing by the rules may loom as immediate and all but inevitable. Even assuming that the costs of criminal indictment (let alone of eventual conviction and punishment) are assigned a dramatically high negative value, the knowledgeable rational calculator would have to discount those costs radically by their improbability. Few criminals expect to be caught, but in the corporate context, the expectation of successful evasion may be not merely poor calculation stemming from youthful bravado, but a realistic assessment of the probabilities. Unlike someone contemplating a career of burglary or drug-dealing, who ought rationally to assume that even if he escapes detection dozens or hundreds of times, the odds favor eventual imprisonment, many corporate wrongdoers may be contemplating a one-time violation, that, in light of the meager resources devoted to white collar prosecution, will almost certainly not lead to criminal punishment. To the extent that the odds favor detection, the

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56. *See* H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 8-13 (1968).

57. Of course, to note that strict liability offenses *raise* the same kinds of questions as other forms of punishment without culpability is not to *answer* those questions, or to imply that the questions must be answered in the same way in all cases.

likelihood of "natural" punishment via the marketplace may itself be sufficient to deter risktaking. There must be many instances in which penalties consistent with the other goals of punishment will be inadequate to deter a rational corporate executive from violating the law. We know too little about the actual mental processes of those who commit (and, more importantly, of those who day after day fail to commit) criminal acts, in the corporate setting or in the street. What weight do they assign to different costs and benefits, how realistically do they assess the risks of detection and punishment? From either an empirical or a theoretical standpoint, however, there is little reason to assume that the material costs of criminal punishment for corporate offenses do or should play a significant role in deterring such misconduct.

What society wants from its members, in any case, is not an intelligent calculation of the costs and benefits of abiding by its basic norms, but more or less unthinking obedience to them. To the extent people are specifically comparing the costs and benefits of breaking criminal laws, the battle is already lost; many of them must conclude, in particular situations, that the calculus favors lawbreaking. "Total deterrence" is a chimera, given the limited resources we are willing to devote to law enforcement, and any approach even to an "acceptable" level of crime probably has to maximize spurs to compliance that do not depend on calculation by potential criminals. For society to function, most people have to obey the law for reasons of conscience and conviction, and not out of fear of punishment.

Criminal law, and criminal punishment, play a significant role in bolstering these moral incentives, through the reinforcement of society's moral standards and the imposition of stigma on those who violate them. Part of this role is intertwined with simple deterrence; the stigmatizing effect of criminal punishment is part of the penalty that attaches, and can be included along with the costs of fines and lost liberty in a cost/benefit calculation. But to a large extent these stigmatic costs transcend the most simplistic versions of deterrence. To the extent people conceive of themselves as having a moral identity as a good or law-abiding person, their habit of obedience to social norms will be strong. The public punishment of those who violate those norms enables the law-abiding to define themselves as such in contrast to those who are not, and, not incidentally, reinforces the view that those who comply with the law are not saps or dupes, but the righteous and respected majority.[58] The message of punishment, it seems to me, is addressed less to the Holmsian "bad man" calculating the angles,[59] but to the good citizen, inclined by education and conscience to

58. This way of thinking about the function of criminal sanction in maintaining social solidarity among the law-abiding has its roots in the theories of Emile Durkheim. *See generally* EMILE DURKHEIM, THE RULES OF SOCIOLOGICAL METHOD (1893); EMILE DURKHEIM, THE DIVISION OF LABOR IN SOCIETY (1893).

59. Holmes' bad man "cares only for the material consequences which . . . knowledge [of the law] enables him to predict," while the "good [man] finds his reasons for conduct, whether inside the law or outside of it, in the vague sanctions of conscience." Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897).

abide by the basic norms of the culture, but in need of occasional reminders that society at large continues to abide by them as well, providing respect for the good actors and serious shame for the bad. Not every instance of crime needs to meet its punishment for this function to operate; where other institutions of moral education are operative, there almost certainly does not need to be enough punishment to make compliance the inevitable rational choice of the self-interested. But there needs to be a sufficient level of punishment to ensure what we rightly call "respect" for law (and self-respect for the law-abiding).

Dan Kahan is only the most recent scholar to point to the stigmatic effects of criminal punishment as constituting its defining and unique character. He is part of a long and well-respected intellectual tradition and, I am confident, one that represents a dominant strand in our culture. Professor Kahan has argued interestingly that we could more effectively capitalize on the stigmatic value of punishment by making more frequent and more creative use of alternative, shaming penalties in the criminal law.[60] I have my doubts. For better or for worse, a culture in which talk-show exposure of one's most embarrassing proclivities constitutes a popular entertainment is probably not one in which standing in the pillory in the public square is likely either to be an effective deterrent or to be perceived as a serious mark of society's fundamental disapproval.[61] But there remains a considerable stigma attached to the criminal conviction itself and, sadly, confinement to our over-crowded, brutalizing, and economically inefficient prison system even for a brief period carries a dramatic moral message in most quarters of society (arguably, especially in the middle- and upperclass environments in which most corporate and business offenders are found). Whatever the economic analysis of the pragmatic costs and benefits of the criminal justice system and of our over-reliance on imprisonment as a sanction, we are unlikely to find alternative criminal sanctions, still less civil alternatives to criminal stigmatization, that carry the same moral message as imprisonment.

But if the dominant message of the criminal law is a moral one, the criminal law must remain a moral enterprise. It is precisely the powerful stigmatizing effect that should make us wary of overcriminalization. I have nothing to add to the conventional wisdom, but true wisdom nonetheless, of the classic expositors of this wariness.[62] Both in justice to those so labeled, and to preserve the always-threatened moral capital of the criminal law from dilution, conviction of crime must ordinarily be reserved for those who violate deeply held and broadly agreed social norms.

Occasionally, of course, if that capital is well preserved, it can be well and judiciously spent; sometimes an emerging but not-yet-complete social consen-

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60. *See generally* Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591 (1996).

61. Even if such explicitly shaming punishments might be effective, there are other reasons why we might hesitate to adopt them. *See, e.g.*, Steiker, *supra* note 9, at 796 n.120.

