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STRATEGIC ISSUES SERIES

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ECONOMIC AND ORGANIZED CRIME: Challenges for Criminal Justice

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Research and
Statistics Division

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The views in this discussion paper are those of the author and do not represent the views or positions of the Department of Justice, Canada. The paper was commissioned as an opinion piece to stimulate research and discussion.

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The Research Papers included in the Strategic Issues series generally have been prepared for the Statistics and Environmental Analysis Unit of the Research and Statistics Division (RSD). This series is part of the Research and Statistics Division's efforts to look ahead and to scan the environment to provide contextual facts and perspectives on a wide range of social and economic issues. Topics covered include: the policy challenges of bio-technology and genetics; speculation on markets for crime and a proposed typology for understanding crime; the impacts on children of divorce and separation; globalization; and global governance of the Internet.

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Biography

R. T. Naylor is Professor of Economics at McGill University. His main fields of specialization are black markets, smuggling and international financial crime. He is author of six books including *Hot Money And The Politics Of Debt* and *Patriots And Profiteers*. His material on topics such as gunrunning, gold smuggling, black market operations of guerrilla groups, and money laundering has appeared in several criminology journals, including *Crime, Law & Social Change* of which he is senior editor. He was part author of the recent study by the United Nations Office for Drug Control and Crime Prevention, entitled *Financial Havens, Banking Secrecy and Money Laundering*.

1.0 Introduction

A concern that economic crime is changing and increasing has led to frequent calls for Justice systems around the world to respond with dramatic new investigatory and prosecutorial powers. For example, there have been calls for increased freedom for police in conducting uncover operations, measures to trace and seize the proceeds of crime and laws to make membership in a criminal "organization" a crime *per se*.

This discussion paper questions the need for such justice innovations. It asks:

1) How much of crime is profit-driven and what difference does that motive make? What do profit-driven offenders actually do and what adverse economic effects do their actions actually have?
2) How clear is the frontier between profit-driven crime and normal economic activity?
3) How should responsibility for detecting, deterring and dealing with profit-driven crime be shared between the criminal justice system and the regulatory apparatus? What other options are available?

2.0 Clarifying the Terms

Before attempting to answer those questions, three preliminary clarifications are essential - namely the role of profit, globalization and technological change in determining criminal behaviour.

2.1 The Myth of Profit Maximization

On the surface, crimes motivated by profit are different from those driven by passion, peer pressure or simple perversity of human nature. The lure of profit is presumed "rational" and profit-driven events therefore seem predictable. That also seems to suggest at least part of the appropriate response - if there is financial motive, it can be removed; and if there is monetary damage, it can be compensated. This assumes that the offender is a cost-benefit calculator who weighs the probable consequences against the possible gain. In that way, the profit-driven criminal can be assumed to behave in a way analogous to the profit-maximizing corporation.

The problem is, the notion of profit maximization may be useful for building mechanistic models to grace the opening chapters of introductory Economics texts, but as an explanation for business behaviour it is a serious oversimplification. A legitimate corporation first seeks survival. Then it may seek to satisfy the shorter term financial goals of its senior employees as well as its investors, something distinct from the long-term profit goals of the corporate *per se*. Then perhaps it might seek to expand its sphere of indirect commercial influence, engage in political lobbying or raise corporate prestige through community and cultural affairs. These cannot be

simply lumped into an attempt to maximize corporate "goodwill."[1] To the extent that a steady stream of profit is necessary to achieve most or all of these results, it will not necessarily correspond to a theoretical maximum - some notion of a satisfactory profit rate will suffice.[2] Therefore, the corporation's profit goals are more likely to be expressed in terms, not of maximizing the difference between cost and revenue in the short run, but of generating the stream of net revenues to permit survival, expansion and development over the long run. Indeed, if a legitimate firm were really a simple profit maximizer, there would be no reason for it to stay legitimate - yet obviously only a small percentage of entrepreneurs and corporations cross the line.

Much the same applies to a criminal "firm." Certainly profit is part of the calculation. But the notion that everything is subordinated to the hunt for a maximum of profit is very misleading. Even in profit-driven crimes, many other factors can be at play to determine actions - jealousy, ego enhancement, the search for prestige among peers, or the desire for increased status which in turn might be enhanced more by displays of generosity than cold-blooded pursuit of more wealth. Thus, a criminal firm, too, operates within a social matrix in which all manner of other, not strictly economic, criteria figure in its decision rules.

2.2 Globalization: Fact or Fancy?

Yet a second essential clarification concerns the role of "globalization." Globalization is the modern term for a process that began at least as far back as the time of Marco Polo, if not before, by which information about trade and financial opportunities spreads across national and/or regional frontiers, and goods and money shortly follow. Globalization is a factor in crime since criminal entrepreneurs, like legitimate business people, expand their geo-political horizons to conform to the opportunities resulting from greater ease of long-distance communication and travel.

This is not to suggest that the broad geo-economic context in which crime occurs is no different today than, say, at the end of the Second World War. There are real differences. One is scale - more people, more goods and more income. This, though, is a long-term trend. Even rapid acceleration of growth rates dates at least back to the early 19th century. It is hard to see how it translates into a *qualitative* change in the current criminal threat. Certainly there is more economic crime today, but there is also much more legal economic activity, and there is no proof the first is growing faster than the second.

A second difference is complexity of economic interrelations - the fact that more and more economic activity takes place in a market-driven context. But this, too, is a long-term historical trend, it is just as true inside countries as well as outside, and it therefore has only an indirect link at best to "globalization," whatever that may mean.

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1 See for example, Christopher Stone, *Where The Law Ends: The Social Control of Corporate Behaviour* (New York: Harper & Rowe, 1975), p. 39.

2 Unfortunately, that over-simplification has also affected discussion of the phenomenon of "corporate crime", the commission of offences by legitimate business concerns in the drive for greater financial and commercial success. Cf. Marshall Clinard, *Corporate Corruption: The Abuse of Power* (New York: Praeger, 1990), p. 5.

A third factor frequently cited as part of the trend to “globalization” is the seemingly remarkable propensity for people today to move across borders. What seems to be forgotten is that the passport was not generalized until after the First World War. Until then the main impediment to travel was the likelihood of being robbed and murdered, together with the fact that most people had neither the inclination nor the income to try. Those who utter platitudes about today's borderless world should try to cross the US-Mexico frontier during a trade dispute or drug alert. The frequently cited example of the EC is remarkable precisely because it is so exceptional.

Furthermore, there is a prevalent idea that a world in which people are increasingly free to travel (relative to the situation 50 years ago, but not to previous centuries) is also a world in which it is easier for serious economic criminals to escape. Each octogenarian Nazi war criminal unearthed serves to belie this simplistic belief. Similarly, the recent tendency of the US government to authorize transnational kidnapping to bring (mainly drug) offenders to American justice suggests that secure places to hide are getting harder to find. Counterfeit is now considerably harder to use. In the past, it relied on information asymmetries (e.g. the fact that births and deaths might not correlate and drivers' license applications were not matched with social security numbers). But today technology has considerably reduced those information asymmetries. It has made crime more difficult, not less.

Thus, the real issue is not a (non-existent) borderless world or the (genuine) growing ease of international travel, but the ability to enforce law across borders - which is scarcely a new problem.

2.3 Modern Information Technology: Hype and History

Modern communications and transportation technology have a major impact on economic exchanges (illegal as well as legal). But the effects of electronic communication and mass-based, cheap and rapid international transport of goods and people today are, quite likely, no greater and arguably significantly smaller than the effects of the railway, steamship and telegraph in the first half of the19th century.

The extent of change brought about by electronic funds transfers, for example, can be put into perspective with a simple comparison. On the one side, calculate the time required to send a bill of exchange or purse of silver coin by sailing ship across the Atlantic in the period up to the early 1800s, and compare it to the time required to make a telegraphic transfer once the first trans-oceanic line was laid by the mid-1800s. Then calculate the relative time saving from the switch from telegraphic (electrical) funds transfer to electronic funds transfer in the latter half of the 1900s. In the first case the difference was truly revolutionary; it is not in the second.

It is important to distinguish new crime from new methods. To take one common case, frequently "computer crime" is singled out as a prime new area of concern. But it really boils down to a series of traditional criminal acts (e.g. extortion, counterfeiting or fraud) that happen today to be assisted by the use of computers. The crimes remain the same. The only difference is the technique used to commit them, and the ability to do them from much further away than was commonly the case.

Furthermore, even these electronic changes in technique noticeable today can be exaggerated compared to the effects of their analogues a century and a half back. The advent of the telegraph not only permitted the creation of a genuine world market in which all traders had access to the same price information at almost the same time, therefore transcending the constraints of location, but it also gave criminals a fancy new tool. Brokers lost little time in using the fast access to data to trade on privileged and insider information; scam artists and commodity traders alike used it to rig markets. From the start, too, telegraph companies worried about hackers and about the security for telegraphic funds transfers in a manner little different in its essentials than the concerns about Internet commerce and finance today.[3]

This is not to say the techniques are without importance. Clearly, devices like call-forwarding can be used to confuse potential targets in fraud operations. New electronic technologies, too, permit multiple iterations of certain acts that, in the past would have been extremely time consuming, perhaps, impossible. Electronic technologies have certainly been important recently in counterfeiting of cheques, credit cards, securities and currency. But all they represent is the latest stage in an ongoing struggle between issuers of financial instruments and would-be fraudsters that dates way back to the onset of modern credit instruments.[4]

Furthermore, three other factors must be taken into account.

One is that the bulk of criminals are scarcely techno-wizards. Most crimes are committed using old-fashioned techniques. Even with money laundering, not a single case of the use of e-money for laundering has been unearthed, while there is ample evidence criminals still cart large amounts of currency notes across borders.

Second, on the other side, there seems not nearly so much hesitation by the state to use the new technologies for information exchange and surveillance. Therefore, it is arguable that the new technologies contribute more to detection and resolution than to commission of crimes.

Third, and ironically, while the alarmist scenario speaks of technology increasing the opportunities for traditional crime groups by moving into white-collar offences, the truth has seemed to be the opposite - technological changes have had a greater tendency to render larger organizations uncompetitive and unnecessary. Incidentally, this democratization of criminal opportunities argues further for moving the locus of attention away from the offender to the offence.

[3] See the excellent treatment in Tom Sandage, *The Victorian Internet* (New York: Berkley Books, 1999).
[4] Thanks to Mike Levi for these examples.

