1. Introduction
Economic analysis examines crime as a special case of rational maximizing behavior, in which certain harmful acts may be deterred through the careful construction of expected penalties relative to the gains from crime. Of considerable interest is the source of separate criminal law, since deterrence could often be created by an obligation to pay ex-post damages—in either contract, or tort—that is, deterrence may be said to be a characteristic of several areas of law where control of an externality is at stake. Both tort law and criminal law may be described as minimizing social cost. Just why do we need to use the coercive power of the state to augment penalties in some areas of behavior? Of related interest is the observation that criminal law moves with the times, and to some extent, with cultures (Friedman, 2007). There are at once great similarities, through history and across civilizations, with a near universal criminalization of murder, theft and violence against the person, and observable differences, such as the harsher treatment of drug offenses in some countries, or the prosecution of some nationals for certain offenses carried out abroad. Just what does criminal justice do?

In considering the particular distinguishing characteristics of criminal law, we need carefully to separate normative economic analysis from positivistic observations. Much of the literature, such as it is, focuses on good reasons for separating criminal law (Posner, 1985; Shavell 1985 and 1993; Bowles et al., 2005). This is often portrayed as normative analysis, telling us the sensible way to create deterrence in certain difficult situations: principally when wrongdoers hide their activities. Normative analysis of the optimal design of criminal law is actually more of an example of normative analysis as positive theory (NPT), which is often encountered in regulatory economics (Viscusi et al., 2005) and is implicitly followed in Bowles et al. (2005). There has been little work assessing the correspondence between theory and the allocation of cases across the tort-criminal divide, that is, testing NPT (Dnes and Seaton, 1997). There is an additional line of analysis in more general legal studies that is concerned that criminal law may be used inappropriately, typically by the state to reinforce more general policies in some area (Klein, 1999; Dnes, 2005): a mixture of normative criticism and positivistic observation of practices.
We also need to recognize some variety in the nature of torts, in particular distinguishing intentional from unintentional torts, and of criminal offenses, where recklessness may be a major issue. Landes and Posner (1987) argue that the absence of the defense of contributory negligence in cases of intentional tort is explained by a wish to deter avoidance expenditure by potential victims, given that least-cost prevention will always result from the injurer not forming the intention in the first place. An implication is that this principle should carry over to criminal law, although we can question whether contributory negligence is always irrelevant in crimes of violence since the defense of provocation is very similar to contributory negligence. In an analysis of punitive damages in tort, Biggar (1995) shows that, when bargaining is possible between parties, above average (that is, punitive) damages are required to prevent victims incurring wasteful avoidance expenditures when they in fact face above average injuries. Biggar’s observation extends to criminal law as a version of Posner’s point that sufficient penalties create deterrence, which removes the need for wasteful avoidance by potential victims.

2. The nature of criminal activity

Most generally, a person is considered to have committed a crime by intentionally carrying out an act prohibited by statute or common law, and for which the coercive power of the state is drawn upon in imposing a penalty.1 Historically, the common law comes first, although statutes should not be underestimated, particularly in the almost military rule governing much of colonial America in the run-up to independence (Friedman, 2007). Despite a modern trend towards codification of the criminal law, in several common-law jurisdictions, many serious crimes (for example, murder) remain essentially common-law crimes. It is not obvious why many injurious acts are regarded as crimes when others are not. Indeed, some non-injurious acts, such as unfinished robberies, can be ‘victimless’ crimes. Also, in the past, many actions now treated as crimes were treated as torts. Both tort and criminal law use ex-post penalties to deter harmful acts: We need to examine the key features of criminal law that set it apart from its civil counterpart (Posner, 1985).