62. *See generally* PACKER, *supra* note 8; Kadish, *supra* note 32.

sus on a moral norm can be validated and advanced by enshrinement in the criminal law. We do not have to wait until *everyone* is persuaded that some environmental offenses are as harmful as more conventional crimes before tapping the moral teaching authority of the criminal law by imposing criminal sanctions on them; the definition of conduct as criminal can serve to advance as well as to document a social consensus. But a slim majority should be slow to write deeply controversial moral views into criminal law over the strong objections of a significant minority—that is the story of Prohibition, and it is a recipe for a decline in the stigma of criminal conviction that is the vital strength of the criminal law. Neither should we attach the "criminal" label to conduct that is merely a technical violation of administrative "rules of the road." Particularly in white collar regulatory contexts, where the moral and practical importance of violations will not always be apparent to the ordinary citizen, routine criminal punishment of trivial offenses may obscure the moral significance of well-deserved condemnation of serious offenders; the ability of the market manipulator to brush off a conviction as a "spot of trouble with the SEC" is enhanced if criminal sanctions are frequently imposed on violations that really *ought* to be brushed off as insignificant to the offender's moral status in the community.

Equally importantly, the moral nature of the criminal law should not be undercut by permitting the criminal punishment of those who cannot fairly be blamed for their actions. This is the point of Professor Kadish's classic questioning of strict liability statutes.[63] The moral message of criminal conviction is that the defendant did something deeply wrong. This message is crucially compromised if the law permits the conviction of persons whose conduct was *not* deeply wrong, because they could not really have avoided the harmful result due to excusable ignorance of the relevant facts or lack of control over the circumstances. Particular instances of unfair punishment or strict liability do not necessarily damage the social effect of the criminal law at large. Outside the studies of moral philosophers and criminal law scholars, in fact, the practical political effect of the application of strict liability may be to reinforce popular satisfaction with the law—where serious harm has been done, the public may not stop to consider the subtleties of the morality of punishment. Over the long haul, however, detaching the label "criminal" from the connotation of moral blame for deeply wrongful conduct, applied after a morally serious inquiry, will inevitably lessen the potential of the criminal law to work its distinctive role.

B. Retaining a Moral Grounding for the Punishment of Corporate Crimes

Seen from this perspective, the ready availability of civil or administrative sanctions may present a somewhat different range of choices than would appear desirable from the purely economic standpoint. Advocates of a moral approach to criminal law and deterrent theorists can find common ground in rec-

63. Sanford Kadish, *The Decline of Innocence*, 26 CAMBRIDGE L.J. 273 (1968).

ommending the expanded use of civil remedies in place of criminal ones, where the moral grounding of the criminal law is lacking. If all we are really interested in is providing counter-incentives to corporate actors who might otherwise be tempted to cut corners or externalize costs, the state does not have to brand those actors with the stigmata of criminal conviction or undertake the procedural burdens of the criminal justice system in order to provide those incentives. If a finding of criminality is necessary in order to impose a fine, then we may be left with the unpalatable choice of over-using the criminal law or providing inadequate sanctions for regulatory offenses. Diverting into civil processes cases in which our goal is the adequate "pricing" of corporate behavior should be welcomed by those who respect the moral force of the criminal law and fear overcriminalization, as well as by those who see the criminal/civil distinction as mere verbiage and fear the inefficiency of criminal procedure. If, however, criminal punishment is seen as a special moral enclave, and not simply as one end of a continuum of available incentives and sanctions for regulating behavior, some of the other recommendations of the civil sanctions advocates seem less desirable.

1. *The Moral/Stigmatic Perspective.* If there is a special moral purpose underlying punishment, the argument for wholesale abandonment of corporate criminal enforcement in favor of civil sanctions is much less attractive. We may want to shift some of the burden of white collar enforcement out of the criminal process, in order to preserve careful limits on the criminal sanction, and preserve its moral message. But this does not imply that the criminal law has no role to play in business or corporate contexts as such. To the contrary, even when the need for incarceration may be questionable on incapacitative or rehabilitationist grounds, the stigmatizing effect of the criminal law may well justify criminal punishment, and even imprisonment, of many white collar offenders. Where the moral requisites of the criminal law are met, in fact, the special moral concerns of the criminal law will support the populist call for treating white- and blue-collar offenders in a sufficiently similar fashion that reasonable people will regard the punishments as equitable.

Many corporate crimes fit comfortably within traditional criminal law categories of intentional harm to persons or property. Whether prosecuted under traditional names like homicide or larceny, or under specific rubrics (securities fraud, environmental crime) that recognize the unique behavioral configurations that may not easily match behavior patterns commonly associated with the traditional terms, such acts are easy candidates for criminal punishment. Indeed, in such cases the populist critic's demand for punishment commensurate with the penalties levied on the more traditional variants of the crime have a powerful moral force.

Beyond such analogues to or instances of traditional crime, white collar offenses are appropriate for criminal punishment where the moral wrong in the act can be made clear to the general public. Even pure regulatory offenses often involve deception and covert activity (document destruction, false state-

ments to regulatory agencies) of a sort that partake of paradigmatic notions of "manifest criminality."[64] The harms or risks caused by violations of regulations may be such that the public will understand the moral wrong involved, and even where the rule itself might seem technical or arcane, the intentional violation of known rules conveys a disregard of the rule of law and of the interests of others that carries a moral meaning.

The punishment of corporations themselves poses special problems for a theory of punishment based on morality and stigma. To the deterrence theorist who sees only differences of degree between civil and criminal punishment, whether to punish corporations is an economic question about the efficiency of various sanctions: Are fines (civil or criminal) that fall ultimately on the shareholders a better or worse way of controlling the delicts of corporate managers than individual penalties on those managers themselves? If such corporate fines do provide a useful alternative or supplement to individual penalties, what are the costs and benefits of invoking criminal procedure in at least some cases? Assuming that some corporate sanctions were thought useful, the argument for channeling such sanctions into civil or administrative procedures are likely to be quite strong. And, surely, if corporate criminal penalties are imposed, their effect on the corporation's future behavior is likely to be calculated in purely economic terms: From the standpoint of a corporation, the difference between a criminal fine and a civil fine of the same amount can easily be translated into the dollar value of any additional public relations harm imposed by the "criminal" label.

