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SYMPOSIUM

THE TORT/CRIME DISTINCTION: A GENERATION LATER

RICHARD A. EPSTEIN*

I. A CHANGE IN WORLD VIEW

This Paper marks the second occasion—both in Boston, but a generation apart—that I have grappled with the tort/crime distinction as it has developed first at common law and today in the mass of statutes that regulate virtually every area of human endeavor. When I first wrote about this subject in my paper Crime and Tort: Old Wine in Old Bottles,¹ my philosophical outlook was both deontological and libertarian. I understand the first of these terms less well today than I thought I did then, but its basic import is that certain inherent qualities of actions and mental states brand them as wrongful, regardless of the consequences they bring about. As this one sentence summary indicates, the deontological approach typically defines its field negatively. In general it is anticonsequentialist, that is, opposed to any theory that looks to the aggregate consequences of certain actions to determine their moral worth.² More specifically, this approach is also antiutilitarian, that is, opposed to any theory where the consequences that count go to the gain or loss (or perhaps only the pleasure and pain) of the various individuals governed by the legal rule.

The libertarian side of the theory claims that the proper role of government is limited to restraining the use of force and fraud in the conduct of human affairs, thus preserving the maximum scope for freedom of action for all persons governed by the legal order. From these premises two conclusions seemed to follow. The criminal law should concentrate its resources on intentional violations of the person and intentional depriva-

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² See, e.g., JOHN RAWLS, A THEORY OF JUSTICE 30 (1971) (characterizing a deontological theory, i.e., “justice as fairness,” as “one that either does not specify the good independently from the right, or does not interpret the right as maximizing the good”); see also Heidi M. Hurd, What in the World is Wrong?, 1994 J. CONTEMP. LEGAL ISSUES 157, 160-62 (summarizing deontological theory and distinguishing it from consequentialism).
tions of property. The tort law should seek to protect these same interests against all other external deprivations, including many that are strictly accidental, by awarding money damages to the victim from the wrongdoer. In some cases of imminent danger injunctive relief could be appropriate as well, although the issue of prospective relief injects a mass of complications to which I shall briefly refer later.  

Over the years, I have remained quite content with the basic substantive orientation of the tort/crime distinction, but have become more uneasy about its intellectual foundations. My ideal government is not quite as small as the above theory suggests, but it is still much smaller than the massive government in place today. The shifts in basic intellectual outlook are perhaps more substantial. On the political theory side, a robust libertarian theory is vulnerable to the charge that it fails to account for the coordination, public goods, and holdout problems of such great concern in the organization of social affairs. Thus it is not sufficient to assume that the only forms of conduct accompanied by undesirable social consequences are those involving the use of force or fraud. The libertarian posture seeks to minimize the use of force and fraud and their consequences. However, a more comprehensive social statement seeks to maximize social welfare, embracing the libertarian prohibitions, but going beyond them to allow certain forms of regulation and taxation to overcome these otherwise intractable coordination problems. The set of forced exactions that are totally barred under a libertarian approach have a limited, but secure place in the larger system of social controls.

Similarly, on questions of method, I believe that the deontological approach is wrong insofar as it claims that its normative conclusions can be denied only on pain of self-contradiction. Today many writers believe that the protection of individual autonomy is not a primary goal of legal rules, but that, to the contrary, any “natural” distribution of talents is determined largely by luck and hence morally arbitrary. Given this perspective, it follows that legal rules should introduce certain measures of sharing across individuals, if not by forced labor, then by systems of taxation and regulation that redistribute the fruits of individual labor. One can argue against these views, but hardly on the ground that they are self-contradictory, or even that they are morally suspect in their effort to raise

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3 See infra Part IV, at 16.
5 See Rawls, supra note 2, at 100-08 (suggesting that “[t]he natural distribution [of talents] is neither just nor unjust” and that such distributions are “simply natural facts”).
6 Id. at 274-84 (identifying the function of such measures in an ideal institutional framework based on the principle of distributive justice).
A GENERATION LATER

the level of the least fortunate closer to the level enjoyed by those who have a greater share of natural abilities and endowments. A defense of the older regime of individual liberties and properties cannot rest on a simple assertion that people have rights and that other individuals are not allowed to do actions that violate those rights. One has to show why any given configuration of rights is superior to its rival conceptions, an undertaking that typically requires an appeal to consequences, less for particular cases, and more for some overall assessment of how alternative legal regimes play out in the long run. In a word, one has to become a utilitarian of some stripe to justify rules in terms of the consequences they bring about.

A utilitarian approach is frequently attacked on the ground that the critical outcomes needed to fuel the system are invariably indeterminate. In many legal contexts, the choice of legal rules is hard to make, but the inferences we can draw from a select set of difficult legal cases are far from obvious. More concretely, it is only when individuals look to some of the hardest questions within the legal system—whether we choose negligence or strict liability as the basic principle of tort law—that we find both our moral instincts and our utilitarian calculations coming up short. But those hard cases are not the ones we should chose initially to test the moral limits of a legal rule. Rather the operative inquiry steps back a long way and asks: Why, of all the possible tort rules that could organize the system of tort law, do those two survive in constant tension with each other? At this level it is not difficult to imagine the adverse consequences of a rule requiring the victim of harm to pay damages equal to the harm that he sustained to the party that inflicted the harm. This rule might be ingeniously justified on the ground that it induces a high degree of victim precaution. But don't bet on its social appeal. It takes little temerity to say that no legal system will ever adopt so odd a position, given the massive insecurity generated by subsidizing individuals to maim or kill their fellow human beings. Likewise a rule declaring that all promises are presumptively criminal acts would not sit well either: it is simply too costly for the legal system to declare war on the mutual gains arising from ordinary exchanges. Sometimes these presumptive gains are overridden by

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third-party losses, but those losses must be demonstrated by clear evidence and not simply asserted.