The standard of proof is different in the case of crime. First, the prosecution must prove its case beyond reasonable doubt, which is a tougher criterion than the one used in civil disputes. In a tort case, by contrast, it is enough to show that the defendant was negligent by the standards

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1 In this chapter, I use examples from common-law countries, principally England and the American jurisdictions.
of a reasonable person in causing the injury. The tougher criterion in a criminal case suggests caution in applying the penalties that the court may impose, which are potentially severe. Punishment in a criminal case goes beyond compensating the victim and imposes harm on the criminal, and punishing the wrong person is likely to create considerable welfare loss as well as undermining individual integrity. Severe, often non-monetary punishment may be implied by a need to create deterrence when offenses are frequently hidden, or when the magnitude of harm exceeds the financial resources of the wrongdoer.

Secondly, in most cases, the prosecution must show that the criminal intended to commit the crime: there must be mens rea, a ‘guilty mind’. The intent to cause harm is, almost universally across common-law countries, required to be subjective intent. There is a strong requirement that the wrongdoer knew what the result of the specific harmful act would be, or was possibly reckless over the consequences. Criminal law tends to avoid finding mens rea just because some other ‘reasonable’ person in the same situation would have recognized a risk, or would have clearly intended the harm by a similar action. This again contrasts with civil cases: for example, the torts of nuisance and negligence are defined independently of the state of mind of the tortfeasor. In nuisance, either there was ‘unreasonable user’ or not; in negligence, either one did or did not take ‘reasonable’, that is, cost-effective, steps to avoid doing some harm. Such contrasts, and especially the emphasis in criminal law on subjective intent, suggest that an important element in criminalizing an activity is the deterrence of a certain type of person, who is likely to impose harm deliberately on members of society or knowingly to take large risks. From a normative perspective, we

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2 Although Lando (2006) argues that punishing the wrong person can still have a deterrent effect on wrongdoers.

3 English law did for a while allow an objective element to creep into assessing mens rea in criminal damage cases by holding a party guilty if they failed to consider a risk that would have been obvious to a reasonable person. There has now been a retreat back toward a largely subjective focus in R v. G and R [2003] UKHL 50; 3 WLR 1060 (Lord Bingham of Cornhill: ‘But it is not clearly blameworthy to do something involving risk to another if . . . one genuinely does not perceive the risk. Such a person may fairly be accused of stupidity or lack of imagination, but neither of these failings should expose him to conviction of serious crime . . . ’). So, once more, the common law in England asserts blame for ignoring a high risk of which one is aware, or for failing to consider an obvious and apparent risk of which one should be aware, given all the facts in the case and not in comparison with another individual. Objectivity has however been introduced by statute, as a ‘reasonable person’ standard for interpreting consent, in sexual offences, most likely simply as a public policy move to increase the number of convictions.
are rightly less concerned with individuals who blunder into the same acts, because they do not pose the same kind of long-term threat.

In terms of a spectrum of harm, many injurious acts resulting from negligence are the subject of tort actions. However, intentional harm and severe forms of negligence, like ‘recklessness’ over risk taking or gross negligence over professional duties, are dealt with by the potentially more severe sanctions of the criminal law. One explanation of this distinction is that criminal law aims to suppress the criminal frame of mind, which is identified by the demonstration of intent. ‘Recklessness’ (and ‘gross negligence’) are commonly interpreted by the courts as amounting to a form of intent, for example, if a person drops a rock from a freeway bridge onto a car, killing the driver, that person may have ignored a serious risk that was obvious to them (advertent recklessness) or not cared a hoot about an obvious risk (inadvertent recklessness).

The major exception to the requirement to show mens rea is the case of the strict-liability crime, such as possession of narcotics. In a drugs case, possession may reasonably be taken to imply intent to use the items, although it would anyway be virtually impossible to distinguish accidental from deliberate possession. Therefore, these examples of strict-liability crimes are not really inconsistent with the general requirement for intent to be proved. A defense in these cases can be that one did not know of the possession, which is consistent with treating possession as indicative of intent absent proof to the contrary. Strict-liability crimes originated for relatively minor offenses, as explicitly considered by the US Supreme Court in 1922. Later, of course, the tendency has grown for statute law to impose strict liability: for example, in parts of the US Sarbanes-Oxley Act dealing with CEO responsibility for financial information.