3.0 Understanding Profit-Driven Crime

Traditionally, understanding profit-driven crime has been hampered by weaknesses in the existing paradigms. Not only has the primary concern of criminology always been who offenders are, but the criminal justice system obviously focuses on prosecution of the person deemed responsible for an act, not on the act *per se*, the growing popularity of *in rem* forfeitures notwithstanding. Since offenders are all treated under a common criminal code, there is little incentive to investigate what, in terms of economic organization and economic consequences, differentiates contract killing from smuggling cigarettes, purse snatching from peddling child pornography, cracking a safe from pulling off a telemarketing scam. From this perspective, the main distinction between, for example, breaking-and-entry and insider trading is the social class and, presumably, the potential for rehabilitation, of the offender. Yet it is possible to classify profit-motivated crimes into several distinct economic categories without getting bogged down into disputations about the social origins of the offender. [5]

3.1 Predatory Offences

First are crimes of a *predatory* nature - everything from purse snatching to ransom kidnapping to extortion. Though there may be many complexities (derived, for example, from technological change) in how predatory offences are conducted, their essence is simple and direct.

A predatory crime:

- involves *redistribution of existing wealth* from one party to another;
- leads to *bilateral* transfers involving victim and perpetrator. Though others may be involved in subsequent actions involving the target property, the basic act remains a bilateral transfer;
- implies transfers that are also *involuntary*, generally using force or its threat, though guile may sometimes suffice;
- creates readily identifiable *victims* (individuals, institutions or corporations);
- generates *losses* by victims which are simple to determine - the robbed or defrauded person or institution or corporation can point to specific money and property;
- invokes an *unambiguous morality* - someone has been wronged by someone else; and,
- calls for *simple policy responses* - over and above direct punishment of the guilty, restitution should be made to the victim of his or her property.

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[5] The distinction between predatory and enterprise offences was first developed in R.T. Naylor, "From underworld to underground: Enterprise crime, 'informal sector' business and the public policy response." *Crime, Law & Social Change* (1996), p. 24 and "Mafias, myths and markets: On the theory and practice of enterprise crime." *Transnational Organized Crime* (1997) v. 3, no. 3. It was elaborated to include commercial offences in R.T. Naylor, "Washout: A critique of follow-the-money methods in crime control policy." *Crime, Law & Social Change* (1999), p. 32, and to include "corporate crime" in Margaret Beare and R.T. Naylor "Major issues relating to organized crime: The economic context." *Law Commission of Canada* (April 1999).

Historically, the justice system and law enforcement apparatus were designed to deal primarily with the predatory form of profit-driven crime, where there was a clear victim, readily identifiable property that had been misappropriated, and a straightforward resolution based on simple moral principles that enjoyed a broad social consensus.

Law enforcement remains heavily biased toward seeing crime as essentially a predatory phenomenon (simply put, a "cops and robbers" worldview). Yet other forms of profit-driven crimes are quite different in nature and in their social and economic impact. In these other categories, the harm is harder to assess, the identity or even the existence of victims more problematic, and the borderline between the responsibilities of economic regulator and police no longer so clear.

3.2 Market-based Offences

The second category consists of *market-based* (or enterprise) crimes. Although there are isolated incidents of bans on trafficking in occasional goods and services dating back centuries, for the most part these are relatively new. Most of what are today regarded as market-based offences date from decisions (if they really merit the term) in the early part of the 20th century to criminalize personal vice - the consumption of drugs or alcohol, gambling, prostitution, etc.[6]

A market-based crime:

- involves the production and/or distribution of *new goods and services* that happen to be *illega*l by their very nature;
- leads to exchanges that are *multilatera*l involving (among others) producers, distributors, retailers and money managers on the supply side and consumers on the demand side, much like legitimate market transactions;
- generates transfers that are *voluntary*;
- makes it difficult to define a "*victim*", unless it is some abstract construct like "society as a whole";
- generates *income earned* by the supplier and expenditure by the consumer rather than losses;
- invokes an *ambiguous morality* that can also be subject to sudden and radical change; and,
- creates *socially divisive debate* as to what the appropriate policy response should be.

This last constitutes a very important distinction between predatory and market-based offences. There is not now, nor in the foreseeable future is there likely to be, a credible lobby, including veteran police officers, that calls for the legalization of armed robbery.

[6] For a critical view of the creation of market-based offences in the early part of this century, see, among many others, Mike Gray, Drug Crazy: *How We Got Into This Mess & How We Can Get Out* (New York: Random House, 1998) and Mark Thornton, *The Economics of Prohibition* (Salt Lake City: University of Utah Press, 1991).

Nor should it ever be presumed that because of the lack of formal record keeping or simplicity of institutional arrangements, markets in illegal goods and services are radically different from legal ones, or unsophisticated. There are complex arms-length commercial interactions between various levels on the supply side, and different types of debit and credit relations between suppliers and customers all along the chain.[7] Drugs, arms, gold and a host of other commodities reveal those characteristics. [8]

Market-based offences can be further subdivided into three subsets:

1. those encouraged by regulatory restrictions;
2. those driven by taxation;
3. those that result from prohibition.

In the first case, restrictions on total amount permitted, or administrative rules dictating allocation, cause the emergence of a parallel market in which the "regulated commodity" is available at a higher price than on the legal-but-controlled market. That is the case, for example, with black market steroids diverted from the legal pharmaceutical distribution system, and, to some degree, with the illegal trade in such things as wildlife or ivory.

In the second case, goods subject to excise, sin or luxury taxes may be available on the parallel market at a lower price than on the legal one, the difference being largely (though not exclusively) a function of evaded tax. These can be termed "relative contraband".

In the third case, where the goods or services are "absolute contraband", there is no corresponding legal price - the illegal market stands alone.

There are also certain services that could fall into any of the three subcategories, depending on the legal context. Underground gambling, for example, is absolute contraband in areas that ban it completely. It is, however, relative contraband where placing bets is permitted in outlets that pay heavy taxes. And it is a regulated service subject to diversion into a parallel market if the law permits only state-owned or state-licensed establishments to offer citizens the right to ruin themselves financially in the long run in exchange for an adrenaline rush in the short.

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7 During the early 1980s, for example, in Cochamba, Bolivia, it was possible to enter verbal contracts, sometimes paid for on margin, for future deliveries of specified quantities of cocaine paste at specified prices. This neatly eliminated the cash-flow problems faced by manufacturers in a period when the spot market was weak. See Anthony Henman, "Cocaine futures" in Roger Henman et al. (ed.), *Big Deal:The Politics of the Illicit Drugs* Business (London: Pluto Press, 1985), p. 171.

8 See, for example, R.T. Naylor, "Loose cannons: Covert commerce and underground finance in the modern arms black market." *Crime, Law & Social Change* 22 (1995) and "The underworld of gold" *Crime, Law & Social Change* 25 (1996).

MARKET-BASED OFFENCES: A TYPOLOGY

Type	Created by	Price Relationship
Regulated commodity	Restriction	Illegal higher than legal
Relative contraband	Taxation	Illegal lower than legal
Absolute contraband	Prohibition	No legal reference point

These differences are important, both for the kinds of policy options that might be called for, and for methods of evaluating success or failure of such policies. For example, a policy that is successful against the first type of good or service will work by restricting the flow onto the parallel market and thereby increase the spread between legal and illegal prices. A policy successful against the second will increase the supply on the legal market relative to the illegal and therefore reduce the spread. A policy successful against the third cannot be evaluated by reference to price alone. With no legal source or substitute, price hikes as a result of increased enforcement may do more to increase the amount of income spent on the banned item than to reduce the quantity consumed.

Nonetheless, all three types fall into the general category of market-based crimes, and are therefore fundamentally different from profit-driven crimes of a predatory nature.

To be sure, in practice the contrast between predatory and market-based offences at times seems murky. Some predatory crimes, for example, require market-based ones to dispose of the merchandise or launder the proceeds. Nevertheless, complex though such transactions might be, they are secondary. The primary act generating the money is unambiguously predatory since it involves an involuntary transfer of existing wealth.

Similarly, some market-based offences are committed in an environment punctuated by force or fraud. Occasionally, drug dealers settle accounts at gunpoint and adulterate their merchandise before sale to final customers. The basic act, however, is usually a consensual contract between the supplier of and customer for new goods and services. And therein lies the problem.

It takes two to commit a market-based offence - there can be no market unless there is a supply side and a demand side. Why, then, should suppliers be singled out for special treatment? That is the usual approach taken today, but it has no basis in morality and logic. With predatory offences, the “supplier”, so to speak, takes the initiative against an unwilling victim. However, an illegal market is almost always demand driven. The customer is, in that sense, more guilty than the supplier - though the criminal justice system works on precisely the opposite assumption.

3.3 Commercial Offences

A third, somewhat messier category might be called *commercial* crimes (with a more restricted meaning than that usually ascribed to the term by police forces with "commercial crime" divisions). These crimes are committed *by* otherwise legitimate entrepreneurs, investors and corporations. (Crimes committed *against* them - for example, an employee embezzling from a purchasing account - would fall into the predatory category.)

Commercial crimes, too, can be subdivided, into crimes of production and crimes of distribution. In the first, an entrepreneur or executive might engage in illegal dumping of toxic waste to avoid the costs of proper disposal, or violate safety standards to save money on equipment. These are crimes whose basic intent is to reduce costs. In the second, the responsible party might falsify data on a contract to pad the bill, or con customers with worthless product guarantees. These are crimes whose basic intent is to increase revenues. Although the range is wide, commercial crimes have certain common characteristics.

A commercial crime:

- involves the production of goods and services which are *inherently legal*, but whose methods of production and/or distribution are illegal;
- creates exchanges within a normal business setting that are *multilateral*;
- produces exchanges that are also *superficially voluntary with an involuntary hidden aspect*;
- leads to clear *victims* by virtue of involving fraud against workers, suppliers, customers or, in such things as environmental offences, against the public as a whole;
- generates *income earned but unmerited* by virtue of the illegal methods;
- invokes, in principle, *unambiguous morality*, since fraud is involved; and,
- calls for punishment that logically should involve restitution for misappropriated or damaged property.

Once again, what is clear in theory is not necessarily so in practice. In many cases, it is difficult to be sure where sharp business practice ends and fraud begins. At what point does a high-pressure sales tactic become a confidence trick? At what point does effective advertising become deliberately deceptive? Once the border between pure information and advertising is crossed, the distinction between legitimate advertising and marketing fraud becomes quite problematic.