The moral/stigmatic perspective, however, suggests another take on the problem. At first blush, it may seem silly—a kind of category mistake—to speak of judging the "morality" of an artificial legal entity. And I would certainly concede that a corporation's "moral culpability" in a particular matter must be a kind of metaphor, or perhaps an extension of the moral culpability of certain of its responsible human agents. But I do not think it is silly, or even metaphorical, to think of applying stigmatic sanctions to corporate entities, and to speak meaningfully of corporations "deserving" punishment. The corporate form is a powerful tool of business organization, capable of diffusing individual responsibility and accountability for action. The victims of corporate misconduct may reasonably feel that they have been injured not (or at least, not only) by individual human actors, but by largely unaccountable anonymous conglomerate institutions, in which individual actors were driven by forces or incentives difficult to attribute to any one person. In other cases, however, it may make perfect sense for a victim to feel that she was injured not by "the corporation" but by the malevolent or careless actions of a particular agent of the corporation acting largely on his own. Given the power of corporations, their reification as legal "persons" and (perhaps even more important) the desire of at least some large public companies to present themselves as social and economic personalities, the same concerns about fairness and public respect for law that dic-

64. *See* GEORGE P. FLETCHER, RETHINKING CRIMINAL LAW 141-46 (1978).

tate criminal punishment of individual white collar criminals argue against letting corporations escape the moral accounting that comes with a criminal prosecution, especially (though not exclusively) when the corporate form makes it difficult to establish culpability on the part of any particular individual.[65]

Still, a pragmatic understanding of the differences between corporations and individuals suggests that corporate criminal sanctions will not often be very valuable. Small and closely-held corporations generally have little identity apart from their owners and managers. The diffusion of individual responsibility that may inhibit individual prosecution in large bureaucracies is unlikely to create problems in this context, and the corporate entity itself is unlikely to be perceived by the public as having any separate personality. Moreover, little effective stigma can be imposed on a closely-held entity: Small corporations that are convicted can simply disappear, to be replaced by new ones.

Even large corporations will generally be less susceptible to stigma than individuals. Human beings, even in our mobile and anonymous society, carry reputations with them. Members of the middle and upper classes in particular, who are the primary agents of corporate misconduct, will typically have a large stake in respectability, and may be especially susceptible to formal findings of significant immoral conduct. But the size, immortality, and mutability of corporations render corporate reputations typically less vulnerable to stigmatic sanctions than those of finite mortal beings. Individual reputations may have been earned over a lifetime of achievement, and may have their primary value within a limited geographic, social, or business community; their destruction may leave a person with only limited opportunities either to earn redemption in the same community, or to build an equivalent position afresh in a new one. Moreover, because a large corporation can have a vastly broader range of activities than any single individual, its capacity to submerge reputational damage from even extremely harmful acts in a larger context of favorable associations can make the stigma of a conviction almost irrelevant. To his family and friends, perhaps, the felonious executive's life is more than just the sum of a few counts of mail fraud, but to the general public, including prospective employers, the stigma of conviction may (even to an unfair degree) overwhelm good characteristics. But everyone understands that only some constituents of IBM or the Ford Motor Company were involved in any criminal activity that may be charged to the corporation, and that the broader concerns of the company and its many employees, shareholders and (replacement) officers—from arts grants to the distribution of desirable consumer products—are not necessarily tainted by criminal acts. And if all else fails, it is easier for a corporation than for one of its middle managers to "die" and be "reborn" under a new iden-

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65. Although I am not here concerned to work out a specific test for determining corporate liability, it seems to me quite sensible to distinguish a kind of "corporate *mens rea*" that turns on whether an action is properly attributed to upper management or corporate policy or institutional culture or incentive structures rather than to individual motivations.

tity. Indeed, in a world of rapid flux in the merger markets, even large corporations seem to stage such deaths and rebirths regularly, spending millions to familiarize consumers with a new identity even when the old one was perfectly serviceable.

Occasionally, then, considerations of equity or accountability may require the imposition of corporate criminal liability to insure a sufficiently weighty response to a significant violation of public norms. This will usually be the case only when no individual can be proven culpable, or where the individuals who can be punished are insufficiently important to bear the weight of stigma appropriately attaching to the harmfulness or offensiveness of the wrong. But where sufficiently responsible individual actors can be held individually accountable, separate corporate punishment is likely to be of any importance only where the corporation itself is sufficiently large, stable, and publicly identifiable that it can meaningfully be said to be affected by blame.

2. *The Remedial Limits of Monetary Compensation.* The effective availability of monetary compensation for victims of corporate misconduct is a much less relevant consideration from the standpoint of a system of blame and stigma than it is from a purely utilitarian perspective. Like deterrence, compensation can be effected through civil systems (indeed, unlike deterrence, compensation has traditionally been seen as the paradigmatic goal of the civil forms of action). To the extent criminal sanctions are simply one more way of forcing actors to internalize the costs of their actions, applied only when compensatory regimes are inadequate, the strengthening of civil justice modalities, or their augmentation by additional punitive damages, will make resort to criminal justice less necessary. And, of course, in general, corporate misconduct is much more likely to yield financially compensable harms, and financially responsible perpetrators. Hence, from this perspective, expanded use of civil sanctions will be more attractive in the corporate case than in the case of "ordinary" blue-collar crimes against person and property.

Civil sanctions, however, do not serve the unique functions of the criminal process in educating the public about basic standards of behavior, stigmatizing violators, and reinforcing the security, sense of justice, and automatic compliance of the law-abiding nearly as powerfully as criminal punishment. Because compensation does not exhaust the purposes of criminal punishment, the availability of compensation outside the criminal justice system does not obviate the need for criminal prosecution. Where criteria for criminal punishment derived from these functions are met, the ready availability of adequate financial compensation for victims through a civil suit is not a good reason to forgo criminal charges.

By the same token, achieving compensation for victims is not in itself a very good reason to seek a criminal sanction. The increased emphasis on restitution as a component of sentencing risks making the criminal charge appear in some cases as nothing more than an efficient device for collecting and distributing restitution to victims. Where a criminal charge is otherwise appropriate, there

is nothing wrong with using the sentencing process to provide restitution, eliminating the need for duplicative civil lawsuits by victims. But if criminal charges are seen simply as one way of achieving financial redress for the victims of corporate crimes, the unique moral meaning of the criminal law may become blurred.