Given the foregoing, my current view is that we should think about legal rules in terms of the incentives they create for individual conduct, be they for good or ill. Once we take this approach, it hardly matters where we start with the creation of legal rights and responsibilities. The key inquiry is not our current baseline, but whether we can imagine some legal changes capable of generating social gains greater than their overall costs. Thus, in an odd sense, it hardly matters whether the inquiry begins with a Hobbesian view that natural liberty is simply the actions that individuals can get away with before they meet a greater rival force, or the more congenial Lockean theory, premised on a view of natural rights guaranteeing to all individuals a right to be free of aggression against their persons and property. All individuals gain vastly from the security of possession and exchange promised by the Lockean view of individual rights, so that no matter what the starting point, the logic of the social contract allows for movement in only one direction. Faced with an all-or-nothing choice, individuals in the Hobbesian state would be prepared to exchange their freedom to attack for blanket protection from attacks by others. But those in a Lockean world will not be prepared to make the same exchange in reverse. In the one case we move, and in the other we stay put. And the end points are the same in both cases.

To be sure, both sets of exchanges are hypothetical in the sense that we can never hope to observe actual contracts between the various individuals subject to a common rule. But in both cases we attribute the term "social contract" to these mental inquiries because we seek the same result that voluntary contracts normally yield to their participants: mutual gain judged from the ex ante perspective. The object of the social contract is to obtain the same result where voluntary exchanges are not possible. At that point the inquiry shifts to the form of government that will best secure the (well-nigh) universally preferred Lockean system of rights. Hobbes's unitary sovereign can be faulted for his evident totalitarian dangers that, in turn, would drive us to more sophisticated govern-

11 HOBBES, supra note 9, at 115-19.
12 The ex ante constraint is surely decisive because any system that imposes criminal sanctions on aggressors will not leave violators well off ex post. Indeed, one of the greatest perils to any system of contract—voluntary or hypothetical—is the institutionalization of a general principle of ex post regret, whereby those who do not like the observed outcomes can undo the entire arrangement. When that regret contingency is known in advance, the initial deal will not get off the ground because no one will regard himself as a potential winner.
ment structures—complex voting systems, divided power, federalism, judicial review—in order to ensure that the state designed to preserve individual rights and liberties does not rise up to consume them.

II. NEITHER CRIME NOR TORT

This set of introductory remarks takes us somewhat far afield. It has, however, powerful implications for the proper relationship between tort and criminal law, albeit in a way that is somewhat orthogonal to the stated purpose of this Symposium. The usual discussion of tort and crime focuses on the differences between the two systems of enforcement and attempts to articulate a principled justification for distinguishing the two. I believe that this is an important inquiry, and one to which I will turn in a moment. But in any comprehensive view of the subject, it is not the first question on the table. Far more important is the question of whether certain forms of conduct should be subject to any form of sanction—private or public—at all. The more fundamental issue therefore concerns the combined scope of the two sets, rather than questions of overlap and coordination.

On this note it is critical to recognize that many of today's law enforcement problems arise from the overall expansion of liability—both civil and criminal—to criminalize types of conduct that had been unquestionably legal before the passage of new law. Inquiries that concentrate on the role of mens rea in determining criminal liability or the reach of proximate causation in determining civil liability miss the central point: What broad classes of conduct should be subject to either form of legal sanction in the first place?

As mentioned earlier, the libertarian world view places powerful limitations on the use of state power. A conceptual predicate of this view is that many forms of conduct generate no adverse legal consequences regardless of their public approval ratings. Decisions such as whom to marry, with whom to associate, or what to do with one's property and life lie outside the scope of state interests. The legal system thus creates many small islands of independence in which people are free to go their separate ways so long as they do not trespass against the liberty and property of their neighbors. The system is internally symmetrical with respect to the rights it creates and the obligations it imposes. In consequence, the libertarian view leaves a relatively narrow scope in which the state may impose either tort or criminal responsibility.

The greatest resistance to government power comes from the contraction of the private realm and the corresponding expansion of the public realm. Consider questions of land use. There has never been any doubt that individuals who commit trespasses on the property of their neighbors

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are subject to either civil or criminal liability. The same has surely been true with respect to nuisances, such as the discharge of pollutants on land, water, or air. Yet the potential liabilities accompanying the newer environmental restrictions go far beyond those associated with traditional wrongs such as nuisance or pollution. Today it is wrong to place a railway tie on the side of a critical dune unless one first receives a permit from the state,\(^\text{14}\) and it is a criminal offense to modify the habitat of any endangered species located on private property.\(^\text{15}\) It hardly matters what dangerous conditions are corrected or what collateral benefits are created. Because there is rarely a particular harm to any one person, the set of sanctions tends to be criminal in nature. But the core objection to this form of criminal liability does not rest on the observation that these offenses are strict liability offenses, although that is sometimes the case. Nor does it rest on the possibility that individuals may not receive sufficient notice that the law deems the designated conduct criminal. They often receive an abundance of notice; public officials are always willing to proclaim their commands from the mountain tops in order to satisfy the most exacting due process requirements. And surely the statutes could incorporate, explicitly or by implication, a narrow exception for cases of abject necessity, which would seem pointless if the crime in question is removing a rubber tire from a wetland under the jurisdiction of the Army Corps of Engineers.