The result of such ambiguities is that, although some commercial offences may be clear cut enough for traditional criminal prosecution, others may not. The civil courts often seem the most logical way to resolve many disputes that fall into this category. Yet

the tendency has been toward criminalization of actions formerly regarded as regulatory problems or issues to be settled by civil litigation. This is particularly evident with some kinds of securities offences.[9]

If a case involves falsifying a prospectus with completed fabricated sales figures or seeding an ore sample prior to announcing an issue of junior gold mine shares, there is clear fraud involved.[10] However, in securities dealing, things are rarely so clear. Most prospectuses are designed to titillate rather than inform. Furthermore, one other major type of security offence, that of insider trading, criminalized in many Western countries following US lead in the 1980s, raises some particularly serious questions.

Insider trading was first conceived as an offence involving officers of corporations about to merge who took advantage of that knowledge to speculate to their own profit. It was then extended beyond its original mandate to embrace employees of law firms planning mergers and acquisitions, merchant banks involved in financing them, reporters for financial newspapers who got leaks, and even janitors who picked up discarded memos in the trash. If any of them used such information to anticipate stock price movements for their own gain, they were guilty of insider trading.[11] It thus became unclear just where the frontiers between "inside information" and the normal search by potential investors for data on which to base a stock purchase really fell. Simultaneously, the core issue ceased to be breach-of-fiduciary-duty, and became simply obtaining profit that other people thought should rightfully be *theirs*, from correctly guessing stock price movements. This tendency to seek an ever-expanding mandate while blurring the central moral issues seems a danger inherent in all attempts to use the *Criminal Code* for purposes of economic regulation.

However, even if the offence of insider trading were redefined to accord better with its original mandate, its logic could still be open to question. Insider trading is not a predatory crime - it does not involve the forced transfer of property. It is not a market-based crime - the object of the exchange, securities, is perfectly legal. It is not even clearly a commercial crime - to trade on privileged information to capture the profits from market movements that take place for independent reasons is quite different from rigging the market to make it move in a particular direction. With insider trading there is no victim in the classical sense. What is at issue is a quarrel between two sets of investors over distribution of profit. In the past (and in the bulk of instances also in the present) most such disputes were (are) left to the civil courts. With stock markets as with race tracks, it should never be forgotten that insider tips can provide an advantage but, unless combined with painting the tape or doping the horse, can never guarantee the results.

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9 In the 40 years prior to 1990, for example, only 12 people had ever been sentenced to jail terms under the *Securities Act* of Ontario. During the next five years, 14 were jailed. (18 OSCB 346 27 January, 1995.)

10 See, for example, the cases described in Diane Francis, *Contrepreneurs* (Toronto: MacMillan,1988).

11 For an examination of the Wall Street insider trading scandals of the mid- to late 1980s, see R.T. Naylor, *Hot Money and the Politics of Debt*, 2nd ed. (Montreal: Black Rose Books, 1994, Postscript II).

SUMMARY: PRIMARY OFFENCES

Type	Transfer of	Basic Act	Method
Predatory	Wealth	Illegal (theft)	Illegal (force or guile)
Market-based	Illegal goods and services	Illegal (trafficking)	Legal (market)
Commercial	Legal goods and services	Legal (market)	Illegal (fraud)

Thus, the three types of profit-motivated crimes vary enormously in terms not just of their economic nature and impact, but also in terms of their legal implications. With predatory crimes, the basic act and the method are both illegal. With market-based ones, the basic act is illegal while the method *per se* (free market exchange for fair value) is not. With commercial, the basic act is legal, while the method is not.

3.4 Social Offences

It is possible to define a fourth, more nebulous category that might be called social crime. Here the offence is the indirect consequence of otherwise legitimate action. The goods and services are inherently legal and the method of production and distribution conforms to established rules and regulations. But accidental or unpredictable "externalities" (the impact of otherwise legal acts on the broader society or environment) lead to powerful anti-social consequences.

In this category, actions have to be judged against a higher standard than that defined in the *Criminal Code*, and against those actions there is often no well-defined institutionalized recourse. It is a major problem determining just who the responsible party may be - corporate executives and managers in their individual capacity, or the corporation itself as a distinct entity. And if the second, just how can corporations be presumed to have a *mens rea* without which the application of criminal law becomes hard to justify?[12] Furthermore, the problem of balancing, for example, the loss of employment, income and tax revenues from clamping down on cigarettes against the costs to public health from their consumption is not one with which the criminal justice system is or ever will be equipped to deal.

[12] There is an enormously contentious literature dealing with the issue of "corporate crime." This debate started with the publication of Edwin Sutherland's *White Collar Crime* (New York: Holt, Rinehart and Winston, 1949); was considerably elaborated on in Christopher Stone's *Where The Law Ends: The Social Control of Corporate Behaviour* (New York: Harper & Row, 1975); picked up steam in Marshall Clinard and Peter Yeager, *Corporate Crime* (New York: Free Press, 1980); and probably reached its peak with John Braithwaite's *Corporate Crime in the Pharmaceutical Industry*. Although there has been much literature since, the battle lines were essentially set - between legalists who saw the corporation as unable to commit crimes separate from those of its executives and those who argued for a distinct and collective corporate responsibility. On the notion of a corporate *mens rea* and the various permutations and combinations suggested, see Russell Mokhiber, *Corporate Crime and Violence* (San Francisco: Sierra Club, 1988), pp. 23-4.

4.0 Crime and Economic Welfare

This distinction is useful in clarifying another common source of confusion - does criminal activity increase or decrease national wealth? Some insist it is a pure negative, entailing losses to legitimate citizens plus the cost of operating the criminal justice and corrections system. Indeed, the standard procedure is to trot out reams of crime statistics lumping all offences together into some grand crime "rate" along with an estimated aggregate "loss" to society. Others argue that aggregate crime statistics are meaningless, given how widely the sub-components vary in nature and social consequence, and that certain types of crimes, judged in strictly economic terms, constitute a net benefit by generating new incomes to some citizens. (Indeed, some go further, arguing that much economic activity in the underground economy is actually good in so far as it challenges "bad" laws that retard economic development.)[13]

The reality is that both sides are right, for they are talking about two quite different things.

Predatory crimes are crimes purely of redistribution of *existing wealth*. They do not generate new goods and services and therefore do not increase total income flows. Therefore, barring indirect consequences like the costs of increased security (which could be argued either way), their net effect on Gross National Product (GNP) is zero.

By contrast, market-based crimes involve the production and distribution of *new goods and services*. Judged in strictly economic terms, they should have a positive impact on GNP. Indeed, it is now standard procedure in many countries to try to estimate the value of underground transactions in both legal and illegal goods and services, provided they are based on consensual exchanges, and to add that value to their existing national income data to get a better picture of just how "well" their economies are doing.

Commercial crimes are more complex to judge. The essence of a commercial crime is to apply illegal methods to the production and distribution of legal goods and services that would otherwise be produced by someone else using legal methods. The supplier, for example, using illegal methods to reduce costs, does not gain at the expense of other suppliers or its own workers; it is a matter purely of redistribution. There is no net effect on the economy's total production of goods and services. The gains made by the supplier at the expense of customers by cutting quality or engaging in deceptive marketing, arguably the supply of goods and services conforming to what the customer thinks he or she is getting, are actually reduced. GNP, adjusted for the quality of goods, should fall in this case. On the other hand, it is remotely possible that, on occasion, the commission of a commercial offence helps expand the supply of goods and services. If, for example, the fraud takes the form of something like illegal disposal of hazardous

[13] The most extreme, but very influential, version of this doctrine was by Hernando de Soto, *The Other Path: The Invisible Revolution in the Third World* (New York: Harper and Row, 1989). For a critique, see Naylor, "From underworld to underground: Enterprise crime, 'informal sector' business, and the public policy response." *Crime, Law & Social Change* 24 (1996), pp. 87-90 and Francisco Thoumi, *Political Economy & Illegal Drugs in Colombia* (Boulder: Lynne Rienner, 1995, Ch. 2).

wastes, with the result that costs to consumers are reduced at the expense of environmental degradation, depending on how the economic impact of the environmental damage is reckoned, the result could be an actual increase in GNP - even though sensible environmental accounting would dispel any notion this represents a net gain in economic welfare.

Similarly, with social crime, the net effect depends entirely on how the measurement is done. If national income is estimated in the normal way, by examining total value of market transactions, then any production of new goods and services unambiguously increases society's total GNP and, with it, supposedly, economic welfare.[14] This is all the more true because in this case, unlike that of market-based crime, the new goods and services, being legal, can be directly measured. But if national income is measured in a broader way to take account of potential depreciation of human and ecological capital, there are unintended costs which should be subtracted. It is impossible to say *a priori* what the net effect will be.

In all cases, when assessing the overall economic effects of criminal acts, it is necessary to distinguish between the immediate impact of the act at the micro level, and the consequences of increased expenditure for policing, prosecution and correction at the macro level. If an economy is at full employment, arguably the diversion of resources into economically unproductive activity associated with crime control is a net loss. But if the economy has unemployed resources, increased expenditure on police, prosecution and imprisonment operates just like any other net injection of funds to produce a positive multiplier effect. Indeed, one of the reasons the US economy did not stumble badly in the post-Cold War period may be that increased expenditure for the prison-industrial complex more than offset reductions in what previously went to the military-industrial complex. Over the last decade, the military budget has fallen about US$50 billion, while the crime-control budget has risen by about $100 billion. Furthermore, that the US employs so many people in construction and maintenance of prisons, and jails such a large percentage of its economically active population, may itself account for the fact that the US unemployment rate is lower than that of other wealthy Western countries.[15]

4.1 Secondary Crimes

The existence of such distinctions which are clear in theory, though in practice less so, has important further implications in terms of just what secondary criminal acts are involved in their commission. Take as examples violence, money laundering, tax evasion and corruption.

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[14] This is the conventional measure. It is also an absurdity. GNP measures were originally devised not to measure welfare but to calculate total resources available to governments during war. Since then, despite being subject to repeated and devastating criticisms, they have transformed themselves into measures of economic well-being. (See, for example, Victor Anderson, *Alternative Economic Indicators* (New York, Routledge: 1991)).

[15] Even better, the process may be more self-sustaining than military-industrial expenditure. The more people jailed who then lose the right to vote, the fewer the number able to object politically to the soaring expenditure on prisons, while, on the other side, the more people earning their income in the prison-industrial complex, the more political support there is likely to be. An excellent recent treatment of these issues is in Joel Dyer, *The Perpetual Prisoner Machine: How America Profits from Crime* (Boulder: Westview, 2000).