This problem is perhaps most vivid when the compensation is being sought by the government itself as a victim of crime. The government's sovereign role as enforcer of fundamental norms is undermined if the government is seen to bring criminal charges for entrepreneurial reasons. In cases of procurement and program fraud, as in other cases, an award of restitution may be an appropriate component of a sentence. But the decision to institute a criminal charge must be insulated as much as possible from the considerations that drive the government as a private civil litigant. Criminal litigation must be more than a good way for the government to collect damages for breach of contract.

There is some ground for concern that revenue considerations may have an increasing influence on prosecutorial decisionmaking. Widespread complaints of abuse of the forfeiture remedy, for example, show the danger of viewing criminal and quasi-criminal punitive remedies as a source of income for the government. There is some ground for concern that the increased fines available under the corporate sentencing guidelines might be altering prosecutorial attitudes toward indicting corporations. Prosecutors once had little incentive to include the corporation in the indictment when managers were being charged with crime. Adding the corporate defendant simply put another lawyer (and perhaps one backed by greater financial resources) at the defense table; absent a good reason to indict the corporation (hopefully, one consonant with the principles discussed above), the case would typically proceed against the individual offenders. If a corporate indictment can provide a substantial cash return for the government, and if prosecutors are going to be judged, in part, on how much revenue they produce, an artificial incentive to expand corporate prosecution is created.

3. *Coordination of Administrative and Prosecutorial Expertise*. If criminal punishment is just an extension of administrative means of deterring corporate wrongdoing, it would seem to follow that the administrative agencies responsible for enforcing specialized regulations in the first instance should play a greater role in determining when criminal sanctions should be utilized. After all, the specialized administrators of the SEC or the EPA are best positioned to decide what kinds of violations are most important to their regulatory program, to determine the relative costs to society of noncompliance, and to adjust enforcement modalities to meet the goals they were set up to pursue. The environmental lawyers, scientists and economists at the EPA know better than criminal lawyers in the Justice Department how important it is to deter violations of each particular rule; generalist prosecutors are not especially well placed to assess the priority of clean air violations versus water pollution offenses, or to judge the environmental harm created by a

particular offense. If deciding whether to pursue a criminal remedy is more or less the same kind of decision as determining the level of a civil penalty, or how to regulate a particular kind of emission—in essence, a balancing of the incentives and costs to be imposed on business in order to protect the environment without overly inhibiting valuable economic activity—the power to institute criminal charges should lie primarily with the expert administrators who are assigned to make those judgments.

Of course, in areas of specialized regulatory enforcement, close coordination between criminal prosecutors and regulatory agencies is extremely important. The degree of harm created by a violation of law is an important component in any prosecutorial decision, and the degree of harm created by violations of technical or specialized regulations is not always immediately apparent to persons who lack expertise in the relevant administrative field. Moreover, it is clear that administrative agencies will inevitably play a major role in selecting cases for criminal prosecution. While prosecutors may make the final determination when to pursue charges or what dispositions to accept, the universe of cases in which they make those decisions is primarily controlled by the law enforcement and administrative agencies that refer cases for investigation and prosecution.

But if the criminal sanction has its own special quality, those who administer it have their own special expertise. The EPA or SEC lawyer may be better able to compare each case with other violations of securities or environmental laws, in terms of its importance to operating honest capital markets or protecting environmental quality, but the prosecutor is better equipped to compare the violation with other types of crime in terms of the moral blameworthiness of conduct, the degree of departure from general standards of citizenship, and the equity of imposing stigmatizing punishment. The prosecutor, thus, can be and should be the guardian and enforcer of the special position of the criminal law. This means that the prosecutor (and the courts of general criminal jurisdiction) must ultimately control the decision whether the misconduct of corporate executives is properly equated with the traditional common-law crimes of members of other social and economic classes.

IV

THE PROSECUTOR AS ADMINISTRATOR

A. The Erosion of Adversarialism

The expanded use of civil punitive sanctions is not the only reason why the discussions to which I alluded at the outset of this article—the exchanges between defense and government attorneys about the suitability of criminal punishment—were taking place in my office, rather than in a court or legislature. Another powerful trend in American criminal justice contributes to this result. This trend is to some extent one of procedural rather than substantive law, although it is in significant part a product of substantive criminal law develop-

ments, and it has significant implications for substantive criminal law. Our criminal justice system—particularly in white collar criminal cases, but also more broadly—has gradually transformed from an adversarial into an inquisitorial system, in which guilt and punishment are increasingly decided not in courts, but through a kind of administrative adjudication, in which prosecutors play the part of magistrates or administrators.

Put this way, the proposition offends the conventional wisdom. Conventionally, the Anglo-American system of criminal adjudication is understood as an adversarial system, and contrasted with the continental European inquisitorial system. American lawyers have tended to glorify our system, which is claimed to be more protective of liberty, more democratic, and less dominated by agents of the government establishment than the civil law tradition, thanks to the role of the lay jury, the formal equality between the representatives of the government and of the defendant, and the "neutrality" and independence of the judiciary. Increasingly, however, academic experts (and occasional public commentators influenced by them) tend to make the same sharp comparisons with a reverse twist, praising the inquisitorial system as more rational, more effective, and even more careful to avoid conviction of the innocent, thanks to the dominance of professional judges with a mandate for finding the truth, the reduced importance of manipulative defense counsel, and (particularly importantly) the absence of plea bargaining. But whether seen as the glory of our system or its shame, the adversarial nature of the process is its distinguishing characteristic.

In the adversarial system, as it is described in law school criminal procedure courses, high school civics texts, and Hollywood movies alike, the litigation is controlled by the parties—the state and the criminal defendant—who stand equal before a neutral court; a jury of lay citizens, rather than professionally trained judicial officers, determines whether guilt has been proved; the judge acts as relatively passive "umpire" who settles legal issues between the parties but does not actively seek to control the selection or presentation of those issues, or to guide the process to a factually accurate and legally just result; evidence is taken primarily orally, on the occasion of the formal trial, and neither the jury nor even (for the most part) the judge possesses a written file or dossier or other record of evidence gathered during the course of the government's investigation of the case.