The third major distinguishing characteristic of criminal law is that the harm has an element of public harm about it, as perceived by Blackstone (1765). Crime disrupts social codes of behavior that are thought to be beneficial to all. Crimes like murder, assault or robbery, for example, are disturbing to many people and not just to their victims. In fact, by standard utilitarian analysis, we should not prosecute murder on the basis of harm to the victim, who has died and feels no pleasure or pain: the legal problem with murder is its inherent threat to the wider population, as the murderer may strike again and is generally likely to have characteristics threatening to good public order. Even if we knew the murderer would never strike again, one would not want to do business with him, and there

are issues of creating deterrence in any normal society.\footnote{One needs to say ‘normal’ as there are some nutty arguments about in legal teaching that purport to dismiss deterrence as a function of criminal law by noting, for example, an account circulating at Trinity College, Cambridge, that the punishment of the murderer of the only other person in the Gobi Desert could serve no purpose for deterrence, assuming that the two individuals were the limit of a society, but one could find other reasons for punishing. Such arguments are not as smart as some think: who will do the punishing? Once one allows for any authority, it seems the society is increased beyond two; and without the authority it seems there would be no deterrence nor reason for it, looking to the future – nor any possibility for it, given that there were only two people, viewed in the past. A variant on ‘two men’ is the ‘last man’ argument, in which it is alleged that there would be no reason to punish to create deterrence, if we knew for sure that the murderer is the last of his class. It is then argued that, still, we probably feel a (Kantian) need to punish. The problem is actually that if we do not punish the last murderer, we create a problem analogous to the ‘chain store paradox’: failure to punish the ultimate murderer causes the penultimate one to become the last one for deterrence purposes, so that, by backwards induction, all deterrence would fail. Therefore the ultimate murderer must be credibly subject to punishment to support deterrence at earlier stages of the ‘game’. Such arguments anyway overlook the enormous issue of uncertainty: even if my rebuttals were wrong, just how many full information, two-man – or end game – societies are there? The proper approach to the deterrence hypothesis is through examining empirical work, such as Dezhbakhsh et al. (2003).}

In this context, it is interesting to note that early common-law punishments for crimes often included substantial elements of naming and shaming: perhaps a period in the stocks for those disrespectful of authority in seventeenth-century society, or possibly the branding of a burglar. The widespread social harm from burglary or violence appears to go beyond mere diffuse damages, which would arise in tort law.\footnote{Note my discussion of Boomer v. Atlantic Cement Co., 257 NE 2d 870 (CA of NY 1970) in Dnes (2005).}

There is a wider public interest in prosecuting the criminal than in suing the typical tortfeasor. The victim of a crime (or a relative in a case of murder) has an incentive to sue to reclaim personal losses only. However, this will not obtain compensation for the fear and anxiety experienced by dispersed observers of the crime. Notice that the victim can often take an action in tort against a criminal, although such actions may be prohibited by statute, in the case of England, or may run up against American Constitutional protections preventing double jeopardy (Klein, 1999). Also, consider the distinction between negligence, a tort, and gross negligence, such as drunkenness while driving a train, where the criminal law steps in. The gross element appears to reflect the wider social concerns: the anesthetist who might be prone to leaning an elbow on the air line; the train driver who might incline toward drinking alcohol on the job.
It may also be that there is generally a low probability of apprehension in the case of many criminal acts, particularly as the criminal intends to hide the crime. Therefore, relatively severe penalties may be needed to deter the harm, along with organized detection if, as Becker (1968) suggests, the conditional probability of conviction given arrest is relatively highly effective in deterring the risk-taking criminal. In general, if there is only a 50 percent chance of catching the thief of a car valued at $1,000, the fine must be set at just over $2,000 if the expected value of stealing is to be negative. Action in tort would for the most part succeed only in reclaiming $1,000 damages. The difference is that, in tort, we tend to know when the accident or nuisance has occurred. Criminals are often members of impoverished sections of the community who would not be able to pay damages, particularly as they often sell stolen property at below market value. Then, the only real way to create a deterrent is to impose a custodial or other non-monetary sanction. These considerations suggest that the coercive power of the state is useful in deterring criminal behavior, either through enhanced penalties, or because of a need for organized detection.