Violence (actual or implied) plays a radically different role depending on the specific type of crime. In predatory acts, violence is a central instrument without which, in many cases, the principal act could not take place. Therefore, legitimate society is directly and deliberately threatened. By contrast, in market-based acts violence *per se* is not required - the transfers of money and goods are voluntary. Violence occurs mainly in an ancillary phase, in struggles between rival suppliers over the resulting profits. It is therefore a consequence of the fact that certain goods and services are illegal rather than being inherent in the act of serving the market *per se*.

With money laundering, there is also a difference. With all three types of crimes, it may be necessary for the criminal to, first, hide and, later, launder the money to evade detection and enjoy the proceeds. But, in the event the perpetrator is caught, the ultimate fate of the money is quite different.

SUMMARY: SECONDARY OFFENCES

Crime	Violence	Corruption	Money Laundering	Tax Evasion
Predatory	Normal	Rare	Rare	None
Enterprise	Sometimes	Sometimes	Frequent	Frequent
Commercial	None	Frequent	Sometimes	Sometimes

With predatory offences, there are no “proceeds” in the normal sense, and therefore no presumption of forfeiture of the proceeds. Rather, there is property which must be restored to the victim. In market-based offences, there clearly are illicitly earned proceeds, with no victim to whom restitution is due. This is precisely the rationale for forfeiture laws. In commercial offences, there might be a mixture of both - there may be both fraudulently obtained property and illicit profits. Logically, they should be treated distinctly.

The major types of economically motivated crime also differ according to their fiscal implications. With predatory offences where both the basic act (misappropriation of resources) and the method by which it is carried out (force or fraud) are illegal, there are no fiscal implications. Income taxes are levied on net new income flows, not on redistribution of existing ones. Criminals who commit predatory offences should repay victims and perhaps incur fines in addition to, or instead of, prison terms. But logically they should not be expected to pay taxes on their ill-gotten gains, since the victim, to whom full restitution should be made, would end up being the one who bears the burden of the tax in the form of reduced funds available for restitution.

With market-based offences, where the basic act (the sale of explicitly banned goods or services) is illegal, but the method by which it is carried out (voluntary market exchange) is not, the fiscal implications are also unambiguous. Income taxes are legally due on the proceeds of the sale of any good or service, legal or illegal in nature. Failure to render such taxes to the fiscal authorities adds an additional layer of criminality over and above the basic offence. If the commodity sold is one that is taxed in legal markets, there may be yet another layer of fiscal offence from the failure to pay excise, sales and value-added taxes. This, of course, does not apply in the case of prohibited goods. And with regulated goods, it may or may not apply, depending on whether the goods were diverted to the black market directly from the supplier or after passing through the formal marketing chain.

With commercial offences, the situation is more complicated. Whether or not the offence has any fiscal implications depends on the precise instance and the precise type of tax.

If a commodity is subject to special excise taxes, evasion in itself constitutes the market-based offence. The commodity becomes contraband, which can be seized and destroyed. However, if a commodity is subject, not to excise, but only to sales or value-added taxes, evasion of those taxes constitutes a commercial offence. What is involved is the sale of a legal good or service by illegal means. The commodity is not in itself contraband.

Thus, three distinct fiscal offences are committed. The first, evasion of excise and other special taxes applicable to a particular commodity involves the conversion of that commodity into contraband. The fiscal offence and the market-based crime become synonymous. The second, the evasion of sales tax, involves a crime with respect to methods of production or distribution, and therefore converts a legal act into a commercial crime. The third, evasion of income tax, involves a crime with respect to the financial proceeds of acts of production or distribution. It applies mainly to market-based offences, though could be present in a commercial one as well.

These considerations indicate that the three types of crime imply three different types of responsibilities for the criminal justice system with respect to the resulting proceeds. With predatory offences, the role of the justice system is to find and restore to the proper owner misappropriated property, and nothing more. In enterprise offences, that role may consist of both finding and taxing hidden revenues, or of finding and forfeiting illegal profits - it would be illogical to attempt both. In commercial offences, that role may include all three - restoring misappropriated (fraudulently obtained) property, finding and taxing hidden revenues and/or finding and forfeiting misbegotten profits. In all cases, fines can be used as a form of punishment for the guilty party - they are quite distinct in logic and purpose from restitution, tax collection or forfeiture.

Finally comes corruption. Here, too, there is a big difference in the categories.

With the possible exception of drug trafficking, no criminal act has achieved greater notoriety of late than corruption. The struggle is led by transnational corporations worried not about the morality, but about the possibility their competitors might steal the edge, or that they might have to shell out, in bribes, the money they save from evading taxes. Politicians routinely rail against it in public, though how many continue to practice it in private is anyone's guess. New governments see the fight against corruption as an excellent means of discrediting the predecessor regime and purging the public service of old regime loyalists, therefore clearing the space for patronage appointments of their own supporters. The battle has been recently joined by international lending institutions whose main concern is that leakage of foreign exchange into the offshore retirement accounts of Third World officials will threaten the capacity of their countries to repay their foreign debts. Thus, for a variety of reasons, a powerful anti-corruption coalition has formed - albeit with corruption defined, implicitly or explicitly, as nothing more than the direct payment of bribes, likely its least insidious form.

Despite the fervour, in profit-driven crime, corruption (in the limited sense of cash payment for economic advantage) is usually not a primary offence. Predatory acts do not involve corruption per se. Nor, strictly speaking, do market-based offences, to the extent the market exchanges involve fair value and free transfer. However, corruption can occur as a secondary consequence of both when perpetrators attempt to subvert the law enforcement system to cover up their actions. Corruption may occur in certain types of commercial offences, when those seeking commercial advantage use it to bypass normal mechanisms for getting access to contracts or resources. Even then it is not likely to be the norm. Where corruption is pervasive is in social crimes, where it also takes a form particularly difficult to root out.

It is no mystery why in some countries economic regulations are so spottily enforced. Regulatory agencies quickly become captive of the industries they supposedly regulate. They become dependent on them for the primary information necessary to enforce the rules. Moreover, between regulator and regulated, there is usually a revolving door through which top personnel routinely come and go. (Perhaps the most notorious instance in recent years involved U.S. military contractors and the Pentagon.[16]) But even more important, corporations subject to regulation are almost always heavy political donors. They, therefore, influence directly, through campaign contributions and lobbying of politicians, and indirectly, through information designed to mould public opinion, both the shape of regulatory legislation and the degree of enthusiasm with which it is enforced. Indeed, one of the major reasons why corporations do not face more criminal sanctions is not that they respect the need for workers' safety and the integrity of the environment so scrupulously, but because of their capacity to shape the regulatory context through a form of legalized influence peddling.[17]

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16 R.T. Naylor, "Corruption in the modern arms business: Lessons from the Pentagon scandals" in Arvind Jain (ed.), *The Economics of Corruption* (Boston: Kluwer, 1998).

17 These issues are well discussed in Stone, *Where the Law Ends*, 95-117. See also Marshall Clinard, *Corporate Corruption: The Abuse of Power* (New York: Praeger, 1990) and David Burnham, *Above the Law: Secret Deals, Political Fixes and Other Misadventures of the US Department of Justice* (New York: Scribner, 1996).

5.0 Ten Major Complications

Once profit-driven crime is viewed more through an economic than a legal lens, and the distinctions brought into sharper relief, difficulties faced by the traditional justice system in coping with it also become clearer. These are both moral and practical.

5.1 Pioneer or Profiteer?

Far from the existence of absolute standards for judging deportment, what constitutes a profit-driven *crime* depends very much on the historical and political context. Opium trafficking, slave trading and privateering (piracy under a national flag against ships of designated enemies) were, until quite recent times, much more likely to secure for their perpetrator a knighthood than a noose.[18] In Medieval Europe usury (which meant simply lending at interest, regardless of the rate) was more than a crime, it was a sin. Indeed, it is still is in countries where Islamic law prevails. In the old Soviet Union, two of the most serious economic crimes were "exploitation" and "speculation", hiring labour outside the household and buying with intent to resell at a profit, things that are the essence of a capitalist economy.[19]

Today, prominent in the list of economic crimes are violations of intellectual property laws. The US pushes particularly hard for serious action by host countries to curb piracy of patents, trade marks and industrial designs - apparently forgetting the degree to which its own industrial supremacy was built in the 19th and early 20th centuries on deliberate copying of other countries' technology without accreditation or compensation.

Thus, it is misleading to assume that economic activities currently seen as criminal will always be so regarded. Someone viewed as a profiteering criminal by one set of people at one point in time might be viewed by others, or even by the original set at another point in time, as a pioneering entrepreneur.

While a counter-argument can be made that civil society across the world by now has a fairly common set of standards to judge what constitutes a predatory crime, by no stretch of the imagination can the same be said for market-based and commercial ones. Take for example, one activity, a crime in some jurisdictions and legal in others, that promises to become increasingly important, and increasingly contentious, in the new century.

During the last two decades, the development of immunosuppressive drugs, combined with, on the one side, an affluent and aging population in the North, and, on the other, an increased number of impoverished young people in the South, has led to an international traffic in organs for transplant.[20] In the North, it is strictly forbidden to

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18 On privateering, see for example, Donald MacIntyre, *The Privateers* (London: Elek, 1975) and C.M. Senior, *A Nation of Pirates* (London: Newton Abbot, 1976).

19 See R.T. Naylor, *Patriots and Profiteers: On Economic Warfare, Embargo Busting and State-Sponsored Crime* (Toronto: McClelland & Stewart, 1999, Ch. 6).

20 See, for example, Committee on Trafficking in Organs and Body Parts for Transplant, International Commission of Health Professionals for Health and Human Rights, *Report* (Geneva: July 7, 1989).

buy or sell human spare parts, a position endorsed by the World Health Organization. In much of the South, even where the traffic is illegal, the law is rarely enforced.[21] Although various bodily parts are sold - everything from bits of skin to ovaries and sperm - the most controversial involve organs from living donors that do not regenerate, particularly kidneys and corneas. Horror stories abound of hijackings of organs from drugged patients in hospitals, or the kidnapping of people by organ theft rings, but the most important source is actually voluntary. Although there have been some recent efforts to suppress the trade, to this day in India organ brokers tour the slums to find people willing to sell vital parts to rich patients jetting in from the Gulf states, Europe or North America to private hospitals. A similar traffic exists in parts of North Africa, South East Asia and South America.[22] There was even in Germany an entrepreneurial individual who set up an international kidney exchange; and there have been proposals for the traffic to be legalized even to the point of creating a futures market - people would be able to sell their organs now for delivery on their death to hospitals specializing in transplant surgery. [23]

5.2 So What's Wrong?

Clearly once beyond the realm of predatory crimes involving involuntary redistribution of existing wealth, rights and wrongs become fuzzy. With market-based offences that position is rendered especially awkward by the apparently willing participation of so many members of legitimate society, and by the fact that so much police activity involves interfering in decisions about personal moral choices.