Of course, modern procedure texts note that this model is not in fact a perfect description of what actually occurs in our criminal courts. It is acknowledged that the grand jury is largely the tool of the prosecutor; that guilty pleas, often the result of carefully negotiated plea bargains, dispose of far more cases than are tried; and that those bargains, sometimes in combination with sentencing guideline systems, often dictate the sentence to be imposed on the defendant. It is recognized, almost in an aside, that in cases disposed of without trial there is no jury at all, and no witnesses appear for cross-examination. Such factual information as the judge receives beyond the defendant's own acknowledgment of guilt—and there may be none—will likely be presented in written

summary rather than in oral form. And most importantly, the only real assessment by the institutions of justice of whether the accused is actually guilty of the offense charged is made by the police and prosecutor, not by the (absent) jury or by the judge (who simply accepts the voluntary and intelligent decision of the defendant to waive trial).

These inconvenient facts, however, are typically seen as distortions of or excrescences on the model of procedure that applies in principle, but that, sadly, is often departed from in practice. Plea bargaining and prosecutorial discretion may control the fates of most defendants, but these practices are rarely seen as a system in their own right. In the debates over the superiority or inferiority of the adversarial system one rarely sees an acknowledgment that for most defendants the primary adjudication they receive is, in fact, an administrative decision by a state functionary, the prosecutor, who operates essentially in an inquisitorial mode.

We know extremely little about the "criminal procedure" that actually applies in these administrative adjudications. Clearly, what occurs in court—the formal acceptance of the plea of guilty in a ceremony that focuses more on the intelligent and voluntary nature of the decision to plead than on whether the evidence in fact demonstrates the defendant's guilt—is not a genuine adjudication of guilt. And where the sentence is already largely determined either by the terms of the plea agreement or by sentencing guidelines driven by the offense of conviction (which is determined by the prosecutor) or by the facts underlying the offense (often bargained-over and usually largely controlled by the prosecutor in any case), even the degree of punishment to be imposed is more often the product of prosecutorial than of judicial decisions.

Society is plainly not relying on the judiciary to decide guilt in these cases. The substantive evaluation of the evidence and assessment of the defendant's responsibility is made not in court at all, but within the executive branch, in the office of the prosecutor. The brief formal procedure in court obscures what can be an elaborate and lengthy process of adjudication of the defendant's guilt. That process is invisible, and takes place in the prosecutor's offices. It is rarely governed by formal legal standards, other than the basic definitions of offenses, and the procedures by which it is governed are not usually written down anywhere. But that process is the actual adjudication process for criminal cases.

That process is primarily inquisitorial. Unlike the adversarial model's judge, who serves as a "neutral umpire" between contending parties, the prosecutor is tasked to determine the facts. The prosecutor is encouraged actively to pursue evidence—of innocence as well as of guilt—and is not limited to considering the defenses actually raised by the suspect. On the other hand, within the prosecutorial agency, the defendant does not even have a formal right to be heard or to produce evidence, is not entitled to hear the authorities' evidence before deciding how to proceed, and has no right to discovery of the evidence against him until and unless a case is brought to court. The defendant certainly does not stand as an equal to the government before a neutral arbiter, but

rather is the "subject" of an investigation being conducted by government officials, who are largely concerned with executing the government's policies and goals.

Sophisticated defense counsel, however, have long understood that this does not leave them without recourse. Although the prosecutor is not under any legal obligation to listen to a defense lawyer's protestations of innocence or arguments for leniency, it is almost always in the prosecutor's interest to do so. Prosecutors are reluctant to bring cases that they will lose, or that will be sharply criticized by judges or by the public as unfair or oppressive. Fair-minded prosecutors, moreover, take seriously their obligation to bring charges only when justified, and will typically be quite willing to listen to arguments that they are pursuing an inappropriate target. And for any prosecutor, there is at a minimum a tactical advantage in hearing in advance a defendant's likely defenses at trial. Thus, even in the absence of a formal right to be heard, prosecutors are generally prepared to grant such an opportunity. And once that hearing is had, the power of persuasion, in the hands of skilled and effective counsel, can be a power indeed.

In the kinds of cases with which we are concerned, defense counsel will often make extensive, formal arguments to the prosecutors about the appropriate ultimate disposition of the case. Such presentations typically include the proffer of factual information and evidentiary materials, as well as arguments concerning the merits of the case and factors relevant to prosecutorial discretion. Nor are these presentations limited to the prosecutor in charge of the matter. If the line prosecutor rejects the defense's contentions, counsel may seek "appellate review" by the prosecutor's supervisors, at ascending levels of prosecutorial bureaucracy, from unit chief to criminal division chief, to the U.S. Attorney or District Attorney, and in federal cases, even to the Department of Justice in Washington.[66]

It is easy to see in these proceedings an informal but nevertheless quite distinct system of administrative adjudication. Although both the defense lawyers and the prosecutorial bureaucracy may operate with one eye on the eventual litigation that may result at the end of the internal process—surely an influence not unknown in administrative agencies formally conceived as adjudicatory—it would be a mistake to analogize these decisions too closely to settlement discussions involving private parties. The prosecutors involved in these decisions typically see themselves as public officials making a decision that is in substantial part adjudicatory. That is, prosecutors undertake to determine, in response to the defendant's arguments, whether the evidence truly demonstrates guilt, and if so, what sentence is appropriately imposed. Moreover, the process used to make that decision involves an opportunity for the affected parties to argue, and even to present evidence, that they are not, or at least cannot be demon-

66. Thanks once again to the work of Kenneth Mann, this process is now well understood by academics as well as by practitioners. *See generally* KENNETH MANN, DEFENDING WHITE COLLAR CRIME (1985).

strated beyond a reasonable doubt to be, guilty of the offenses the prosecutor is contemplating.

I am not here primarily concerned with the procedural aspects of this system, and so will not address whether this system of adjudication meets minimal standards of due process, or whether the institution of procedural rules to govern these internal processes could improve its fairness.[67] I merely want to point out that in the vast majority of criminal cases, the prosecutor operates not simply as an adversarial litigant but as an adjudicator of guilt or innocence (and often also of the appropriate punishment). If this is the only meaningful adjudication many defendants receive, it is not necessarily a casual or unfair one. At least when the process operates at its best (it may not do so always, or even often—but the same can be said of jury trials), it cannot be dismissed as arbitrary. It is not, however, an adversarial or judicial system. It is an inquisitorial and administrative one, characterized by informality and *ad hoc* flexibility of procedure.