Homicide is an interesting offense raising the important issue of distinguishing gross negligence, or recklessness – both criminalized as forms of manslaughter – from regular negligence where the tortfeasor simply fails to take cost-effective precautions. The standard legal answer is that some risk taking attracts opprobrium owing to the greatness of the gap between the injurer’s avoidance costs and the expected damage. The argument is one based on the size of the cost-benefit margin. Unless this refers to the inability of the offender to pay damages owing to his wealth constraint and the non-linearity affecting gambles with life, it is not obvious that the cost-benefit margin gives a reason for criminal penalties. We may find it reprehensible, but if there were sufficient wealth, that is, if people placed modest values on taking serious risks of fatal injury, liability for compensatory damages would be sufficient to deter the negligent taking of high risks, just as in the case of smaller risks.

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7 Note again the importance of subjective intent: if we are worried about the criminal’s mind inclining toward hiding harm, then it is indeed subjective intent that matters.
8 Friedman’s (2000) Law’s Order points out that the police service could be privatized.
9 Learned Hand J in Conway v. O’Brien, 111 F. 2d 611 (2nd Cir. 1940); Lord Hewitt CJ in R v. Bateman [1925] 94 LJKB 791 talked of matters going beyond compensation so as to amount to a crime against the state and deserving punishment.
It is the presence of a non-linearity that is crucial in defining gross negligence and recklessness in the criminal law. The treatment of manslaughter never permits an individual to take a gamble when it is objectively highly likely that fatal injury will result. This recognizes the inability of anyone to accept liability to pay compensation that would induce the victim to undergo the activity associated with the risk, and sets the optimal level of manslaughter to zero (ignoring enforcement costs). However, the law does not treat the fatal accidents associated with manslaughter as certain. When fatal acts are virtually (or ‘morally’) certain, the criminal law treats this as evidence of intent for murder.10

Cases of manslaughter involve risks to life that victims would never take and which the law tries to suppress. The more successful the law is at suppressing manslaughter, the more can potential victims refrain from taking avoidance measures that would often be highly disruptive to their lives. As Biggar (1995) points out, potential victims must often take steps like not going out at certain times to avoid undeterred intentional torts or crimes. The penalty for manslaughter is typically less than for murder because less deterrence is required. The need for less deterrence follows from the lack of specific intent and from the lower benefits to the injurer from the act. Owing to the lack of premeditation, the injurer is less likely to hide the act, so manslaughter will tend to be revealed by circumstances. Also, the benefit will be a lower, indirect one (for example, avoiding costs of staying alert in practicing one’s profession) rather than a larger, direct one (killing to obtain a legacy).

Finally, most crime is socially wasteful and represents a classic form of rent-seeking behavior (Tullock, 1967), which may in itself give some rationale for its special treatment. Criminals devote resources to pure redistribution of existing goods without creating anything new, and criminal law may be seen as forcing their transactions back into the market place. Their potential victims also devote resources to security devices, to paying insurance companies, and, indeed, to funding the cost of the police service. Similarly, a thief may value a stolen item at an amount (say $1) that is below its owner’s valuation (of say $0.50). We cannot be sure that resources move to their highest-valued uses when items are stolen. Crime is typically doubly wasteful.