This, in fact, can be gauged from the internal logic of the offences. With a predatory crime, both the act and the method are illegal, and the public has a clear understanding of the nature of the offence and the harm done. With market-based crimes, the act is illegal, though whether it should be is subject to contention, while the method is not, making the morality doubly debatable. With commercial crimes, while fraud is always deplored in principle, it is often hard to define in practice. The goods and services being transacted are inherently legal. And there is the additional complication that often the general public, not to mention juries and perhaps some law enforcement officers and judges, do not understand just what the offence really is.[24]

Moreover, with a predatory offence, the victim takes the initiative in counteraction and the victim, along with most other citizens, can be expected to cooperate fully with the police. In a market-based offence, the police take the initiative, and the public response might be indifferent or even hostile. There is an expectation that each and every predatory offence will be investigated. In market-based crimes, since those who

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21 *Medical Post* (5/9/89). It has not always been so well enforced in the North either. See, for example, "London kidney exchange in trouble." *Nature* (1989) v. 337. Only after a scandal over parts for sale did the British government tighten the law to make the ban effective.

22 *Medico-Legal Journal* (1989) v. 57, pt. Two; L'Express 1/6/90; Nancy Scheper-Hughes "Theft of Life" *Society* (1990) Sept./Oct.

23 Richard Schwindt and Aidan Vining, "Proposal for a Future Delivery Market for Transplant Organs." *Journal of Health Politics, Policy and Law* (Fall 1986) v. 11, no. 3.

24 A certain Montreal business consultant who had been convicted of a securities offence in the US 20 years ago told me of his recent experience at US immigration. Asked if he had a criminal record, he replied in the affirmative. He was asked to elaborate. The immigration officer's puzzled response was, "Is that a crime?"

buy are really as guilty as those who sell, there are so many "guilty" parties that the police are necessarily selective about whom to target. Police actions may catch only the most visible and vulnerable who are also the most easily replaced component of the trafficking networks, leaving the illicit market operating largely unscathed.

Indeed, there is a sense in which police action is actually counterproductive. With a predatory crime, a police crackdown can be expected to reduce the number of perpetrators and the number of instances of the offence. With a market-based crime, the opposite is true. The response of illegal markets to intensified police action is to increase, not decrease, the number of participants and the number of transactions - there are more intermediaries, each dealing in smaller amounts of merchandise. Therefore, ironically, what would be taken in predatory offences as a sign of a law enforcement crisis, more offenders and more illegal actions, in market-based offences can be taken as a sign of success. By virtue of confounding and compounding the two, crime data become easy to misinterpret. That can lead to serious mistakes in policy and in resource allocation.

5.3 Whose Business Is It?

Even within North America, the creation of modern market-based offences was scarcely a matter free of controversy. During the 19th century, most governments accepted the sensible notion that personal vice was the business only of the person with the vice, thereby excluding from the criminal code a whole host of offences that would later be incubators of modern "organized" crime.

Then, in the early 20th century, North America was swept by a wave of Puritanism made up of several components: the temperance movement; a resurgence of small-town "decent" values against big-city cosmopolitan decadence; Anglo-Saxon racism (blacks were associated with cocaine, Mexicans and "Hindoos" with cannabis, Orientals with opiates and the Irish with alcohol); and a movement to disenfranchise immigrant voters by closing the saloons which functioned as working men's political clubs.[25]

These political currents were compounded by another. The US Constitution seemed to drastically curtail federal law enforcement powers. Policing serious predatory crime was the preserve of the states. Hence, to assert its presence, the federal authority took the form of regulation, taxation and prohibition of certain goods and services - in effect, the very creation of the category of market-based crime. Recreational drugs, prostitution, gambling and even alcohol were criminalized and federalized. Canada and much of the Western world followed the American lead, albeit usually with less intensity.

[25] Apart from the previously cited works of Gray, *Drug Crazy* and Thornton, *Economics of Prohibition*, these developments are traced in Stephen Fox, *Blood and Power: Organized Crime in Twentieth-Century America* (New York: 1989). This is a fairly superficial history that depends heavily on recycling standard anecdotes, but nonetheless has sensible observations about the emergence of the puritan drive.

There were several consequences. One was the extinction of the old red light districts - henceforth, the business of supplying and demanding personal vice ceased to respect intra-urban frontiers. Indeed, the criminalization of supply meant that criminal entrepreneurs had to deliberately mix with polite society to lower their profile. A second was the creation of a class of wealthy criminals who could use the profits resulting from criminalization of personal vice to penetrate legitimate parts of the economy. A third was the emergence of the view that "organized crime" in the vice trade was the result of an alien conspiracy, a view that continues to misinform debate to this day.

4. Who Done It?

Although the distinction between predatory, market-based and commercial crime should be offender-neutral, there is a stereotype with respect to the nature of the offender population associated with each type.

With predatory crime, the popular presumption is that most offences are the work of individuals or gangs which are regarded, and treated under law, as merely aggregations of individuals.

OFFENDERS AND OFFENCES: THE STEREOTYPICAL DISTINCTION

Offender	Offence
Individual	Predatory
Group	Market-based
Corporation	Commercial

However the rise of market-based offences is inevitably associated in the public (and police) mind with "organized crime". This involves applying to a group the notion that the whole is larger than the sum of the parts, and that it should be so treated in law. This view is used to argue for harsher punishments for members of an "organized crime" group and treating membership in proscribed organizations an offence *per se*. At that point, association rather than action becomes the crime.

Most predatory crimes are the work of individuals or *ad hoc* groups. Debate often confounds two quite distinct things - a criminal association and an association of criminals. Serious research has shown that, to the extent "organized crime" groups actually exist, they are not economic but political and social in nature. They form a kind of underground government to adjudicate disputes and allocate property rights. But once the rules are set, each individual member operates alone or in partnership

with others, who may or not be members of the group. In the same vein, criminal markets are not based on hierarchical administrative structures operating on command to monopolize a market, but loose and *ad hoc* networks engaged in arms-length commercial transactions.

THE CRIMINAL FIRM: TWO VIEWS

Model I	**Model II**
Large "organizations"	Individuals, small groups
Management hierarchy	Arms-length *ad hoc* deals
Long-term planning	Opportunistic
Huge profits	Modest profits
Profits concentrated	Profits widely dispersed
Infiltrate legal markets	Most money stays on the street
Legal markets corrupted	Most invested cash behaves legally

The concept of "corporate crime" is also problematic. Is it even possible for a corporate crime to exist independently of the actions of managers and executives? How can the When it comes to actually meting out punishment, there are even more problems. For an individual, apart from fines, the criminal justice system can mete out punishment in the form of loss of liberty or, in some places, loss of life. If a corporation is deprived of loss of liberty, its charter is suspended and it is almost inevitably driven to bankruptcy, a punishment that seems to fall as much on shareholders and creditors as on the executives whose decisions were responsible. If a corporation is deprived of life, in the sense of having its right to operate permanently repudiated, the same results clearly follow. Therefore, almost all corporate punishment takes the form of fines. But they, too, fall on the general shareholders who are powerless, and the executives who made the decisions that led to the charges are almost always indemnified.[26]

[26] See the references cited in note 13 above.

5.5 A Helping Hand?

There is another form of crime associated with corporations that seems, on the surface, easier to handle: the case where a corporation cooperates with career criminals to advance their joint interests. Take, for example, the case of hazardous wastes.

For many decades, hazardous wastes were handled just like ordinary garbage. But after major scandals in the 1970s, governments began to toughen up. For key sectors of the US economy like oil, chemicals and pharmaceuticals, this seemed like a major new regulatory burden. In fact, the regulatory structure was shaped largely to the demands of the chemical industries which were intent on two things - to make sure there would be no interruption of production, and to guarantee that their liability would be kept under control. They had help.[27]

The trick was to turn the wastes over to licensed disposal companies which would pick up the hazardous material, charging the producing corporations much more than the fee for ordinary garbage but less than the cost of proper disposal. Then they would haul it to a landfill site where the owner would sign off on the manifest. Ultimately, the hazardous waste might be buried with regular garbage, dumped in rivers or municipal sewer systems or stacked on vacant lots or buildings. At that point, the companies producing the waste were in the clear. If the material is ever discovered it may be very difficult if not impossible to trace it back to the company of origin and the disposal company could well have gone bankrupt and the principals vanished.[28]

5.6 Partners in Crime?

Not only are the borders between crime and aggressive commerce often blurred, in some cases explicitly criminal acts and inherently legal ones are embedded together in a matrix of economic activity to such a degree that the two, while theoretically distinct, are mutually interdependent.

Consider, for example, the situation in the garment trade in many urban centres in North America. Conditions reminiscent of sweatshops, long regarded as extinct in North America, reappeared in the 1980s. Typically they drew their labour from a number of sources: first time entrants into the labour force whose lack of documentary history facilitated income tax and social security charge evasion; moonlighters cheating unemployment insurance agencies; welfare recipients working for cash on the side; and illegal aliens in a state of debt-bondage to the gangs that brought them over. Since they often lacked collateral, they could not get working funds from the formal

[27] See Alan Block and Frank Scarpitti, *Poisoning for Profit: The Mafia and the Toxic Waste Business* (New York: 1985) and Andrew Szasz, "Corporations, organized crime, and the disposal of hazardous waste: An examination of the making of a criminogenic regulatory structure." *Criminology* (1986) v. 24, no. 1.

[28] Alternatively the stuff could be shipped abroad, dumped in some developing country where officials were either corrupt or ignorant of the nature of the material or where the country was too poor to resist the dumping fees. See, for example, Third World Network, *Toxic Terror: The Dumping of Hazardous Wastes in the Third World* (Penang: 1989); Jim Vallette, *The International Trade in Wastes: A Greenpeace Inventory*, Greenpeace International (30 Jan.-3 Feb. 1989); Center for Investigative Reporting, *Global Dumping Ground: The International Trade in Hazardous Waste* (Washington: 1990).

capital market. So some turned to loan sharks recycling money from drugs, gambling or other criminal sources. If New York experience is a general guide, these small shops might also have to pay extortion money to mob-run trucking firms which signed sweetheart contracts with the owners at the truckers' expense.