B. The Increase of Prosecutorial Power and its Effect on the Law of Business Crimes

What I am concerned with here is the complex reciprocal interaction between the substantive trends that blur the nature of criminal law, and the procedural tendency toward prosecutorial adjudication of criminal cases. On the one hand, the expansion and loosening of the categories of criminal law, particularly in the corporate context, play a significant role in enhancing prosecutorial power. Anyone alarmed by my description of our actual slide toward an administrative law model of criminal procedure may well find that checking the substantive trend is a necessary step in restoring a more adversarial model of procedure. On the other hand, just as a completely different procedural system has grown up in the shadow of our adversarial ideology, it may well be that a *de facto* system of substantive criminal law, about whose terms we also know very little, is developing in the shadow of our official criminal law doctrines.

The first point is more familiar. In a world in which a criminal conviction depends on proof beyond a reasonable doubt of very specific elements of carefully defined and limited criminal statutes, including subjective *mens rea* elements, and in which the sentence to be imposed is subject to the discretion of a judge, adversarial adjudication of criminal charges can be expected to be highly attractive to defendants who have the emotional and financial resources to take advantage of them. Plea bargaining will still occur, for a variety of reasons: The certainty of a negotiated settlement will still prove attractive to many defendants; the limited resources devoted to the judicial system will still make efficient case dispositions sufficiently attractive to prosecutors to generate some discount to defendants who waive trial; the ability of some defendants to avail themselves of expensive and unpredictable procedures will still create opportu-

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67. For a preliminary discussion of these issues, see Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117 (1998).

nities for attractive discounts from the expected outcome of a trial (just as the *in*ability of some defendants to bring sufficient resources to bear may leave them no alternative to compromising potentially valid defenses for less benefit than they might be worth). But for defendants with the resources to fight, a carefully limited substantive criminal law will often make trial a realistic alternative. Moreover, if resort to court is relatively easy, prosecutors engaged in plea negotiations will have to accept outcomes based on a realistic understanding of the likelihood of conviction in court, and sentences set within the parameters of what judges would impose. Under such circumstances, even negotiated dispositions will have to mimic fairly closely (subject to whatever discount defendants can obtain in exchange for the efficiency and certainty of a plea) the outcomes of those cases that are resolved in court.

Overbroad criminal statutes loosen these constraints on the system of negotiated pleas. To the extent that the legal landscape permits conviction in a wider variety of circumstances, or on a lesser showing, or with more drastic sentencing consequences than is just, resort to judicial resolution becomes a much less attractive option for defendants. If the defendant is guilty simply because a provable harm occurred, without inquiry into mental culpability, there will be many cases in which guilt under the legal standard is a forgone conclusion. If a corporation is criminally liable for the unauthorized acts of mid-level managers, the corporation will often not have a viable defense, despite legitimate questions about the justice of punishing it. If a defendant with a reasonable claim of innocence faces a radical disparity in expected punishment between the sentence mandated by the guidelines and that offered as part of a plea agreement, the risks of going to trial may be unacceptable.

Such defendants are increasingly relegated to making their most significant moral and factual arguments to prosecutors, as a matter of "policy" or "prosecutorial discretion," rather than making them to judges, as a matter of law, or to juries, as a matter of factual guilt or innocence. Where the outcomes that can be expected in court are more severe than even prosecutors think are just or necessary for the protection of the public, prosecutorial discretion stops being a matter of triage (deciding where compromise from their preferred outcomes is necessary to maximize limited resources), and becomes instead a matter of deciding what outcomes are morally appropriate in the prosecutors' own eyes. As relatively inflexible sentencing guidelines or statutory mandatory sentences replace judicial discretion, prosecutors can determine sentences by their charging decisions or by marshaling proof of guideline elements; their control over the sentence frees prosecutors engaged in negotiations from any need to mimic the outcomes that would be produced by the local judges. With the judges' discretion disabled, only the prosecutor can moderate the impact of the guidelines, and where the law requires judges and juries to convict regardless of the defendant's moral innocence, only the prosecutor can decide whether justice is served by invoking that law.

These factors have a special bite in the corporate context. It is largely in the context of administrative or regulatory offenses, for example, that *mens rea* has

been weakened as an element of criminal liability—the accused murderer still gets to claim it was an accident; the accused polluter may not. In this setting, the prosecutor gets to decide not only the factual question of whether the defendant intended to do harm, but also (subject only to concerns about possible jury nullification) whether and how much it matters if he did not. Similarly, if the mail fraud statute has become so broad that the courts will affirm a conviction for any conduct short of "the punctilio of an honor the most sensitive,"[68] the fraud defendant runs a desperate risk by going to trial. The standards applied by prosecutors in deciding whether to bring a case will surely be more restrictive than "we'll spend law enforcement resources on anyone who is less than punctilious," and so the prosecutor may become a better bet than an appellate court to limit the reach of the criminal law. The point is not an unfamiliar one; critics of "overcriminalization" have long pointed out that excessively broad criminal statutes increase the power of prosecutors.[69]

The conventional view, moreover, is that this is a bad thing, and that prosecutorial discretion is not an adequate substitute for statutes carefully drawn to prohibit only conduct that deserves criminal punishment. "Criminalize them all and let prosecutors sort them out" is not a particularly inspiring slogan for a penal code. I have no desire to defend such a penal code, or to take issue with the longstanding conventional liberal wisdom condemning criminal statutes that punish too broadly, and leave it to the executive branch to apply them only to people who would deserve punishment under a more narrowly drawn statute. But while we are waiting for legislatures to improve their work-product, it is perhaps worth thinking about how we survive in a world in which statutes routinely *are* expanded beyond their proper boundaries.

The answer, unsurprisingly, is that we must indeed rely on prosecutors to sort them out. But because we have limited ourselves, on the whole, to deploring the overbroad criminal law that leads to an excessive reliance on prosecutorial discretion, we have failed to study in any serious way how that discretion is exercised, or to provide prosecutors with guidance to exercise their judgment appropriately. Just as we are relatively blind to the actual operative rules of criminal procedure used to dispose of most of our criminal cases, we are almost completely ignorant of the operative rules of substantive criminal law that are being applied within that system.