10 In R v. Moloney [1985] 1 All ER 1025, Lord Bridge required awareness of ‘moral certainty’, that is, overwhelming probability, before recklessness amounted to mens rea for murder. The standard of proof requires the defendant to have been aware of the risk. This covers the type of case where someone fires a gun indiscriminately in a crowded room, which would be treated as murder in England and as second-degree murder in most states in the USA.
3. **Empirically testing the tort-criminal boundary**

Dnes and Seaton (1997) carried out statistical work aimed at correctly identifying the tort criminal boundary, based on the characteristics of negligence and manslaughter cases. Essentially, they tested the predictive power of NPT. In cases of manslaughter, they expected to find difficulty in detection, direct costs and direct benefits to the injurer, the non-linearity affecting the value of risk to life, the desirability of discouraging avoidance expenditure by the victim, and the possibility of encouraging the injurer to avoid provocative environments (situational deterrence). These six characteristics should be found much less frequently in simple negligence cases. Dnes and Seaton examined 64 English manslaughter and negligence cases recorded on the Lexis database, 32 of which were manslaughter cases for which the Court of Appeal in England upheld a guilty verdict. Generally, the predicted characteristics did show across the cases, although there were many exceptions.

Dnes and Seaton compared the characteristics of the manslaughter cases with 32 fatal-accident cases where the Court of Appeal in England upheld judgment for the plaintiff. The characteristics judged important in manslaughter did not feature at all heavily in cases of negligence, with some exceptions: for example, in *Pearce v. Secretary of State for Defence*, the plaintiff claimed terminal cancer was caused by participation in the testing of atom bombs in the 1950s, which implies the non-linearity is present and that the injury was hard to detect. The cases were all fairly close to classic negligence cases like *Lambert v. Lewis*, in which a coupling broke, detaching a trailer from a Land Rover: detection was obvious, there were no direct benefits or costs to the driver, the non-linearity did not operate as this was a small risk, the situation was that of normal life, and we would want the victim to invest in care (for example, keeping a safe distance on the road).

Dnes and Seaton obtained probit estimates of equation (4.1) to assess the importance of each of the characteristics in explaining the classification of cases across the tort-manslaughter boundary.

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11 Why should law create deterrence in manslaughter cases where people lose self-control? Surely they cannot be deterred? Penalties for manslaughter may make those who feel they are vulnerable to loss of self-control take care to keep out of provocative situations. The cool-headed neighbor might complain of smoke and call the environmental health authority if persuasion failed. However, the hot-headed neighbor might be deterred from complaining, knowing how he could over-react if then engaged in an argument. Situational deterrence may be compared to controlling the scale of a tort.

12 [1988] 2 All ER 348.

13 [1981] 1 All ER 1185.
\[ y^*_i = \alpha + \sum_{j=1}^{K} \beta_j D_{ij} + u_i \]  

where,

\[ y_i = 1 \text{ if } y^*_i > 0 \text{ and is otherwise zero} \]
\[ D_{ij} = \text{dummy variable representing the } j\text{th characteristic for the } i\text{th case.} \]

Therefore, \( y_i \) shows whether a case is defined as manslaughter (\( y_i = 1 \)) or as unintentional tort (\( y_i = 0 \)).

The five independent variables used in the probit estimation were those characteristics that are hard to categorize solely as manslaughter or tort variables: difficulty in detection, direct benefits to the injurer, the presence of the non-linearity affecting the value of risk to life, the desirability of discouraging avoidance expenditure by the victim, and situational deterrence. The results indicated that manslaughter cases were more likely to have higher levels of all the variables. Situational deterrence was the only statistically insignificant variable, possibly because it turned out to be correlated quite strongly with other variables, especially the presence of the non-linearity. All variables had a positive impact on the probability of the case being manslaughter, with the non-linearity showing the greatest impact followed by benefit to the injurer, detection difficulty and avoidance costs for the victim. Cost to the injurer was excluded from the estimation because it only characterizes manslaughter.