No, the objection to the criminal sanction quite simply comes from the deep and passionate belief that government should not undertake these exercises at control at all, or at the very least, that if it intrudes on the lives of its individual citizens, then it should compensate them for the losses it imposes.\(^\text{16}\) This position follows the argument on state control outlined above.\(^\text{17}\) Start with a world in which disputes between neighbors are regulated by the law of nuisance and ask whether the further regulation works on balance to the joint improvement of the parties. Certain rule adjustments surely make sense, which helps explain why privately planned unit developments usually adopt covenants more extensive than those required under the law of nuisance. Yet the legal restrictions mentioned above are more intrusive still, but their gains to affected parties are small or nonexistent. As between the parties, we may describe the transactions as \textit{Pareto Pessimal}, meaning that both neighbors end up worse off than before, without any enormous positive external gains to


\(^{16}\) See generally Richard A. Epstein, \textit{Takings: Private Property and the Power of Eminent Domain} 263-73 (1985) (addressing the applicability of the Takings Clause of the Fifth Amendment to, \textit{inter alia}, land use regulations).

\(^{17}\) \textit{Supra} notes 9-12 and accompanying text.
justify these restrictions. The protest therefore is directed in good utilitarian fashion at the scope of the regulation. The internal logic of criminal law has nothing to do with the issue.

The same argument is equally applicable to other contexts as well. Today it is a crime to pay workers wages below some minimum established by statute, or to discriminate in the hiring or promotion of employees, or to use equipment in ways that do not comply with the mandates of the Occupational Health and Safety Administration ("OSHA"). In all of these cases, the use of legal sanctions, criminal or tortious, are in my view wholly inappropriate, even if the government were to give ample notice of the restrictions imposed, and prosecuted only those persons who acted in conscious disregard of the legal command. As with various forms of environmental legislation, the argument against criminalization is quite simply that government ought not, for substantive reasons, undertake to regulate these activities at all. The case for government intervention is to stabilize the social environment so that individuals can use their property in productive ways and engage in various forms of productive labor. Although restrictions on the use of aggression and force advance overall social welfare, similar restrictions on building a home or running a business have exactly the opposite effect. Such restrictions cut off the gains from voluntary exchange but produce little, if anything, by way of external benefits.

It is all too easy to claim that ordinary people do not have sufficient information to be accurate judges of their own interests. Yet usually the truth lies elsewhere. Few government officials can ever gather sufficient reliable information to decide for other people which particular course of action is best. Those who claim that markets do not create perfect incentives for cooperative behavior likewise ignore the far greater distortions created in the political arena when transfer payments are divorced from productivity gains. To be sure, there are some possible exceptions to this proposition, but the basic logic of the hypothetical contract dictates that the first task is not to understand the overlap between crime and tort. Rather, we must first commit ourselves to restricting the domain over which both operate.

III. The Expansion of the Criminal Law

Once we have made the decision to sanction these forms of conduct it is easy to explain the inexorable expansion of the criminal law, even if we

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put aside the entire issue of drug offenses.\textsuperscript{21} The first step in the argument is to show why traditional tort law will no longer do the job. Quite simply, the answer is that there are no victims to whom a tort remedy could be sensibly assigned. Consider once again the issues of land use control and worker safety regulation. Turning first to land use regulation, precisely who is hurt if an individual owner decides to turn over some soil or build a stairway up the side of a hill? Clearly it is not the neighbors, most of whom have engaged in similar conduct (before the restriction was imposed) or who currently chafe under like restrictions. To be sure, neighbors do not always get along in this or any other world, so that at least some neighbors might well be inclined to report violators to public officials in order to exact a fair measure of vengeance against them. But those sorts of indirect unhappiness do not count as compensable or protectable interests under either the tort or the criminal law. So, too, with harms to the “environment:” no private plaintiffs stand ready and available to police them. Consequently, it falls to the government by default to fill the void said to exist. Further, in this case the government sues only as the government, rather than in its capacity (analogous to the private landowner) as steward or owner of public lands and waters. The utter want of a definable, focused wrong thus propels these cases into a large and unstructured public arena.

The second stage of the argument is more difficult. The government can proceed in its own name to remedy the perceived wrong with either civil fines or criminal actions. In principle it would seem that when tort law normally remedies the relevant harm, civil fines should be the preferred public response. We utilize public officials to decrease enforcement costs rather than to escalate conflicts with individual defendants. To be sure, most regulatory statutes provide for civil penalties. Yet enforcement rarely stops there. Instead, such statutes allow the state—at its option—to pursue the criminal route, either by way of fine or imprisonment. The expansion of power is often justified in part by the fact that most of the prohibited acts are done intentionally, and hence fit more easily in the criminal camp. We expand the scope of the \textit{actus reus} without any offsetting contraction of the relevant \textit{mens rea}.

This “double whammy” is hardly defensible when the underlying conduct should not be subject to any sanctions at all. But once we take the first step, the second comes easily. After all, ordinary criminal prosecutions do not allow a defense for ignorance of law. It is quite enough to intend to do the act that the law has declared harmful. The approach has great merit as a means to dispose of false pleas of ignorance for conven-

\textsuperscript{21} On which I am tempted by a standard that eliminates all punishment for use, all public aid for illegal drug users, and all defenses of diminished responsibility based on drug use. See Richard A. Epstein, \textit{The Moral and Practical Dilemmas of an Underground Economy}, 103 \textit{Yale L.J.} 2157, 2175-76 (1994).
tional, widely acknowledged crimes. Yet it holds little attraction in con-
nection with regulatory offenses made criminal by stipulation only.

Unfortunately, it is all too easy to pinpoint the motivation behind this
expansion of state power. The political discourse announces that filling in
a wetland constitutes the most pressing of social evils. We avoid explicit
comparisons to murder, rape, and theft. The political logic dictates a flex-
ible government response to meet the growing peril. Criminal sanctions
may entitle a defendant to some protections not available in civil cases: a
higher standard of proof and certain privileges against self incrimination
as the two most obvious. But, by the same token, the government comes
to wield two strategic weapons against a potential defendant: civil san-
cctions when questions of proof are hard to resolve, and criminal sanctions
when evidence of a violation is stronger. It is very difficult for any public
official to resist a free grant of more police power. Likewise, it is equally
difficult for a legislator to deny the criminal sanction when it has been
supplied so many times before.