If the term "plea bargaining" obscures an administrative system of factual adjudication by police and prosecutors, and hampers the development of rules to regulate that system, so the term "prosecutorial discretion" obscures the

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68. The phrase is Cardozo's famous description of the duties of a fiduciary, from *Meinhard* v. *Salmon*, 249 N.Y. 458 (1928). As Professor Coffee has pointed out, mail fraud cases that create criminal liability for breach of purported fiduciary duties risks turning criminal liability on the failure to meet, not the minimal norms of acceptable behavior in society, but the "evolutionary and aspirational" norms characteristic of such special relationships. Coffee, *supra* note 3, at 207.

69. *See, e.g.*, Abraham S. Goldstein, *Conspiracy to Defraud the United States*, 68 YALE L.J. 405 (1959); Phillip E. Johnson, *The Unnecessary Crime of Conspiracy*, 61 CAL. L. REV. 1137 (1973); Lynch, *supra* note 13, at 718-723.

possibility that systematic substantive rules are being applied by prosecutors, and hampers their development of such rules. As Ronald Dworkin explained, "discretion" can have many meanings.[70] But its usual connotations suggest to many ears arbitrariness or lack of standards. While prosecutorial discretion, like plea bargaining, is a widely-recognized phenomenon, for most observers, the lack of judicial review of prosecutorial decisions, and the resulting lack of articulable, enforceable standards for the exercise of discretion, makes prosecutorial decisionmaking appear a kind of black hole, from which emanate occasional exercises of mercy (this was a single slip by a young person of promise with an otherwise impeccable record; we will give him a break this time) or systematic resource-allocation judgments (we will give generous plea offers, or even refuse to prosecute, in marijuana possession cases, in order to free the resources necessary to take a hard line on cocaine or heroin sellers). The idea that prosecutors do, or should, apply a body of substantive criminal law rules to determine whether justice requires or permits punishment is not often encountered.

The evidence suggests, however, that, at least sometimes, prosecutors do apply such rules. The law may countenance imposition of criminal liability on a corporation based on the acts of relatively low-level corporate agents, and dismiss as irrelevant arguments that the agents' acts were not approved by high-level officers. If this is the legal standard, one would expect vast numbers of convictions of corporations; virtually every case in which a corporate executive is convicted for actions in the course of his employment should have the corporation as a co-defendant. Yet prosecutions of corporations are in fact rather infrequent. Every one of the thousands of "abusive" civil RICO filings that critics claim transform modest civil disputes into terrifying federal treble damage actions is alleging that the defendants committed a crime punishable by twenty years in prison, yet the culprits seem to escape criminal prosecution even when the courts uphold the theory of the civil complaints. Statutes may impose strict liability on violators of administrative regulations, but in every area of the law where this is so, the responsible administrative agency hums along, imposing sanctions, bringing suits, and enforcing its mandates in case after case, without prosecutors feeling obliged to follow up with criminal sanctions. There is some reason to believe, then, that prosecutors do not typically enforce the criminal law to the full limits of the doctrines that most concern critics.

In effect, as the overbreadth of the formal substantive criminal law drives an increase in prosecutorial power, the resulting growth of prosecutorial authority will tend to increase pressure on prosecutors to develop internal administrative practices and standards for the exercise of discretion that will become a separate *de facto* substantive criminal law. The problem is that this body of law is largely unwritten and may vary from district attorney to district attorney, or even from individual prosecutor to individual prosecutor.

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70. RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 31-34 (1977).

Determining what rules prosecutors do enforce and what standards they apply in making their decisions is difficult. Appellate opinions that affirm convictions on a theory of strict liability (for example, by approving jury instructions that did not include a *mens rea* element) often contain fact statements suggesting that a jury might well have found wrongful intent had it been asked; one might infer that the prosecutors who chose to bring the case did not believe that the defendants were not culpable. But this does not mean that the prosecutors selected the case for prosecution for this reason, or that they would not have brought a case where other factors (degree of harm, size of enterprise, extent of public outcry) were similar and evidence of mental culpability was lacking.

More importantly, appellate opinions or even trial records cannot serve as guides to actual practice, because they deal with the minority of cases that are litigated in court. How often do prosecutors demand guilty pleas to technical offenses from defendants who have no alternative under laws that punish the blameless? The limited public record available in cases of negotiated dispositions will rarely reveal the standard being applied by the prosecutor-as-adjudicator. Perhaps the prosecutors believed the defendant guilty of serious offenses that satisfy traditional standards of blame, but settled for a plea to a technical criminal violation as the procedural device for achieving the level of punishment thought appropriate by the authorities. Or perhaps the prosecutor simply enforced the technical rule because the defendant was guilty of that offense and the prosecutor believed that the law was just and should be enforced according to its terms. Or perhaps the prosecutor chose to utilize an overbroad statute for some discretionary reason extraneous to the facts of that particular violation—perhaps today's Al Capones are being sent away not for tax evasion, but for a high-guideline money laundering offense that is really just an automatic consequence of an aggressive use of the mail fraud statute on a dubious fiduciary duty theory, or for some strict liability regulatory offense that would not have been used against an ordinary business executive. We cannot easily know.

In my experience, the substantive standards applied by prosecutors in many cases parallel the canons of a more humane criminal law than appears in our statutes and appellate decisions. Moral blameworthiness, for example, tends to be important to prosecutors; "how could he know that the pills were mislabeled?" is an objection prosecutors tend to take seriously, if convinced of the factual predicate.[71] But the fact of the matter is that we just do not know, in any systematic way, what kinds of standards are being used by our administrative adjudicators. Moreover, because the role of the prosecutor in devising such standards is not fully recognized or legitimated, prosecutors themselves

71. The emphasis on moral blame may not always be favorable to defendants. If it discourages literal enforcement of strict liability statutes, it also tends to drive the expansion of mail fraud, as prosecutors elide the technicalities of traditional fraud law into a more general condemnation of behavior that is sleazy or self-interested.

may shy away from this understanding of what they are doing, or, worse, may ignore the function altogether, defining themselves simply as adversarial enforcers of the overbroad criminal law handed to them by the legislatures and the courts.