Dnes and Seaton (1997) then classified the 64 cases as manslaughter or negligence based on the probit analysis of case characteristics. They predicted 86 percent of the cases correctly: only three manslaughter cases were incorrectly classified as negligence. In general, the presence of any three criminal characteristics was sufficient to classify a case as criminal, although two characteristics were sometimes sufficient as long as they were drawn from detection costs, benefit to the injurer, and avoidance costs for the victim. Only six negligence cases were incorrectly classified as manslaughter. One of the cases concerned a claim of damages against the police force for the death of a prisoner in custody, where a criminal prosecution had failed. Dnes and Seaton also found their model predicted well for a sample of 34 classic (that is, case-book) manslaughter and negligence cases.

4. **Misuse of criminal law: hybrids**

Posner’s (1985) NPT analysis of the distinction between criminal and tort law could lead us to adopt an essentially public-interest view of regulation, when positivistic analysis should be taking a private interest view (Stigler, 1971). Regulatory economists have observed much use of the
coercive power of the state to attain sub-group aims, which is consistent with Posner’s (2007) claim that the common law tends to evolve efficiently, owing to the incentive to appeal holdings creating a deadweight loss, whereas statute law is used by special-interest groups in rent seeking. There are examples of criminal law being used inappropriately in place of civil law, and cases of civil law being used as a substitute for criminal law. Usually the substitution concerns tort law, although sometimes it is contract, and invariably we can see some emanation of the state, in the terminology of judicial review, that has found it easier to substitute across the criminal-civil divide.

Sometimes the use of criminal law is staggeringly inappropriate: as in the case of the BBC license fee in the UK. A government decision was consciously taken in pre-war Britain to provide, via the BBC monopoly, not the broadcasting that people wanted, but, rather, the broadcasting that was seen as good for them – to be paid for by a tax on the ownership of broadcast receivers (Coase, 1950). Broadly speaking, and notwithstanding the subsequent breakdown of the monopoly after emergence of more populist independent broadcasters and their proliferation on digital services, a person found to own a television set without a license will be fined, and will then have a criminal record. The most that could ever have been claimed for this policy is that the coercive power of the state is used to avoid a coordination problem, similar to a problem of paying for public goods. It is difficult to avoid the conclusion that the state is using its coercive power simply to reduce the cost of pursuing those taking BBC services, offered to all, and subsequently failing to pay for them. Similar issues appear to arise in privatized public-transport services in the UK, where bylaws continue to exist as part of the deal in transferring the services to the private sector. In one recent case, a young woman was taken to court after being found with her feet on the seating of a train and ended up with a criminal record. Appropriate responses might have included refusing to sell her any more tickets, or claiming back from her the cost of damage done. The use of criminal law, although convenient for company policy, cannot be justified by the underlying economics.

A further example of the use of criminal law in place of civil law is the punishment of violations of environmental regulations as crimes, with fines and possibly prison sentences. We can show that fines for pollution, if they are set using a polluter-pays principle, are equivalent to strict liability in tort, and achieve no more than the application of a negligence standard: the difference being that fines are paid, whether or not the firm takes cost-effective avoidance care, on any remaining pollution for which the firm would rather pay the fine than incur higher marginal costs of avoidance. In Figure 4.1, optimal avoidance is given by a point like A*, where marginal
avoidance cost begins to exceed marginal external cost, which has been set as a unit pollution fine. A fine is paid over the $A^*$ to $A^{\text{Max}}$ level of operation: that is, over the range where we should not wish precautions to be taken. If tort law governed the situation, the firm would not be negligent if it ended avoidance at the optimal level, $A^*$, and no damages would be paid. This comparison shows that a distributional effect is the main consequence of introducing criminal law, as administrative law, simply as a matter of using the coercive power of the state to encourage desirable behavior. In this example, tort law would achieve the same allocation of resources but would leave environmental costs where they fall, once the efficient level of abatement is reached. Criminal law would be appropriate to punish intent to hide damage.