By degrees, we create a simple syllogism. Once we bring public offi-
cials into a case, criminal sanctions are possible. The more modest ration-
alization of efficient enforcement of diffuse public wrongs slips into the
background.

A similar analysis applies to various statutes for workplace safety. In
most instances, restrictions are no more desired by workers than they are
by management. The regulations in question usually derogate from free-
dom of contract, not provide remediation of frauds and deceit that em-
ployers sometimes practice on their workers. For example, the usual ap-
proach of OSHA is to insist that safety comes through precise compliance
with detailed and often absurd regulations about the conditions of the
premises.22 Many of these precautions are either counterproductive or
too expensive for what they achieve relative to simpler precautions that
workers could take in their day-to-day work.23 There is accordingly little
incentive on the part of employees to report violations to the govern-
ment. After all, what do they have to gain by the enforcement of a stat-
ute that makes their own work more difficult, and in some instances less
safe? Most reporting therefore is likely to come from disgruntled or fired
employees who (like the neighbors in land use cases) seize the opportuni-
ty to report violations of the law to wreak a fair measure of vengeance on
their (former) employers. The net effect is that OSHA enforcement typi-
cally requires unannounced inspections—trespasses now cloaked in the
privilege of the underlying administrative mandate. The newer genera-

22 For a recent anecdotal indictment of the follies of OSHA, see PHILIP K. HOW-
ARD, THE DEATH OF COMMON SENSE 12-15 (1994) (commenting on the scope and
specificity of OSHA regulations and the massive expenditures made by employers to
reach mandated compliance levels).

23 E.g., id.
Once again state officials will be hard pressed to turn down the strategic advantages that come from being able to choose between civil and criminal sanctions. Once again the political dynamic ensures a normatively questionable expansion of public power.

All this is not to say that property damage and workplace injuries do not happen. But in those cases, why deviate from traditional patterns of private enforcement? The real workplace injuries are usually covered by workers' compensation (which was consensual in its origins, and could easily be made consensual today) and occasionally by the tort law, so for tangible harms a private plaintiff will quickly seek redress for his wounds. But for diffuse workplace safety issues, the absence of an identifiable plaintiff means that the regulatory work, once unmoored from a requirement of actual injury, falls by necessity into the lap of the state. Once again, the tort law will play second fiddle to the criminal law. The situation clearly moves in reverse as well: trim down the ambitious scope of government regulation and these diffuse social harms would be the first to disappear from the social plate. The state would concentrate on grievances real victims pursue in response to real injuries. Cutting down on both tort and crime therefore should be the first order of social business.

IV. CRIME AND TORT CABINED

Some actions still remain illegal even under standard libertarian theory, aided perhaps by a limited assist from the antitrust laws. How should control of these wrongs be divided between tort and criminal law? In principle, the utilitarian overlay\(^{24}\) looks to maximize some social welfare function. The upshot is to use criminal and tort law to optimize the net gain from productive activities, less the sum of the costs of harmful ones and the costs of their prevention. The dialogue then switches to the familiar litany of optimal deterrence, which envisions harm from both under- and over-enforcement of the law (criminal and tort) and hopes to steer a path between the two.\(^ {25}\) Questions of individual rights, so congenial to the traditional deontological approach, are swept away by a set of instrumental and technical concerns. The connection between the ordinary expectations of citizens is washed away in a sea of jargon. The comprehensibility and legitimacy of the law, both criminal and civil, are sorely tested. Or so the standard story goes.

Lest we despair, I believe that we can make the jargon intelligible. Just as the techniques of social contract theory are equal to the task of defining individual rights, they can also explain why the traditional view of the

\(^{24}\) E.g., supra notes 5-8 and accompanying text.

tort/crime distinction should make sense. The key to rapprochement rests on the relationship between moral discourse and practical affairs. Ordinarily, we form views of right and wrong with a view to making judgments about the conduct of others. Those judgments then guide both individual and group behavior. Questions of enforcement are not central to either of these inquiries, and tend therefore to recede quickly into the background.

Legal discourse builds heavily on this moral discourse but does not duplicate it. Law and friction are inescapable companions. Enforcement questions of all sorts and sizes necessarily intervene between the articulation of a sound moral judgment and its translation into a legal command. The undeniable proposition that enforcement is expensive implies that some moral norms will not be enforced legally because resources are not there to enforce them. The undeniable proposition that legal enforcement is often unreliable also implies that simple proxies will often prove more workable than complex substantive commands: the length of a knife blade becomes a proxy for the intention to inflict bodily harm. The practical side of legal discourse treats these constraints as an inescapable component of the overall enterprise. The peculiar jumps and starts of the legal system frequently are little more than a workable compromise between the morally appropriate and the legally feasible. As a result, many of our legal doctrines, even on substantive issues, take an odd form to compensate for the remedial inadequacies of the legal system. The project in this section is to trace this twisting process as it relates to the tort/crime distinction.

The standard economic models of tort and crime are optimal deterrence models that ask what system of rules will minimize the costs of violations and enforcement. However, the equations driving this analysis are not capable of formal solution. So in the mathematical tradition, we abandon the elegance of a formal proof and adopt in its stead a messier but sturdier system of successive approximations that bring us ever closer to the ideal. What is required is a judicious mix of hunch and wisdom.