Thus taxes were evaded, social security charges unpaid, wages reduced, and regulations regarding working conditions brazenly ignored. What the workers lost in wages and benefits and the public sector in revenue turned up on the other side of the ledger as increased profit. Mobsters took their share in the form of usurious interest charges, payoffs from trucking companies, kickbacks from suppliers, extortion payments from manufacturers and the occasional extra like the privilege of putting the odd associate or relative on the payroll or the profits from alien smuggling operations. Meanwhile the output (strictly legal) was sold to respectable fashion companies and big department stores which had subcontracted to the sweatshops. These legitimate firms took their share in the form of increased corporate net income as a consequence of reduced supply costs. Without their active participation, none of the explicitly illegal earnings would have been possible.[29]

5.7 Subcontracting Responsibility

When such interrelations occur, it is often difficult for the justice system to allocate responsibility fairly. Seemingly respectable businesses maintain sufficient distance from the explicitly illegal acts from which they are clearly and consciously beneficiaries, so that they cannot be judged legally culpable.

This problem has been highlighted recently by attention paid to tobacco smuggling. Canada, it appears, was shocked to discover that its major tobacco producers deliberately set up subsidiaries abroad to link up with career smugglers who would bring cigarettes back into Canada to be sold on the black market and therefore expand total tobacco sales in the face of steadily rising taxes. Yet, since World War II cigarettes have been the most widely smuggled commodity on the planet. To this day one cigarette out of every three entering world trade disappears from sight. In total about 300 billion cigarettes per year are sold illegally. Tobacco companies ship en masse to what are euphemistically called “free-trade” centres and sell the cigarettes, often on credit, to wholesalers. They in turn hire or sell to career smugglers who move the merchandise into the target country, along with loads of whiskey, weapons, electronics and American brand-name jeans. In the countries of destination, the tobacco companies arrange for local advertising and marketing companies to handle the arrival of the merchandise in order to create an extra layer of insulation. Since any sensible smuggler wants a two-way flow of cargo, on the return leg the small boats or planes typically carry everything from cocaine to illegal immigrants. Yet to this day it is difficult to make a criminal case against the companies because they are not the ones who do the actual smuggling.

[29] See Alan Block (ed.), *The Business of Crime* (Boulder: 1991) for a compilation of official documents and hearings on the resurgent sweatshop phenomenon.

5.8 Unintended Consequences of Crime-fighting

Where a particular criminal activity can be isolated, law enforcement action may produce unexpected and costly feedbacks that might generate more crimes than they solve. These can be especially difficult to handle when they manifest themselves on an international scale as with international trade in Jamaican *ganga* in the 1980s. If *ganga* farmers were driven out of business. They would move *en masse* into the urban slums, swelling an already enormous problem of urban crime that threatened Jamaica's social stability as well as tourism, the most important source of legal foreign exchange. Banks and the country's exchange reserves could be depleted sufficiently to drastically reduce imports of capital equipment necessary for economic growth. Consequently, loans extended to Jamaica by both Western commercial banks and international development agencies might have gone into default, and exports from other countries to Jamaica might drop precipitously.[30] In this not-purely-hypothetical example, what started as a resolution of a straightforward criminal justice problem developed into a full-fledged international social and economic crisis.

5.9 Diverting Attention

Not least of the problems associated with these more complex forms of profit-driven crime is the fact that treating them essentially as criminal justice issues may give a false impression of the real nature of a problem. Take the example of the recent savings and loan (S&L) bank crisis in the US where attention paid to a handful of crooks diverted attention away from the real issues - a combination of serious structural malaise and profound weaknesses in the regulatory apparatus.

Historically created to use local savings to finance local housing development particularly in small-town America, during the mid-to-late 1970s the S&L associations got into trouble. Population growth slowed, industrial depression blighted many small communities in the northeast, and interest rates began to shoot up. As other institutions began offering high and rising interest rates, the S&Ls were drained of deposits to which they had to respond by bidding up the deposit rate, while their loans, almost all in the form of long-term residential mortgages, yielded very low returns. Then came “deregulation” to complete the disaster.[31]

The US federal government decided that the solution lay in freeing the S&Ls to speculate in stocks, play the junk bond market and pump money into commercial real estate areas in the South and West. Simultaneously, it opened the door to the takeover of the industry by individuals who turned out to include corporate raiders, real estate sharks and bank fraud artists plus a smattering of gun-runners.[32]

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30 Author's own interviews and research in Jamaica in the 1980s and 1990s.

31 There are a number of excellent works on the S&L crisis. See, for example, James O'Shea, *The Daisy Chain: How Borrowed Billions Sank a Texas* S&L (New York: 1991); Stephen Pizzo, Mary Fricker and Paul Muolo, *Inside Job: The Looting of America's Savings and Loans* (New York: 1989); James Ring Adams, *The Big Fix: Inside the S&L Scandal* (New York: 1990); Martin Mayer, *The Greatest Ever Bank Robbery* (New York: 1990); and Kitty Calavita, Henry Pontell and Robert Tillman, *Big Money Crime: Fraud and Politics in the Savings and Loan* Crisis (Berkeley: University of California Press, 1997).

32 The weakest book on the S&L crisis, Pete Brewton's *The Mafia, CIA & George Bush: The Untold Story of America's Greatest Financial Debacle* (New York: Shapolsky Publishers, 1992), attempts to deal with this side of the story.

Every species of bank job figured in the action. There were bust-outs in which insiders would siphon the money off into phony loans to confederates, and then vanish. There were cash-for-dirt deals, land flips, linked financing schemes, nominee loans and more. These all became standard operating techniques in which turned into the most expensive financial debacle in history. The cost to the taxpayer for bailing out the system was US$325 billion.

In the wake of the collapse, public attention was riveted on high-profile prosecutions of a few individual crooked financiers and developers. It was claimed that fraud figured in nearly 75% of the hundreds of S&Ls that had failed. But the crooks who were prosecuted accounted directly for only a few tens of millions of the hundreds of billions "missing". It would have been extremely difficult to recover the rest since it was not criminality but regulatory failure which permitted the uncontrolled lending and wild speculation and the beneficiaries included legitimate borrowers, mainly real estate developers and construction tycoons, who were operating within fuzzy and selectively enforced laws.

In environmental crime as well, a weak regulatory environment was the critical factor. The failure of the regulatory apparatus to keep activities under surveillance led previously legitimate business people to, first, cut the occasional corner, then, once their confidence and their greed grew, to make violations the norm rather than the exception.[33]

5.10 Whose Law? Whose Order?

Ideally, criminal justice should punish the perpetrator and give aid and comfort to the victim. The problem with dealing with complex profit-driven crimes is that law can be easily captured by one side in a commercial dispute and used, not for economic redress but for economic advancement. History is full of examples.

In the late 20th Century intellectual property has become a critical battleground. An example is the controversy over the Napster, the program, widely diffused over the Internet, that permitted easy downloading of music or videos onto a writeable CD? On the one hand, corporations insisted this was "piracy" that would ruin their business. On the other hand, certain artists and writers used this and similar technology to by-pass the usual commercial channels and deal directly with their audiences. Is the Napster an instrument of property crime against corporate intermediaries or a commercial innovation that will aid communication between artists and audiences? Is that the kind of decision the criminal justice system should be called upon to make?

[33] See the reconsideration of the "mob" role in Donald Rebovich, *Dangerous Ground: The World of Hazardous Waste Crime* (New Brunswick: Transaction Publishers, 1992).

6.0 The Alternatives

Profit-driven crime is a serious problem but not always or solely a serious criminal justice problem. There may be other alternative approaches to increase compliance.

When a profit-driven crime like armed robbery, involving redistribution of existing wealth through force (actual or implied) or deceit, takes place, the act, the cost and the victim are easy to define; and standard methods of crime control will continue to take centre stage. But when a profit-driven crime (like trafficking in some restricted good or service or manipulation of the terms and conditions under which normal goods and services are produced and sold) takes place, it usually does so as part of a complex of other, legitimate business transactions. When a corporation peddles goods with deceptive product guarantees there may be difficult to distinguish between aggressive marketing and an explicit con-job.

When criminal activity and legitimate commerce act in mutually complementary ways, it is not always easy to bring the more guilty parties to justice. When an attempt is made to "solve" such crime problems, there is danger of setting off a host of unexpected social and economic consequences that may end up being more of a problem than the designated crime. When crimes involve apparently legitimate institutions used in an apparently illegitimate way, proceeding with traditional criminal justice methods that focus on bad individuals presents the additional danger of distracting attention from deeper causes, like the need for profound structural and regulatory reform. Because so many crimes of a market-based or commercial nature involve complex interrelations with the legitimate economy and can have profound, unintended and unexpected consequences, that it may be unwise to rely on the criminal justice system alone (or in some cases at all) for their resolution. There is serious need to consider alternative instruments.

There are three distinct levels at which alternative instruments can be directed.

POTENTIAL ALTERNATIVE INSTRUMENTS

Objective	Level	Alternative Instrument
General prevention	Operating environment	Regulatory system
Specific deterrence	Specific enterprise	Private financial system
Detect and prosecute	Actual offences	Tax system

These instruments can try to broadly prevent, by creating an environment that is not conducive to crime. In this case, they should aim to improve operating standards, levels of transparency and information flows among various institutions of the legitimate economy. This is one of the primary roles of the regulatory system.

They can try to narrowly deter by protecting a particular institution from actual incidents. In this case, they should aim to enhance operational security in the actual conduct of affairs. It is widely believed (though by no means proven) that one of the best techniques is to work with and through the private financial system. The theory is that it is easier to monitor the financial flows that result from crime than to watch out for forbidden transactions in goods and services that generate the flows.

Or they can try to detect and to deal with particular offences once they have been committed. In this case, the tax system has a powerful, often underutilized, role to play.

6.1 The Regulatory System

Clearly, the distinctions between these three are not absolute. Although the main function of the regulatory system, for example, will be to upgrade the overall environment by improving information flows, increasing transparency of transactions, assuring high standards of staff training, etc., it is sometimes called upon to help in the detection and prosecution of specific offences. However, expectations have to be tailored to the type of offence.