V

SOME TENTATIVE CONCLUSIONS

Determining an appropriate role for criminal punishment in a setting in which prosecution is only one of a variety of tools for governmental sanctioning of undesirable behavior is difficult without some agreement about the nature of the "criminal." The law increasingly makes available sanctions that look like punishment, but are denominated "civil" and are imposed by agencies other than the criminal courts. The criminal law, especially in white collar cases, creeps into situations that may once have seemed to call for civil remedies for tort or breach of contract. Even the distinctive forms of criminal procedure evolve, in the real world of plea bargaining and prosecutorial discretion, into a kind of administrative law, inquisitorial system. Is there any hope for regaining boundaries in such a system? Can we identify distinctive characteristics of criminal punishment?

I think that we can identify a distinctive role for criminal enforcement. As argued above, that role is less about manipulating the incentive structure for executives making explicit cost-benefit decisions (though to be sure, in a crude way, the force of the criminal law lies ultimately in the extremely negative consequences that attend on its violation, and the subject matter of the criminal law is a body of behaviors we would want to deter). There are many non-criminal sanctions and regulatory devices that the modern state can use to encourage desirable behavior and discourage its opposite. The criminal law, in contrast, is a blunt and archaic tool of regulation. But the power of the criminal law derives largely from its primitive and brutal character. The criminal law defines, or should define, the outer boundaries of the tolerable, and enforces those boundaries by declaring those who transgress them as outlaws.

In an ideal world, criminal law scholars have long argued, this function would determine the scope of criminal statutes and judicial doctrines, which would define as criminal only such conduct as justifies this level of societal condemnation. My own belief is that this position may be too rigid. In at least some circumstances, overbroad legislation coupled with discretionary administrative melioration of the law can produce significant social benefits not easy to achieve otherwise.[72] But I do not mean to defend that belief here, and I cer-

72. The conventional example would be statutes prohibiting various kinds of vice, in which society compromises between those who would write majority standards of, say, sexual morality or the consumption of intoxicants into the criminal law, and those who either dissent from the standard or object to its public enforcement, by adopting laws that honor the majority sentiment while encouraging police and prosecutors to ignore most violations; the resulting structure can bolster desirable standards of behavior while still creating generally understood *de facto* legal tolerance.

tainly do not argue that the existing situation regarding corporate misconduct models such circumstances. I am content to accept, for purposes of argument, that we would be better off it the law of white collar crime satisfied the traditional standards of criminal justice.

While we are waiting for Congress and the courts to listen to these suggestions, however, we might perhaps try to make better use of the prosecutorial discretion that (in the usual view) cannot be an adequate or just substitute for appropriate laws. An essential first step in this process is to recognize more fully not only the power that prosecutors exercise, but also the function that they serve as *de facto* judges of the facts and creators of the operational law in a wide range of (especially white collar) cases. To the extent that prosecutors are encouraged to think of themselves as serving primarily an adversarial function (albeit one tempered, in the conventional view, by higher standards of ethics, justice, and mercy), the self-conscious creation of quasi-legal principles of prosecution (even internal, individual standards, let alone any formalized or enforceable ones) is discouraged: If your job is to enforce the law as the legislature gives it to you, exercises of mercy or discretion will always have an episodic, infrequent, even slightly illicit character—for who is the prosecutor to decide that morally innocent actors who have harmed should not be punished, when the elected legislature has created strict liability crimes?

If, however, we recognize more overtly that our system in fact delegates a great deal of administrative authority to prosecutors to make substantive rules, just as it delegates to them the power of (at least initial) adjudication of the facts, we increase the likelihood that that power will be exercised responsibly. Moreover, to the extent that prosecutors are given to understand that the moral authority of the criminal law is one of the limited resources that they are responsible to allocate wisely, the development of moral standards for prosecution, in default of moral standards of criminal law-making, becomes not merely an ethical imperative but a practical part of the prosecutor's accepted function. Just as a prosecutor (or a police department) may decide that its limited personnel, money, or energy can best be concentrated on particularly harmful or frequent crimes, shifting resources from auto theft to narcotics enforcement to burglary investigations depending on current trends in criminal behavior, so it makes eminent sense to concentrate the moral resources of criminal prosecution by focusing effort on those cases for which the criminal sanction was designed, prosecuting primarily cases in which the public designation of an offender as an outlaw is deserved, and can be made to stick—in the moral judgment of the community as well as in court.

If the distinctive role of the criminal law is to be found in its moral force, the criminal law has a significant part to play in policing corporate or business misconduct. That role is by definition limited. Criminal punishment should not be imposed for technical regulatory violations, or in the absence of moral blameworthiness; it should not be a device for collecting revenue in the form of corporate fines, expediting compensation of victims, or adjusting the marginal costs of corporate activities that regulators would like to discourage. Indeed, it

is precisely because the criminal law has been viewed as a tool for these purposes that its reach has expanded inappropriately, and that consequentialist policy analysts have seen it as all but interchangeable with civil sanctions. But where the behavior of corporations and their agents transgresses fundamental social norms, and needs to be formally declared unacceptable both to stigmatize the offenders and to reassure the law-abiding public that society takes its basic moral code seriously, reliance on civil sanctions is inadequate, and the criminal law should be applied in its full force. If legislatures and courts are not willing to trim the criminal law to reflect these values, then prosecutors, who have an enormous public and professional stake in the continued efficacy of the criminal law, will have to develop discretionary standards that promote them.

I hope and believe that the best prosecutors are groping for just such standards in their daily discretionary decisions. Some are fortunate enough to work in offices where a self-conscious tradition of procedural fairness to defendants and substantive seriousness about the invocation of criminal sanctions is deliberately passed on as part of the training. As the anecdotal account with which I began suggests, it is routine, in at least some prosecutorial agencies, for prosecutors charged with policing corporate misconduct explicitly to ask, and to permit defense counsel to press them on, the question of the appropriate role of criminal as distinct from civil sanctions in deciding whether to bring criminal charges. I would suggest to them that the traditional standards of the criminal law are a good place to look, still, in answering that question.