This analysis suggests no unique approach, but I propose a first cut: as between tort and crime—for the moment as between private and public enforcement—which should come first? Historically, this is a somewhat naive question because the development of civil law delict and common law trespass and appeal did not distinguish sharply between criminal and civil prosecution. Few standing state officials were around to handle

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26 See H.L.A. Hart, The Concept of Law 181 (1961) (observing that the development of law has been "profoundly influenced" by moral discourse, but that legal validity need not be explicitly tied to morality).

27 See, e.g., Posner, supra note 4, at 119-77.

28 See J.H. Baker, An Introduction to English Legal History 571 (3d ed. 1990) ("In early societies there is no concept of the 'state.' Both compensation and
any kind of case, so that private enforcement applied to all forms of anti-social conduct, of which deliberate harms were the most pressing. It was only with the emergence of the instruments of the modern state that criminal enforcement became a specialized, public function. Thus the tort law is a good place to begin because it functions with weaker social institutions.

That conclusion is reinforced by the observation that traditional crimes against property and persons have real victims who make ideal plaintiffs. Just how would the legal system look if its only enforcement mechanism was the tort law? To answer this question, we need to make some assumptions about the effectiveness of this system in practice. Here I shall hypothesize some very benevolent and wholly implausible assumptions that tend to collapse the legal inquiry into the moral one. I shall assume that questions of detection and proof can all be disposed of in a reliable fashion; that the costs of bringing suit are sufficiently low that it pays plaintiffs to sue for all but the smallest offenses; that the solvency of the defendants is sufficiently great that they can answer for the substantial harms they inflict; and that the substantive law can fashion decent damage rules (no easy task).

To make this last point more sharply, consider two broad families of damages rules. The first awards a sum equal to the hurt that the plaintiff suffers; the second posits a sum equal to the gain that the defendant obtains by inflicting harm. In the tort world the first of these measures is usually preferred on the ground that an individual should be left no worse off after the wrong committed than before. In practice the measure is quite unattainable in connection with certain horrible injuries for which no sum of money offers appropriate compensation. Likewise, the measure makes little sense in wrongful death cases where individual victims cannot receive the damages payment.

However, in light of the austere assumptions set out above, these obvious difficulties may not be fatal to a privately operated system of sanctions. As long as the relevant measure of damages is greater than a defendant's gains, potential defendants will not commit harmful acts, even if they do not pay full tort compensation. Thus, if an injury causes $10 million in damages and produces a gain of $500,000, a (calculating) defendant asked to pay anything over $500,000 will not undertake the action. He is still worse off by doing the act and disgorging its benefits than by doing nothing at all. The conclusion here is a happy one: With reliable enforcement, perfect deterrence is possible with less than full tort damages.

However, it is also clear that even this tort-restitution cushion does not counteract such simple realities as offenders who escape detection or who are insolvent. Nor is the legal system a paragon of accuracy, even in sim-
ple accident cases. But through it all, the basic intuition remains true: For accidental harms at least, a system that puts the full burden of enforcement on the injured plaintiff works better than a system of state prosecution for harms to discrete individuals. The private plaintiff has good knowledge of the facts—or at least better knowledge than anyone else—and strong incentives to prosecute the matter to judgment. So as a first approximation the traditional tort system looks optimal despite its imperfections. Thus we can take some comfort in the older cases that stressed the dominance of tort in cases of accidental harms.29

The same view seems to flow from liberal political theory. It is easy to forget that one of the major issues in the classical treatments of political philosophy concerned the scope of tort and crime, and setting the appropriate limits to the doctrine of self-defense, whose contours are of great importance in the state of nature, that is, prior to the effective introduction of police forces. In this regard, it is useful to note that the Lockean view draws a similar distinction between tortious and criminal behavior. It is worth quoting the familiar and illuminating passages:

10. Besides the crime which consists in violating the law, and varying from the right rule of reason, whereby a man so far becomes degenerate, and declares himself to quite the principles of human nature and to be a noxious creature, there is commonly injury done to some person or other, and some other man receives damage by his transgression, in which case he who hath received any damage, has besides the right of punishment common to him with other men, a particular right to seek reparation from him that has done it. And any other person who finds it just, may also join with him that is injured, and assist him in recovering from the offender, so much as may make satisfaction for the harm he has suffered.

11. From these two distinct rights, the one of punishing the crime for restraint, and preventing the like offence, which right of punishing is in everybody; the other taking reparation, which belongs only to the injured party, comes it to pass that the magistrate, who by being magistrate hath the common right of punishing put into his hands, can often, where the public good demands not the execution of the law, remit the punishment of criminal offenses by his own au-

29 E.g., Hulle v. Orynge, Mich. 6 Edw. 4, fol. 7, pl. 18 (1466), reprinted in J.H. Baker & S.F.C. Milson, Sources of English Legal History 327, 330 (1986). A participant in that case observed:

[I]f a man is shooting at the butts and his bow swerves in his hand and [the arrow] kills a man, against his will, this (as has been said) is not a felony. If, however, he injures a man by his archery, the man shall have a good action of trespass against him: and yet the archery was lawful, and the injury which the other suffered was against his will.

Id.; see also Weaver v. Ward, 80 Eng. Rep. 284 (K.B. 1616) (applying a similar distinction to the insanity defense that, although irrelevant in tort, is critical in criminal law).
tority, but yet cannot remit the satisfaction due to any private man, for the damage he has received.  

The major reason why some power of punishment vested in the magistrate was “to prevent [an act] being committed again, by the right he has of preserving all mankind, and doing all reasonable things he can in order to that end.” Because cases of pure accidental harm do not have the follow-on effect, they seem not to call for criminal sanction. Locke understood that deliberate harm undermines the sense of security in other persons on which social organization so clearly rests. In a world of scarce resources, it is unlikely that the limited resources of the magistrate will be directed against accidental harms.