With a predatory crime, there is usually little the regulatory system has to offer. Prevention is almost entirely in the hands of private-sector institutions and individuals, while solving and prosecuting such crimes is mainly the preserve of the traditional law enforcement apparatus.

With a market-based crime, for the most part the regulatory system also has little to offer. Banned goods and services are traded on markets that run parallel to, but are institutionally distinct from, those that handle the products of the legal economy.

With a commercial crime, there is clear scope for the regulatory system to be of considerable use, since a commercial crime involves the provision of legal goods and services in illegal ways, at least some of which should be picked up routinely by the oversight apparatus of the regulatory system. But how that happens can be a matter of some concern.

In the US case, regulatory institutions function as deputies in the detection and prosecution of specific offences and offenders. Regulatory bodies ranging from the Securities Exchange Commission to the Post Office routinely initiate criminal investigations and bring criminal charges. Ludicrous though it seems, among the branches of the US government which have recently initiated money-laundering cases are the Departments of Agriculture and Education! But this is role for which the competence of the regulatory system is subject to much doubt. And there is a realistic fear that the more energy regulatory bodies put into attempts to enforce criminal law,

the less they will have for their proper roles. This deputization process involves more than simply using criminal law enforcement for regulatory enforcement, something that is in itself of debatable merit. It involves subordinating the regulatory framework to the demands of criminal law enforcement. In that regard, working with economic regulators can scarcely be described as a *bona fide* alternative to the criminal justice process.

6.2 The Role of the Private Financial System

Today, it is becoming increasingly popular across the world to attempt to recruit financial system employees as "front-line troops" in the "war" on money laundering. When banks and similar institutions hesitate to volunteer, requiring governments to conscript them, there are allegations that the banks are not merely "soft on crime", but actively complicit with the "enemy". They do not wish, so the accusation goes, to scare off such prime customers as criminals dripping filthy lucre. Not only is this characterization wrong - bankers generally are extremely frightened about the possibility of being caught in some big money-laundering scandal - it reflects, once more, the confusion generated by the failure to appreciate the fundamental differences between various forms of profit-driven crime.

Bank employees are expected, and are trained, to be on the alert for various forms of theft or fraud against an institution - bum checks, forged letters of credit, bogus collateral, diverted loans or counterfeit currency offered on deposit or in exchange. They also have to be on guard against insider abuse - theft or electronic-funds transfer fraud. This means that bank employees will be on the lookout for transactions resulting from predatory or commercial crimes in the normal course of business. In these cases, crime control and the financial institution's self-interest coincide.

However, with enterprise crimes, the bank is involved in quite a different way, as a depository or transferor of perfectly sound, if illegally earned, monetary instruments. Anti-money-laundering rules put the bank in a position of conflict of interest between its role as a profit-seeking institution and its new law enforcement obligations. Furthermore, unlike predatory crime directed against the financial institution, where a bad cheque or phony collateral can be subjected to appropriate scrutiny under standard banking practices, there is nothing to physically and objectively differentiate the deposits of drug dealer or used-car dealer.

On what basis can banking personnel make the required judgements as to "suspiciousness" and balance this against rights to privacy? The problem lies not just in the information requirements, and the way they have progressively escalated, but also in the very nature of the information and the bankers' role in providing it.[34]

[34] See R.T. Naylor, "Washout: A critique of follow-the-money methods in crime control policy," *Crime, Law & Social Change* (1999) v. 32.

These requirements began, first in the US and then elsewhere, with the Currency Transaction Report, a form that had to be filled out by financial institutions and their clients in the event of a large cash deposit (or withdrawal, but that was less problematic). This report detailed information about the depositor and the origins of the money. The second to become popular was the Suspicious Transaction Report which banks and other institutions had to fill in should a transaction exhibit certain characteristics that put it in the suspect category. The third, popular in the EC but recently rejected in the US, is a set of Know-Your-Client rules. These involve not so much exogenously required forms as a set of exogenously determined vetting procedures which in turn could lead to additional information passed on to law enforcement. Although one type of information requirement seems to flow logically into the next, in fact each represents a qualitative change in the relations between "banker" and client, and between financial institutions and the law enforcement apparatus.

Furthermore, these rules fly squarely in the face of modern banking trends - where more and more transactions are initiated and conducted by the client, where tabulation of deposit records is centralized, and where as much business as possible is being impersonalized. Once again, the profit-seeking (cost-reducing) interests of the financial institution put it at loggerheads with any desire to draft the financial sector into the front lines of the "war" on crime.

Not least, this is one area where technology clearly acts to facilitate criminal transactions. The advent of electronic purses with peer-to-peer transfer capacity, and the propensity for people to enter and leave countries, not with cash or travellers' cheques, but with debit cards, threatens to soon make the reporting apparatus now being carefully put in place, largely irrelevant.

As well, there are serious doubts whether the crime control approaches involving the financial sector in the war against crime are worth the cost. We lack the fact-based research on how much of a threat profit-driven crimes really pose.

6.3 The Role of the Fiscal System

Although also a part of the government regulatory apparatus, the fiscal system has an importance that is quite distinct. While the main role of the regulatory system is to change the general environment in which business takes place, the tax system can be used much more aggressively on a case-by-case basis. Still, there is a limit to the range of crimes against which the tax system is effective. Most commercial crimes take place in a way that embeds them in a matrix of legal economic activity, and the flows of illegally earned income will, as a rule, be subject to taxation. Tax evasion may take place, but it will be a secondary offence, and the tax code then acts to complement normal law enforcement measures.

The real power of the tax system comes in dealing with enterprise crime. All incomes earned, whether legally or illegally, are taxable. Both failure to pay and providing false information are potentially criminal offences. No peddler of child pornography is likely

to either accurately report his chosen profession or declare the income from it. But it has been proven by practical experience that using the tax code is by far the most efficacious way to strip criminals of illegal income. It is better than the various provisions for criminal asset forfeiture; and it can accomplish most of what civil forfeiture procedures do without the same adverse effects on due process and civil liberties.

Civil forfeitures are particularly popular in the US, and there is talk of introducing them in Britain as well as in Ontario. That should not occur without considerable debate. Civil forfeitures involve *in rem* procedures and, as the US Supreme Court has ruled repeatedly, property has no civil rights. However, it is impossible to label someone's car or home or bank account the proceeds of cocaine trafficking without at the same time tainting the owner with the same accusation. Even worse, this happens routinely in procedures where the burden of proof is reversed. And in the US, there is no obligation to file criminal charges in order to seize property deemed the "proceeds-of-crime".

With tax law these kinds of dangers do not exist, for there is no need to stipulate the origin of the money. Everyone must pay their income taxes, or be subject to heavy penalties and back interest, and potentially jail terms. Most procedures, though, are civil; there is also no inherent problem of reversing the onus. The existence of unaccounted money is sufficient proof of failure to pay taxes. Furthermore, attacking illegal income through the tax code sends out an important message - everyone must pay their taxes, and if they fail to do so voluntarily, the state had tough means at its disposal to collect what is due.

There have been three main objections to reliance on the tax code for such purposes. One is that it legitimizes criminal activity. This is false. The law is clear - income taxes must be paid regardless of whether the source of the funds is legal or illegal. Furthermore, market-based crimes are driven, at least partially, by the search for profit. If the theory behind proceeds-of-crime approaches is correct, it does not matter who takes away the proceeds. The loss will remove both the motive (profit) and the means (working capital) for further crimes.

Another objection is that using tax proceeds will take away only a percentage of the net income, depending on the tax bracket. This objection, too, is easy to dismiss. Add in the penalties, back interest and fines, and a great deal more than just the amount given by the tax bracket disappears.

Finally, it is argued that by using tax instead of asset-forfeiture procedures, criminals would have the right to write off expenses. To this the response is, not only is that perfectly legitimate, but it is actually an advantage. It is legitimate because the income of enterprise criminals does not come from theft or fraud. As market-based entrepreneurs enterprise criminals do have costs; and it is net income or profit that they *earn* which motivates them, not what they have to *spend* as costs. On the one

hand, failure to let them deduct costs subjects them to double punishment - they would have had to lay out money to cover costs and then pay taxes on that sum to the government. On the other hand, there are major advantages to crime control from letting market-based criminal entrepreneurs write off their costs. To do so, they must present details of their expenses - identifying the purposes for which it was spent and the beneficiaries. In effect, the criminal's profit-seeking instincts can be put to work to actually improve information on criminal markets and to map out criminal networks.

These advantages, it must be stressed, derive from the use of the tax code as a tax code. There is, unfortunately, another model that is much less worthy of emulation.

When the movement to ban alcohol and narcotics began in the US, it faced a Constitutional problem. Regulating such matters seemed, at first glance, beyond the powers of the federal government. Yet state-by-state variations in prohibition laws would have rendered them unworkable. However, the Supreme Court ruled that the federal government had the right to regulate anything that it had the right to tax. Hence, both early drug law and the alcohol regulations were written as revenue statutes. That meant primary responsibility for enforcement went to Treasury agents. Unlike practice in any other country deriving its institutions from British practice where the two functions are kept firmly apart, in the US the Internal Revenue Service (IRS) became at once a police force and a tax collection agency.[35]

This blurring of the distinction between tax and criminal code enforcement took another big step forward in the 1930s when the US government used charges of income tax evasion against Chicago kingpin Al Capone. The objective in this and similar future cases was not to grab the assets of mobsters and so deter them from further sins, or to cripple their “organizations” by taking away their working capital. Rather, it was simply to find something for which they could be tossed in jail.[36]

By so doing, the IRS put matters squarely in reverse. Instead of the threat of criminal sanction being used to enforce tax regulations, tax law was (and in the US continues to be) used to enforce the criminal code in proceedings in which the objective is to get the individual rather than his or her overdue taxes. Not only has that meant the IRS ties up resources in high-profile criminal cases instead of using them to generate tax revenues for general government purposes, it also means that using tax law to prosecute criminals indirectly for other offences sends out to the public the message that it is all right to cheat on taxes provided the money originates from legitimate sources.[37]

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35 Some of this history and its implications for international relations is traced in Ethan Nadelmann, *Cops Across Borders: The Internationalization* of U.S. Criminal Law Enforcement. (University Park, Penn.: State University Press, 1993).

36 Two decades later similar treatment was meted out to Frank Costello. See Andrew Tully, *Treasury Agent* (New York: 1958), p. 9.