Just as we can find inappropriate use of criminal law in place of tort law, so we can find examples where an emanation of the state makes use of tort law, or possibly some other branch of civil law, to avoid more costly procedures in criminal law. In the US, a considerable debate has grown up around this phenomenon of ‘hybrid cases’, owing to concerns that it may undermine constitutional protections for defendants in criminal cases. The US Supreme Court has generally been protective of defendants in these cases, taking the view that if the penalty element in the case is sufficiently large, then the case looks like a criminal one and defendants should have constitutional rights to such things as legal representation protected.
Examples include: civil *in rem* forfeiture proceedings,\(^{14}\) fines for the violation of environmental standards,\(^{15}\) exclusion of an alien,\(^{16}\) and the preventive custody of the mentally abnormal.\(^{17}\)

Constitutional lawyers worry that if a case looks sufficiently close to a criminal one, then it should be surrounded by the same safeguards. In particular, issues have arisen around applying the Fifth Amendment’s clause prohibiting double jeopardy, and the Eighth Amendment’s clause prohibiting excessive fines. We see interplay between constitutional law, judicial review by the Supreme Court, and the tort-criminal boundary. Broadly, it is argued that once a constitution exists,\(^{18}\) the authorities should not circumvent it by making use of civil-law procedures that are not intended for punishing citizens for criminal violations. The hybrid action appears to have been growing significantly in recent years (Klein, 1999).

5. **Foreign crimes and long-arm laws**

Uniquely, English common law has always prosecuted murderers and bigamists regardless of where the offense took place. That is, if a UK citizen (the English common law is now the basis for the 1957 Homicide Act applying to all of the UK) murders somebody in another jurisdiction, he may be prosecuted and punished in the UK upon return or extradition. This makes sense as an approach and should be commended more widely, again focusing on the significance of the subjective intent of the villain. Given the risk of the murderer’s returning to his home country, there is a wider benefit from prosecuting the overseas murder.\(^{19}\)

It is possible that the UK approach to overseas murder reflects a desire to stop murderers simply taking their victims outside of the national territory, perhaps to some no man’s land, to carry out the dastardly killing. What makes it more likely that it is indeed the more sophisticated wider concern with the subjective intent of the ex-patriot citizen is that the

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\(^{16}\) *Kennedy v. Mendoza-Martinez*, 372 US 144 (1963) (rejecting revocation of citizenship without trial following conviction for evading the military draft).

\(^{17}\) *Kansas v. Hendricks*, 521 US 346 (1997) (proceedings for lifelong commitment to a mental institution, following completion of a sentence for a criminal offense, raises issues of due process).

\(^{18}\) We could make this point for less formal constitutions.

\(^{19}\) Whereas the extradition of a foreign national for a crime committed in the extraditing country’s territory is straightforwardly interpreted as maintaining deterrence for all citizens regardless of origin.
avoidance of a jurisdictional loophole would simply require a rule that the ex-patriot could be prosecuted from home, if there were no foreign jurisdiction with an interest in prosecution.

Both the UK and USA have laws prohibiting their nationals from behaving corruptly at home and abroad. So, within the common-law world, we can gather up examples of several crimes that might be thought to be high-profile instances of harmful acts likely to undermine trust within society. We see a long-arm procedure in place reinforcing the idea that those criminal-law sanctions, although often costly, form the appropriate mechanism to create deterrence. It may be that the approach of prosecuting crimes regardless of location is not extended further owing to cost factors.

6. Conclusions
The study of the tort-criminal boundary is not widely studied, but we have identified a brand of normative analysis as positive theory (NPT) that gives good reasons for separating criminal law. Broadly, the emphasis is on the nature of criminal intent, and the manner in which widespread impacts may have very high values attached to them. There is a need to develop non-monetary punishments that can be supported by the coercive power of the state. It is possible to construct empirical tests of the classification of cases across the tort-criminal boundary.

We have also seen that inappropriate use of criminal sanctions is common enough, and, actually, most countries probably have many examples of the substitution of tort for criminal law, and vice versa. There is, therefore, a public-policy case for the constitutional regulation of the use of criminal law, to cases involving the wider public interest that we have identified in terms of intent and a need for non-monetary penalties.

References
Criminal law and economics