The more difficult situation is indeed the opposite. Many deliberate harms are detected. But often the questions of apprehension and satisfaction of judgment are not satisfied. This minor inconvenience of the tort system has enormous consequences both for its internal operation and the emergence of the criminal law.

To begin with the former, ask: Why do we recognize a privilege of inflicting harm in self-defense? The privilege itself is messy and requires figuring out the right rules to govern the use of excessive or deadly force, and deciding whether the mental state of the aggressor is relevant in setting proper limits on the defense. But for these purposes, the central point is that there would be no need for any privilege of self-defense if the tort damage system worked flawlessly. In each case the aggressor would be captured after inflicting the harm and subjected to a damage award that left him worse off for inflicting the harm than from never acting at all. Aggression would never pay, so no one would ever attempt it. Who worries about the scope of a self-defense privilege if it need never be exercised? But once we recognize that legal remedies are always imperfect, self-help remedies become critical to the success of the system, which now has to sort through these questions as best it can. Better that we run the risk of undue retaliation and concealed aggression then eliminate the privilege altogether.

The breakdown of the tort remedial system also leads to the creation of the criminal law. To be sure, with accidental harms, it might be better to

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30 Locke, supra note 10, at 6-7. The references to the transition from collective punishment by individuals to collective punishment by magistrates marks the transition from a state of nature. Of course noxious beasts could be killed with impunity, and the parallel Locke draws between such conduct and private enforcement of one’s interests in the state of nature is an intentional one. Id. at 7. Further, the deadly punishments are allowed for lesser offenses, if such is needed for public safety. Id. (“[E]ach transgression may be punished to that degree, and with so much severity as will suffice to make it an ill bargain to the offender . . . .”).

31 Id. (emphasis omitted).

chalk up the plaintiff’s inability to collect a judgment to experience. Yet we do not adopt that same restrained attitude toward deliberate actions fully capable of repetition. Self-defense will sometimes fail, even if legally allowed. But public fines will hardly fill the gap, for if the perpetrator of the wrong has no wealth, he is no more able to pay a large fine than a damage award. So the question is, what asset of the individual can the law seize? Although a person might have “plenty of nothing,” he always fears losing at least two assets: his liberty and his life. Take these away and deterrence against aggression can proceed apace even if compensation is utterly unavailable to the injured party. Such deterrence in turn benefits others, at least indirectly, through a reduction in the crime rate and the concomitant increase in personal security. Hence the question becomes whether the increment of deterrence achieved through punishment is worth the dislocation it creates in the lives of guilty individuals. Although there is always some question as to how much punishment is optimal, the criminal law’s focus on deliberate harm once again speaks eloquently to the overall social judgment: deterrence is better than inaction when reparation is not possible. One imposes criminal sanctions even if the loss of any life and liberty (including the wrongdoer’s) is regarded as a social loss, and even though (in the modern context) the costs of incarceration are high. Once we account for the imperfections of our legal institutions, the need for both crime and tort, and the distinction between them, starts to assume its customary shape.

Some additional complications are needed to fill in the outlines of any comprehensive theory. It is a major over-simplification to assume that all harms are caused by one of two types of human conduct: accidental or deliberate. Tort and criminal law scholars delight in noting the many gradations of mental states falling uneasily in between. Thus, next to strict liability are rules imposing liability absent the highest levels of care; beside these are rules for ordinary negligence; next come rules for gross negligence; for recklessness; for willful and wanton conduct; and for different shades of intention that involve conscious indifference or substantial certainty that harm will ensue from the performance of certain actions. It takes no feat of deductive logic to realize that although tort and crime divide the world into two spheres, the basic inventory of mental states contains at least half a dozen notable members, and perhaps more if we account for the various shades of criminal intention (purpose, knowledge, etc.) as well.

The basic conceptual problem is just how any legal system can juggle more distinctions than it can use. One possibility is to ignore many of the refinements, especially in the important class of stranger cases. Thus, the strict liability vision of the tort world does not preclude a plaintiff’s recovery when the defendant has committed negligence. Quite the opposite, one of the standard justifications for the strict liability rule is that it dispenses with proof of negligence, which is surely present in the large majority of civil cases. On the other side, we can simplify our treatment
of criminal intention by using grades of intention solely on the more delicate question of which offense (manslaughter, murder) with which to charge a suspect. The basic divide therefore seems to be between gross negligence on one side and reckless indifference on the other—about the best that can be done.

Even here the inevitable complications continue to creep in at the edges. The injection of punitive damages into civil actions once again undermines the strict separation contemplated by classical views of the subject. See Kenneth Mann, Punitive Civil Sanctions: The Middle Ground Between Criminal and Civil Law, 101 Yale L.J. 1795, 1861-71 (1992) (assessing the impact of the expansion of civil punitive damages on the tort/criminal law distinction).

Many punitive damage cases involve affront and dignitary interests, to which the criminal law pays relatively little regard. In other instances punitive damages work well—perhaps too well—against institutional defendants where the solvency risk is small, so that public resources can be directed to those cases where private prosecution is not possible. The insolvent defendant is beyond the scope of the tort law in a way that the institutional or professional defendant is not.

Several other challenges to the crime/tort line deserve brief mention here. One key question concerns whether injunctions should join damages as a tort remedy. In principle, why not enjoin actions that result in death or serious injury, especially because no amount of damages can offer full compensation? In some cases, most notably in disputes between neighbors, an injunction might also be a feasible remedy. If some harm has already occurred, the injunction prevents its repetition. In other cases, the fixed physical relations between parties establish who is in harm's way, as with upper and lower riparians. Still, the risk with injunctions is that they could enjoin lawful conduct, which, if allowed, would have resulted in no harm. This overdeterrence problem is usually met by requiring a plaintiff to show irreparable harm or imminent danger before issuing the injunction.