37 See the complaint of former IRS Commissioner Fred Goldenberg, *Money Laundering Alert* (Feb. 1992).

6.4 The Role of the Civil Courts

All of these alternatives - the regulatory system to raise operating standards, the private financial system to generate information, and the tax system to engage in search and destroy missions against the profits of crime - seem to have a role, albeit a highly qualified one, to play in enforcing criminal justice. But not only is that not their primary job, it also begs the question of whether or not many of the things against which they are to be deployed should even be considered crimes. It may be time to consider seriously decriminalization of a whole range of actions, and to therefore throw back onto the civil court system the job of dealing with any damage these actions might have done. The most obvious are securities cases where what is at issue is a quarrel between sets of investors over distribution of profit. But there are many more. Today, for example, not only have most anti-trust procedures abandoned the criminal route, but courts are hearing more and more cases of civil torts for damages in anti-trust cases.

Indeed, the history of anti-trust is instructive. In the US the first anti-trust legislation, the Sherman Act, introduced a legal innovation, the implications of which are perhaps still not fully appreciated. It permitted the government to choose to proceed against corporations that engaged in conspiracies to fix prices on either civil or criminal grounds. It also permitted "victim" firms to attempt private law enforcement through civil suits. Indeed, it strongly encouraged them to do so by introducing the concept of "triple damages" that a plaintiff could obtain.[38] This not only muddied the distinction between civil and criminal proceedings, not only subcontracted law enforcement to private actors, but made the implicit judgement that bounty hunting was a stronger motive than civic responsibility in motivating people to assist in maintaining the law. The result over the next century was a series of court cases in which contests between economic competitors were transferred from the marketplace (where, in theory, they would be conducive to increasing efficiency) to the courts (where, in practice, the main objective was not to rectify a wrong but to see what they could grab at the other party's expense).

Thus, there is a right and a wrong path to returning functions to the civil courts. In the US, use of civil procedures has too often become simply a backdoor way of reducing the burden of proof in criminal cases. Apart from the litany of outrages under civil asset forfeiture, there is also the misuse of things like RICO. The very name - *Racketeer Influenced and Corrupt Organizations Act* - means that defendants are labelled criminals, while in the event of civil RICO cases, their prosecutors (mislabelled plaintiffs) are required to meet only a civil standard of proof. The civil-criminal distinction is further muddied by the device, uncritically picked up from anti-trust procedures, of "triple damages". Indeed, the very term is absurd. There are either

[38] Russel Mokhiber, *Corporate Crime and Violence* (San Francisco: Sierra Club Books, 1988), pp. 7-8.

damages, used for compensation in civil suits, or there are fines, used as punishment for criminal conduct. What happens in RICO cases, as in anti-trust, is that punishment takes the form of fines disguised as damages which are then paid to the plaintiff rather than the government, unless, as so often is the case, it is the government itself that is bringing a civil suit against the plaintiffs in response to their allegedly criminal conduct![39]

This confusion of civil and criminal actions is particularly problematic, and especially dangerous. In strict theory, civil actions are supposed to involve:

1. actions by one private citizen against another;
2. seeking damages that correspond to actual acts; and
3. procedures that require only a slim margin of proof (balance of probabilities).

On the other hand, in strict theory, criminal actions are supposed to involve:

1. actions by the state or its agencies against a private citizen;
2. seeking punishment that can involve loss of life and liberty; and
3. procedures that, because of the gross imbalance of resources between the two parties and the heavy consequences, require a high standard of proof (beyond reasonable doubt).

Therefore, there is something fundamentally at variance with notions of natural justice when the state or its agencies, with the overwhelming preponderance of resources, proceed against a private citizen in actions that have *punitive* effects, while being required to meet only a civil standard of proof. This is particularly the case when it is realized that criminal laws are mainly legislative acts, while civil is largely judge-made. Granted, these instances are mostly in the regulatory field where punishment usually takes the form of monetary losses. But they nonetheless are punishment, not compensation. On the other hand, it could be argued that it makes little sense to proceed with a criminal process if the potential result is not loss of life and liberty, but merely money. That is precisely why, for decades, there have been calls for the definition of a type of offence, mid-way between that which gives rise to a civil damage suit and that which can bring about a criminal prosecution with punitive consequences.[40]

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[39] In the US, some particularly bizarre results have followed from combining RICO with asset-forfeiture in securities cases. In strict theory asset-forfeiture is restitution - in the absence of a defined victim, the state represents "society" as the aggrieved party. But the logic of an insider trading case, for example, is that some definable investors have been defrauded - that is the core of the crime. Therefore, a definable group of investors should be compensated when damages are assessed. Yet in the RICO case against junk-bond king, Michael Milken, for example, he had to forfeit hundreds of millions of dollars of allegedly ill-gotten gains to the government, not to other investors, even though his primary offence was insider trading!

[40] Cf. Herbert Packer, *The Limits of the Criminal Sanction* (Stanford: Stanford University Press: 1968), pp. 252-3. Packer uses the term "civil offence" to describe this new entity. For an excellent discussion of the logic, see John Coffee, "Paradigms lost: The blurring of the criminal and civil law models - and what can be done about it." *Yale Law Journal* (1992) v. 101.

6.5 Between Civil Compensation and Criminal Prosecution

Two factors seem to make such a middle-ground approach desirable. One is the need to restore clarity and meaning to the distinction between civil and criminal procedures. The second is the inappropriateness of the criminal sanction in dealing with many profit-driven offences that fall into the market-based or commercial category.

Traditionally, the criminal sanction worked because it targeted a special subset of actions which the public at large regarded as particularly odious. Not only was the harm clear, but the acts themselves were readily comprehensible. Hence, labelling someone a criminal was by itself the most important part of the sanction - fines or imprisonment were secondary, as much atonement as punishment. But the more the criminal sanction is used to regulate personal moral choices, the more it loses its bite. The public at large may cease to view the "criminal" act with opprobrium.[41] Therefore, to maintain any capacity to deter, the secondary part of the sanction must be escalated, perhaps out of all proportion to the public's perception of the severity of the actual offence. As US experience shows, sentences lengthen, the proportion of the population incarcerated grows, and prisons become less places of penance than training schools in criminal skills for a disgruntled population, disproportionately from ethnic and social minorities.[42]

If a middle ground between civil compensation and criminal prosecution is to be found in which, as in a criminal case, the state or its regulatory agencies proceed against a citizen, it requires rethinking the standard of proof. Since the state or its agencies are seeking something beyond compensation and restitution typical in a normal civil case, it should require a higher than civil standard of proof. Since the action carries no threat of loss of life or liberty, and carries less of a stigma than a criminal process, it should not require a criminal standard of proof.[43] Fortunately, here, US experience provides a guide.

Recently in the US there has been considerable debate about the consequences of civil asset forfeiture - the fact that it involves criminal accusation and criminal punishment without criminal trial. It has often been suggested (indeed it was originally written into, though later dropped from, the recent asset-forfeiture reform bill) that a procedure in which a citizen could face heavy losses of property to the government on the ground that his or her property was the proceeds of crime, even though the actual property owner was not subject to criminal prosecution, demanded something better than the

41 Packer, *Limits*, pp. 265-6.

42 Dyer in *Perpetual Prisoner* notes that today the whole prison-jail system in the US is 10 times the size of three decades ago, the largest expansion of prisoner population the world has ever known. If current growth rates continue, by 2020 two thirds of all Black men will have been imprisoned. (186 et passim)

43 The sole instance where a regulatory agency should have the right to proceed with actions that potentially involve punitive provisions without a higher than civil standard of proof are in revenue cases. These are different because the mere existence of income or assets that has not been adequately accounted for constitutes all the proof necessary that a fiscal offence has been committed.

standard of proof used in civil suits. The suggested alternative was called "clear and convincing" proof. Thus, if the civil standard was about a 51% probability, the criminal perhaps 90%, clear and convincing proof stood at somewhere between two-thirds and three-quarters.[44]

Furthermore, there actually are precedents. In the US, it requires something that falls between civil and criminal standards, for example, to put people in a mental institution against their will.[45] This is precisely the kind of legal middle ground that would make sense in dealing with profit-driven offences that involve either citizens exercising moral choices of which the majority of other citizens disapprove, with no obvious damage to anyone but the person exercising the choice, or which involve complex economic relations that are beyond simply regulatory matters but are not clearly criminal. It is a standard of law, incidentally, that could be applied either to individuals or to corporations. And it would therefore also sidestep the legal and moral morass produced by the unwieldy, almost indefinable concept of "corporate crime".[46]

By creating this category a government intent on dealing with profit-motivated offences actually gains a great deal of flexibility. It has a choice of three legal instruments - civil, financially punitive and criminal - depending on the seriousness of the offence and the quality of available proof. In all three cases, there is the potential of monetary awards, which are the most logical response to profit-driven crime. In a civil procedure, they will be limited to genuine damages; in a financially punitive one, they will take the form of fines; and in a criminal one, they could include fines in addition to jail terms.

Furthermore, in dealing with offences that result from the actions of corporate bodies, the state would have the option of a civil damage suit if the actions are accidental, a financial punishment procedure if they are due to negligence, or criminal prosecution if malicious intent by identifiable corporate officers can be demonstrated.

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44 This, of course, is not in the law books! It is just a rough extrapolation of intent from the debate. Thanks to Brenda Grantland of Forfeiture Endangers American Rights for this point.

45 Coffee, *Paradigms Lost*, pp. 1890-1.

46 See variously Braithwaite, *Corporate Crime*; Pearce and Tombs, *Toxic Capitalism*; Stone, *Where the Law Ends*; and Packer, *Limits of Criminal Sanction*, for various, usually incompatible positions.

7.0 Conclusion

There are constant pressures on the criminal justice system to take on roles for which it has traditionally not been equipped. Given the widespread belief that the world is under siege by criminal organizations, those pressures are likely to increase. The popular view is that the world is facing a new criminal threat - new crimes and enormous increases in the number and technological sophistication of old crimes to which it must respond. Yet a criminal justice should always be conservative, hesitating to follow fad and fashion. And, arguably, the degree to which there is a new, greatly expanded criminal challenge has been exaggerated, perhaps grossly.

Probably the most important lesson to be drawn is that the real criminal justice challenge lies in understanding the twilight zone where crime and business interact, often to their mutual benefit. That is a zone where regulatory and alternative instruments may be better suited than traditional criminal justice approaches that were created largely to deal with crimes involving involuntary redistribution of wealth.