Yet sometimes the likelihood of future harm may be great, but identification of potential victims may be uncertain. Now, the familiar coordination problems make it difficult for potential victims to come together to prevent actions likely to result in accidental harm. Resort to systems of licensing (which have often been subject to massive forms of abuse) is one possible response to this difficulty. This alternative works tolerably well as long as the shift from private to public enforcement does not escalate civil sanctions into criminal ones. More importantly perhaps, the idea of a proactive public police force makes better sense when there is reason to prevent harm before it happens instead of relying on the deterrent effect of private litigation to achieve that result. The rise of the public police force made this centralization of function a reality, although one not without risk of abuse. Once again the collectivization of the injunctive function should not be allowed to blur the lines between criminal
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punishments, appropriate for conspiracy and attempts, and a lesser set of sanctions to deal with accidental injuries.

Finally, the view taken here helps explain something of the popular unease concerning attempts. Clearly these events cannot be regarded as torts, because of the want of a present victim. To keep matters in proportion, the control of dangerous attempts must come through the criminal law, now in circumstances in which the punishment of victimless offenses makes sense, given the insecurity that failed efforts to kill or maim instill within the community at large. But what form of punishment? The practical compromise in this area is that we punish attempts less severely than completed offenses. It is hard to gainsay that view of the world in the absence of any clearer compass.

Professor Steven Shavell has put his finger on the major difficulty. It is quite impossible to think of the ideal punishment for attempted offenses unless and until one first understands the status of punishment for completed offenses. If these crimes are fully punished at the optimal level, then why bother with attempts? Punishment of the fewer completed crimes makes clear the power of the state, and the number of attempts—successful and otherwise—will decrease. In the end, the optimal level of deterrence for completed offenses could remove all potential gain from such conduct, obviating the need to punish attempts at all: indeed, there would be no attempts to punish, for no one would dare take the risk of capture. The analysis here is nothing more than a reprise of the basic argument on self-defense.

But once again imperfections in the remedial structure shape the attempted/completed offense distinction, as they do with the law of self-defense. Here of course insolvency is not an issue, but as Shavell notes, social norms place serious upper bounds on the amount of allowable punishment for any offense. This moral sentiment has a good practical base. Allow torture and the effort to control criminals could induce widespread misconduct by those officials entrusted with enforcing the criminal law. Impose a death sentence for a first murder and the principle of marginal deterrence is violated because the punishment for the second can be no worse than for the first, which is why the “three strikes and you’re out” rule may lead criminals to commit serious wrongs to avoid arrests for trivial offenses. Yet placing some upper bound on punishment

34 Shavell, supra note 25, at 436-37.
35 Id. at 436.
36 See, e.g., Peter J. Benekos & Alida V. Merlo, Three Strikes and You’re Out!: The Political Sentencing Game, Fed. Probation, Mar. 1995, at 3, 6 (commenting on observations by police officers that offenders facing a third conviction under a “three strikes” system are more prone to violent acts); Timothy Egan, A 3-Strike Law Shows It’s Not As Simple As It Seems, N.Y. Times, Feb. 15, 1994, at A1 (noting that police officers have encountered a “nothing to lose” attitude in confrontations with suspects facing a third conviction).
levels compresses the scale of punishments up and down the line. This being the case, the only way to avoid having the second murder go for free is to tolerate at the margin insufficient deterrence for the first and all subsequent offenses. In brief, the law cannot preserve the right spacing between offenses whenever there are upper bounds—practical or moral—on the infliction of punishment.

It is out of this sense of frustration that the law of attempted acts, and, by similar logic, of conspiracy and accessory liability, are born. If one cannot increase the level of punishment on the small class of completed offenses, then at some administrative cost it is possible to expand the net of punishable offenses to capture near misses (which in attempted murder cases could easily mean a large chest wound) in order to make up some of the difference. As that is the case, there is good reason to understand why people are so conflicted about the treatment of attempts and similar offenses. The analytically correct solution depends on coordinating the punishment of attempts with that of completed offenses. Yet the available information typically provides no clue how to fine tune the day-to-day operations of the criminal law. So the system moves about in a middle range, without clear guidance. Here, the economics can explain the source of the ordinary ambivalence, even if it cannot define a precise niche for the law of attempts.

V. LAW AND POPULAR MORALITY

Thus far I have tried to explain why a shift to an overtly consequentialist calculus does not require abandoning the traditional distinction between tort and criminal law. In closing, I think it useful to ask how the moral and economic theory influences the legitimacy of the legal system in the eyes of a wary public whose rights and duties it determines. In order to approach that topic it is probably appropriate to say something tentative about how the general public forms its views of legal rights and duties.

In the absence of hard evidence, a couple of conclusions seem clear. The enormous resistance to consequentialist thinking in ordinary life should remind the legal profession that the vast bulk of the population does not resonate overtly with any of the economic theorizing of which I

37 A similar issue arises in the tort law. Compensation in cases with a less than 50% chance that the defendant causes the harm in question depends on our treatment of cases where the likelihood of causation by a defendant is greater than 50%. If there is full compensation in the 50%-plus cases, then there should be no enforcement in the 50%-minus cases, at least if deterrence is the goal of the civil system. But if we utilize partial compensation for the 50%-plus cases, then we should use it across the board. Whether that response is appropriate depends on the distribution of cases around the 50% point. If all individual cases are below the 50% level, the result will be underdeterrence unless we effect some adjustment. However, complications of this sort are hard to work into popular morals.
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have been guilty in this short Paper. Notwithstanding the rise of law and economics in the academy, most people are more or less where I was on legal thinking when I first addressed the tort/crime distinction in 1977. They accept a strong categorical distinction between accidental and deliberate harms, and recognize that the latter are dangerous enough to require public control.

A major challenge to this distinction lies in the endless number of tort suits against institutional defendants, all claiming that something more than accidental harm is at stake. The most expensive words in the tort lexicon are "send them a message," with its attendant invitation to punitive damages as well as hefty compensatory damages. Although overused and misused on particular occasions, the phrase has at least one saving grace: it reminds us that most people have some sense of the deterrence value associated with imposing both tort and criminal liability. It reminds us that, for firms as well as individuals, reputational loss—that ubiquitous stigma—delivers a large part of the total sanction. Once we have invoked "the message," it becomes increasingly difficult to defend the position that social consequences and social utility—real or perceived—have no bearing on popular views about civil and criminal liability.

Can these impulses be folded into a model that assigns to the criminal law an expressive or condemnatory role missing from tort law? At one level, the looming threat of punitive damages in tort settings constantly blurs the distinction between the two systems. Many tort cases give rise to expressive or condemnatory actions as well. But for these purposes, a more vexing inquiry is whether the criminal law—even at its core—truly reflects a social effort to regenerate fundamental norms by publicly condemning those who violate them. At some level, every society has to face the task of reaffirming its values and beliefs during times of crisis. Funer al services that remind us of the sacrifices by those who have fallen victim to senseless violence surely fill this role, as does the ultimate conviction of an assailant.

But my own hunch is that the centrality of the criminal law to these functions is limited. The enormous amount of self-examination and recrimination in Israel following the assassination of Prime Minister Yitzak Rabin began at the instant of his untimely death and continued unabated through the funeral services. It reached a fever pitch long before the beginning of the trial of his assailant, Yigal Amir. Of course, this trial will fall into the public spotlight. Yet there is little reason to think that its inevitable outcome will shape Israeli or world opinion on the central question of whether, and if so how, the harsh debate over peace with Palestine induced—or drove?—Amir to commit cold-blooded murder.

Most criminal trials are not show trials. Often they involve acts of violence that ordinary people down on their luck commit on their fellow citizens. In most cases the criminal system strains to keep up with the inflow of business. Under these circumstances, the instrumental role of criminal trials—locking people up—necessarily comes to dominate any
possible expressive role. Routine cases often raise troublesome questions of circumstantial evidence, and provoke protracted disputes over the proper set of jury instructions. They offer a thousand temptations to divert judge and jury from the fundamental principles of criminal responsibility. At bottom, I remain convinced (if open to persuasion) that whatever ordinary people think about the criminal law, their views are not shaped in any material way by its day-to-day operation. The social benefits often attributed to the “expressive” or “educative” function of criminal trials most likely flow from some other source.

In *The Hollow Hope* 38 Gerald Rosenberg offers painstaking evidence that the formation of public attitudes on such critical issues as racial desegregation and abortion depends little on the reasoning in judicial decisions. Few people are persuaded to change their opinions, one way or the other, by *Roe v. Wade*, 39 or even *Bowers v. Hardwick*. 40 On all these grand issues people reach their own decisions based on information from other sources that operate more powerfully on their intuitions and sensibilities. 41 Ironically, perhaps only lawyers see legal opinions as formative influences shaping individual preferences and moral judgments.

What seems true about the premiere issues of the day carries over to the more mundane issues of civil and criminal responsibility. I can testify that any thoughts I had on the tort/crime distinction prior to my time in law school were developed in complete ignorance of the Model Penal Code or the Restatement of Torts. Rather, like other people, I derived my views from the people with whom I spent most of my life: family, friends, religious leaders, even newspapers and television, but rarely the law. Even a direct confrontation with the legal system in action is unlikely to change these core beliefs. Such experiences are far more likely to become test cases that illustrate the wisdom of prior beliefs or the folly of current practices, depending on the circumstances. At most, the operation of the system can confirm to those who care that the system is, or is not, doing the proper job. The vast criminalization of regulatory offenses does little to shape the views of ordinary people as to what conduct should be made legal or not. Although academics may love to speak about the most sophisticated form of corporate responsibility, ordinary citizens still associate crime with aggression and molestation, as well they should.

38 Gerald N. Rosenberg, *The Hollow Hope* (1991) (questioning the capacity of the Supreme Court to produce significant social reform).
40 478 U.S. 186 (1986).
41 Rosenberg, supra note 38, at 157-69 (contending that the success of the civil rights movement resulted from economic and electoral developments, shifting international demands, and other fundamental societal changes); id. at 247-65 (attributing the end of discrimination against women to changing economics, decreasing fertility rates, and improved education).
The great danger therefore is that the proliferation of criminal sanctions, and to a lesser extent, tort sanctions, will undermine any widely shared belief that the criminal or tort law does what ordinary people expect it will do. If someone actually tells us that building a retaining wall on private property is as dangerous as poisoning a public well, we might conclude that state officials do not attach a very high value to the sanctity of life, or worse still, that committing crimes against the person is no more serious than violating one of the countless administrative rules that govern our lives. Regardless of their limitations, utilitarian theories do not fall prey to that charge. They may use funny language to explain why the older modes of doing business made sense, but they hardly represent a frontal assault on either the categories of conduct that count as criminal or tortious, or the relevant preconditions for civil and criminal liability. Instead, they should be understood as a way to shore up a set of intuitions that have proved themselves insufficient to withstand the relentless attack by the modern regulatory state. A retrenchment in the size of government will do enormous good in restoring public respect for state enforcement efforts and redirecting scarce public resources towards more useful ends. We need to worry about the line between tort and crime. But we also need to shrink both domains simultaneously. On that issue at least, both utilitarian thought and ordinary sensibilities should lead to the same conclusion.